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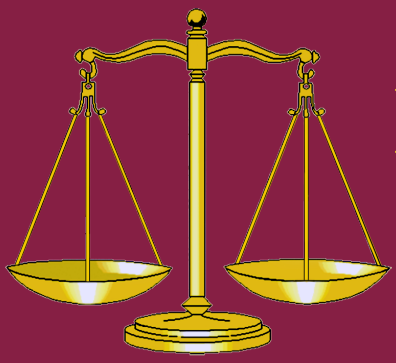

Military Law Review

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

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Military Law Review

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MILITARY LAW REVIEW

Volume 228 **Issue 3**

RAZING HILLS: REPAIRING MILITARY RULE OF EVIDENCE 413 IN RESPONSE TO *UNITED STATES V. HILLS*

LIEUTENANT COMMANDER JEFFERY C. BARNUM*

I. Introduction

The investigation was going well, which is not at all how it started. It began with a morale barbeque during a foreign port call. The alcohol flowed freely. One of the sailors drank a lot—more than she ever had in her young life. As the evening progressed, her memory became spotty. She remembered drinking Fireball whiskey, being helped back to her hotel room, and vomiting on her floor. And she remembered the accused on top of her, penetrating her. The next morning, she woke with no clothes on, vomit on the floor, and the accused's wallet under the bed.

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* Judge Advocate, United States Coast Guard. Presently assigned as Staff Judge Advocate, U.S. Coast Guard Training Center, Yorktown, Virginia. LL.M., 2017, The Judge Advocate General's School, Charlottesville, Virginia; J.D., 2012, University of Washington, Seattle, Washington; B.Sc., 2008, Excelsior College, Albany, New York. Previous assignments include Staff Attorney, Coast Guard Fifth District, Portsmouth, Virginia, 2014–2016; Staff Attorney, Military Justice Division, Legal Service Command, Norfolk, Virginia, 2012–2014; Executive Officer, USCGC NEAH BAY, WTGB-105, Cleveland, Ohio, 2007–2009; Deck Watch Officer, USCGC SENECA, WMEC-906, Boston, Massachusetts, 2005–2007. Lieutenant Commander Barnum has also been published in the *Washington Law Review*, Jeffery C. Barnum, Comment, *False Valor: Amending the Stolen Valor Act to Conform with the First Amendment's Fraudulent Speech Exception*, 86 WASH. L. REV. 841 (2011), the *Albany Law Review*, Jeffery C. Barnum, *Encouraging Congress to Encourage Speech: Reflections on* United States v. Alvarez, 76 ALB. L. REV. 527 (2013), and the *Temple Law Review*, Maureen A. Howard & Jeffery C. Barnum, *Bringing Demonstrative Evidence in from the Cold: The Academy's Role in Developing Model Rules*, 88 TEMP. L. REV. 513 (2016). Member of the bars of Washington State, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This paper was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

It was not until several months later that she sought out the command's victim advocate. She gathered the courage to come forward after attending a sexual assault prevention training. That is how the case landed on your desk.

Unfortunately, witnesses from the barbecue have not provided much in the way of corroboration. Although they remember the victim drinking, none remember any egregious signs of intoxication, and none saw her leave with the accused. When interviewed, the accused admitted to helping the victim to her hotel room, but denied seeing her vomit. He also said that she "was all over him," and, anyway, she "didn't seem that drunk."

Your talented and determined investigator has, however, turned up two other instances where the accused had sex with intoxicated women. One was two years ago at his previous unit; the other was four years ago when he was at "A" school. That is not all. Your suspect was accused of sexual assault during his sophomore year in college, almost eight years ago. None of the prior assaults were prosecuted or even charged because apparently none of the various investigating agencies were aware of the other alleged assaults.

It seems that there is finally enough evidence to prove that the accused sexually assaulted all four women. Your plan is to use evidence of each sexual assault to prove the others, as permitted by Military Rule of Evidence (MRE) 413. Specifically, MRE 413 allows introduction of evidence of "one or more offenses of sexual assault" for "any matter to which it is relevant."[1] With that understanding, you charge the three service-connected sexual assaults and prepare for trial.

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2012) [hereinafter 2012 MCM]. The Military Rules of Evidence (MREs) were re-issued in 2013, and the language is slightly different: "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant." Exec. Order No. 13,643, 78 Fed. Reg. 29,559, 29,577 (May 21, 2013) (amending MRE 413). The language was unchanged in the 2016 and 2019 Manuals for Courts-Martial. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2019) [hereinafter 2019 MCM]. Unless specifically noted, any citations to the 2019 MCM indicate identical language was present in the 2016 edition.

Not so fast, says the Court of Appeals for the Armed Forces (CAAF). At the tail end of its 2016 term, in *United States v. Hills*,[2] the CAAF categorically prohibited the use of charged misconduct as MRE 413 evidence.[3] The CAAF held that it was constitutional error to permit the use of charged misconduct—of which the accused is presumed innocent—to prove other charged misconduct. Having different standards of proof for the same conduct only compounded this error. As the CAAF noted, "The juxtaposition of the preponderance of the evidence standard with the proof beyond a reasonable doubt standard with respect to the elements of the same offenses would tax the brain of even a trained lawyer."[4]

However, the CAAF erred in holding that charged misconduct is categorically barred from use as MRE 413 evidence. It did so by construing the incorrect version of the rule, ignoring the plain text of the statutory language, and judicially inserting words into the legislatively enacted language of MRE 413. Even so, the CAAF correctly identified a substantial constitutional error where the trial judge permitted the *Hills* panel to use charged misconduct as MRE 413 evidence, diluting the presumption of innocence, and thus violating the accused's due process rights.

Restoring proper understanding of MRE 413 will require the concerted efforts of multiple actors. *Hills* raises two distinct issues. First is the CAAF's incorrect interpretation of abrogated statutory language. In response, MRE 413 should be amended to clarify that charged misconduct may be used as MRE 413 evidence. The second issue is preserving the accused's presumption of innocence. To ensure that it remains intact, the standard panel instructions should be amended to require that charged misconduct be established beyond a reasonable doubt before being employed as MRE 413 evidence. Only remedying both issues will allow the constitutional use of charged misconduct as MRE 413 evidence.

Comprehending the problems and providence of *Hills* requires an understanding of the history of MRE 413. Part II examines that history, and the history of MRE 413's antecedent, Federal Rule of Evidence (FRE) 413. Against this backdrop, Part III examines the CAAF's textual interpretation in *Hills*. While its interpretation left much to be desired, the CAAF's

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[2] United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016).
[3] *Id.* at 354.
[4] *Id.* at 358.

identification of a due process error was correct, as the analysis in Part IV confirms. Finally, Part V proposes solutions to both the Rule 413[5] interpretation problem as well as the constitutional problem. Proposed statutory language and panel instructions are included as appendices.

II. Climbing the Hills: The Path from Enactment to Constraint

A. Enacting a Federal Rule for Evidence in Sexual Assault Cases

Before Rule 413 authorized the rule-based admission of "other sexual offenses," admission was governed by an inconsistent patchwork of common law. In some cases, courts shoehorned the evidence through Rule 404(b)'s narrow opening, finding a basis other than character or propensity to justify admission. The Oregon Supreme Court, for example, upheld the admission of evidence of prior sexual assaults on the same victim "to demonstrate the sexual predisposition this [accused] had for this particular victim, . . . not that he had a character trait or propensity to engage in sexual misconduct generally."[6] Wyoming's Supreme Court went further by characterizing prior sexual offenses as "motive," one of the traditional categories of prior bad acts enumerated in Rule 404(b).[7] Still, other courts have permitted introduction of other sexual offenses when the accused

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[5] When referring to language or concepts common to FRE 413, MRE 413, or the state analogue, this article will refer to the evidentiary rule as "Rule 413." When a distinction is necessary, a reference to the specific evidentiary code will be provided. Additionally, although the *Hills* court focused on MRE 413, its reasoning is equally applicable to MRE 414. United States v. James, 63 M.J. 217, 220 (C.A.A.F. 2006) ("In light of the common history and similar purpose of M.R.E. 413 and M.R.E. 414, there is no need to distinguish the two rules . . . .").

[6] State v. McKay, 787 P.2d 479, 480 (Or. 1990).

[7] Elliott v. State, 600 P.2d 1044, 1048 (Wyo. 1979). In *Elliott*, the court considered "the admissibility . . . of testimony of an older sister of the victim concerning prior attempts of a similar nature involving her as a victim." *Id.* at 1045. The court also mused that perhaps this prior act evidence was potentially admissible as evidence of a "common design or plan," another one of the enumerated 404(b) exceptions, but decided that "[i]n this particular instance, however, we conclude that admissibility of the evidence is justified as proof of motive." *Id.* at 1048.

disputed whether the victim consented,[8] implicitly applying the doctrine of chances.[9]

However, this patchwork pattern of admissibility was not universal. Other courts, hewing closer to the prohibition on character evidence, overturned convictions supported by other sexual offenses. For example, the Delaware Supreme Court overturned a charge of child rape, noting that sexual gratification was not an element of the charged crime, so any "motive" was irrelevant.[10] A California court rejected other sexual offense evidence outright, noting that the use of prior acts to credit a victim's testimony "does not comport with the applicable statutory and decisional law."[11] A New York court, in a case involving charges of rape and murder, held that "[g]unpoint threats and theft or attempted theft of jewelry are hardly 'unique' or 'uncommon' in rape cases,"[12] and thus did not meet the legal definition of *modus operandi*. Admission of prior sexual offenses was uncertain, and with this uncertainty came a sense that sexual offenders were escaping conviction because of a restrictive rule of evidence.[13]

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[8] *See, e.g.*, Rubio v. State, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980) ("We hold that when a defendant in a prosecution for rape raises the defensive theory of consent, he places his intent in issue. The State may then offer extraneous offenses which are relevant to that contested issue.").

[9] United States v. Tyndale, 56 M.J. 209, 213 (C.A.A.F. 2001). The doctrine of chances "posits that it is unlikely a defendant would be repeatedly, innocently involved in similar, suspicious circumstances." *Id.* *See also* EDWARD J. IMWINKELRIED, 1 UNCHARGED MISCONDUCT EVIDENCE § 5:6 (2020) ("The doctrine [of chances] teaches us that the more often the defendant performs the actus reus, the smaller is the likelihood that the defendant acted with an innocent state of mind. The recurrence or repetition of the act increases the likelihood of a mens rea or mind at fault." (citations omitted)).

[10] Getz v. State, 538 A.2d 726, 733 (Del. 1988) ("To the extent that sexual gratification may be equated, for example, with motivation such evidence bears upon an issue which is not an element of the offense and concerning which the State has no burden."). The *Getz* court also rejected the theory that the proffered evidence (consisting of prior acts of child molestation with the victim) fit into a "common scheme or plan." *Id.* at 734. *See also* People v. Lewis, 506 N.E.2d 915, 918 (N.Y. 1987).

[11] People v. Key, 153 Cal. App. 3d 888, 898 (Ct. App. 1984).

[12] People v. Sanza, 121 A.D.2d 89, 96 (N.Y. App. Div. 1986).

[13] *See, e.g.*, 140 CONG. REC. 23602 (1994) (statement of Rep. Susan Molinari) ("The enactment of this reform is first and foremost a triumph for the public—for the women who will not be raped and the children who will not be molested because we have strengthened the legal system's tools for bringing the perpetrators of these atrocious crimes to justice.").

Against this unsettled backdrop, Representative Susan Molinari and Senator Bob Dole proposed amendments to the FREs in 1991.[14] Although initially unsuccessful, they secured passage of the amendments in 1994, with overwhelming support in both Houses of Congress.[15]

The Rule was adopted for several reasons. First, it facilitated probabilistic or "doctrine of chances" evidence.[16] This type of evidence can be very powerful in the murky world of sexual offense prosecutions, where the criminal can be confused with the conjugal.[17] Combined with other evidence of the commission of the charged offense, "knowledge of the [accused's] past behavior may foreclose reasonable doubt as to guilt in a case that would otherwise be inconclusive."[18]

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[14] Women's Equal Opportunity Act, S. 472, 102d Cong. § 231 (1991). *See also* 140 CONG. REC. 24799 (1994) (statement of Sen. Dole) ("Congresswoman Susan Molinari and I initially proposed this reform in February 1991 in the Women's Equal Opportunity Act, and we later reintroduced it in . . . the 102d and 103d Congresses."). In this floor speech, Senator Dole noted several sources which would aid in giving effect to the new rules. *Id.* First, he noted the analysis of the previous iterations of the rules which were substantively identical to those enacted. *Id. See also* 137 CONG. REC. 6030–34 (1991) (providing previous analysis of the rules). Second, he urged that the address of Mr. David Karp, a Department of Justice Senior Counsel, to the Association of American Law Schools be "considered an authoritative part of [the rules'] legislative history." 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994), for the prepared statement that Mr. Karp presented. These sources were also cited by the House sponsor of the bill, Representative Susan Molinari. 140 CONG. REC. 23602 (1994) (statement of Rep. Molinari).

[15] The amendments passed the House by a vote of 348 to 62, and the Senate by a vote of 75 to 19. 140 CONG. REC. 24799 (1994) (statement of Sen. Dole).

[16] Karp, *supra* note 14, at 20 ("It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."). *See also* 137 CONG. REC. 6032 (1991) ("The rationale commonly given for this exception is the probative value such evidence has on account of the inherent improbability that a person will innocently or inadvertently engage in similar, potentially criminal conduct on a number of different occasions."); 140 CONG. REC. 24799 (1994) (statement of Sen. Dole) ("This includes . . . [an] assessment of the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense.").

[17] Karp, *supra* note 14, at 21 ("In violent crimes other than sexual assaults, there is rarely any colorable defense that the defendant's conduct was not criminal because of consent by the victim. The accused mugger does not claim that the victim freely handed over his wallet as a gift.").

[18] *Id.* at 20.

Additionally, the Rule permitted an inference that prior acts of sexual misconduct demonstrated a propensity to commit other sexual offenses.[19] Thus, a panel member could conclude that the accused "has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him."[20] If the evidence shows that the accused has these predilections and, more importantly, has acted on them on another occasion, then "a charge of sexual assault has far greater plausibility than if there were no evidence of such a disposition . . . ."[21]

Finally, because these crimes often depend on the testimony of a single witness—assuming one comes forward at all—"there is a compelling public interest in admitting all significant evidence that will shed some light on the credibility of the charge and any denial by the defense."[22] After requesting and receiving comments from the Judicial Conference of the United States on the proposed rules, the rules went into effect on 9 July 1995.[23] The military rule came into effect shortly thereafter.

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[19] Except through Rule 413, evidence of a criminal predisposition is not admissible. 2019 MCM, *supra* note 1, MIL. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

[20] Karp, *supra* note 14, at 20.

[21] 137 CONG. REC. 6032 (1991). This assertion of a predisposition to commit a sexual offense was (and is) controversial. *Id. See also* Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013); United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000) ("The scientific community is divided on the question of recidivism for sexual offenders. Some have found a rate of recidivism is very high for sexual offenders while some have found the rate lower for rapists than for burglars, drug offenders, or robbers." (citations omitted)). Solving (or at least rejoining) the debate about the desirability of Rule 413 is beyond the scope of this article. However, it is important to note and acknowledge that the legislature had a rational basis to prescribe the rules, and, unless the rules are unconstitutional, a court is duty-bound to give them their desired effect. *Wright*, 53 M.J. at 481 ("Congress enacted the Rules. Thus, unless these Rules are unconstitutional, we are bound by the Rules.").

[22] 140 CONG. REC. 27499 (1994) (statement of Sen. Dole). *See also* Karp, *supra* note 14, at 20.

[23] JUDICIAL CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), *reprinted in* 159 F.R.D. 51–57 (1995). The Judicial Conference opposed the amendments, and its opposition was nearly unanimous, with only the representative of the Department of Justice

B. The Military Gets into the Act: The Enactment of MRE 413

The military version of the Rule, MRE 413, took effect in January 1996.[24] Its constitutionality was challenged not long after in *United States v. Wright*.[25] At trial, Senior Airman Wright pled guilty to one sexual assault but contested a separate sexual assault allegation. The Government used evidence of the former as MRE 413 evidence in its prosecution of latter. After he was convicted of both assaults, Senior Airman Wright appealed to the CAAF, claiming that MRE 413 violated the Due Process Clause of the Fifth Amendment by introducing evidence that violated "fundamental conceptions of justice."[26] The CAAF rejected this argument, noting that MRE 413 did not, on its face, undermine the presumption of innocence.[27] Instead, it found the Rule constitutional, both facially and as applied.[28] The court further held that judges must apply a Rule 403 balancing test when considering the admissibility of evidence under MRE 413, in addition to ensuring the evidence meets certain threshold requirements. The CAAF listed nine non-exclusive factors judges must consider as part of that balancing, which later became known as the *Wright* factors.[29] In

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in favor of the amendments. *Id.* at 53. However, even in face of this "highly unusual unanimity," *id.*, Congress did not modify the proposed rules. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(d)(2), 108 Stat. 1796, 2137 (providing the amendments be enacted 150 days after receiving a report in opposition from the Judicial Conference "unless otherwise provided by law").

[24] At the time, an amendment to the FREs applied in courts-martial 180 days after the amendment's effective date. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 1102 (1995). Military Rules of Evidence 413 and 414 were later explicitly adopted by Executive Order in May 1998. Exec. Order No. 13,086, 3 C.F.R. 155 (1999). There is no substantive difference between the Federal Rule and the Military Rule. *Wright*, 53 M.J. at 480 n.4. Military Rule of Evidence 413 (along with the rest of the MREs) were re-issued in their entirety in 2013. Exec. Order No. 13,643, 3 C.F.R. 246 (2014). This re-issue enacted the stylistic changes to the FREs which came into force on 1 December 2011. *See* H.R. DOC. NO. 112-28, at 1, 2, 95 (2011) (reprinting the transmission from the Chief Justice of the Supreme Court to Congress per the Rules Enabling Act), https://www.gpo.gov/fdsys/pkg/CDOC-112hdoc28/pdf/CDOC-112hdoc28.pdf.

[25] *Wright*, 53 M.J. 476.

[26] *Id.* at 481 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

[27] *Id.*

[28] *Id.* at 483.

[29] *Id.* at 482–83. The *Wright* balancing factors are constitutionally required, providing a bulwark against admittance of evidence that would otherwise violate the Due Process clause of the Constitution. United States v. Dewrell, 55 M.J. 131, 138 (C.A.A.F. 2001). The non-exclusive *Wright* factors are: strength of proof of prior act, probative weight of evidence, potential for less prejudicial evidence, distraction of factfinder, time needed for

the sixteen years between *Wright* and *Hills*, the CAAF only heard twelve cases addressing the application of MRE 413 or 414.[30]

C. The Courts of Criminal Appeal Are Unanimous: Charged Misconduct May Be Used as MRE 413 Evidence

In the years that followed *Wright*, three of the four service courts of criminal appeals (CCAs) confronted the issue of using charged misconduct as MRE 413 evidence.[31] Each arrived at the same conclusion: that such use was legally permissible.

The Army Court of Criminal Appeals (ACCA) was the first to consider the issue in *United States v. Barnes*.[32] Because the trial judge did not conduct a thorough MRE 403 balancing on the record, the ACCA spent much of its decision weighing the various *Wright* factors.[33] It ultimately affirmed Staff Sergeant Barnes's conviction, finding "no prohibition against or reason to preclude the use of evidence of similar crimes in sexual assault cases in accordance with [MRE] 413 due to the fact that the 'similar crime' is also a charged offense."[34]

In *United States v. Bass*, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) likewise squarely addressed the use of charged misconduct as MRE 413 evidence.[35] First, the NMCCA looked to the

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proof of prior conduct, temporal proximity, frequency of the acts, presence or lack of intervening circumstances, and relationship between the parties. *Wright*, 53 M.J. at 482.

[30] United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2013); United States v. Yammine, 69 M.J. 70 (C.A.A.F. 2010); United States v. Ediger, 68 M.J. 243 (C.A.A.F. 2010); United States v. Burton, 67 M.J. 150 (C.A.A.F. 2009); United States v. Schroder, 65 M.J. 49 (C.A.A.F. 2007); United States v. Bare, 65 M.J. 35 (C.A.A.F. 2007); United States v. Tanner, 63 M.J. 445 (C.A.A.F. 2006); United States v. Washington, 63 M.J. 418 (C.A.A.F. 2006); United States v. James, 63 M.J. 217 (C.A.A.F. 2006); United States v. Berry, 61 M.J. 91 (C.A.A.F. 2005); United States v. Bailey, 55 M.J. 38 (C.A.A.F. 2001); United States v. Dewrell, 55 M.J. 131 (C.A.A.F. 2001).

[31] The Coast Guard Court of Criminal Appeals is the only service appellate court that did not consider the issue.

[32] United States v. Barnes, 74 M.J. 692 (A. Ct. Crim. App. 2015), *review denied*, 75 M.J. 27 (C.A.A.F. 2015). In *Barnes*, the accused was charged with raping two separate victims, with one rape occurring in 2006 and the other in 2009. *Id.* at 694–95.

[33] *Id.* at 699–701.

[34] *Id.* at 697–98.

[35] United States v. Bass, 74 M.J. 806, 815 (N-M. Ct. Crim. App. 2015), *review granted*, (C.A.A.F. Nov. 30, 2015), *pet. withdrawn*, No. 16-0162, 2016 CAAF LEXIS 42 (Jan. 5,

plain language of the Rule, noting that it permitted evidence of "any other sexual offense." The NMCCA concluded that this language "is broad and betrays no exception for charged misconduct."[36] Next, the court highlighted the illogic of excluding charged offenses (with sufficient evidentiary strength to merit a trial) as MRE 413 evidence while permitting evidence of outdated offenses.[37] Finally, the NMCCA rejected Petty Officer Bass's as-applied constitutional challenge, remarking that the CAAF had affirmed the use of charged misconduct in *United States v. Wright*.[38]

Finally, the Air Force Court of Criminal Appeals (AFCCA) addressed the issue of charged misconduct as MRE 413 evidence in their unpublished decision *United States v. Maliwat*.[39] The AFCCA did not analyze whether MRE 413 permitted the admittance and use of charged misconduct because the Government did not request an MRE 413 instruction until the close of trial.[40] Thus, much of the opinion examined whether the procedural protections of MRE 413 applied and whether the MRE 413 evidence was properly admitted in the first instance.[41] The AFCCA noted that the trial court had properly instructed the members as to the use of the propensity evidence, and thus did not prejudice the accused.[42] Finding no

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2016). In *Bass*, two separate victims alleged sexual assault and abusive contact over a period of approximately six months. *Id.* at 810–11.

[36] *Id.* at 815. The NMCCA also observed that the it is "not a rulemaking body and, even were [it] inclined to find such an exception prudent, [it is] bound to apply the Rule as written, not as may be desired, unless it is unconstitutional." *Id.* (citing United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000)).

[37] *Id.*

[38] *Id.* at 816. However, the NMCCA failed to recognize a crucial difference between *Bass* and *Wright*. At the time of Senior Airman Wright's trial, he had pled guilty to one of the specifications and was contesting only one of the charges, *Wright*, 53 M.J. at 479–80, while Petty Officer Bass contested all of the charges before the court-martial, *Bass*, 74 M.J. at 815. Even so, the NMCCA's other bases for affirmance—the plain reading of the statutory text and the purposive analysis—were still likely sufficient to affirm the trial court, assuming there were no defects in the instructions.

[39] United States v. Maliwat, ACM 38579, 2015 WL 6655541 (A.F. Ct. Crim. App. Oct. 19, 2015), *vacated*, 76 M.J. 128 (C.A.A.F 2017), *aff'd on reh'g*, 2017 WL 4003928 (A.F. Ct. Crim. App. Aug. 30, 2017). In *Maliwat*, the accused was charged with rape of one victim and abusive sexual contact of another. *Id.* at *1.

[40] *Id.* at *3–4.

[41] *Id.* at *4–5.

[42] *Id.* at *4. The AFCCA contrasted *Maliwat* with the CAAF case *United States v. Burton*, 67 M.J. 150 (C.A.A.F. 2009), where no such propensity instruction was given at trial. However, in its analysis of the procedural protections, the AFCCA foreshadowed the CAAF's own error in viewing MRE 413 solely as a rule of admission divorced from the use of the evidence. *See* discussion *infra* Section III.A.3.a.

prejudice, and conducting no inquiry into the propriety of using charged misconduct as MRE 413 evidence, the AFCCA affirmed.

Although not unified in their reasoning, each CCA to consider the use of charged misconduct as MRE 413 evidence allowed such use. That all changed when the CAAF took up the case of Sergeant (SGT) Kendall Hills, U.S. Army.

D. The CAAF Joins the Battle

Unlike in the cases considered by the CCAs, all of the offenses in *Hills* involved the same victim, and all occurred within a two-hour window.[43] In its analysis, the CAAF first examined the language and history of MRE 413, concluding that "charged offenses are not properly admitted under M.R.E. 413 to prove a propensity to commit [other] charged offenses."[44] The CAAF also found that the use of charged misconduct as MRE 413 evidence raised "serious constitutional concerns" by eroding the accused's presumption of innocence.[45]

1. A New Rule: Charged Misconduct May Not Be Used as MRE 413 Evidence

While the CAAF began its analysis by re-affirming MRE 413's constitutionality, it quickly noted that it had not previously addressed whether charged misconduct may be used as MRE 413 evidence.[46] Just as quickly, the CAAF held that it may not.[47] The CAAF observed that neither it nor any federal circuit court had permitted the use of charged misconduct as Rule 413 evidence.[48] The court then distinguished both *Wright* and another case involving charged sexual offenses, *United States v. Burton*. In *Wright*, the accused pled guilty to the specification that was later used

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[43] United States v. Hills, 75 M.J. 350, 352 (C.A.A.F. 2016). Unlike its previous *Barnes* opinion, the ACCA conducted a thorough analysis of the language and history of MRE 413. United States, v. Hills, ARMY 20130833, 2015 WL 3940965, at *6 (A. Ct. Crim. App. June 25, 2015), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016).
[44] *Hills*, 75 M.J. at 357.
[45] *Id.* at 355–56.
[46] *Id.* at 354.
[47] *Id.*
[48] *Id. But see* United States v. Guardado, 75 M.J. 889, 894–95 (A. Ct. Crim. App. 2016) (listing several federal cases preceding *Hills* that appeared to permit Rule 413 evidence between charged offenses), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017).

as MRE 413 evidence; in *Burton*, the trial court never admitted the charged offenses as propensity evidence under MRE 413.[49]

Next, the CAAF dissected the Rule to support its holding. It started by asserting that "the structure of the rule suggests that it was aimed at conduct other than charged offenses."[50] The *Hills* court noted that MRE 413 required disclosure of evidence at least five days before trial, which, according to the court, "implies that only evidence of uncharged offenses (of which the accused would not otherwise be aware absent disclosure) are contemplated by the rule."[51] Next, because evidence of charged misconduct was already admissible to prove the underlying offense, no special rule of admission was necessary.[52] The CAAF also looked to select statements within the Rule's legislative history to suggest that the Rule was aimed solely at uncharged misconduct.[53] Finally, the court acknowledged that, while the Rule permitted bolstering victim credibility, "there [was] no indication that M.R.E. 413 was intended to bolster the credibility of the named victim through inferences drawn from the same allegations of the same named victim."[54] This reasoning suggests that *Hills*'s factual background played a major role in the legal outcome. The CAAF concluded that the trial court abused its discretion by admitting evidence of other charged offenses under MRE 413.[55] Although this error alone was likely sufficient to reverse SGT Hills's conviction, the CAAF went further and examined the constitutionality of the use of charged misconduct as MRE 413 evidence.

2. The Use of Charged Misconduct as MRE 413 Evidence Eroded the Accused's Presumption of Innocence

The CAAF also found constitutional error in the final instructions to the panel. It concluded that the judge's instructions on the use of charged

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[49] *Hills*, 75 M.J. at 354.
[50] *Id.* at 355.
[51] *Id.* Of course, this reading ignores the provisions directing the use of such admitted information. *See* 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a) ("The evidence may be considered *on any matter* to which it is relevant." (emphasis added)). *See also* discussion *infra* Section III.A.3.a.
[52] *Hills*, 75 M.J. at 355.
[53] *Id.*
[54] *Id.*
[55] *Id.* In its opinion, the CAAF also noted that the Article 32 officer had recommended against going to trial, another indication of the CAAF's concern about the *Hills* facts. *Id.* at 352.

misconduct violated the accused's presumption of innocence, and thus the Due Process clause of the Fifth Amendment.

At trial, the judge instructed that the each charged sexual offense "may have a bearing on your deliberations in relation to the other charged sexual assault offenses . . . only under the circumstances I am about to describe . . . ."[56] The judge then instructed the panel to determine by a preponderance of the evidence if the other sexual assaults (i.e., not the charged offense under deliberation) occurred.[57] If so, then "*even if you are not convinced beyond a reasonable doubt* that the accused is guilty of one or more of those offenses, you may nonetheless consider the evidence of such offenses, or its bearing on any matter to which it is relevant in relation to the other sexual assault offenses . . . ."[58]

This juxtaposition of differing standards of proof highlighted the constitutional conundrum. The accused had the right to have every element of every offense proved beyond a reasonable doubt.[59] He had pled not guilty to all charges and, therefore, enjoyed the presumption of innocence as to those offenses.[60] As CAAF noted, "It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."[61]

The CAAF examined the panel instructions in light of these constitutional principles. It observed that the instructions "provided the members with directly contradictory statements about the bearing that one charged offense could have on another, one of which required the members to discard the accused's presumption of innocence, and with two different burdens of proof—preponderance of the evidence and beyond a reasonable doubt."[62] Not surprisingly, the court held that "the instructions in this case invited the members to bootstrap their ultimate determination of the accused's guilt with respect to one offense using the preponderance

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[56] *Id.* at 356.
[57] *Id.*
[58] *Id.* (emphasis added).
[59] *Id.* (citing *In re* Winship, 397 U.S. 358, 364 (1970)).
[60] *Id.* Here, the CAAF distinguished *Wright*, in which the accused contested only one of the charges. *Id.* (citing United States v. Wright, 53 M.J. 476, 479 (C.A.A.F. 2000)).
[61] *Id.*
[62] *Id.* at 357.

of the evidence burden of proof with respect to another offense."[63] It further concluded that the error was not harmless beyond a reasonable doubt, and reversed the lower court's ruling.[64]

III. The CAAF Erred in Its Interpretation of MRE 413

While the CAAF correctly analyzed the panel instructions' constitutional shortcomings, it gravely erred in several respects in its statutory interpretation of MRE 413. First, it ignored the basic canons of statutory construction. Second, its recourse to the legislative history was both unnecessary and unsound. Third, its textual interpretation undercut the purpose of Rule 413, ignoring the standard textual/purposive interpretative framework used by other courts (including the CAAF itself) in interpreting Rule 413. Finally, its interpretation would lead to irrational results.

A. The Court Failed to Apply Standard Canons of Statutory Construction

In its *Hills* decision, the CAAF abandoned the standard canons of statutory construction. To begin, it was not construing the correct version of MRE 413, instead using an outdated version not applicable to the charged misconduct. The CAAF also ignored the plain meaning rule, failing to even examine the text of the outdated rule it applied. Finally, the CAAF failed to read MRE 413 in context, violating another basic canon of construction. Any one of these violations would be fatal to the court's analysis; taken as a whole, they severely undermine the CAAF's interpretation of MRE 413 in *Hills*.

1. The CAAF Analyzed Outdated Statutory Text

Although not specifically listed as a canon of statutory construction, it is axiomatic that the reviewing court should use the text of the statute in force at the time of trial. Even if the trial court incorrectly used an outdated statute, the reviewing court is obliged to correct the error. In *Hills*, the CAAF failed to do so, and instead focused its interpretation on superseded language. It thereby diminished the integrity of its statutory interpretation and limited the prospective effect of its decision.

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[63] *Id.*
[64] *Id.* at 358.

As with many MREs, the language of MRE 413 closely tracks the corresponding FRE. The FREs, including FRE 413, were updated in 2011;[65] the MREs followed suit via Executive Order in May 2013, largely adopting the restyled Federal rules for application in military courts-martial.[66] The President directed these changes to take effect immediately.[67]

Sergeant Hills should have been tried under the amended MRE 413. The charges against SGT Hills were referred to a general court-martial on 11 June 2013, he was arraigned on 18 July 2013, and he was tried 23 to 25 September 2013—all after the revised MRE 413's implementation.[68] However, the trial court interpreted the outdated language.[69] The CAAF failed to notice or correct this error, instead compounding the trial court's mistake by also analyzing the superseded text.

2. The Hills *Court Did Not Apply the Ordinary Meaning of MRE 413's Text*

"[T]he beginning point [of statutory construction] must be the language of the statute [itself] . . . ."[70] If the language is unambiguous and "the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to

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[65] H.R. DOC. NO. 112-28 (2011), https://www.gpo.gov/fdsys/pkg/CDOC-112hdoc28/pdf/CDOC-112hdoc28.pdf. The FREs were updated to "adopt clear and consistent style conventions for all of the rules." *Id.* at 99–100.

[66] Exec. Order No. 13,643, 3 C.F.R.246 (2014).

[67] *Id.* § 2. However, this section also stated that these amendments should not be construed as expanding criminal liability for acts committed prior to the effective date, and neither should it be construed as invalidating any action commenced prior to the effective date. *Id.* For procedural rules, such as those governing admission of evidence, the evidence rules in place at the time of trial govern. *Cf.* Hopt v. People, 110 U.S. 574, 587–88 (1884) (holding the changes in rules governing the competency of felons to testify did not violate the *ex post facto* clause).

[68] Joint Appendix at 18, 22, United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016) (No. 15-0767/AR).

[69] *Id.* The court may have done so because the Government cited the 2008 *Manual for Courts-Martial* as authority for its MRE 413 motion. *Id.* at 282.

[70] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.").

its terms."[71] Judges universally apply[72] this "basic and unexceptional" principle.[73] The only exceptions to the plain meaning canon are when the text creates an absurd result[74] or suggests a drafting error.[75]

A closely related canon directs using the ordinary meaning of the text within the statute.[76] The ordinary-meaning rule, which has been called "the most fundamental semantic rule of interpretation,"[77] simply states that in the absence of a legislatively provided definition, courts will construe the "statutory term in accordance with its ordinary or natural meaning."[78] Courts will use a variety of approaches to discern the ordinary meaning of a term, including context, operation, or other laws passed contemporaneously with the passage under consideration.[79] Courts will also use "standard, recognized dictionaries [as] a valuable source to understand a word's approved, common meaning."[80]

Even though the CAAF interpreted outdated language, it is nonetheless a meaningful starting point for analysis. Differences between the current

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[71] Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted). *See also* Estate of Cowart, 505 U.S. at 475 ("[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.").

[72] Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (Rehnquist, C.J.) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances." (citations omitted)); Burlington N. R.R. Co. v. Okla. Tax Comm'n, 481 U.S. 454, 461 (1987) (Marshall, J.) ("Unless exceptional circumstances dictate otherwise, '[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete.'" (alteration in original) (citation omitted)).

[73] Estate of Cowart, 505 U.S. at 476.

[74] United States v. King, 71 M.J. 50, 52 (C.A.A.F. 2012) ("Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result." (citation omitted)). However, the absurd results doctrine is rarely invoked. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 459 (2002).

[75] Bohac v. Dep't of Agric., 239 F.3d 1334, 1338 (Fed. Cir. 2001).

[76] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175–76 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)).

[77] SCALIA & GARNER, *supra* note 70, at 69.

[78] FDIC v. Meyer, 510 U.S. 471, 476 (1994) (citation omitted).

[79] 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:28 (7th ed. 2019).

[80] *Id.* (citations omitted). Of course, a dictionary definition can be misused, especially if a single dictionary produces a contrary (but interpretatively desirable) result. *Id.* Nonetheless, "dictionaries can provide a useful starting point to determine a term's meaning, at least in the abstract, by suggesting what a legislature could have meant by using a particular term." *Id.*

language and the language analyzed by the CAAF provide a basis to amend MRE 413 to explicitly permit charged misconduct to be used as 413 evidence.[81]

Prior to May 2013, MRE 413(a) provided that "[i]n a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant."[82] Two phrases merit closer examination: the phrase identifying the subject of the charge ("an offense of sexual assault") and the phrase describing the other admissible evidence ("one or more offenses of sexual assault").

The noun phrase "offense of sexual assault" is modified by the indefinite article "an." As the indefinite article, "an" is "[u]sed . . . before most singular nouns . . . when the individual in question is undetermined . . . esp. when the individual is being first mentioned or called to notice . . . ."[83] While the subject of the charge is identified individually, the Rule describes the evidence of other sexual misconduct as "one or more offenses of sexual assault." Thus, "one or more" can reach any other sexual misconduct committed by the accused (including charged misconduct), as the text does not contain any limiting principle. However, the phrase "one or more" does not define the outer limits of the corpus of admissible evidence. It is, therefore, at least susceptible to judicial limitation.[84]

The current text of Rule 413 is even more straightforward: "In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense."[85] As with the previous language, the identification of the subject of the charge focuses solely on the charge. However, the phrase of admission widens

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[81] *See* discussion *infra* Section V.A.1.

[82] 2012 MCM, *supra* note 1, MIL. R. EVID. 413(a). The rule defined "offenses of sexual assault" as including crimes that involved "any sexual act or sexual contact, without consent . . . ." *Id.* at MIL. R. EVID. 413(d)(1).

[83] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1 (1976) [hereinafter WEBSTER'S DICTIONARY]. *Accord* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1987) [hereinafter RANDOM HOUSE DICTIONARY] ("[N]ot any particular or certain one of a class or group: *a man; a chemical; a house*.").

[84] *See, e.g.*, United States v. Hills, 75 M.J. 350, 354 (C.A.A.F. 2016).

[85] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a).

the universe of sexual offenses to any other sexual offense committed by the accused. The word "any" denotes "the maximum or whole of a number or quantity,"[86] while "other" refers to "[e]xisting besides, or distinct from, that already mentioned or implied."[87] Thus, the phrase "the accused committed any other sexual offense" casts a wide net. The only textual exclusion is the charged offense itself, which is excepted out by the word "other." As with the previous rule, this version does not prescribe any other limitations. However, with the current language, the outer limits of the corpus of admissible evidence are well-defined: it is any offense other than the charged offense.[88]

This singular/universal dichotomy (present in both versions of the text) contrasts the one (the subject of the charge) against the many (the other sexual misconduct). This distinction is sharpened when juxtaposed against the backdrop of the spillover instruction. In nearly every court-martial involving "unrelated but similar offenses," the military judge instructs that "[a]n accused may be convicted based only on evidence before the court (not on evidence of a (general) criminal disposition). Each offense must stand on its own and you must keep the evidence of each offense separate."[89] Thus, when the accused is charged with several sexual

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[86] WEBSTER'S DICTIONARY, *supra* note 83, at 97 (using "give me [any] letters you find" and "he needs [any] help he can get" as examples). *Accord* THE OXFORD ENGLISH DICTIONARY 539 (2d ed. 1989) [hereinafter OED] ("In affirmative sentences it asserts concerning a being or thing of the sort named, without limitation as to which, and thus constructively of *every* one of them, since every one may in turn may be taken as a representative . . . ."); RANDOM HOUSE DICTIONARY, *supra* note 83, at 96 ("[E]very; all: *Any schoolboy would know that*. *Read any books you find on the subject*.").

[87] OED, *supra* note 86, at 981. *Accord* WEBSTER'S DICTIONARY, *supra* note 83, at 1598 ("[N]ot being the one (as of two or more) first mentioned . . . ."). *See also* RANDOM HOUSE DICTIONARY, *supra* note 83, at 1371 ("[B]eing the remaining ones of a number: *the other men, some other countries*.").

[88] Put another way, the previous language started narrow ("one") and then expanded ("or more"), whereas the present language is as expansive as possible ("any") limited only by the eliminating the subject of the charge ("other").

[89] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 7-17 (1 Sept. 2014) [hereinafter BENCHBOOK]. Although many of the references to the Benchbook are identical between the 2014 edition and the most current version, the instructions concerning MRE 413 were changed in response to *Hills*. *See also* United States v. Hogan, 20 M.J. 71, 73 (C.M.A. 1985) (noting that "spillover" from one offense to the next "would violate one of the most basic precepts of American jurisprudence: that an accused must be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition." (citing United States v. Lotsch, 102 F.2d 35, 36 (2d Cir. 1939))).

offenses, MRE 413 contemplates addressing each offense individually ("a sexual offense") while still permitting the other charged offenses to be a part of the universe of evidence considered relating to any other sexual offenses committed by the accused.[90]

Of course, the evidence of other charged sexual offenses would already be before the court-martial because such evidence would be relevant as to those charges. In our hypothetical case, the evidence of prior sexual offenses at "A" school and at the accused's previous unit would be admissible to prove those charges. However, the "spillover" instruction, read in isolation, would prevent panel members from considering evidence of those assaults in their deliberations on the most recent assault. It instead directs panel members to keep the evidence of each offense separate.[91] This issue brings us to the next canon of statutory construction: the whole-text canon.

3. The CAAF Failed to Construe MRE 413 in Context

The whole-text canon is a "fundamental principle of statutory construction (and, indeed, of language itself) that [states that] the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."[92] Context is critically important because it "is a primary determinant of meaning."[93] When applied to either version of MRE 413, the context reveals that MRE 413 applies equally to charged and uncharged misconduct because the Rule specifies the permissible *uses*

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[90] When used with charged misconduct, MRE 413 departs from the spillover mandate, although it is important to note that Rule 413 was passed well after *Hogan* and *Lotsch*. This is not unique to Rule 413: The Benchbook specifically contemplates the use of charged misconduct as MRE 404(b) evidence. BENCHBOOK, *supra* note 89, ¶ 7-17, Note 2 ("Notwithstanding the [spillover] instruction . . . there are circumstances under MRE 404(b) when evidence relating to one charged offense may be relevant to a similar, but unrelated charged offense."). Military Rule of Evidence 404(b) permits the use of other crimes, wrongs, or acts to prove anything except the character of the accused, including motive, opportunity, or absence of mistake. 2019 MCM, *supra* note 1, MIL. R. EVID. 404(b).

[91] BENCHBOOK, *supra* note 89, ¶ 7-17.

[92] Deal v. United States, 508 U.S. 129, 132 (1993), *cited with approval in* Yates v. United States, 574 U.S. 528, 537 (2015).

[93] SCALIA & GARNER, *supra* note 70, at 167. *See also* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . ." (citation omitted)).

of the evidence. However, much of the CAAF's analysis of MRE 413 rests upon an incorrect assumption that MRE 413 merely regulates the *admission* of otherwise inadmissible evidence.[94]

a. With Charged Misconduct, Every Rule of Evidence Governing Admission of Evidence is a Rule of Admission and Use

When an accused is charged with unrelated but similar offenses, a rule of admission necessarily governs use as well.[95] Thus, in this context there is no bifurcation between admission and use, and for evidence to be admitted over an objection, it must be offered for a specific purpose. The purpose may be broad, such as making a fact "more or less probable than it would be without the evidence,"[96] or it can be narrow, such as when offered to prove the accused's motive, opportunity, or intent.[97] Put another way, in this context a finding that a piece of evidence is admissible is shorthand for that piece of evidence being admissible for a particular purpose.[98]

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[94] *See, e.g.*, United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016) (discussing the notice provisions as logically implying that "only evidence of uncharged offenses (of which the accused would not otherwise be aware absent disclosure) are contemplated by the rule"). "Charged misconduct is already admissible at trial under M.R.E. 401 and 402, and it is not subject to exclusion under M.R.E. 404(b)." *Id.*

[95] As noted previously, the standard spillover instruction operates in the background of any trial where there are multiple "similar, but unrelated" charges. *See supra* notes 89–90 and accompanying text. Even without objection, evidence of one crime may not be admitted as to another (unless relevant to both). Hearkening back to the opening hypothetical, evidence of each of the separate assaults could *only* be used as to that specific charge. *See* United States v. Burton, 67 M.J. 150, 152 (C.A.A.F. 2009) ("The Government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as M.R.E. 404 or 413.").

[96] 2019 MCM, *supra* note 1, MIL. R. EVID. 401. Of course, it is not just any fact, but a fact that is "of consequence in determining the action." *Id.*

[97] *Id.* at MIL. R. EVID. 404(b).

[98] Once viewed in this way, using MRE 403 to exclude charged evidence from being used as MRE 413 evidence is doctrinally consistent. MRE 403 provides that a judge may exclude (i.e., not admit it for certain purposes) otherwise relevant evidence if the probative value is substantially outweighed by certain factors. *Id.* at MIL. R. EVID. 403. In the MRE 413 context, the MRE 403 analysis is informed by the factors detailed in *United States v. Wright*. 53 M.J. 476, 482 (C.A.A.F. 2000). A piece of evidence could be admitted to prove one of the charged acts while still being excluded from being used as MRE 413 evidence. The *Hills* case provides a paradigmatic case where evidence of charged misconduct, otherwise before the court-martial as evidence of charged misconduct, should have been excluded from admission as MRE 413 evidence. *See, e.g.*, United States v. Hills, ARMY 20130833, 2015 WL 3940965, at *9 (A. Ct. Crim. App. June 25, 2015) (finding that the

Thus, if purpose is required for admission, even the admission of a piece of evidence for one purpose does not mean it can be used for all purposes..[99] For example, a witness's prior inconsistent statement usually cannot be considered as evidence of its own truth, but it can be used to evaluate the witness's credibility.[100] Similarly, if the accused testifies, a prior conviction for a crime of moral turpitude may only be used for "its tendency, if any, to weaken the credibility of the accused as a witness."[101]

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trial judge abused his discretion by admitting charged misconduct as MRE 413 evidence in violation of MRE 403), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016). *See also* People v. Villatoro, 281 P.3d 390, 409 (Cal. 2012) ("Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of [Rule 403] and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.").Because the panel has already heard evidence of the charged misconduct, the practical effect of excluding charged misconduct as MRE 413 evidence is one of instructions. Yet courts should maintain the doctrinal dividing line between admitting evidence for one purpose (to prove a charged offense) while excluding it for another (to be used as propensity evidence, notwithstanding Rule 413). Not all courts maintain fidelity to this distinction. *See, e.g.*, United States v. Williams, 75 M.J. 621, 626 (A. Ct. Crim. App. 2016) ("In a case where the application of M.R.E. 413 involves only charged misconduct, we agree with the military judge that this is not a matter of admissibility, but is rather one of instructions."), *vacated*, 75 M.J. 430 (C.A.A.F. 2016); *see also* United States v. Henry, 75 M.J. 595, 607 (A.F. Ct. Crim. App. 2017) ("Admissibility of charged (contested) conduct: Evidence of charged conduct is already independently admissible and thus does not require a separate rule to authorize its admission. Therefore, cases interpreting and applying Mil. R. Evid. 413 are not relevant to the admissibility of charged conduct.").

[99] 2019 MCM, *supra* note 1, MIL. R. EVID. 105 ("If the military judge admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the military judge, on timely request, must restrict the evidence to its proper scope and instruct the members accordingly."). *Cf.* United States v. Abel, 469 U.S. 45, 56 (1984) ("[T]here is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case.").

[100] 2019 MCM, *supra* note 1, MIL. R. EVID. 801(c) (defining hearsay as an out-of-court statement offered for the truth of the matter asserted). *See also* BENCHBOOK, *supra* note 89, ¶ 7-11-1 ("[Panel members] may not consider the earlier [inconsistent] statement(s) as evidence of the truth of the matters contained in the prior statement(s). In other words, you may only use [them] as one way of evaluating the witness's testimony here in court. You cannot use [them] as proof of anything else."). However, if the prior inconsistent statement was given under "penalty of perjury at a trial, hearing, or other proceeding or in a deposition," the statement may be used substantively. 2019 MCM, *supra* note 1, MIL. R. EVID. 801(d)(1)(A).

[101] BENCHBOOK, *supra* note 89, ¶ 7-13-2. The instruction further admonishes that the panel "may not consider this evidence for any other purpose and you may not conclude from this evidence that the accused is a bad person or has criminal tendencies and that (he) (she),

If there are purposes for which the evidence may not be used, MRE 105 requires a judge to instruct the members to restrict their use of the evidence to its proper scope.

This concept of limited admissibility applies to evidence of similar but unrelated charges. Here, as noted above, the military judge instructs the members that they may not use evidence of one offense to convict for another.[102] Thus, the fact that evidence has been put before the court-martial for the purpose of proving one charge is wholly irrelevant as to whether that evidence may be used (via Rule 413) to prove another. Placing the evidence before the court-martial is merely the first hurdle in the evidentiary steeplechase—the permitted uses of the evidence must also be resolved. Military Rule of Evidence 413 does exactly that.

b. Rule 413 Specifically Addresses the Permitted Uses of MRE 413 Evidence

Rule 413 explicitly reminds us of this purposive prerequisite to admission. Had the CAAF adhered to the whole-text canon and read the phrase of admission in conjunction with the clause directing the proper use of this evidence, they may have avoided their erroneous statutory interpretation.

In addition to regulating admission, MRE 413 also provides that "[t]he evidence may be considered on any matter to which it is relevant."[103] Without Rule 413, evidence of charged misconduct could not be used to prove a separate sexual offense specification.[104] Rule 413, however, permits the use of this evidence to prove another sexual offense. The mere fact that the other offense appears on the charge sheet does not limit its further admission as Rule 413 evidence because the purpose of proving an

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therefore, committed the offense(s) charged." *Id. See also* 2019 MCM, supra note 1, MIL. R. EVID. 609(a)(2).

[102] BENCHBOOK, *supra* note 89, ¶ 7-17.

[103] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(a). The abrogated language contains a similar provision, permitting the evidence to "be considered for its bearing on any matter to which it is relevant." 2012 MCM, *supra* note 1, MIL. R. EVID. 413(a).

[104] *See* United States v. Burton, 67 M.J. 150, 152 (C.A.A.F. 2009) ("The Government may not introduce similarities between a charged offense and prior conduct, *whether charged or uncharged*, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as M.R.E. 404 or 413." (emphasis added)).

additional sexual offense is entirely distinct from proving the primary charged offense.

Unfortunately, in *Hills* the CAAF departed from this principle. First, the court stated that the "structure of the rule suggests that it was aimed at conduct other than charged offenses," observing that MRE 413's notice period would be superfluous for such offenses.[105] Yet it is not only the evidence that is important, but also the Government's desire to put that evidence to a particular use that triggers the notice provision. Even if the evidence is otherwise being presented, the notice provision permits the accused to marshal arguments to exclude the charged misconduct as MRE 413 evidence.[106]

Next, the CAAF held, "Charged misconduct is already admissible at trial under M.R.E. 401 and 402, and it is not subject to exclusion under M.R.E. 404(b). Thus, as a matter of logic, it does not fall under M.R.E. 413, which serves as an exception to M.R.E. 404(b)."[107] Again, the CAAF ignores the purposive dimension of admitting evidence, conflating placing the evidence before the court-martial with admitting the evidence for all purposes. Further, MRE 413 does serve as an exception to MRE 404(b); however, it excepts the permissible *uses* of the evidence, not its *admission* or exclusion.[108]

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[105] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).

[106] *See supra* note 98.

[107] *Hills*, 75 M.J. at 355 (citations omitted). The CAAF quoted Representative Susan Molinari in support of this proposition. *Id.* ("The new rules will supersede in sex offense cases the restrictive aspects of Federal [R]ule of [E]vidence 404(b)." (alteration in original) (quoting 140 CONG. REC. 23603 (1994) (statement of Rep. Susan Molinari)). However, Representative Molinari went on to say that in "contrast to rule 404(b)'s general prohibition of evidence of character or propensity, the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing 'on any matter to which it is relevant,'" clarifying that the exception to Rule 404(b) was on the *use* of the evidence. 140 CONG. REC. 23603 (1994) (statement of Rep. Susan Molinari).

[108] Military Rule Evidence 404(b) prohibits "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." 2019 MCM, *supra* note 1, MIL. R. EVID. 404(b)(1). However, such evidence can be used for *any other* purpose, including proving intent, opportunity, or motive. *Id.* at MIL. R. EVID. 404(b)(2). The proponent must identify the specific purpose of the evidence, and the use of the evidence is restricted to that stated purpose. United States v. Smith, 52 M.J. 337, 342 (C.A.A.F. 2000); *see also* BENCHBOOK, *supra* note 89, ¶ 7-13-1 (providing instructions for MRE 404(b) evidence). In contrast, MRE 413 is not restrictive in its prescribed uses of the evidence. 2019 MCM,

Other parts of MRE 413 highlight the dichotomy between the admission of evidence and its subsequent use by the panel in their deliberations. The rule specifically states that it "does not limit the admission or consideration of evidence under any other rule."[109] Had the CAAF considered the entirety of MRE 413, it would have been reminded that admission of evidence involves an analysis of the use of that evidence. In doing so, it should have concluded that MRE 413 permits the use of both charged and uncharged misconduct.

Although the plain-text and whole-text canons are not the only textual canons offended by the CAAF's interpretation,[110] the CAAF's discounting of these basic principles caused the court to look beyond the unambiguous text to other less authoritative sources to reach its interpretative ends.

B. The Examination of MRE 413's Legislative History is Unnecessary, Lacks Context, and is Unduly Narrow

The CAAF not only examined the structure of MRE 413, but also its legislative history. However, as noted previously, if the statutory text is unambiguous, then recourse to the legislative history is unnecessary.[111] Moreover, the CAAF's brief examination of MRE 413's legislative history focused solely on those parts of the history that discuss uncharged

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supra note 1, MIL. R. EVID. 413(a). Thus, MRE 404(b) places a restriction on the *use* of the evidence, while MRE 413 provides an exception to that restrictive use.

[109] 2019 MCM, *supra* note 1, MIL. R. EVID. 413(c).

[110] Courts are also prohibited from inserting language into the statutory text. As Justice Felix Frankfurter noted, "A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947). *See also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) ("Judicial interpolation of legislative gaps would be questionable even if judges could ascertain with certainty how the legislature would have acted . . . . The unaddressed problem is handled by a new legislature with new instructions from the voters."). The insertion of the word "uncharged" into MRE 413's text violates this principle. *But see* SINGER & SINGER, *supra* note 79, § 47:38 ("Although some courts are hesitant to supply or insert words, the better practice probably requires courts to enforce legislative intent or statutory meaning where it is clearly manifest. The judicial addition of words necessary for the clear expression of intent or meaning assists legislative authority.").

[111] *See supra* note 71 and accompanying text.

misconduct. This singular focus failed to provide appropriate context and ignored parts of the history that address the purposes of the Rule.[112]

1. The References to Uncharged Misconduct Lack Context

In its brief examination of Rule 413's legislative history, the CAAF did not account for the differences between civilian criminal trials and courts-martial. It included only two statements from the history, both of which state that the Rule is designed for uncharged misconduct.[113] This is not surprising, as the legislative history is replete with references to uncharged misconduct. However, these statements were made in support of a rule for civilian courts. In contrast to courts-martial, these courts have jurisdictional and jurisprudential limitations which limit their ability to hear all known offenses in a single trial.

The jurisdiction of civilian courts, federal or state, is limited by the location of the crime. Generally, crimes within a state's boundaries are subject only to the law of that state.[114] As for federal crimes, not only must there be federal jurisdiction over the offense, but the Constitution directs that trials shall be "held in the state where the said crimes shall have been committed."[115] This jurisdictional issue was one of the reasons

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[112] The use of floor speeches, remarks, and committee reports as interpretative aids is not universally accepted. *See generally* SCALIA & GARNER, *supra* note 70, at 369–90 (detailing the historical pedigree of eschewing legislative history as aids in statutory construction). *But see* SINGER & SINGER, *supra* note 79, § 47:15 ("[C]ourts may use statements by a bill's sponsor as an interpretive aid . . . . In no event are contemporaneous sponsor remarks controlling to analyze legislative history."). However, to the extent they should be used at all, these legislative materials must be both contextual and complete. Courts, including the CAAF, have used these materials when examining the scope of Rule 413. *See, e.g.*, United States v. Wright, 53 M.J. 476, 480 (C.A.A.F. 2000); United States v. Mound, 149 F.3d 799, 801 (8th Cir. 1998); United States v. Enjady, 134 F.3d 1427, 1431 (10th Cir. 1998); United States v. Larson, 112 F.3d 600, 604 (2d Cir. 1997).

[113] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).

[114] CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 21–23 (2016) (noting that extraterritorial application of state law occurs "in only a limited set of circumstances and ordinarily only in cases where there is some clear nexus to the state").

[115] U.S. CONST. art. III, § 2, cl. 3. *See also id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . ."); FED. R. CRIM. P. 18 ("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

undergirding Rule 413's proposal.[116] In that context, "uncharged" simply means the court lacks jurisdiction to hear the case.

In contrast, court-martial jurisdiction relies upon the status of the offender instead of the location of the crime.[117] In our hypothetical, the most recent assault took place overseas, while the other two assaults took place stateside, albeit on different coasts. Yet none of this presents a problem: all could be joined in a single court-martial.

But it is not only the worldwide jurisdiction that separates courts-martial from civilian criminal trials; the standards for joinder and severance are also different. In a federal civilian trial, there are discrete reasons to join offenses.[118] In the military, "[o]rdinarily all known charges should be referred to a single court-martial."[119] In addition, the civilian standards for severance are much more expansive, providing for severance if joinder "appears to prejudice the defendant."[120] This prejudice includes the "possibility that the jury might use evidence of one crime to infer guilt on the other or that the jury might cumulate the evidence to find guilt on all crimes when it would not have found guilt if the crimes were considered separately."[121] In contrast, a military judge may sever offenses "only to

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[116] Karp, *supra* note 14, at 25 ("This occurs, for example, in the case of a rapist or child molester who commits crimes in a number of different states, or who commits some crimes in state jurisdiction and others in federal jurisdiction."). *See also* 137 CONG. REC. 6033–34 (1991).

[117] UCMJ art. 2(a) (2019); *see also* Solorio v. United States, 483 U.S. 435, 451 (1987) (holding that the military status of the accused is dispositive as to personal jurisdiction).

[118] The federal rules permit joinder when the offenses "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." FED. R. CRIM. P. 8(a). Although the standards for joinder are also narrower in federal court than in courts-martial, the federal rules still provide for joinder of offenses of "same or similar character," which would presumably permit joining disparate allegations of sexual offenses into a single trial. *See, e.g.*, United States v. Tyndall, 263 F.3d 848, 850 (8th Cir. 2001) (upholding joinder of two sexual assaults occurring within a year of each other). However, several states are even more restrictive, permitting joinder only when the offenses arise out of the same course of conduct. *See, e.g.*, FLA. R. CRIM. P. 3.150; PA. R. CRIM. P. 453; UTAH CODE ANN. § 77-8a-1 (West 1990); MASS. R. CRIM. P. 9. *See also* MASS. R. CRIM. P. 9, Reporter's Notes ("Rule 9 takes the position that the goal of judicial economy will rarely be paramount to affording the defendant a trial as free from prejudice as possible; therefore, joinder of unrelated offenses is prohibited except at the instance of the defendant or with his written consent.").

[119] 2019 MCM, *supra* note 1, R.C.M. 601(e)(2) Discussion.

[120] FED. R. CRIM. P. 14(a).

[121] United States v. Midkiff, 614 F.3d 431, 440 (8th Cir. 2010) (quoting United States v. Boyd, 180 F.3d 967, 981–82 (8th Cir.1999)).

prevent manifest injustice."[122] The drafters recognized that this provision "roughly parallels Fed. R. Crim. P. 14, but is much narrower because of the general policy in the military favoring trial of all known charges at a single court-martial."[123]

Although much of the legislative history for FRE 413 may apply to MRE 413, blindly applying it discounts the differences between the two systems. The military's offender-based jurisdiction ensures that many disparate crimes—potentially committed in a variety of civilian jurisdictions—will be joined in a single trial. There is a strong preference in the military system for this practice.[124] The CAAF's failure to acknowledge this context contributed to its erroneous interpretation of MRE 413. Even disregarding this gloss of the differences between systems, the *Hills* court's examination of the legislative history remains thin and narrow.

2. Hills *Quoted Only a Small Subset of the Historical Materials*

Although there was ample material,[125] *Hills* only examined two statements from the legislative history.[126] This sparse consideration ignores statements discussing the proposed uses of this evidence—purposes which apply equally to both charged and uncharged misconduct. For example, Senator Dole noted the evidence of other sexual offenses may be used to demonstrate "the defendant's propensity to commit sexual assault or child molestation offenses."[127] Additionally, he noted that this evidence would aid the factfinder in assessing "the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense."[128]

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[122] 2019 MCM, *supra* note 1, R.C.M. 906(b)(10).

[123] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 906(b)(10) Analysis, at A21-54 (2016). Severance "may still be appropriate in unusual cases." *Id.* The 2016 edition of the MCM is cited because the appendices were sharply abrogated in the 2019 edition.

[124] *See* United States v. Simpson, 56 M.J. 462, 464 (C.A.A.F. 2002).

[125] *See supra* note 14.

[126] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016).

[127] 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). *See also* 140 CONG. REC. 24603 (1994) (statement of Rep. Molinari).

[128] 140 CONG. REC. 24799 (1994) (statement of Sen. Dole). *See also* 140 CONG. REC. 24603 (1994) (statement of Rep. Molinari).

These types of justifications fill the legislative history,[129] but were ignored by the *Hills* court.

Thus, the CAAF's examination of the legislative history is both unnecessary and unsatisfactory. It is unnecessary because the statutory text is unambiguous and does not limit the consideration of other sexual offenses.[130] It is unsatisfactory because resorting to the legislative history does not clarify whatever ambiguity one might pretend to find. For example, the legislative history is full of references to uncharged misconduct; but it also contains references to jurisdictional challenges to bringing all charges in a single forum.[131] The history also addresses the different uses of the evidence, which apply to both charged and uncharged misconduct. So, if any inquiry is appropriate, it must move beyond the words of the legislative history, and examine the purposes of the Rule.

C. *Hills*'s Interpretation of MRE 413 Undercuts Its Purpose

Discerning and giving effect to a statute's purpose is, of course, the aim of statutory interpretation. As noted above, the purpose is often found in the plain words of a statute.[132] If not apparent on the face of the statute, then "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[133]

As the *Hills* court realized, MRE 413 was enacted to account for the recidivist tendencies of sex offenders.[134] Yet the court narrowed MRE 413 to undercut this purpose. Recidivist tendencies need not be uncharged to be evident. Indeed, of the many cases involving charged misconduct as

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[129] *See, e.g.*, 137 CONG. REC. 6032–33 (1991) (discussing the use of other sexual offense evidence to show "motivation" and "improbability"); Karp, *supra* note 14, at 20–21 (discussing the same).

[130] Rubin v. United States, 449 U.S. 424, 430 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete . . . ." (citation omitted)).

[131] *See supra* note 116.

[132] *See supra* notes 70–76 and accompanying text.

[133] SCALIA & GARNER, *supra* note 70, at 63.

[134] United States v. Hills, 75 M.J. 350, 355 (2016) (recognizing that MRE 413 permits "bolstering the credibility of a victim because '[k]nowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of [the victim's] claims . . . .'" (quoting Karp, *supra* note 14, at 21 (alteration in original))). "M.R.E. 413 was intended to permit the members to consider the testimony of other victims with respect to an accused's past sexual offenses". *Id.* Regardless of the wisdom of this particular policy goal, the admission of other sexual offenses for this purpose represents the considered legislative judgment of Congress. *See supra* note 21.

MRE 413 evidence,[135] the overwhelming majority deal with multiple victims whose assaults are separated by significant periods of time.[136] Far fewer cases feature multiple charged allegations by the same victim (albeit over a period of months or years),[137] and only five feature multiple charged events in the same evening (albeit with different victims).[138] There are only four cases (*Hills* and three others) where MRE 413 was used for offenses against the *same* victim on the *same* occasion.[139]

The *Hills* case is an outlier, likely not contemplated by the drafters of Rule 413. The CAAF was correct in recognizing that the Rule's history did not support the use of evidence between charges that cover the same

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[135] As of 12 July 2020, there are at least ninety-one cases (not including *Hills*) where the Government sought to use charged misconduct as MRE 413 evidence. The author conducted two Westlaw searches to identify these cases. The first search examined any case that cited *Hills*. The second search ("charge! /s (413 OR 414)") found instances predating *Hills* where the Government sought to use charged misconduct as MRE 413 evidence.

[136] Of the ninety-one cases, seventy-four dealt with different victims assaulted on different occasions. *See, e.g.*, United States v. Guardado, 75 M.J. 889, 892 (A. Ct. Crim. App. 2016) (at least four victims, assaults spanning several years), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017); United States v. Claxton, ACM 38188, 2016 WL 6575036, at *2 (A.F. Ct. Crim. App. Oct. 31, 2016) (two victims, assaults separated by nine months), *aff'd*, 76 M.J. 356 (C.A.A.F. 2017); United States v. Ellis, No. 201500163, 2016 WL 4529601, at *1 (N-M. Ct. Crim. App. Aug. 30, 2016) (two victims, assaults separated by nine months).

[137] Only eleven (out of ninety-one) involved the same victim being assaulted over a long period of time. *See, e.g.*, United States v. Berger, NMCCA 201500024, 2016 WL 3141753, at *1 (N-M. Ct. Crim. App. May 26, 2016) (accused assaulted his wife over a period of at least thirteen months), *rev'd*, 76 M.J. 128 (C.A.A.F. 2014); United States v. Bonilla, ARMY 20131084, 2016 WL 5682541, at *1 (A. Ct. Crim. App. Sept. 30, 2016) (accused assaulted his step-daughter over a period of eight years), *aff'd*, 76 M.J. 335 (C.A.A.F. 2017).

[138] *See, e.g.*, United States v. Williams, ARMY 20140924, 2016 WL 7416140, at *2 (A. Ct. Crim. App. Dec. 21, 2016) (accused assaulted two different women in a single evening), *aff'd*, 77 M.J. 64 (C.A.A.F. 2017); United States v. Reynolds, ARMY 20140856, 2017 WL 65548, at *1 (A. Ct. Crim. App. Jan. 5, 2017) (accused assaulted a Sergeant First Class and her daughter at the same family gathering), *vacated and remanded*, 76 M.J. 442 (C.A.A.F. 2017); United States v. Martin, NMCCA 201400315, 2015 WL 3793707, at *1 (N-M. Ct. Crim. App. June 18, 2015) (accused assaulted two different junior enlisted members at the same party). *Martin* preceded *Hills*, and the court summarily dismissed the MRE 413 issue in a footnote. *Martin*, 2015 WL 3793707, at *1 n.1. The CAAF granted review on an unrelated issue and affirmed. United States v. Martin, 75 M.J. 321, 322 (C.A.A.F. 2016).

[139] Three of these cases were reversed. *See, e.g.*, United States v. Duarte, ARMY 20140843, 2017 WL 413946, at *1 (A. Ct. Crim. App. Jan. 30, 2017) (per curiam). The only affirmance came in *United States v. Mark*, ARMY 20160101, 2017 WL 4842562 (A. Ct. Crim. App. Oct. 23, 2017) (per curiam), where the court found the accused had waived his objection to the MRE 413 instruction. *Id.* at *1.

course of conduct.[140] Yet the CAAF's opinion not only encompasses situations raised by *Hills*, but also any situation involving charged misconduct.[141] In doing so, it undermined a key purpose of Rule 413: permitting the factfinder to use all available information about the accused's other sexual offenses in deciding whether to convict the accused.[142] The CAAF's analysis in *Hills* failed to hew to the standard textual/purposive analytical framework used by other courts interpreting Rule 413.

D. Courts Have Faithfully Employed the Textual and Purposive Analysis

The CAAF's errors are further highlighted when contrasted with other court opinions interpreting Rule 413. California's Supreme Court considered the admissibility of charged offenses under its version of MRE 413[143] in *People v. Villatoro*.[144] That court considered both the plain

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[140] United States v. Hills, 75 M.J. 350 355 (2016) ("[T]here is no indication that M.R.E. 413 was intended to bolster the credibility of the named victim through inferences drawn from the same allegations of the same named victim."). Although the court drew the distinction between a single victim and multiple victims, both conditions (same victim *and* same allegations) must be true to be satisfied, as David Karp specifically addressed the need for this evidence when the allegations involve a single victim, presumably on multiple occasions. Karp, *supra* note 14, at 34 ("My final illustration concerns the class of cases in which the charged offense and the uncharged acts were committed against the same victim."). Same-victim evidence usually arises in cases of familial assaults, either on the spouse, *e.g.*, *Berger*, 2016 WL 3141753, at *1 (accused's wife), or the children, *e.g.*, *Bonilla*, 2016 WL 5682541, at *1 (accused's step-daughter).

[141] The CAAF reinforced this prohibition in *United States v. Hukill*. 76 M.J. 219, 222 (C.A.A.F. 2017) ("We therefore clarify that under *Hills*, the use of evidence of charged conduct as M.R.E. 413 propensity evidence for other charged conduct in the same case is error, regardless of the forum, the number of victims, or whether the events are connected. Whether considered by members or a military judge, evidence of a charged and contested offense, of which an accused is presumed innocent, cannot be used as propensity evidence in support of a companion charged offense.").

[142] *See* 137 CONG. REC. 6031 (1991) ("The willingness of the courts to admit similar crimes evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the public's security against dangerous sex offenders.").

[143] The California rule of evidence governing other sexual offenses provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." CAL. EVID. CODE § 1108(a) (West 2019). Section 1101 generally prohibits character evidence, analogous to MRE 404(a), and Section 352 permits exclusion of otherwise admissible evidence, analogous to MRE 403. *Id.* §§ 352, 1101.

[144] People v. Villatoro, 281 P.3d 390 (Cal. 2012).

language[145] and the purpose of the Rule,[146] concluding that the Rule permitted the use of charged offenses.

The CAAF itself used this plain-language-focused, purpose-informed framework when it interpreted MRE 413 in *United States v. James*.[147] The *James* court examined whether the other sexual offenses needed to occur before the charged offense in order to be admissible.[148] Although MRE 413's legislative history speaks at length about "past" sexual offenses, the CAAF noted that the plain language of the Rule simply discussed "'one or more offenses' with absolutely no mention of when the offense(s) might have occurred."[149] The CAAF recognized the supremacy of the text, but looked to the Rule's purpose for support as well. After doing so, it could "find no reason to conclude that prior misconduct is probative and subsequent misconduct is not."[150]

Had the CAAF followed a similar path in *Hills*, it might have avoided significant interpretative error. The *James* and *Villatoro* opinions demonstrate standard statutory interpretation: First examine the text, then, if necessary, consider the purpose of the rule. Analyzing MRE 413 using this interpretative framework reveals that there is no statutory bar to permitting use of charged misconduct as MRE 413 evidence.

E. Applying *Hills* Produces Incongruous and Incompatible Results

Using MRE 413 in a post-*Hills* world highlights how the CAAF's interpretive errors have undermined MRE 413's purpose. *Hills* forces the Government to choose between joining all known offenses in a single court-martial (and forgoing the evidentiary benefits of MRE 413) or instituting serial prosecutions, trying one assault after another. In addition, *Hills* arbitrarily excludes other sexual offense evidence. Both issues illustrate how *Hills* frustrates Rule 413's purpose: permitting the factfinder access to the accused's entire history of sexual misconduct.

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[145] *Id.* at 409 ("[W]e conclude nothing in the language of section 1108 restricts its application to uncharged offenses.").
[146] *Id.* ("[T]he clear purpose of section 1108 is to permit the jury's consideration of evidence of a defendant's propensity to commit sexual offenses.").
[147] United States v. James, 63 M.J. 217, 221 (C.A.A.F. 2006).
[148] *Id.* at 217–18. Although *James* was an MRE 414 case, "[i]n light of the common history and similar purpose of M.R.E. 413 and M.R.E. 414, there is no need to distinguish the two rules for the purpose of our discussion of the granted issue." *Id.* at 220.
[149] *Id.* at 221.
[150] *Id.*

While the military system strongly prefers to join all offenses in a single court-martial, *Hills* forces the Government to choose between two unpalatable courses of action: Either prosecute multiple offenses one at a time, requiring multiple trials with each of the victims testifying multiple times; or join all offenses in a single trial, forgoing the congressionally mandated evidentiary advantage.

Avoiding serial prosecutions serves several legitimate ends. The purpose of the military justice system is to quickly and fairly adjudicate offenses,[151] and multiple courts-martial works against this purpose. A court-martial is a significant expenditure of resources—not only for the lawyers involved, but also for panel members and witnesses.[152] Additionally, forcing victims of sexual assault to testify on multiple occasions countermands the Government's significant interest in protecting victims, possibly even discouraging future sexual assault reports and full participation in the judicial process.[153] Congress has already recognized and addressed this problem as it related to victim testimony at Article 32 hearings; in 2012, it modified the UCMJ to avoid compelled victim testimony.[154] Mandating that a victim must testify at several proceedings frustrates strongly grounded policy.

Policy preferences are not the only things that illuminates the illogic of the CAAF's decision. *Hills* precludes the admission and use of contemporary sexual assaults while permitting evidence of assaults that are years or decades old. This admission of evidence rests not on considerations of relevance or prejudice, but only on whether the allegation appears on the charge sheet. Unlike other rules of evidence,[155] there is not a specific

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[151] *See* 2019 MCM, *supra* note 1, pt. I, ¶ 3 ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[152] Prior to 1969, the *MCM* cautioned against joining minor and major offenses in a single court-martial. This requirement was found to be "too unwieldy to be effective, particularly in combat or deployment." *Id.*, R.C.M. 601(e) Analysis, at A21-29.

[153] *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, NAT'L CRIME VICTIM L. INST., Sept. 2011, at 1 (detailing the trauma experienced by sexual assault victims during in-court testimony), http://www.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify.

[154] Lieutenant Colonel John Loran Kiel Jr., *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, ARMY LAW., July 2016, at 8, 10–11.

[155] *See, e.g.*, 2019 MCM, *supra* note 1, MIL. R. EVID. 609(b) (limiting the use of prior conviction evidence that is over ten years old).

time bar for MRE 413 evidence.[156] Because memories fade, the quality of the evidence for older offenses is likely to be far lower than the evidence of more recent misconduct. Additionally, contemporary events provide a more accurate picture of the accused. Yet *Hills* provides for the admission and use of antiquated offenses while preventing the use of more contemporary evidence. This problem will only be exacerbated in the coming years with the elimination of the statute of limitations for sexual assault, which was previously five years.[157] So, for our hypothetical case, the accused's sexual assault in college (eight years old) could be used, while all of the more recent assaults (two and four years old) would have to stand on their own.

IV. The Panel Instructions Amplified Constitutional Error

Although the CAAF's statutory interpretation in *Hills* was seriously flawed, it correctly identified constitutional error in the way the MRE 413 evidence was used. The CAAF found two violations of the presumption of innocence: the use of differing standards of proof for charged misconduct, and the use of "presumed innocent" conduct to prove other offenses.[158]

A bedrock principle of American criminal law is that an accused is presumed innocent[159] until a judge or jury finds that every element of the charged offense is proved beyond a reasonable doubt.[160] A court violates the accused's Due Process rights by refusing to instruct on the presumption

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[156] *See, e.g.*, United States v. Bailey, 55 M.J. 38, 40–41 (C.A.A.F. 2001) (holding MRE 413 evidence admissible when ten years elapsed between offense and trial); United States v. Larson, 112 F.3d 605, 605 (2d Cir. 1997) (holding FRE 413 evidence admissible when sixteen to twenty years had elapsed between offense and trial). *See also* 137 CONG. REC. 6034 (1991) ("[T]here is no justification for categorically excluding offenses that occurred before some arbitrarily specified temporal limit.").

[157] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1703, 127 Stat 672, 958 (2013) (amending Article 43, UCMJ).

[158] United States v. Hills, 75 M.J. 350, 356 (C.A.A.F. 2016). The instructions applied both the preponderance of evidence standard (for use as MRE 413 evidence) and the beyond a reasonable doubt standard (for conviction) to the same evidence in the same instruction. *See* discussion *supra* Section II.D.2.

[159] Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

[160] *In re* Winship, 397 U.S. 358, 364 (1970).

of innocence.[161] Additionally, judges must "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."[162] The dilution of this presumption can take many forms, such as forcing the accused to wear prison garb at trial,[163] the presence of a large number of uniformed police officers,[164] or confining the accused to a "prisoner's dock."[165] A prosecutor can also undermine the presumption, either through questioning a witness[166] or in argument.[167]

A court can also dilute the accused's presumption of innocence by incorrectly instructing the panel. For example, this could be done by instructing the panel that the presumption of innocence is designed to protect the innocent and not the guilty.[168] Similarly, instructions that the panel must decide whether the accused is guilty or innocent ignore the bedrock presumption of innocence.[169] Incorrectly instructing on the use of circumstantial evidence can also degrade the accused's presumption of innocence and lower the Government's burden.[170] Even reminding the panel that the accused had a vested interest in the outcome of the trial presupposes the accused's guilt, and thus violates the accused's Due Process rights.[171]

More pertinently, if the panel must find a fact beyond a reasonable doubt, then instructing that it can find or infer the fact by a preponderance of the evidence is error. In *State v. Rodgers*, the Connecticut Supreme Court considered a jury instruction that permitted an inference established

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[161] *Coffin*, 156 U.S. at 461. *See also* Taylor v. Kentucky, 436 U.S. 478, 490 (1978).
[162] Estelle v. Williams, 425 U.S. 501, 503 (1976).
[163] *Id.* at 512.
[164] Johnson v. State, 406 S.W.3d 892, 914 (Mo. 2013).
[165] Walker v. Butterworth, 599 F.2d 1074, 1080 (1st Cir. 1979).
[166] United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990) (holding that a hypothetical question that assumes the accused's guilt is "prohibited because it creates too great a risk of impairing the presumption of innocence").
[167] Pagano v. Allard, 218 F. Supp. 2d 26, 36 (D. Mass. 2002) (referencing the accused's presumption of innocence as a "cloak that comes off" at the beginning of jury deliberations constituted a denial of due process).
[168] United States v. Doyle, 130 F.3d 523, 538 (2d Cir. 1997).
[169] United States v. Andujar, 49 F.3d 16, 24 (1st Cir. 1995); United States v. Mendoza-Acevedo, 950 F.2d 1, 4 (1st Cir.1991).
[170] United States v. Dove, 916 F.2d 41, 46 (2d Cir. 1990) (finding that using a hypothetical inquiry into "whether Jack shot Mary," while instructing on the concept of circumstantial evidence, was impermissible because it assumed Jack's guilt).
[171] United States v. Brutus, 505 F.3d 80, 86 (2d Cir. 2007).

only by a preponderance of the evidence.[172] The court noted that the "the standard of proof as to inferred facts is no less than that applied to basic facts," and, thus, the instruction was constitutionally defective.[173]

A California appeals court confronted potential dilution of the presumption of innocence as it wrestled with the same issues presented by *Hills*. In *People v. Cruz*, a single defendant was accused of sexually assaulting three different girls on separate occasions.[174] The trial court gave the standard propensity instruction, directing the jurors that they must first find that the offenses occurred by a preponderance before they could use those offenses to determine if the other offenses were committed (i.e., beyond a reasonable doubt).[175] This muddled instruction proved to be too much for the court. It reasoned:

> A robot or a computer program could be imagined capable of finding charged offenses true by a preponderance of the evidence, and then finding that this meant the defendant had a propensity to commit such offenses, while still saving for later a decision about whether, in light of all the evidence, the same offenses have been proven beyond a reasonable doubt. . . . We believe that, for practical purposes, the instruction lowered the standard of proof for the determination of guilt.[176]

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[172] State v. Rodgers, 198 Conn. 53, 56–57 (1985). The judge gave the following instruction: "Now, circumstantial evidence. . . . You may apply the rule of circumstantial evidence. This rule involves the offering of evidence of facts from which you are asked to infer the existence of another fact or set of facts. Such an inference may be made provided two elements in the application of the law are satisfied. One, that the fact from which you are asked to draw the inference has itself been proved beyond reasonable doubt. Two, that the inference that has to be drawn is not only logical and reasonable but is strong enough so that you can find that it is *more probable that the fact to be inferred is true*." *Id.* at 57. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 496–97 (2000) (holding that any fact that enhances an accused's sentence must be found by the jury beyond a reasonable doubt).

[173] *Rodgers*, 198 Conn. at 58.

[174] People v. Cruz, 206 Cal. Rptr. 3d 835, 836–38 (Ct. App. 2016).

[175] *Id.* at 838–39. The appellate court contrasted *Cruz* with *People v. Villatoro*, 281 P.3d 390 (Cal. 2012), noting that the *Villatoro* trial court required finding the offense committed beyond a reasonable doubt *before* being able to use it to determine propensity. *Cruz*, 206 Cal. Rptr. 3d at 839.

[176] *Cruz*, 206 Cal. Rptr. 3d at 840. The CAAF echoed this sentiment, noting that a similar instruction given in SGT Hills's court-martial "would tax the brain of even a trained lawyer." United States v. Hills, 75 M.J. 350, 358 (C.A.A.F. 2016).

Differing burdens in the instructions were not the only area that caused the CAAF constitutional concern. It rejected the notion that a panel may use an offense, of which the accused is presumed innocent, to determine guilt on a separate offense without ever overcoming that presumption.[177] Even if there were not a conflicting standard of proof, using one as-yet-unproven offense to prove another would still erode the accused's presumption of innocence, creating "the potential for circular findings of proof; a possible triple helix of evidence where the evidence of guilt of each offense helps establish the next, spiraling upward until the threshold of reasonable doubt is crossed."[178]

V. Fixing the Problem: Amendments and Instructions

Hills presents two separate but interrelated problems: one the court created and the other it ably identified. Both need to be fixed to restore MRE 413. First, MRE 413 must be amended to permit the use of charged misconduct as MRE 413 evidence. Second, the standard Benchbook instructions must be modified to protect the accused's presumption of innocence and recognize the interaction between the spillover instruction and the mandate of MRE 413.

A. Restoring MRE 413's Congressionally Mandated Framework

Hills categorically bars the use of charged misconduct as MRE 413 evidence,[179] and its categorical bar was reinforced in *United States v. Hukill*.[180] *Hills* must therefore be amended in order to allow such usage, thereby restoring MRE 413's congressionally-mandated construction.

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[177] *Hills*, 75 M.J. at 356 ("It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent."). However, the CAAF favorably examined the *Villatoro* case, which required the presumption to be overcome before the jury could use the offense as "other act" evidence. *Id.* (citing *Villatoro*, 281 P.3d at 400).

[178] United States v. Guardado, 75 M.J. 889, 893 (A. Ct. Crim. App. 2016), *rev'd in part*, 76 M.J. 90 (C.A.A.F. 2017).

[179] *Hills*, 75 M.J. at 357 ("[W]e hold not only that charged offenses are not properly admitted under M.R.E. 413 to prove a propensity to commit the charged offenses . . . .").

[180] *United States v. Hukill*. 76 M.J. 219, 222 (C.A.A.F. 2017).

The CAAF's failure to interpret the correct (and current) version of MRE 413 supports MRE 413's amendment.

Either Congress[181] or the President[182] can prescribe a change to the MREs. The required changes would be modest. All that is needed to repair *Hills*'s damage is to insert "including other charged offenses" after the phrase "any other sexual offense."[183] Military Rule of Evidence 414 should be similarly amended.[184]

In addition to changes to the text of the Rule itself, a paragraph should be added to the appendix analyzing the MREs. This note would caution judges to carefully examine the probative value of offenses involving the same victim in a contemporaneous course of conduct.[185] Although the vast majority of cases involving charged misconduct as MRE 413 evidence involve either multiple victims or a long pattern of abuse,[186] there are a few cases that involve the same victim assaulted in the same evening.[187] Such evidence should have been excluded by MRE 403,[188] and the analysis in the *Manual for Courts-Martial* should assist judges in arriving at the correct decision.

B. Properly Instructing the Panel on the Use of Charged Misconduct as MRE 413 Evidence

Permitting charged misconduct as MRE 413 evidence is not enough—military judges must properly instruct on the use of that evidence. What instruction should be given will depend on the type of MRE 413 evidence in the case.

Some have advocated for doing away with the panel instruction mandating that the MRE 413 evidence be established by a preponderance

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[181] *See, e.g.*, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 535 (2014) (directing modification of MRE 404(a)).
[182] UCMJ art. 36 (2019) (delegating the power to modify "modes of proof" for courts-martial to the President).
[183] *See infra* app. A, ¶ 1.
[184] *See infra* app. A, ¶ 2.
[185] *See infra* app. A, ¶ 3.
[186] *See supra* notes 136–138.
[187] *See, e.g.*, United States v. Hills, 75 M.J. 350, 353 (C.A.A.F. 2016); United States v. Duarte, ARMY 20140843, 2017 WL 413946, at *1 (A. Ct. Crim. App. Jan. 30, 2017).
[188] *See supra* note 98.

of the evidence.[189] There are several reasons to eliminate this mandate. Principally, it is not legally required. The only legal requirement for "other act" evidence is a judicial determination that a panel member *could* find by a preponderance of the evidence that the other act occurred.[190] Instructing the panel to make a preliminary determination about the other acts is unnecessary and invites confusion. After all, if a panel member does not believe that the other act occurred, then they will not consider it in their deliberations on the current charge. Moreover, only a small minority of jurisdictions that have a Rule 413 require the jury make this preliminary finding.[191]

While eliminating the different standards of proof from the panel instructions would reduce the confusion, it would not solve the ultimate problem. Panel members would still be using an offense of which the accused is presumed innocent to determine if the accused is guilty of another offense. This is improper. The offense should only be used once the presumption of innocence is overcome, and that may happen only once the panel finds beyond a reasonable doubt that the offense occurred.[192]

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[189] United States v. Williams, 75 M.J. 621, 629 (A. Ct. Crim. App. 2016), *vacated*, 75 M.J. 430 (C.A.A.F. 2016).

[190] *Id.* (citing Huddleston v. United States, 485 U.S. 681 (1988)). As the logic of *Huddleston* goes, if *no* panel member could find that the other act occurred, it is not relevant, and is therefore inadmissible. *Huddleston*, 485 U.S. at 689.

[191] Only the Seventh and Eighth Circuits have promulgated pattern jury instructions that require a preliminary finding. THE COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 27 (2012); JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 41 (2017) (requiring unanimous finding by a preponderance before Rule 413 evidence can be used). Similarly, of all the states that permit Rule 413 evidence, only Arizona, California, and Georgia require this preliminary determination. CRIM. JURY INSTRUCTIONS COMM., STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS 25 (5th ed. 2019) (requiring clear and convincing evidence that other act occurred); JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 968–73 (2020); 2 GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS § 1.34.12 (4th ed. 2020). Other jurisdictions simply hand the evidence to the jury and let them consider it in the same manner as other evidence in the case. *See, e.g.*, United States v. McHorse, 179 F.3d 889, 903 (10th Cir. 1999).

[192] In this way, MRE 413 is analytically distinct from MRE 404(b). Generally, the accused's other sexual offense requires the offense be complete (i.e., all elements met) before admission. 2019 MCM, *supra* note 1, MIL. R. EVID. 413(d). In contrast, a fact which may be primary evidence of a separate charge may also be relevant *for a limited purpose* and may not require all elements to be met for the evidence to be relevant under MRE 404(b).

Once the panel makes that finding, the presumption no longer attaches and the panel may use that evidence "for any matter to which it is relevant." Thus, an instruction modeled after the one given in *Villatoro* should be given when charged misconduct is used as MRE 413 evidence.[193]

But not every case involves only charged misconduct. There are three potential "other sexual offense" scenarios: all uncharged misconduct, all charged misconduct, or both charged and uncharged misconduct. The first is straightforward. *Hills* left in place the preponderance of evidence standard as applied to uncharged misconduct.[194] Thus, there is no need to change the existing instruction.[195] The second situation is similarly straightforward, except that instead of a preponderance of the evidence standard, the standard is beyond a reasonable doubt.[196]

The third scenario involves the hybrid situation where there are multiple sexual offenses on the charge sheet in addition to uncharged misconduct. In this case, the Government should have a choice: Elect to use only the uncharged misconduct as MRE 413 evidence and receive the instruction without a specific burden of proof,[197] or elect to use all the sexual misconduct in the case (charged and uncharged) and have all of the misconduct be proved beyond a reasonable doubt.[198] While the uncharged misconduct need not necessarily be proved beyond a reasonable doubt,[199] applying differing standards of proof to different pieces of MRE 413 evidence invites confusion, and thus potentially undermines the accused's presumption of innocence. Moreover, if these rules are known at the

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[193] People v. Villatoro, 281 P.3d 390, 400 (2012). *See also* JUD. COUNCIL OF CAL ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, *supra* note 191, at 972–73 (providing instructions on using charged offenses as propensity evidence).

[194] United States v. Hills, 75 M.J. 350, 356 (C.A.A.F. 2016) ("We continue to hold that proper M.R.E. 413 evidence is not fundamentally unfair; is admissible on any matter to which it is relevant; and that, subject to M.R.E. 403, the presumption is in favor of admissibility." (citing United States v. Wright, 53 M.J. 476, 483 (C.A.A.F. 2000))).

[195] *See infra* app. B, ¶¶ 1–2. This proposed instruction also simplifies the instruction by removing the preliminary determination that the other misconduct be proved by a preponderance of the evidence, echoing the instruction cited with approval in United States v. Schroder, 65 M.J. 49, 56 (C.A.A.F. 2007) (quoting United States v. McHorse, 179 F.3d 889, 903 (10th Cir.1999)).

[196] *See infra* app. B, ¶¶ 1, 3.

[197] *See id.* ¶ 2.

[198] *See id.* ¶ 3.

[199] *See Hills*, 75 M.J. at 356 n.3 ("The fact that no presumption of innocence attaches to uncharged conduct is why the use of charged conduct as propensity evidence is analytically distinct from uncharged conduct.").

beginning of trial (as opposed to being discovered while the case is appealed), the Government could elect a different charging strategy, if appropriate.[200]

Finally, if charged misconduct is used as MRE 413 evidence, the standard spillover instruction must be modified. The revamped spillover instruction should clarify the uses of the MRE 413 evidence, reiterate the standard of proof required before that evidence may be used, and delineate the charges where the MRE 413 evidence may be employed.[201]

VI. Conclusion

When the CAAF categorically barred the use of charged misconduct as MRE 413 evidence, it committed a serious error. In doing so, it upset the state of the law as it had been developing and cast doubt on the Government's ability to prosecute sexual assaults. Unfortunately, the CAAF's reasoning departed from the plain text of the Rule and otherwise undercut the Rule's purpose of fully informing the panel about the breadth of the accused's conduct to aid them in their determination.

However, the CAAF was absolutely correct when it identified constitutional error in the manner in which charged misconduct was being used as MRE 413 evidence. The court correctly identified the instructions as confusing and highlighted the troubling prospect of one charged offense (being proved only by a preponderance) being used to prove another beyond a reasonable doubt.

Fortunately, the path forward is clear. Because the CAAF interpreted outdated language, MRE 413 should be amended to encompass charged misconduct. At the same time, the courts should use updated instructions to protect the accused's presumption of innocence.

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[200] Although serial prosecutions would seem to be disfavored for a variety of policy reasons, *see* discussion *supra* Section III.D, there may be cases where it is appropriate. The difference between the Government electing serial prosecutions and having them mandated by an incorrect interpretation of the MREs is that it *permits* the decision by an accountable department while providing the full benefit of the Congressionally mandated evidentiary rules.

[201] *See infra* app. B, ¶ 4.

Appendix A

Proposed Changes to Military Rules of Evidence 413 and 414

1. Amend Military Rule of Evidence 413(a) to read as follows (additions in italics):

In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense, *including other charged offenses*. The evidence may be considered on any matter to which it is relevant.

2. Amend Military Rule of Evidence 414(a) to read as follows (additions in italics):

In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation, *including other charged offenses*. The evidence may be considered on any matter to which it is relevant.

3. Insert the following in the Analysis of Military Rules of Evidence 413 and 414:

When admitting evidence involving the same victim in a contemporaneous course of conduct, judges should carefully examine the probative value of the evidence in determining whether to admit the evidence under MRE 413 / 414. Applying the non-exclusive factors outlined in *United States v. Wright*, 53 M.J. 476, 482 (C.A.A.F. 2000), the fact that the alleged offenses occurred within a short period of time against the same victim undercuts the temporal proximity and frequency factors. *See* United States, v. Hills, ARMY 20130833, 2015 WL 3940965, at *8 (A. Ct. Crim. App. June 25, 2015), *rev'd*, 75 M.J. 350 (C.A.A.F. 2016).

Appendix B

Proposed Benchbook Instructions for Military Rule of Evidence 413 and 414 Evidence

The following changes should be made to paragraph 7-13-1 of the Military Judges' Benchbook:

1. Amend Note 3.2 to read (deletions are indicated by strikethroughs, additions with italics):

NOTE 3.2: Sexual offense and child molestation cases – MRE 413 or 414 evidence.

In cases in which the accused is charged with a sexual offense or an act of child molestation, MRE 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other ~~uncharged~~ sexual offenses or acts of child molestation, on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered, at least 5 days prior to entry of pleas, or at such later time as the military judge may find for good cause.

In order to admit evidence of other ~~uncharged~~ sexual offenses or acts of child molestation, the military judge must make findings that (1) the accused is charged with a sexual offense/act of child molestation as defined by MRE 413/414; (2) the evidence proffered is evidence of the accused's commission of another sexual offense/child molestation offense; and (3) the evidence is relevant under MRE 401 and 402. The military judge must also conduct a prejudice analysis under MRE 403. (*See* U.S. v. Wright 53 MJ 476 (C.A.A.F. 2000) for factors to consider in applying MRE 403 balance test).

In determining whether the proffered evidence of an ~~uncharged~~ act qualifies as an "other sexual offense" or "other offense of child molestation," the military judge applies a two-part test: (1) whether the conduct constituted a punishable offense under the UCMJ, federal law, or state law when the conduct occurred, and (2) whether the conduct is encompassed within one of the specific categories of "sexual offense" or "child molestation" set

forth in the version of MRE 413(d) or 414(d)(2) in effect at the time of trial. When evidence of the accused's commission of other uncharged sexual offenses under MRE 413, or of other uncharged offenses of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MJ must give the *appropriate instruction in Note 3.3 or 3.4, depending on the type of evidence in the case*. ~~following appropriately tailored instruction based on the evidence admitted. Evidence of other charged sexual offenses or acts of child molestation is not admissible under MRE 413/414 unless the accused has pled guilty to these other charged offenses.~~

~~You have heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offenses(s). [The military judge may list/identify the evidence admitted pursuant to MRE 413/414, if appropriate]. The accused is not charged with (this) (these) offense(s). You may consider the evidence of (this) (these) other offense(s) for its bearing on any matter to which it is relevant, to include its tendency, if any, to show the accused's propensity to engage in (sexual) (child molestation) offenses.~~

~~However, evidence of another (sexual) (child molestation) offense, on its own, is not sufficient to prove the accused guilty of a charged offense. You may not convict the accused solely because you believe (he) (she) committed another (sexual) (child molestation) offense or offenses or solely because you believe the accused has a propensity to engage in (sexual) (child molestation) offenses. Bear in mind that the government has the burden to prove that the accused committed each of the elements of each charged offense.~~

2. Add Note 3.3 to read:

NOTE 3.3: Use this instruction when the MRE 413/414 evidence consists solely of uncharged misconduct.

You heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offense(s). The accused is not charged with (this) (these) other offense(s). You may consider evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other (sexual) (child molestation) offense(s) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual) (child molestation) offenses(, as well as its tendency, if any, to:
(identify the accused as the person who committed the offense(s) alleged in _____)
(prove a plan or design of the accused to _____)
(prove knowledge on the part of the accused that _____)
(prove that the accused intended to _____)
(show the accused's awareness of (his) (her) guilt of the offense(s) charged)
(determine whether the accused had a motive to commit the offense(s))
(show that the accused had the opportunity to commit the offense(s))
(rebut the contention of the accused that (his/her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))
(rebut the issue of _____ raised by the defense); (and) (_____).

You may not, however, convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual) (child molestation) offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that lesser offense). I remind you that the accused is not on trial for any act, conduct, or offense not on the charge sheet.

3. Add Note 3.4 to read:

NOTE 3.4: Use this instruction when the MRE 413/414 evidence consists of at least one act of charged misconduct.

(The accused is charged with multiple (sexual) (child molestation) offenses.)
(In addition,) (you heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offense(s). (The accused is not charged with (this) (these) other offense(s).)
If you find that the accused has committed (one of these) (the) other offense(s) beyond a reasonable doubt, then—and only then—may you

consider this evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).

(You may consider the evidence of such other (sexual) (child molestation) offense(s) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual) (child molestation) offenses (, as well as its tendency, if any, to:
(identify the accused as the person who committed the offense(s) alleged in _____)
(prove a plan or design of the accused to _____)
(prove knowledge on the part of the accused that _____)
(prove that the accused intended to _____)
(show the accused's awareness of (his) (her) guilt of the offense(s) charged)
(determine whether the accused had a motive to commit the offense(s))
(show that the accused had the opportunity to commit the offense(s))
(rebut the contention of the accused that (his/her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))
(rebut the issue of _____ raised by the defense); (and) (_____).

If you conclude beyond a reasonable doubt that the accused committed a charged offense, that conclusion is only one factor to consider along with all the other evidence. You may not convict the accused solely because you believe (he) (she) committed (this) (these) other offense(s) or solely because you believe the accused has a propensity or predisposition to engage in (sexual) (child molestation) offenses. In other words, you cannot use this evidence to overcome a failure of proof in the government's case, if you perceive any to exist. The accused may be convicted of an alleged offense only if the prosecution has proven each element beyond a reasonable doubt. (However, by pleading guilty to a lesser included offense, the accused has relieved the government of its burden of proof with respect to the elements of that lesser offense).

The following changes to paragraph 7-17 of the Military Judges' Benchbook should be made:

4. Add Note 2.1 to read:

NOTE 2.1: Notwithstanding the instruction at NOTE 1 that proof of one offense may not be considered with respect to another and carries no

inference of guilt of another offense, there are circumstances under MRE 413 or 414 when evidence relating to one charged offense of sexual misconduct or child molestation may be relevant to a similar, but unrelated charged offense of sexual misconduct or child molestation.

The following instruction should be used in conjunction with the instruction following NOTE 1, and may be used in lieu of Instruction 7-13-1 when the MRE 413 or 414 evidence consists of at least one act of charged misconduct.

I just instructed you that you may not infer the accused is guilty of one offense because (his) (her) guilt may have been proven on another offense, and that you must keep the evidence with respect to each offense separate. However, there has been some evidence presented with respect to (state the offense) (as alleged in (The) Specification (__) of (The) (Additional) Charge (__) that, in certain circumstances, may be considered with respect to (state the other offense) (as alleged in (The) Specification (__) of (The) (Additional) Charge (__)).

If—and only if—this other evidence has been proved beyond a reasonable doubt, then you may consider this evidence on any matter to which it is relevant. However, you may only consider as between (The) Specification (__) of (The) (Additional) Charge (__) and (The) Specification (__) of (The) (Additional) Charge (__) (and (The) Specification (__) of (The) (Additional) Charge (__)).

However, the prosecution must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge.

THE FIGHT AGAINST ISIS HAS CHANGED—SO SHOULD ITS FUNDING SOURCE

MAJOR CHRISTOPHER D. ELDER*

Reduction of the physical caliphate is a monumental military accomplishment but the fight against ISIS and violent extremism is far from over.[1]

I. Introduction

Election security in Iraq is one of the many key parts to achieving stability and ensuring a lasting defeat of the Islamic State of Iraq and Syria (ISIS)[2] in the region. The 12 May 2018 Iraqi national elections were no exception.[3] Tensions and turmoil were high, and election security was

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* Judge Advocate, United States Army. Presently assigned as Associate Professor, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia. LL.M., 2019, Military Law, The Judge Advocate General's Legal Center and School, United States Army; J.D., 2009, University of Louisville, Brandeis School of Law; B.A., 2002, Texas Tech University. Previous assignments include Chief of Contract and Fiscal Law, 1st Armored Division (Forward-Iraq), Fort Bliss, Texas, 2017–2018; Administrative Law Attorney, 1st Armored Division, Fort Bliss, Texas, 2016–2017; Trial Defense Counsel, Trial Defense Service-Eurasia, Kaiserslautern, Germany, 2013–2016; Trial Counsel, 16th Combat Aviation Brigade, 7th Infantry Division, Joint Base Lewis-McChord, Washington, 2012–2013; Trial Counsel, 62d Medical Brigade, I Corps, Joint Base Lewis-McChord, Washington, 2011–2012; Legal Assistance Attorney, I Corps, Joint Base Lewis-McChord, Washington, 2010–2011. Member of the bars of Kentucky and Texas. A prior version of this article was submitted in partial completion of the Master of Laws requirements of the 67th Judge Advocate Officer Graduate Course.

[1] Ryan Browne, *Top US General in Middle East Says Fight Against ISIS 'Far from Over,'* CNN, https://www.cnn.com/2019/03/07/politics/votel-isis-fight/index.html (quoting General Joseph Votel, Commander, U.S. Central Command) (Mar. 7, 2019, 1:57 PM). *See also* Ranj Alaaldin, *COVID-19 Will Prolong Conflict in the Middle East*, BROOKINGS INST. (Apr. 24, 2020), https://www.brookings.edu/blog/order-from-chaos/2020/04/24/covid-19-will-prolong-conflict-in-the-middle-east.

[2] The group is also known as the Islamic State of Iraq and al-Sham (ISIS), the Islamic State of Iraq and the Levant (ISIL), and al-Dawla al-Islamiya fi al-Iraq wa al-Sham (Daesh). *ISIS*, HISTORY, https://www.history.com/topics/21st-century/isis#section_3 (June 7, 2019). This article will use the term "Islamic State of Iraq and Syria (ISIS)" interchangeably, as it is the term Congress most recently adopted in section 1222 of the Fiscal Year 2018 National Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222, 131 Stat. 1283, 1651 (2017).

[3] Margaret Coker & Falih Hassan, *ISIS is Weakened, but Iraq Election Could Unravel Hard-Won Stability*, N.Y. TIMES, Jan. 30, 2018, at A10.

essential to winning the confidence of the Iraqi people in the election results and establishing regional stability.[4] Despite the billions of dollars the United States spent since 2014 on training and equipping the Iraqi Security Forces (ISF) for combat,[5] U.S. forces could not spend a single U.S. dollar to train or equip local Iraqi police in election security or crowd control.

The fund Congress created to support the fight against ISIS no longer matches the mission. Since its 2014 inception, the Operation Inherent Resolve (OIR) mission, with the Combined Joint Task Force (CJTF) Global Coalition leading the way, is the defeat of ISIS in Iraq and Syria and to "set[] conditions for follow-on operations to increase regional stability."[6] The ISF have now retaken most of the territory held by ISIS in Iraq, and major combat operations against the group have declined since early 2018.[7] With the physical caliphate nearly defeated, the CJTF has shifted its focus from combat operations to preventing the resurgence of ISIS through regional stability[8] operations.[9] However, the funds appropriated to help the ISF and other qualifying groups to counter ISIS do not permit the CJTF to pursue vital stabilization and security efforts aimed at a lasting defeat of ISIS.

Congress has not authorized the Counter-ISIS Train and Equip Fund (CTEF)—the only U.S. appropriation available to train and equip foreign

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[4] *Id.*

[5] Congress appropriated $1.77 billion in fiscal year (FY) 2018, $1.35 billion in FY19, and $1.19 billion in FY20 for the Counter-ISIS Train and Equip Fund (CTEF). Consolidated Appropriations Act 2018, Pub. L. No. 115-141, 132 Stat. 348 (2018); Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018); Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

[6] *Combined Joint Task Force (CJTF) Operation Inherent Resolve (OIR) Fact Sheet*, OPERATION INHERENT RESOLVE, http://www.inherentresolve.mil/Portals/14/Documents/Mission/20170717-%20Updated%20Mission%20Statement%20Fact%20Sheet.pdf (last visited Aug. 28, 2020). Until 2018, the CJTF also had a subordinate Combined Joint Forces Land Component Command (CJFLCC) responsible for operations in Iraq.

[7] U.S. DEP'T OF DEF., *Coalition Announces Shift in Focus as Iraq Campaign Progresses* (Feb. 5, 2018), https://dod.defense.gov/News/Article/Article/1432692/coalition-announces-shift-in-focus-as-iraq-campaign-progresses [hereinafter *Coalition Shift*].

[8] "Stabilization is the process by which military and nonmilitary actors collectively apply various instruments of national power to address drivers of conflict, foster host-nation resiliencies, and create conditions that enable sustainable peace and security." JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-07: STABILITY, at ix (3 Aug. 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_07.pdf.

[9] *Coalition Shift*, *supra* note 7.

forces in Iraq and Syria—for this type of support.[10] Instead, the CJTF may only use CTEF to support groups "participating, or preparing to participate in activities to counter" ISIS.[11] This language significantly limits the groups the CJTF can support with CTEF to those directly combating ISIS. Commanders in the CJTF, along with their judge advocates, find funding stability missions problematic because of the limitation.[12] Election security training is just one of the many examples of support the U.S.-led coalition is unable to perform using CTEF. Additional restrictions limit the CJTF's counter-ISIS construction authority to "facility fortification and humane treatment"[13] and limits all construction, repair, and renovation projects to $4 million per project and no more than $30 million in total per fiscal year, even for otherwise eligible groups.[14] The appropriation also restricts the CJTF from using CTEF to support any groups who are primarily responsible for stability operations, like local police forces, and prevents the CJTF from transferring unused CTEF equipment from Iraq to Syria.[15]

With the shift to stability operations, the groups and projects the CJTF can support with CTEF is shrinking dramatically. Most of these issues are due to the statutory construction of the CTEF appropriation. However, the Department of Defense's (DoD) own Office of the General Counsel (OGC) interpretation of CTEF makes matters worse. This office's opinion further restricts the use of CTEF beyond its plain language and limits support to operations resulting in a "kinetic" effect.[16] This opinion effectively limits CTEF projects to those involving combat or training for combat.[17]

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[10] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[11] *Id.*
[12] Telephone Interview with Colonel Charles Poché, Staff Judge Advoc., Combined Joint Task Force-Operation Inherent Resolve (Nov. 2, 2018).
[13] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[14] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).
[15] *Id.*; Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[16] Telephone Interview with Major Ryan Howard, U.S. Cent. Command Fiscal & Contract L. (Jan. 24, 2019); Telephone Interview with Colonel Charles Poché, *supra* note 12; Telephone Interview with Captain David Marold, Chief of Fiscal L., Combined Joint Task Force-Operation Inherent Resolve (Nov. 5, 2018).
[17] Telephone Interview with Major Ryan Howard, U.S. Cent. Command Fiscal & Contract L. (Jan. 24, 2019); Telephone Interview with Colonel Charles Poché, *supra* note 12; Telephone Interview with Captain David Marold, Chief of Fiscal L., Combined Joint Task Force-Operation Inherent Resolve (Nov. 5, 2018).

Another concern in the near future is that the CJTF is not an enduring institution in Iraq,[18] and stability operations take time.[19] Because of this, the United States requires a long-term presence in Iraq to take responsibility for CTEF and the programs it funds. The Office of Security Cooperation, Iraq (OSC-I), a DoD organization nested within the Department of State (DoS) and the U.S. Embassy in Baghdad, is better suited to conduct long-term stability operations using CTEF. The DoS is also better suited for the diplomacy required to support the third-party organizations stability operations will require. Further, the OSC-I previously owned this mission in the recent past.[20]

The CTEF appropriation, in its current form, lacks the ability and flexibility to adequately support the current and future OIR mission against ISIS. Therefore, Congress should amend CTEF's purpose language to broaden its construction, repair, and renovation authority, and permit support to groups with stability operation missions. Until then, the OGC should modify its opinion limiting CTEF to "kinetic" operations and, instead, broadly interpret the term "counter ISIS" to include stability operations designed to prevent the resurgence of ISIS. The OGC should then issue formal guidance on the use of CTEF. Finally, once ISF combat operations against ISIS cease and the CJTF dissolves, the ISF train and equip mission for stability operations should transfer from the CJTF to the OSC-I.

This article discusses the background of OIR, the evolution of the train and equip funds used by OIR commanders, and an overview of the issues with CTEF in OIR today. This article then compares and contrasts alternate sources of training and equipping foreign security forces and, ultimately, proposes a solution for matching CTEF with the current OIR mission. The mission in Iraq is the lasting defeat of ISIS. A lasting defeat requires stability operations in order to prevent the group's resurgence. Until CTEF evolves, it will veer further off course from the mark Congress

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[18] U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS, at para. 4.a.(3) (Sept. 16, 2009) (incorporating Change 1, June 29, 2017) [hereinafter DODI 3000.05].

[19] *See generally* LINDA ROBINSON ET AL., RAND CORP., FINDING THE RIGHT BALANCE: DEPARTMENT OF DEFENSE ROLES IN STABILIZATION (2018) (evaluating the U.S. military's stabilization efforts).

[20] INSPECTOR GEN., U.S. DEP'T OF DEF., REP NO. DODIG-2012-063, ASSESSMENT OF THE DOD ESTABLISHMENT OF THE OFFICE OF SECURITY COOPERATION-IRAQ, at app. D (Mar. 16, 2012) [hereinafter DOD IG ROI-OSC-I].

originally intended, and the CJTF will continue to fight with one hand tied behind its back.

II. The Evolution of CTEF and OIR

After eight years of the U.S. military's presence in Iraq, and mounting political pressure both at home and abroad, President Barack Obama withdrew U.S. military forces from the country in December 2011.[21] The withdrawal left a fragile Iraqi government in Baghdad, already grappling with sectarian and political infighting.[22] The Government of Iraq (GoI) was a fledgling government with tenuous control over its territory and its identity in the region. Within days of the U.S. departure, Iraqi Prime Minister Nouri al-Maliki, a Shiite, issued an arrest warrant for his Sunni vice president, Tariq al-Hashimi.[23] This sparked the Sunni political block, Iraqiya, to leave parliament in protest.[24] In the months that followed, the three major factions in Iraq—Shia, Sunni, and Kurd—dove deeper into sectarian conflict and political hard line divisions.[25]

A. The Rise of ISIS

In April 2013, Abu Bakr al-Baghdadi formed ISIS, a fundamentalist Sunni Islamic militant group.[26] At the time, al-Baghdadi was part of al Qaeda in Iraq (AQI) and the Islamic State of Iraq (ISI), and his declaration separated ISIS from those original affiliations.[27] Two events sparked the formation of ISIS: the United States' withdrawal from Iraq and "the

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[21] *See* Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 17, 2011, 11:40 PM), https://www.reuters.com/article/us-iraq-withdrawal/last-u-s-troops-leave-iraq-ending-war-idUSTRE7BH03320111218; Scott Wilson & Karen DeYoung, *All U.S. Troops to Leave Iraq by the End of 2011*, WASH. POST (Oct. 21, 2011), https://www.washingtonpost.com/world/national-security/all-us-troops-to-leave-iraq/2011/10/21/gIQAUyJi3L_story.html.

[22] Logan, *supra* note 21; *see also* Wilson & DeYoung, *supra* note 21.

[23] Adam Taylor, *How Iraq Unraveled Since the U.S. Withdrawal, in 10 Steps*, WASH. POST (Jun. 13, 2014, 5:20 PM), https://www.washingtonpost.com/news/worldviews/wp/2014/06/13/how-iraq-unraveled-since-the-u-s-withdrawal-in-10-steps.

[24] *Id.*

[25] *Id.*

[26] MICHAEL W.S. RYAN, U.S. NAVAL WAR COLL., ISIS: THE TERRORIST GROUP THAT WOULD BE A STATE 18–19 (2015).

[27] *Id.*

unanticipated full-scale insurrection against Bashar al-Assad in Syria in the context of the Arab Spring."[28]

In 2012 and 2013, ISIS began capturing and holding territory throughout Iraq and Syria.[29] Then, in June 2014, ISIS gained considerable strength and resources when "about 800 to 1,000 ISIS fighters took [Mosul, a] city of two million people [and] Iraqi forces comprising two divisions of approximately 30,000 soldiers fled after initial skirmishes."[30] Soon after, ISIS expanded and gained control of vast areas throughout northern Iraq. They captured Tikrit in June 2014, the Mosul Dam in August 2014, and Ramadi in May 2015.[31] This expansion moved further south without resistance, and ISIS became a legitimate threat to Baghdad—the center of the Iraqi government.[32] The GoI, facing a threat it could not control, requested the United States return to Iraq and assist in its defense against ISIS.[33] On 22 June 2014, the Ministry of Foreign Affairs of the Republic of Iraq approved an exchange of diplomatic notes between the United States and Iraq, outlining the conditions for a return of U.S. forces into Iraq.[34]

B. The OIR Mission

In August 2014, the United States returned to Iraq to defeat ISIS and began supporting the ISF through air strikes against ISIS positions and building an international coalition.[35] The United States named the mission against ISIS "Operation Inherent Resolve" (OIR).[36] On 17 October 2014, the United States established a multi-nation CJTF under the U.S. Central Command (CENTCOM) combatant command to formally head the

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[28] *Id.* at 18.
[29] *Id.* at 20. *See also* INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. DODIG-2018-147, U.S. AND COALITION EFFORTS TO TRAIN, ADVISE, ASSIST, AND EQUIP THE IRAQI POLICE HOLD FORCE 2 (Sept. 13, 2018) [hereinafter DOD IG ROI-HOLD FORCE].
[30] RYAN, *supra* note 26, at 20.
[31] *Id. See also* DOD IG ROI-HOLD FORCE, *supra* note 29.
[32] Michael R. Gordon, *Iraq's Leader Requests More Aid in Fight Against ISIS*, N.Y. TIMES, (Dec. 3, 2014) https://www.nytimes.com/2014/12/04/world/middleeast/iraqi-leader-seeks-additional-aid-in-isis-fight.html.
[33] *Id.*
[34] Exchange of Diplomatic Notes Between the Embassy of U.S. and the Ministry of Foreign Affs. of the Republic of Iraq (June 22, 2014) (on file with author).
[35] DOD IG ROI-HOLD FORCE, *supra* note 29, at 3.
[36] *About Us*, OPERATION INHERENT RESOLVE, https://www.inherentresolve.mil/About-CJTF-OIR (last visited Aug. 28, 2020).

operation.[37] The CJTF currently contains seventy-four partner nations and five international organizations.[38]

1. By, With, and Through

The U.S. mission in returning to Iraq was—and continues to be—the defeat of ISIS (D-ISIS)[39] "by, with, and through"[40] the GoI and its security forces. Stated more broadly, the CJTF mission is the defeat of "ISIS in designated areas of Iraq and Syria and [to set] conditions for follow-on operations to increase regional stability."[41]

In practical terms, working "by, with, and through" means neither the United States nor the CJTF are the lead in the fight. In all Iraqi operations, the GoI and the ISF lead the fighting, and the CJTF works to support them.[42] To accomplish its D-ISIS objective, the CJTF employs various combinations of advise, assist, accompany, and enable (A3E) missions with the ISF.[43] One of the primary means of supporting the GoI is through

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[37] *Id.*

[38] Press Release, U.S. Cent. Command, CJTF-OIR Reflects on Significant Military Gains, Fighting ISIS in 2018 (Jan. 9, 2019) (on file with author).

[39] Telephone Interview with Colonel Charles Poché, *supra* note 12. On 10 September 2014, the U.S. State Department, along with the North Atlantic Treaty Organization (NATO), announced "[f]ive mutually reinforcing lines of effort to degrade and defeat ISIS . . . . These lines of effort include: 1. Providing military support to our partners; 2. Impeding the flow of foreign fighters; 3. Stopping financing and funding; 4. Addressing humanitarian crises in the region; and 5. Exposing the nature [of ISIS]." *About Us – The Global Coalition to Defeat ISIS*, U.S. DEP'T OF STATE, https://www.state.gov/about-us-the-global-coalition-to-defeat-isis (last visited Aug. 28, 2020).

[40] *Operation Inherent Resolve: Targeted Operations to Defeat ISIS*, U.S. DEP'T OF DEF., https://dod.defense.gov/OIR (last visited Aug. 28, 2020). "'By, with, and through'" as an operational approach entails the conduct of military campaigns primarily through the employment of partner maneuver forces with the support of U.S. enablers, through a coordinated legal and diplomatic framework." Interview by Ctr. for Army Lessons Learned with Lieutenant Gen. Paul E. Funk II, Commanding Gen., III Corps & CJTF-OIR (Jan. 27, 2018).

[41] *About Us*, *supra* note 36.

[42] Interview with Gen. Paul E. Funk II, *supra* note 40.

[43] The CJTF-OIR campaign is separated into four phases: (1) degrade, (2) counterattack, (3) defeat, and (4) support stabilization, with three lines of effort. *Campaign*, OPERATION INHERENT RESOLVE, http://www.inherentresolve.mil/campaign (last visited Aug. 29, 2020). The second line of effort "enable[s] sustainable military partner capacity in Iraq and Syria." *Id.* This is accomplished by training, equipping, advising, and assisting partner forces. *Id.* "Advise—The use of influence and knowledge to teach, coach, and mentor while working by, with, and through a partner. *I am providing you with a recommended and proven (rooted in doctrine and experience) way to do it.* Assist—Directly or indirectly support partners to enhance their ability to deliver desired effects. *I am helping you do something better that*

training and equipping the ISF at various building partner capacity (BPC) sites.[44]

2. The Fight Against ISIS

According to the Coalition narrative, the CJTF must accomplish two goals to defeat ISIS.[45] First, the ISF must defeat the physical ISIS "caliphate."[46] This consists of conventional warfare and keeping ISIS from holding territory. Second, the CJTF must "purs[ue] the lasting defeat of the terrorist organization."[47] Here, the ISF and the Coalition works to prevent the resurgence of ISIS in the future. Unless and until ISIS is dismantled and incapable of reforming, it is not truly defeated. Iraq also requires regional stability to prevent the resurgence of ISIS. This second prong requires the United States and its partners to meaningfully combat ISIS where it derives its strength—in the vacuum created by regional instability and fear.

Beginning in 2015, with the help of the Coalition, the ISF began effectively fighting and taking territory back from ISIS.[48] The ISF regained control over Tikrit in March 2015, Ramadi in February 2016, Fallujah in June 2016, Mosul in July 2017, Tal Afar in August 2017, and Hawijah in October 2017.[49] These successes are largely due to the now-increased fighting ability and capacity of the ISF.[50] The Iraq Train and

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you can already do. Accompany—Move with and be present with the partner. *I will go forward with you.* Enable—Use of coalition capability to enhance the partners' desired effects where their organic means may be insufficient. *I am helping you do something that you cannot effectively do—I can help you with our assets.*" U.S. ARMY TRAINING & DOCTRINE COMMAND, NO. 17-24 U, WHAT THE BATTLE FOR MOSUL TEACHES THE FORCE 42 (2017).

[44] *Campaign*, *supra* note 43. *See also* Deja Borden, *Coalition Support Growing for Build Partner Capacity Effort in Iraq*, U.S. CENT. COMMAND (Apr. 15, 2015), http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/885071/coalition-support-growing-for-build-partner-capacity-effort-in-iraq.

[45] DOD IG ROI-HOLD FORCE, *supra* note 29, at 3 (citing Annex F of the CJTF-OIR Campaign Plan).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

Equip Fund (ITEF)[51] and CTEF were instrumental in providing the ISF with these capabilities.

3. The Current Fight

The strides made by the ISF came much more quickly than the Coalition planners had predicted. In February 2018, "ISIS ha[d] lost about 98 percent of the territory it once held in Iraq and Syria"[52] and the CJTF announced a "shift in focus as [the] Iraq Campaign progresses."[53] With the conventional fight now waning, the CJTF is shifting its focus to its second goal—the lasting defeat of ISIS through stability operations.[54] This phase, also known as "consolidating gains," is the current focus of the CJTF.[55] Consolidating gains has three objectives: (1) to attack the remnants of ISIS to prevent its ability to develop an insurgency; (2) to provide security for diplomatic, economic, and informational activity; and (3) to transition from offensive military operations to security functions (policing and border control).[56]

Congress and CENTCOM agree that wide area security and stability operations are vital to "consolidate[ing] gains [made by the Coalition and the ISF], hold[ing] territory, and protect[ing] infrastructure from ISIS and its affiliates in an effort to deal a lasting defeat to ISIS and prevent its reemergence in Iraq."[57] The Islamic State of Iraq and Syria "is still capable of offensive action and retains the ability to plan and inspire attacks worldwide."[58] Training and equipping are still a vital part to the CJTF strategy,[59] but the focus requires change, along with the CJTF's entry into this second phase. Since February 2018, the CJTF has attempted to focus its train and equip efforts "more on policing, border control and

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[51] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).
[52] *Coalition Shift*, *supra* note 7.
[53] *Id.*
[54] Phase IV of the CJTF-OIR Campaign plan. *Campaign*, *supra* note 43.
[55] DoD IG ROI-HOLD FORCE, *supra* note 29, at 3.
[56] *Id. See also Campaign*, *supra* note 43.
[57] John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1233(d), 132 Stat. 1636, 2039 (2018); Gen. Joseph L. Votel, Commander, U.S. Cent. Command, Defense Department Briefing (July 19, 2018) ("With the newly elected government of Iraq taking shape, we will continue our efforts to support the Iraqi Security Forces in their transition from major combat operations to the wide area security force that the Iraqi people want and deserve and that will be necessary to consolidate their hard-won gains.").
[58] *Coalition Shift*, *supra* note 7.
[59] *Id.*

military capacity building."[60] However, the CJTF is not able to support many of these efforts with CTEF because of its fiscal limitations.

III. Proper Funds

A. Fiscal Law

To keep any one branch of the federal government from gaining too much power, the founders of the United States built into the Constitution specific "checks" on each of the three branches. Sections 8 and 9 of Article I of the U.S. Constitution are examples of the Legislative Branch's check on the Executive Branch. Article I grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[61] Article I also states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[62] Collectively, these are Congress's "power of the purse."[63] This power prohibits Executive Branch agencies, including the DoD, from spending any money until and unless Congress has passed a lawful appropriation.[64]

Congress generally passes appropriations for the DoD annually.[65] In addition to appropriations, Congress also passes authorizations.[66] An authorization is a statute authorizing a particular agency to conduct specified activities using a specified appropriation.[67] Included in these acts are generally three broad limitations on their use: the reasons the agency may use the appropriation (purpose), when the appropriation is available for obligation (time), and the total the agency may obligate (amount).[68] The Supreme Court also held that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[69]

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[60] *Id.*
[61] U.S. CONST. art I, § 8, cl. 1.
[62] U.S. CONST. art. I, § 9, cl. 7.
[63] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 1, § A, at 1-4 (4th ed. 2016) [hereinafter GAO RED BOOK].
[64] United States v. MacCollom, 426 U.S. 317 (1976).
[65] GAO RED BOOK, *supra* note 63, ch. 2, § B.4.a., at 2-17.
[66] *See generally id.* at ch. 2, § C.1, at 2-54.
[67] *Id.*
[68] Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–1519.
[69] *MacCollom*, 426 U.S. at 321 (citing Reeside v. Walker, 52 U.S. 272, 291 (1851)).

For example, U.S. forces may not use any funds to conduct offensive operations outside of the United States, unless Congress authorizes the activity, and only when there are funds from a proper appropriation available.[70] In this instance, Congress traditionally passes an Overseas Contingency Operation, Operation and Maintenance (OCO O&M) appropriation. Unless Congress has provided an exception, the DoD may only use OCO O&M funds to operate and maintain the armed forces when the beneficiary is the U.S. Armed Forces, and only for select missions.[71] This is the primary fund the DoD uses to pay for its operations in the CENTCOM area of operations. However, the fund is not available to pay for any foreign forces.[72] For the DoD, this means Congress must specifically authorize and appropriate a separate fund to provide any train and equip assistance to a foreign force.

In November 2014, the DoD requested Congress appropriate and authorize funds to achieve its goals in supporting the ISF.[73] Specifically, the DoD requested approximately $1.6 billion for fiscal year (FY) 2015 to provide assistance to "military and other security forces of, or associated with, the Government of Iraq, including Kurdish and tribal security forces, with a national security mission, to counter [ISIS]."[74] The types of assistance requested included "the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, *construction*, and stipends."[75]

Congress granted the DoD request beginning in fiscal year 2015 (FY15).[76] Between FY15 and FY19, Congress changed both the appropriations and their authorizations to counter ISIS in several important ways.

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[70] *See* Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1350, 1351, 1511–1519.

[71] *See, e.g.*, Memorandum from Army Budget Off., Department of the Army Financial Management Guidance for Contingency Operations (June 28, 2012). *See also* 10 U.S.C. § 101(a)(13).

[72] Memorandum from Army Budget Off., *supra* note 71.

[73] OFF. OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., JUSTIFICATION FOR FY 2015 OVERSEAS CONTINGENCY OPERATIONS IRAQ TRAIN AND EQUIP FUND (ITEF) (2014).

[74] *Id.* at 12.

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

[76] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

B. The ITEF Appropriation: Predecessor to CTEF

In December 2014, Congress granted the initial DoD request by appropriating approximately $1.6 billion for ITEF and making the fund available for two years (through 30 September 2016).[77]

1. Support to the GoI

The purpose language in ITEF focused on benefiting certain groups, like the GoI, and other groups with an Iraqi "national security mission."[78] The language in ITEF permitted "the Secretary of Defense . . . to provide assistance . . . to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces, with a national security mission, to counter [ISIS]."[79] Congress added an additional condition that the Secretary of Defense must also coordinate the assistance with the Secretary of State.[80]

2. Prohibition on Construction

The types of assistance approved by Congress in ITEF permitted "training; equipment; logistics support, supplies, and services; stipends; infrastructure repair, renovation, and sustainment."[81] Notably, the appropriation mirrored the DoD's request in all types of assistance, except for one. The appropriation passed by Congress contained no reference to construction. In light of the language from the DoD's request for the ability to perform construction, and the express provision for construction in the corresponding Syria Train and Equip authorization (discussed further below), this omission by Congress was clearly intentional.[82] As a

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] "[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)). *See* Bailey v. United States, 516 U.S. 137, 146 (1995) (distinction in one provision between "used" and "intended to be used" creates implication that related provision's reliance on "use" alone refers to actual and not intended use); Merck v. Reynolds, 559 U.S. 633, 655–61 (2010) (Scalia, J., concurring) (use of "discovery" alone in one securities fraud statute of limitations provision and the use of "discovery, or after such discovery should have been made" in another securities fraud statute of limitations provision implies that "discovery" in the first provision means only "actual discovery" and does not include "constructive

result, ITEF prohibited the DoD from performing any construction using ITEF for the benefit of the GoI or the ISF.

Construction is work "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility."[83] A "facility" is "[a] building, structure, or other improvement to real property."[84] This includes the creation of a new facility, adding a feature to an existing facility, all of the work required to develop the land around a facility, and "related real property requirements."[85] In practical terms, this prohibition meant U.S. forces could not use ITEF to build or improve any real property for the ISF. For example, the CJTF could not use ITEF to build any training facilities, life support areas, headquarters, bases, ammunition holding areas (AHA), or improvements to any existing facilities. The DoD could not even use ITEF to lay a gravel road or bulldoze a defensive earthwork berm if the primary beneficiary was the ISF.

Instead, ITEF only permitted the CJTF to repair the GoI's existing facilities. This limited OIR units to bringing existing real property facilities back to their originally intended use and composition, and only when they were in a "failed or failing" state.[86]

C. Authority to Provide Assistance to Counter ISIS in Iraq: Section 1236

At the same time Congress granted the initial ITEF appropriation in December 2014, it also authorized the Secretary of Defense to use ITEF to provide assistance to counter ISIS in section 1236 of the FY15 National Defense Authorization Act (NDAA).[87] The authorization permitted the DoD to use ITEF for the same types of assistance and supported groups listed in the ITEF appropriation. However, section 1236 also added several requirements regarding the purpose of the expenditures. The DoD could use ITEF only when the expenditure was used for "(1) [d]efending Iraq, its people, allies, and partner nations from the threat posed by the

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discovery"); Bates v. United States, 522 U.S. 23, 29 (1997) (inclusion of "intent to defraud" language in one provision and exclusion in a parallel provision). *See also Statutory Interpretation: General Principles and Recent Trends*, EVERYCRSREPORT.COM (Sept. 24, 2014), https://www.everycrsreport.com/reports/97-589.html.

[83] 10 U.S.C. § 2801(b); U.S. DEP'T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT, para. 4-17(a) (12 Feb. 2008) (RAR 24 Aug. 2012).

[84] AR 420-1, *supra* note 83, glossary at 436(defining facility).

[85] *Id.* para. 4-17(a)(4).

[86] *Id.* para. 4-17(c).

[87] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).

Islamic State of Iraq and the Levant (ISIL) and groups supporting ISIL [or] (2) [s]ecuring the territory of Iraq."[88]

D. Authority to Provide Assistance to the Vetted Syrian Opposition: Section 1209

Congress also authorized the DoD, in section 1209 of the FY15 NDAA, to provide assistance to the vetted Syrian opposition (VSO) to counter ISIS in Syria.[89] Instead of appropriating a separate fund, Congress funded this Syria Train and Equip authorization by reprogramming $500 million of the $1.3 billion in funds from the Counterterrorism Partnerships Fund[90] and re-appropriating them in support of the STE program.[91] Section 1209 permitted expenditures with the purpose of "(1) Defending the Syrian people from [ISIS], and securing territory controlled by the Syrian opposition[;] (2) Protecting the [U.S.], its friends and allies, and the Syrian people from the threats posed by terrorists in Syria[;] and (3) Promoting the conditions for a negotiated settlement to end the conflict in Syria."[92] Unlike section 1236, section 1209 initially permitted the DoD to provide "training, equipment, supplies, stipends, *construction of training and associated facilities*, and sustainment."[93]

Separating ITEF and STE created two distinct authorities and funding sources controlled by the CJTF. This separation prohibited the CJTF from being able to reallocate resources purchased under one authority for use in the other theater.[94] As discussed below, this separation created issues

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[88] *Id.*
[89] *Id.* § 1209.
[90] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).
[91] *Id.* § 9016.
[92] § 1209(a), 128 Stat. at 3541.
[93] *Id.* (emphasis added).
[94] Longstanding precedent dictates that an appropriation for a purpose is available to pay expenses necessarily incident to accomplishing that purpose. "It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures . . . ." Major Gen. Anton Stephan, 6 Comp. Gen. 619, 621 (1927). Here, articles purchased under one appropriation's purpose (e.g., ITEF) may not be then put to use for another purpose where there is a more specific appropriation available to the subsequent effort (e.g., STE). *See also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at ch. 3 (4th ed. 2017).

when the CJTF wanted to use equipment purchased for one area of operations in another area.

E. CTEF

The ITEF and STE programs remained functionally unchanged until FY17. As the fight against ISIS developed, the terrorist organization grew outside the borders of Iraq and Syria.[95] In the DoD's FY 2017 Request for Additional Appropriations, the Secretary of Defense asked Congress to combine the ITEF and STE appropriations into a single "Counter-ISIS Train and Equip Fund."[96] The DoD made the request to combat ISIS outside of the borders of Iraq and Syria. Congress granted the request in the FY17 DoD Appropriations Act.[97]

The types of assistance provided in the FY17 CTEF appropriation were the same as the original ITEF appropriation. In other respects, however, the language in CTEF changed significantly from the ITEF appropriation. The FY17 CTEF appropriation allowed the DoD to provide assistance outside of Iraq and Syria in countries "designated by the Secretary of Defense, in coordination with the Secretary of State, as having a security mission to counter [ISIS]."[98] Additionally, Congress removed the ITEF language referring to the GoI, security forces with a "national security mission," and "securing the territory of Iraq."[99] Instead, the purpose language focuses on the type of group or individual receiving the assistance. In particular, CTEF allows the DoD to provide assistance to "foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to counter the Islamic

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[95] *See* Matthew Rosenberg et. al., *ISIS Expands Reach Despite Military and Financial Setbacks*, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/world/middleeast/isis-iraq-syria.html.

[96] *See* U.S. DEP'T OF DEF., REQUEST FOR ADDITIONAL APPROPRIATIONS, OVERSEAS CONTINGENCY OPERATIONS (OCO) COUNTER-ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) TRAIN AND EQUIP FUND (CTEF) (2017). *See also* OFF. OF THE UNDER SEC'Y OF DEF. (COMPTROLLER), U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE REQUEST FOR ADDITIONAL FY 2017 APPROPRIATIONS 10 (2017).

[97] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017). The FY17 appropriation was titled "Counter-ISIL Train and Equip Fund." *Id.* Congress again changed the title in the FY18 CTEF appropriation to "Counter-*ISIS* Train and Equip Fund." Consolidated Appropriations Act 2018, Pub. L. No. 115-141, 132 Stat. 348, 498 (2018) (emphasis added).

[98] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).

[99] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2290 (2014).

State of Iraq and the Levant, and their affiliates or associated groups."[100] The Counter-ISIS Train and Equip Fund also permits the enhancement of "border security of nations adjacent to conflict areas . . . resulting from [the] actions of [ISIS]."[101]

Congress also did not introduce any authority for construction into the FY17 CTEF appropriation. A year later, however, Congress seemingly changed course on its intent to prohibit construction. In the FY18 NDAA, Congress deleted from section 1236 the words "facility and infrastructure repair and renovation" and inserted the term "infrastructure repair and renovation, small-scale construction of temporary facilities necessary to meet urgent operational or force protection requirements with a cost less than $4,000,000."[102] The FY18 NDAA also limited the aggregate amount of construction, repair, and renovation under CTEF to $30 million.[103]

Despite this apparent construction authorization, the CJTF was still unable to perform construction in OIR using CTEF until two years later, when Congress included permissive language in the FY20 CTEF appropriation for construction.[104] Here, the CTEF appropriation was more restrictive than the authorization because it did not authorize construction.[105] The result was an authority without a proper appropriation to carry out the authorization.

The current constraints on CTEF funded construction, repair, and renovation are significant. While the FY20 CTEF appropriation does permit construction, it limits construction projects to "facility fortification

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[100] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017).
[101] *Id.*
[102] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c)(1), 131 Stat. 1283, 1652 (2017).
[103] *Id.* § 1222(c)(2).
[104] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019). The discrepancy is likely a result of a disagreement over construction between the different Congressional subcommittees handling appropriations legislation and authorization legislation. "Like organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular subject matter [(e.g., the Armed Forces)], whereas appropriation bills are exclusively within the jurisdiction of the appropriations committees." GAO RED BOOK, *supra* note 63, at ch. 2, § C.1, at 2-55. Under fiscal law, an authorization act does not provide budget authority. *See generally id*. Budget authority requires an appropriation, and an authorization may not expand the scope of an appropriation's purpose. *Id.* ch. 2, at 2-1 to -3 and 2-54 to -79.
[105] Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (2017); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c), 131 Stat. 1283, 1652 (2017).

and humane treatment."[106] The section 1236 authorization still limits construction, repair, and renovation projects using CTEF to those with a funded cost under $4 million per project, and no more than $30 million in any fiscal year.[107] By comparison to the total amount appropriated under CTEF for a fiscal year, this represents merely five percent of the total budget authority in FY20.[108] Also, any project with a funded cost exceeding $1 million must receive CENTCOM approval and includes a twenty-one-day Congressional notification and wait period.[109] The resultant ability to support foreign security forces who are countering ISIS, like the ISF, using CTEF, is largely limited to services and supplies because of these restrictions on construction, repair, and renovation.

F. The CTEF Requirement Approval Process

The CJTF has primary responsibility for CTEF management.[110] Multiple units within the CJTF have various responsibilities regarding the development, procurement, and divestment of CTEF train and equip missions.[111] Generally, units request CTEF equipment and services through memorandums of request (MORs).[112] Units throughout the ISF and the Coalition first identify train and equip needs and shortfalls within the ISF.[113] For example, the CJTF CJ7 Partner Force Development section "synchronizes train and equip efforts in order to generate a coherent force-generation process that meets operational requirements and tracks the status of CTEF equipment deliveries and divestitures."[114] The Ministry Liaison Team within the CJ7 section "liaises between CJTF-OIR and the

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[106] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[107] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, sec. 1222(c), § 1236, 131 Stat. 1283, 1652 (2017).
[108] Thirty million dollars is 5.02% of $597,500,000 (half of the $1,195,000,000 two-year FY20 CTEF appropriation). *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[109] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, sec. 1222(c), § 1236, 131 Stat. 1283, 1652 (2017).
[110] Memorandum from the Sec'y of Def. to the Sec'ys of the Mil. Dep'ts et. al., Management of the Counter-ISIL Train and Equip Fund (June 7, 2017) (on file with author).
[111] This assertion is based on the author's recent professional experiences as the Chief, Fiscal Law for the Combined Joint Force Land Component Command (CJFLCC)-Operation Inherent Resolve (OIR) from 17 June 2017 to 26 February 2018 [hereinafter Professional Experiences].
[112] *Id.*
[113] *Id.*
[114] DoD IG ROI-HOLD FORCE, *supra* note 29, at 5.

Iraqi Ministries of Interior and Defense" regarding ISF plans and CJTF operational requirements.[115]

Once a requesting unit identifies a need, the unit then develops an MOR packet.[116] The MOR includes all the information about what the unit is requesting, the relevant costs, the circumstances surrounding the requirement, and the primary beneficiary of the request.[117] Once the packet is complete, the CJ4 section, normally responsible for logistics, finalizes the packet and presents it to the Combined Joint Force Land Component Command (CJFLCC) or CJTF CTEF board.[118] This board is comprised of various staff section leaders and chaired by the CJTF Deputy Commanding General for Sustainment.[119] A U.S. Army judge advocate also sits on the board as a non-voting member to advise the Chairman and the board members on various fiscal and other legal matters.[120]

Once approved by the board, the U.S. commander for CJTF approves or denies the MOR, after de-conflicting requirements with the GoI and OSC-I.[121] The CJTF then sends approved MORs to CENTCOM for endorsement.[122] Once all levels fully approve and endorse the requirement, either the Defense Security Cooperation Agency fulfills the need or the contracting office makes the procurement.[123]

IV. Issues with CTEF in OIR Today

A. CTEF Has Limited Construction, Repair, and Renovation Authority

As discussed above, prior to the FY18 NDAA's cap on construction, repair, and renovation, CTEF, and ITEF before it, did not permit construction at all. Projects involving real property facilities were limited to "repair" or "maintenance" only.[124] No other funds available to the CJTF

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[115] *Id.*
[116] Professional Experiences, *supra* note 111.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Telephone Interview with Lieutenant Colonel Anthony C. Adolph, Former Staff Judge Advoc., Off. of Sec. Coop.-Iraq (Jan. 23, 2019) [hereinafter LTC Adolph Interview].
[122] Professional Experiences, *supra* note 111.
[123] *Id.*
[124] A "repair" is the "restor[ation of] a real property facility, system, or component to such condition that it may effectively be used for its designated functional purpose." 10 U.S.C. § 2811(e). The FY17 NDAA also added an additional option to the statutory definition of

permit this type of work for the benefit of the ISF. Now, while CTEF permits construction, its availability is significantly limited. However, the CJTF requires multiple facilities and real property structures to conduct its BPC training mission and its A3E missions with the ISF. Many of the facilities in use for these missions require significant construction or repair efforts. For example, the training area at Besmaya is vital to the ISF training mission and in substantial need of construction and repair.

1. Besmaya

In 2014, when the United States and its coalition partners re-entered Iraq, they chose several BPC sites to conduct train and equip missions. These sites were mostly old U.S. training sites, built during Operation Iraqi Freedom prior to 2011.[125] After the United States left Iraq in 2011, the sites fell into severe disrepair.[126] The CJTF designated one such site, the Besmaya Range Complex (BRC), located outside of Baghdad, as a BPC site, where the Spanish Army still operates its training programs.[127] This site is a prime example of how CTEF's pre-FY18 prohibition on construction and post-FY18 restrictions on real property projects impede the CTJF mission.

Besmaya is a very large area, capable of training soldiers on any weapon system in the Iraqi arsenal.[128] However, the infrastructure was, and continues to be, in severe disrepair.[129] The Spanish pay for the construction, maintenance, and repair of the Gran Capitan area occupied by their

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repair. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 2802, 130 Stat. 2000, 2712 (2016) (current version at 10 U.S.C. § 2811(e)(2)). A repair may now also be the "conver[sion of] a real property facility, system, or component to a new functional purpose without increasing its external dimensions." 10 U.S.C. § 2811(e)(2). Historically, conversions of facilities have fit squarely within the definition of construction. 10 U.S.C. § 2801(a). With this change, Congress permitted conversion projects to be included within the definition of repair and without the requirement for them to be in a failed or failing condition. A "conversion" is the transformation of a facility from its originally intended purpose to that of another purpose. *Id.*

[125] Professional Experiences, *supra* note 111.

[126] This assertion is based on the author's professional experiences during a site visit and tour of the Besmaya Regional Complex (BRC) by the Spanish Army in September 2017 [hereinafter BRC Site Visit]; Task Force Besmaya, Condition of Training Sites, slide 5 (Sept. 17, 2017) (unpublished PowerPoint presentation) (on file with author) [hereinafter BRC Slide].

[127] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

[128] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

[129] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

forces.[130] However, the Spanish relied on the use of ITEF, and now relies on CTEF, to fund improvements to any training facilities and equipping the ISF.[131]

The existing training facilities at the BRC include life support areas (LSA), classrooms, dining facilities, and a basic load ammunition holding area (BLAHA).[132] However, by 2017, these facilities were in such disrepair the ISF could only use part of the kitchen and dining area in the primary dining facility, and only one of the LSAs.[133] The construction restriction not only limited the ability to create new training facilities, it also restricted the CJTF's ability to improve facilities, even to address safety concerns.

For example, the ISF used the BLAHA to hold munitions used in training and for storing ammunition recovered from the battlefield.[134] However, the blast barriers surrounding the facility were deteriorating, and the ammunition load far exceeded the structure's capability to hold the explosives.[135] The ISF were also storing the explosives and ammunition above the facility's capacity and only in one area, rather than spreading the items throughout the BLAHA.[136] The storage structures for holding the munitions were nothing more than exposed metal shipping containers.[137] During the summer, the area reached temperatures in excess of 100 degrees Fahrenheit, and the temperature inside the containers well exceeded the air temperature outside.[138] If the temperatures around the munitions got too high, they were at risk of explosion, secondarily detonating the rest of the explosives in the facility.[139] To make matters worse, the BLAHA was located next to the only usable ISF LSA.[140] All of these factors created a significant safety concern. The BRC BLAHA was in such a deplorable condition that the DoD Inspector General issued

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[130] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[131] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[132] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[133] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[134] *See* Memorandum of Request 510 Packet and Letter of Justification, Request for Repair of the Besmaya Range Complex Base Load Ammunition Holding Area (Jan. 8, 2018) (on file with author).
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

a notice of concern to the CENTCOM commander in February 2018, citing multiple safety issues.[141]

The CJTF wanted to move the BLAHA and build a new one at a remote location with an improved structure and better safety features. However, due to the construction prohibition, the CJTF could not use CTEF to build a new BLAHA. At the time, CTEF also prohibited improving the existing facility.[142] The only course of action available was to repair the BLAHA and restore it to its original dimensions and capabilities, in its current location.

Life support areas, which the BRC also requires to house ISF soldiers during training, provide another example of needed construction. In 2018, the one LSA available for ISF use was significantly overcrowded.[143] The Regional Camp area at the BRC contained an LSA with multiple housing units, bathrooms, classrooms, and the primary dining facility.[144] However, unknown people had looted the containerized housing units, bathrooms, and classrooms in the camp of air conditioners and any other valuable property.[145] Also, the facilities themselves were severely dilapidated due to exposure to the weather and lack of maintenance.[146] Nearly all of the LSA buildings were completely unusable.[147]

As a result, early in the OIR campaign, the CJTF attempted to build a temporary LSA (named "F4N") nearby, using tents and other personal property materials.[148] The CJTF approved and executed the contract. However, when the project was nearly complete, someone vandalized the site and stole essential parts from the generators and electrical system.[149] As a result, the Spanish Army sent an additional request for funds to the appropriate ITEF board to complete the project.[150] When the board looked into the work completed on the project itself, it found the work included

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[141] DoD IG ROI-HOLD FORCE, *supra* note 29.
[142] Improvements to real property facilities are defined as construction. 10 U.S.C. § 2801(a).
[143] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[144] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[145] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[146] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[147] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.
[148] Purchase Request and Commitment for Life Support Area at F4N in the Besmaya Range Complex (Sept. 25, 2015) (on file with author).
[149] E-mail from Mr. Boris Pallares, U.S. Army Corps of Eng'rs, to Mr. Stanley Dowdy, U.S. Army Corps of Eng'rs (Oct. 12, 2017) (on file with author) (describing the original F4N Life Support Area project).
[150] *Id.*

elements of construction.[151] Work on the project had included leveling and grading the site for the tent structures and digging a pit for a water tank.[152] This work falls within the definition of construction. Although the work was a small part of the overall price and work for the project, it triggered concerns about an Antideficiency Act violation regarding the use of ITEF.[153] Work on the project halted.[154] As of spring 2018, the site remained untouched and unusable for the ISF.[155]

The BRC also required classroom space. The CJTF was able to get approval for a conversion project involving badly needed classroom space.[156] The BRC had a set of old barracks buildings (named "M22") that were unusable because flooding and weather damaged the flooring.[157] The project consisted of converting these buildings into classrooms. Because the project would not expand the footprint or dimensions of the original buildings, the engineers were able to classify the work as a conversion.[158] However, if CTEF had permitted construction, the CJTF could have completed the classrooms and the rest of the required facilities more quickly, better tailored to the need, and more economically.

2. Q-West

The Qayyarah Airfield West (Q-West) sits approximately forty miles south of Mosul in a key northern Iraq location.[159] After the ISF took Q-West back from ISIS, the Coalition began conducting A3E missions from the base with their partner Iraqi Air Force units.[160] Combat destroyed most of the infrastructure of Q-West in 2016 during the fight to take back the base from ISIS.[161] During the Mosul offensive, the Coalition also used the

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[151] *Id.* The definition of construction also includes any "[r]elated site preparation, excavation, filling, landscaping, or other land improvements." AR 420-1, *supra* note 83, glossary, at 431.

[152] BRC Site Visit, *supra* note 126; BRC Slide, *supra* note 126.

[153] E-mail from Mr. Boris Pallares, U.S. Army Corps of Eng'rs, to Mr. Stanley Dowdy, U.S. Army Corps of Eng'rs (Oct. 12, 2017) (on file with author).

[154] *Id.*

[155] Professional Experiences, *supra* note 111.

[156] Memorandum of Request 506 Packet, Request for Repair and Furnishing of M22 Classrooms at Besmaya Range Complex (Feb. 4, 2018) (on file with author).

[157] *Id.*

[158] *See supra* note 124 and accompanying text.

[159] Memorandum of Request 801 Packet and Letter of Justification Regarding Procurement of Force Provider Kits at Q-West (July 13, 2018) (on file with author) [hereinafter MOR 801].

[160] *Id.*

[161] *Id.*

base to conduct air and fire support operations in support of ISF units retaking the city.[162] After the ISF liberated Mosul in July 2017, fire support operations out of Q-West declined. Because of its northern location, the CJTF wanted to turn Q-West into another BPC site and increase wide area security forces training for four ISF emergency response battalions (ERB) located in northern Iraq.[163] Wide area security forces training includes "fieldcraft, small arms training, section and platoon maneuver, checkpoint operations, cordon and search, communications, combat first aid, explosive threat awareness, CBRN defen[s]e, [and] ethics and law of armed conflict."[164] At the time, Q-West was experiencing a large increase of ISF units reassigned to the area due to a relocation of an ISF division headquarters and "large numbers of troops . . . from the Mosul area."[165] The CJTF intended to train an ISF battalion-size element, containing approximately 300 soldiers, during each training rotation.[166]

However, the site lacked a sufficient number of LSAs to support the desired training.[167] Q-West also lacked any existing infrastructure the CJTF could convert into LSAs.[168] Because of the CTEF limitations on construction, the CJTF had to consider alternative options. Instead of building the LSAs, they were forced to purchase Force Provider kits for the ISF during their training rotations.[169] A Force Provider kit is a series of large tents for billeting that also includes "ancillary equipment to enable sanitation . . . kitchen installations, refrigeration, laundry units, expeditionary showers, as well as latrines."[170] They are quick to assemble and are highly configurable. Each kit allows for the housing of 150 personnel, and the CJTF purchased two sets for Q-West in the summer of 2018.[171] Army regulations deem tents to be personal property items and not construction

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[162] *See* Chad Garland, *As Mosul Campaign Continues, Q West to 'Get Bigger, But It Won't Get Nicer'*, STARS & STRIPES (Mar. 24, 2017), https://www.stripes.com/news/as-mosul-campaign-continues-q-west-to-get-bigger-but-it-won-t-get-nicer-1.460388.
[163] MOR 801, *supra* note 159.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id. See also Force Provider Expeditionary (FPE)*, USAASC, https://asc.army.mil/web/portfolio-item/cs-css-force-provider-fp (last visited Aug. 31, 2020).
[171] *Id.*; MOR 801, *supra* note 159.

when used in this configuration, so the purchase was permissible using CTEF and was not subject to the $30 million annual cap.[172]

However, the design of Force Provider kits makes them ideal only for temporary environments,[173] and they are quite expensive. These kits cannot function as enduring LSAs, and the duration of their use is limited. Each kit costs approximately $2.5 million, and the CJTF estimated the shipping and ancillary costs to be approximately $750,000.[174] The total cost for this requirement was approximately $5.7 million.[175]

When compared to expeditionary construction projects, the costs of these temporary LSAs for a limited training audience is excessive. For example, the CJTF built an LSA on Camp Union III in Baghdad that was capable of housing approximately 100 personnel for an indefinite period at the total cost of $716,144.07.[176] If CTEF permitted greater flexibility regarding real property projects, the CJTF could have built multiple LSAs at a significantly reduced cost, and they could have used the remaining funds for other projects.

3. Baghdad Operations Center—Media Training Center

The fight against ISIS exists on multiple fronts. For example, one of the primary methods ISIS uses to recruit and spread its messaging is through social media.[177] The ISF's Baghdad Operations Center (BOC) tries to counter ISIS's social media presence through its own social media messaging and by directly attacking ISIS's access and capabilities on the internet.[178]

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[172] AR 420-1, *supra* note 83, glossary at 453. *See also* U.S. DEP'T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION, para. 1-6(h) (18 Mar. 2010).
[173] MOR 801, *supra* note 159.
[174] *Id.*
[175] *Id.*
[176] CJFLCC-OIR Joint Requirement Review Board (JRRB) Request for Construction of Union III Taylorsville Life Support Area (Jan. 17, 2018) (on file with author).
[177] *ISIS Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media Before the S. Comm. on Homeland Sec. & Governmental Affs.*, 114th Cong. 6–8 (2016) (statement of Michael Steinbach, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation).
[178] Meeting Minutes from CJFLCC-OIR Joint Facilities Working Group (JFWG) Regarding MOR-123A, Request for Construction of Ministry of Defense Media Training Center (July 1, 2017) (on file with author).

However, the ISF's capabilities to conduct such a mission are undeveloped.[179] The ISF has information operations (IO) units in many of its different entities. However, the GoI does not have a central narrative, and their IO efforts as of June 2017 were not doing well.[180] As a result, the BOC requested the CJTF construct a Media Training Center (MTC), to train ISF units with the technical expertise to conduct these missions.[181] The center required specialized and technical equipment to meet the need.[182] This also required a specialized facility.[183] The facility the BOC was using in the summer of 2017 was inadequate because it borrowed the space from another ISF unit and was at continual risk of repossession.[184]

The CJTF wanted to grant the request and intended to use an existing contract with British contractors to teach Iraqi officers the required IO skill set, as well as teach them how to train new officers themselves.[185] However, as discussed above, CTEF was not available to the CJTF to simply build an MTC. In order for the CJTF to build the ISF an MTC using CTEF, they were limited to repairing an existing facility. In this case, it was difficult to locate an adequate facility because the BOC did not have many assets.[186] The BOC also required a facility central to their operations in Baghdad.[187]

In addition, in order to properly train and conduct their IO mission across the ISF, they needed to train various officers from different organizations within the GoI.[188] This would provide the centralized messaging and a uniform skill set within each of the ISF's War Media Cells.[189] The political nature of the various groups required the BOC to be the owner of the facility.[190] Otherwise, once built, there was a danger of the true owner reclaiming the facility and commandeering the resources.[191]

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[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] Professional Experiences, *supra* note 111.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*

As a result of the inability to find such a specialized facility, the ISF, BOC, and CJTF considered multiple locations without success.[192] The CJFLCC-OIR Joint Facilities Working Group (JFWG) evaluated the initial request on 1 July 2017.[193] As of February 2018, the project had still not gone beyond the engineering evaluation phase.[194]

B. CJTF-OIR Cannot Support Groups Conducting Stability Operations

1. Consolidating Gains—Stability Operations

Stability operations are key to the current CTJF mission. The ISF have largely defeated the physical ISIS "caliphate" in Iraq.[195] Because of this, the ISF and the CJTF must focus more on pursuing the lasting defeat of ISIS. To prevent the resurgence of ISIS, the CJTF needs to be able to support groups with missions to secure the territory of Iraq and promote stability throughout the country. Both the language of CTEF and the DoD OGC interpretation of CTEF limit the CJTF regarding stability operations.

One example of these limitations is with requests to train and equip regional and local police forces.[196] Two general categories of local police training audiences exist in Iraq: "blue" police and "green" police.[197] "Blue" police are those local police forces with a traditional law and order mission for their assigned area.[198] "Green" police, on the other hand, are forces responsible for holding territory in Iraq against the resurgence of ISIS.[199] As the ISF push ISIS out of territory, these forces "secure liberated

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[192] *Id.*

[193] Meeting Minutes from CJFLCC-OIR Joint Facilities Working Group (JFWG) Regarding MOR-123A, Request for Construction of Ministry of Defense Media Training Center (July 1, 2017) (on file with author).

[194] Professional Experiences, *supra* note 111.

[195] *Coalition Shift*, *supra* note 7.

[196] These groups are distinguished from "hold forces," which are more directly responsible for holding newly won territory against the reintroduction of ISIS forces. Hold forces have a stronger nexus to the CTEF purpose and are eligible for support. An example of these forces are Emergency Response Battalions. MOR 440, Task Force Carabinieri Request for Procurement of Police and Riot Gear for the Training Audiences at Camp Dublin (Aug. 5, 2017) (on file with author) [hereinafter MOR 440].

[197] *Id.*

[198] *Id.*

[199] *Id. See also* DoD IG ROI-HOLD FORCE, *supra* note 29, at 4. "Green" police are also synonymous with "hold forces" or "wide area security forces."

areas and prevent ISIS from reestablishing an effective presence."[200] This also frees the ISF to continue fighting ISIS.

"Blue" police are important to regional stability. They are the local face of the GoI, and they give confidence to the local population in the GoI's ability to establish law and order.[201] "Blue" police are responsible for election security and crime enforcement.[202] However, these forces are currently ineligible for support because they are not directly "countering" ISIS and they do not have a direct "kinetic" effect.[203] The closest groups the CJTF has been able to support with CTEF are the green police hold forces. However, under the current paradigm, even these groups tenuously qualify for support.[204]

While the CJTF may not use CTEF to support the training or equipping of blue police, the fight against ISIS through stability operations would benefit from blue police training. For example, courses in crowd security and riot control would assist the GoI in providing regional stability and election security. The Camp Dublin BPC site is a prime example where the CJTF can leverage already existing trainers and infrastructure to train blue police.

2. Camp Dublin

For most of the OIR operation, Task Force Carabinieri has trained both "blue" and "green" police forces at the Camp Dublin BPC site.[205] The CJTF named the task force after Italy's national military police force, the Carabinieri Corps, because they were the primary coalition partner performing the training.[206] In November 2017, Task Force Carabinieri was renamed Police Task Force-Iraq "to reflect its growing multinational presence."[207] Included in the training audience are Iraq's Federal Police (FEDPOL), Energy Police, Highway Police, Federal Building Security, and local police forces.[208] The courses of instruction include Police

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[200] DoD IG ROI-HOLD FORCE, *supra* note 29, at 4.
[201] MOR 440, *supra* note 196.
[202] *Id.*
[203] *See* sources cited *supra* note 16.
[204] Consider the previously discussed DoD OGC limitation on CTEF support for requirements only intended to produce a "kinetic effect."
[205] DoD IG ROI-HOLD FORCE, *supra* note 29, at 7 (describing that CTEF was not available for the "blue" police training audience).
[206] *Id.*
[207] *Id.* at 5.
[208] MOR 440, *supra* note 196.

Advanced Training, Law and Order, and Counter-Improvised Explosive Device training.[209] The trainees at Camp Dublin fall primarily under Iraq's Ministry of the Interior (MoI).[210] These training audiences also vary in their primary functions in the fight against ISIS.

The FEDPOL, for example, is similar to a traditional military force and directly takes part in combat operations against ISIS.[211] Groups like the Energy Police and Federal Building Security focus primarily on protecting Iraq's infrastructure.[212] The ISF also organizes units like these into ERBs.[213] The GoI uses these ERBs as the "hold forces" to take the place of Iraqi Army units in liberated areas in order to secure territory taken from ISIS and allow the Army units to continue fighting. The ERBs primary focus is to hold this territory and prevent the resurgence of any enemy forces. They conduct urban operations within the security framework of the Iraqi Army and conduct joint operations.[214]

This varied combination of police training audiences creates funding issues when furnishing them with equipment purchased using CTEF. While Italy initially provided some equipment, the Task Force required additional resources to fully train and equip all of their intended courses of instruction.[215] However, only the "green" police qualify for CTEF assistance. This requires the CJTF to parse out which forces receiving the equipment are actually countering or preparing to counter ISIS.

In April 2017, the Carabinieri requested approximately $1.8 million in equipment for their training period beginning in June 2017.[216] This request passed the CJTF CTEF board, but CENTCOM denied the requirement in July 2017.[217] The reason for the denial primarily rested on the inclusion of various items not traditionally associated with warfighting.[218] For example, the request included crowd control shields, crowd control bags, riot gear, and batons.[219] This forced the Carabinieri to re-evaluate and re-submit their request, taking out any equipment

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[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*

associated with riot control training, and they submitted another request in August 2017. As of February 2018, the CJTF had not provided any equipment purchased using CTEF under this MOR to Camp Dublin.[220]

3. The DoD OGC Interprets CTEF Too Narrowly

The Office of the Secretary of Defense's (OSD) guidance on the use of CTEF is narrower than the plain language of the CTEF appropriation. The OSD's OGC interprets CTEF in such a way that the assistance must tie into a "kinetic" effect in relation to the defeat of ISIS.[221] While the OGC has not formalized this interpretation into a policy memorandum, it still has a substantial effect on CTEF requirements and CENTCOM's endorsement of those requirements. However, neither the CTEF appropriation, nor the section 1236 authorization to provide assistance to counter ISIS, contain any language regarding "kinetic" operations against ISIS.[222] Instead, the current version of the CTEF appropriation only limits support to "foreign security forces, irregular forces, groups, or individuals participating, or preparing to participate in activities to *counter* [ISIS], and their affiliates or associated groups."[223] Joint Doctrine does not define the term "counter."[224] The closest analogy in Joint Doctrine regarding countering ISIS is the term "counterterrorism." The *DOD Dictionary of Military and Associated Terms* defines "counterterrorism" as "[a]ctivities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals."[225] The dictionary defines the term "counter" in lay terminology as "to act in opposition to," to "oppose," "offset," or "nullify."[226] Using either of these definitions, the term "counter" can and should be broadly applied when

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[220] Professional Experiences, *supra* note 111.
[221] *See* sources cited *supra* note 16.
[222] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236, 128 Stat. 3292, 3558 (2014) (as amended).
[223] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019) (emphasis added).
[224] JOINT CHIEFS OF STAFF, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2020). *See also* 10 U.S.C. § 310(7).
[225] JOINT CHIEFS OF STAFF, *supra* note 224, at 53.
[226] *Counter*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/counter (last visited Aug. 31, 2020).

used in the CTEF context. Many different means and methods exist to counter ISIS that do not result in an immediate "kinetic" effect.

The OGC interpretation more strictly construes CTEF than Congressional intent regarding the fight against ISIS. In section 1233(d) of the FY19 NDAA, Congress states its intent explicitly.[227]

> It is the sense of the Congress that . . . a lasting defeat of ISIS is critical to maintaining a stable and tolerant Iraq in which all faiths, sects, and ethnicities are afforded equal protection and full integration into the Government and society of Iraq; and [] in support of counter-ISIS operations and in conjunction with the [GoI], the United States should continue to provide operational sustainment, as appropriate, to the [Peshmerga, so that they] can more effectively partner with the [ISF], the United States, and other international Coalition members *to consolidate gains, hold territory, and protect infrastructure from ISIS* and its affiliates in an effort to deal a lasting defeat to ISIS and prevent its reemergence in Iraq.[228]

Consolidating gains, holding territory, and protecting infrastructure from ISIS are all activities that do not traditionally result in a "kinetic" effect.

C. Reallocating Equipment

The separation of ITEF and STE into two separate funding sources and authorizations resulted in the funding compartmentalization of both efforts. The CJTF is responsible for both missions. However, when the CJTF purchases equipment with ITEF for use in Iraq, and the equipment later becomes excess or undesirable for that purpose, the CJTF may not redirect that equipment for use in Syria, where they could use it for training and equipping the VSO.[229]

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[227] John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1233(d), 132 Stat. 1636, 2039 (2018).
[228] *Id.* (emphasis added).
[229] *See* sources cited *supra* note 94. This issue will likely become moot with the withdrawal of most U.S. forces from Syria. Annie Karni & Thomas Gibbons-Neff, *200 U.S. Troops to Stay in Syria, White House Says*, N.Y. TIMES, Feb. 22, 2019, at A9.

The ITEF and CTEF appropriations do permit unneeded or returned equipment, purchased under those authorities, to be taken back into DoD stocks, but they do not permit its transfer to another purpose. The STE did not even allow excess equipment to be taken back into DoD stocks.[230] Until the FY19 DoDAA, neither program permitted the transfer of equipment between theaters.[231] However, the CJTF still may not transfer excess equipment, previously purchased under ITEF or CTEF for use in Iraq, to purposes in Syria. This became an obvious and counter-intuitive problem. The United States and ISF had stockpiles of unused and unneeded weapons and equipment purchased with ITEF and CTEF in Iraq and Kuwait.[232] Yet, the CJTF may not transfer this equipment to forces in Syria, where the CJTF needs it for the VSO, because of the restriction. Instead, the CJTF is left to procure new Syria requirements through the Defense Security Cooperation Agency (DSCA), or the contracting office. The ability to transfer excess weapons and equipment from Iraq to Syria would result in a quicker response to procuring MORs in Syria, a significant cost savings, and a reduction in the amount of resources used by the CJTF.

D. The Acquisition and Cross Servicing Agreement with Iraq

The DoD executed an Acquisition and Cross Servicing Agreement (ACSA) with the Iraqi Ministry of Defense in August 2014.[233] An ACSA is an agreement between the military forces of two nations for the purchase, or equal value exchange, of logistical support, supplies, and services (LSSS).[234] Using this authority, it is possible for the United States to provide multiple LSSS requirements to the Iraqi Ministry of Defense (MoD), to include "construction incident to base operations."[235] At first glance, the use of this ACSA could fill in where CTEF falls short.

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[230] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 9016, 128 Stat. 2130, 2301 (2014).

[231] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, § 9016, 132 Stat. 2981, 3045 (2018) (allowing the transfer of unused equipment purchased under the STE to be transferred for any CTEF purpose).

[232] Michele Gorman, *U.S. Army Lost Track of $1 Billion Worth of Weapons and Equipment: Report*, NEWSWEEK (May 24, 2017, 12:10 AM), https://www.newsweek.com/us-military-lost-track-1-billion-worth-weapons-and-equipment-report-614391.

[233] Memorandum of Acquisition and Cross Servicing Agreement Between the United States Department of Defense and the Iraqi Ministry of Defense (Aug. 2014) (on file with author).

[234] *See generally* 10 U.S.C. §§ 2341–2350.

[235] 10 U.S.C. § 2350(1).

However, neither military force has used this agreement with each other in the fight against ISIS since approximately 2015.[236] Instead, both sides appear to rely on the CTEF programs to support the ISF.

To use an ACSA transaction, the requesting party must reimburse the servicing party in one of several ways for the actual value of the items or services.[237] In short, unlike CTEF assistance, the GoI would have to pay for the cost of the requirement. In recent years, the GoI has experienced significant budget shortfalls. Oil exports account for almost 90% of Iraq's public-sector revenue.[238] Low oil prices, output limitations imposed by the Organization of the Petroleum Exporting Countries, and funding the ISF have significantly limited GoI resources.[239] This limitation on resources provides little incentive or ability for the GoI to pay for equipment and services they believe the United States could provide them without reimbursement under CTEF. In an effort to fulfill several MORs not otherwise eligible for CTEF, the CJFLCC leadership approached their ISF counterparts in early 2018 about using the ACSA.[240] However, the GoI and MoD have been reluctant to even identify who the currently authorized ACSA transaction authority is within the MoD.[241] As a result, the ACSA authority is not likely to fill requirement gaps in the near future without additional agreement between the DoD and the MoD.

V. Alternate Sources of Train and Equip and Comparative Appropriations

In order to analyze the CTEF appropriation's efficacy, it is necessary to explore alternate sources of support and to compare similar appropriations in other theaters.[242] This section looks at several of these relevant sources: The Office of Security Cooperation, Iraq (OSC-I), the Afghanistan Security

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[236] Professional Experiences, *supra* note 111.

[237] 10 U.S.C. § 2344.

[238] CHRISTOPHER M. BLANCHARD, CONG. RSCH. SERV., R45096, IRAQ: ISSUES IN THE 115TH CONGRESS 15 (2018).

[239] *Id.*

[240] Professional Experiences, *supra* note 111; Telephone Interview with Captain Carlos Pedraza, Fiscal L. Judge Advoc., CJTF-OIR (Jan. 15, 2019).

[241] *Id.*

[242] This article does not address the use of 10 U.S.C. § 333 (governing authority to build capacity of foreign security forces) as a potential gap filler for real property requirements because it is not available for that purpose. Because CTEF and its section 1236 authorization provide for *some* construction, repair, and renovation authority, CTEF is the more specific appropriation and any other appropriation is unavailable for that purpose. *See supra* note 240 and accompanying text.

Forces Fund (ASFF), and the North Atlantic Treaty Organization (NATO) Mission in Iraq.

A. The OSC-I

The DoS has the primary responsibility to establish policy and conduct foreign assistance on behalf of the U.S. Government.[243] This responsibility even exists during U.S. military operations.[244] Foreign assistance includes providing security assistance to a foreign nation.[245] Generally, security assistance falls under Title 22 funding authorities, enabling the DoS to train, equip, and assist foreign militaries through security assistance mechanisms like Foreign Military Sales (FMS),[246] Foreign Military Financing (FMF),[247] and International Military Education Training (IMET).[248]

The terms "security cooperation" and "security assistance" each have independent significance in the context of providing assistance to foreign countries. Security cooperation includes "[a]ll [DoD] interactions with foreign security establishments to build security relationships that promote specific [U.S.] security interests, develop allied and partner nation military and security capabilities for self-defense and multinational operations, and provide [U.S.] forces with peacetime and contingency access to allied and partner nations."[249] Security assistance is a subset of security cooperation referring to a "[g]roup of programs . . . by which the [U.S.] provides defense articles, military training, and other defense-related services by grant, lease, loan, credit, or cash sales in furtherance of national policies and objectives."[250]

Many of the Title 22 "security assistance" programs stem from DoS appropriations, and the DoS Office of Security Assistance manages them

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[243] The Foreign Assistance Act of 1961 created the authority for the Executive Branch to conduct foreign assistance on behalf of the United States. Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151) (2012)); *see also* Exec. Order No. 10973, 26 C.F.R. § 639 (1961) (delegating the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State).

[244] *See* The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

[245] JOINT CHIEFS OF STAFF, *supra* note 224.

[246] *See* 22 U.S.C. § 2761 (sales from stocks: allows for the FMS of items from current military stocks); *see also id.* § 2762 (procurement for cash sales: allows for the FMS of items through U.S. contracting mechanisms).

[247] 22 U.S.C. § 2763 (credit sales: allows for FMF utilizing U.S. funds with terms for repayment).

[248] *Id.* § 2347 (International Military Education and Training).

[249] JOINT CHIEFS OF STAFF, *supra* note 224*; see also* 10 U.S.C. § 301(7).

[250] JOINT CHIEFS OF STAFF, *supra* note 224.

under an individual Chief of Mission at the various U.S. embassies.[251] However, the DoD largely administers these programs through DSCA, and the definition includes DSCA as part of security cooperation.[252] The DSCA mission "is to advance U.S. national security and foreign policy interests by building the capacity of foreign security forces to respond to shared challenges."[253] The DSCA accomplishes this mission through various Security Cooperation Organizations[254] (SCOs) throughout the world.

One of these SCOs, based at the U.S. Embassy in Baghdad, is OSC-I. The plan for OSC-I began in February 2009 when President Barrack Obama announced his intent to withdraw all U.S. troops from Iraq by 31 December 2011, and his commitment to "pursuing sustained diplomacy to build a lasting strategic relationship between the two countries."[255] The intent in establishing the OSC-I was to facilitate the transfer of all security assistance responsibilities from the DoD to the DoS.[256] The resulting OSC-I responsibilities were immense, compared to other SCOs at the time, and Baghdad became one of the largest SCOs in the world.[257] Between 2011 and 2014, the OSC-I had primary responsibility for training and equipping the ISF.[258] The OSC-I administered FMS, Foreign Military Construction Services, Foreign Military Sales Credit, Leases, Military Assistance Program, IMET, and Drawdown.[259] During the administration of these programs, personnel at OSC-I were able to develop significant relationships with their Iraqi MoD and MoI counterparts.[260] The OSC-I personnel generally serve a minimum of twelve months in their office and have an opportunity to work closely with the MoD and MoI.[261]

After the U.S. military re-entered Iraq, the CJTF asserted control over the Iraq train and equip missions using ITEF (and later CTEF).[262] The

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[251] 22 U.S.C. §§ 2304(d)(2), 3927.
[252] 22 U.S.C. §§ 2304(d)(2), 3927.
[253] *Mission, Vision, and Values*, DEF. SEC. COOP. AGENCY, https://www.dsca.mil/about-us/mission-vison-values (last visited Aug 31, 2020).
[254] U.S. DEP'T OF DEF., INSTR. 5132.13, STAFFING OF SECURITY COOPERATION ORGANIZATIONS (SCOS) AND THE SELECTION AND TRAINING OF SECURITY COOPERATION PERSONNEL 15 (6 June 2017).
[255] DoD IG ROI-OSC-I, *supra* note 20, at 2.
[256] *Id.*
[257] *Id.* at app. D.
[258] Interview with Anthony C. Adolph, *supra* note 121.
[259] DoD IG ROI-OSC-I, *supra* note 20.
[260] Interview with Anthony C. Adolph, *supra* note 121.
[261] *Id.*
[262] *Id.*

OSC-I retained responsibility for FMS cases and long term planning with the GoI.[263] However, their budget authority diminished significantly year after year.[264] The OSC-I also acted as the liaison between the GoI, MoD, DoS, and DoD. Congress intentionally split these functions between the CJTF and OSC-I.[265] There was no intention for U.S. troops to remain in Iraq for an extended period, and OIR is an international coalition mission.[266] The United States preference was for other nations to perform many of these functions.[267]

B. Afghanistan Security Forces Fund

Compared to CTEF, the Afghanistan Security Forces Fund (ASFF)[268] has broader authority for commanders to provide security assistance. Congress recently renewed ASFF through 30 September 2021.[269] The ASFF allows the commander of the Combined Security Transition Command, Afghanistan (CSTC-A) to provide assistance to the "security forces of the Ministry of Defense and the Ministry of the Interior of the Government of the Islamic Republic of Afghanistan."[270] This includes the Afghan National Army, the Afghan National Police, and even the Afghan Local Police.[271] The CSTC-A may use ASFF to provide "equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funding."[272]

The purpose language in CTEF and ASFF differs significantly. The ASFF permits construction without further restriction where CTEF does not.[273] Like CTEF, ASFF limits its support to membership in certain

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[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).
[269] *Id.*
[270] John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, sec. 1223(b), § 1513(b)(1), 132 Stat. 1636, 2028 (2018).
[271] U.S. DEP'T OF DEF., ENHANCING SECURITY AND STABILITY IN AFGHANISTAN 76 (2019). *See also* Combined Security Transition Command-Afghanistan (CSTC-A), Standard Operating Procedure for the CSTC-A Planning, Programming, Budgeting, and Execution for the Afghanistan Security Forces Fund, para. 5(b) (Mar. 22, 2020) (on file with author).
[272] National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1513(b)(2), 122 Stat. 3, 428 (2008).
[273] *Id.*

security forces.[274] However, CTEF further limits its support to those groups who are also actively countering ISIS or training to counter ISIS.[275] The ASFF does not have similar restrictive language regarding the Taliban, or any other forces the Afghan security forces are fighting. This discrepancy is likely due to a difference in overall mission. While the mission of the CJTF is the defeat of ISIS, the mission of the CSTC-A is to build the infrastructure of Afghanistan and transfer all security responsibilities to the Afghan security forces.[276] Also, the United States leads the Coalition's mission in Iraq, while NATO leads the Afghanistan mission.[277]

Another key difference in the scope of ASFF is Congress's inclusion of "funding" as an approved source of support in the appropriation.[278] Using this language, the CSTC-A can use ASFF to give money directly to security forces of the Government of the Islamic Republic of Afghanistan for a broad range of purposes. However, the biggest difference between CTEF and ASFF is the size of the appropriations. Congress appropriated just over $4.9 billion for ASFF in the FY19 DoD Appropriations Act.[279] By comparison, Congress appropriated $1.35 billion for CTEF at the same time.[280] In short, Congress provides more money, wider authorities, and broader discretion to the security force train and equip mission fighting terrorism in Afghanistan, than that of Iraq and Syria.

C. The NATO Mission Iraq

In July 2018, NATO launched a training and capacity-building mission aimed at Iraq's security forces and defense institutions.[281] The NATO mission is a non-combat role developed in coordination with the CJTF and

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[274] *Id.* ("Assistance provided under this section may include the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, construction, and funds.")

[275] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

[276] *Mission*, NATO RESOLUTE SUPPORT, https://rs.nato.int/rsm/about-us/mission (last visited Aug. 31, 2020).

[277] *Id.*

[278] National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1513, 122 Stat. 3, 428 (2008).

[279] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018).

[280] *Id.*

[281] *Operations and Missions: Past and Present*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_52060.htm (last updated June 4, 2020, 3:47 PM).

the GoI.[282] The North Atlantic Treaty Organization sends "several hundred NATO-trainers" with a goal of helping the ISF "secure their country and the wider region against terrorism and prevent the re-emergence of ISIS."[283] Their focus is on "train[ing] the trainer" in counter-IED, civil-military planning, armored vehicle maintenance, military medicine, and setting up military schools.[284] This NATO mission was up and running in October 2018.[285]

The NATO Mission Iraq will be valuable to long-term stability operations in Iraq. However, the scope of the mission and resources appears to be small in comparison to the total resources and effort needed to achieve a lasting defeat of ISIS. The mission will likely supplement the Coalition's efforts, rather than replace them.

VI. The Solution

The ISF and Coalition fight against ISIS is at a fragile crossroads. The ISF still needs CJTF support to fully defeat ISIS, and stability operations are key to that goal. However, the United States has a history of "forgetting that stabilization is a vital function that must be performed across the range of military operations."[286] Doctrinally, stability operations are a "core U.S. military mission," on par with combat operations.[287] As traditional combat operations against ISIS wind down, the DoD expects ISIS to transition to asymmetric tactics designed to "prevent GoI consolidation of authority in the liberated areas."[288] Currently, the GoI still requires combat operations by the ISF, including the Peshmerga, to set conditions for the next phase of stability operations.[289] The ISF are fighting well, but they still "rely upon significant coalition enablers to achieve tactical overmatch against ISIS" and continued efforts to train and equip the ISF are required for the GoI to "secure its people and territory from ISIS and

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[282] *Id.*
[283] *Id.*
[284] Press Release, U.S. Cent. Command, *supra* note 38.
[285] *NATO Mission Iraq*, N. ATL. TREATY ORG., https://www.nato.int/cps/en/natohq/topics_166936.htm (last updated Aug. 20, 2020, 5:10 PM).
[286] ROBINSON ET AL., *supra* note 19, at x (emphasis removed).
[287] DODI 3000.05, *supra* note 18, para. 4.a.
[288] OFF. OF THE SEC'Y OF DEF., U.S. DEP'T OF DEF., JUSTIFICATION FOR FY 2019 OVERSEAS CONTINGENCY OPERATIONS (OCO): COUNTER-ISLAMIC STATE OF IRAQ AND SYRIA (ISIS) TRAIN AND EQUIP FUND (CTEF) 4 (2018).
[289] *Id.*

deny ISIS the opportunity to regenerate."[290] To successfully achieve this end, Congress and the DoD must make several changes.[291]

A. Broaden CTEF's Purpose Language

The combat mission against ISIS in Iraq is temporary and not intended to last longer than required to obtain a lasting defeat of ISIS. However, a stable and secure territory in Iraq is vital to prevent the resurgence of ISIS. Congress should amend the language of the CTEF appropriation and the section 1236 authorization to match the current fight against ISIS.

1. Broaden Construction, Repair, and Renovation Authority

Congress should amend the CTEF appropriation to allow the CJTF broad authority to conduct minor military construction for qualifying groups, like the ISF. Currently, the FY20 CTEF appropriation states, "[t]hat such funds shall be available to the Secretary of Defense in coordination with the Secretary of State, to provide assistance, including training; equipment; logistics support, supplies, and services; stipends; infrastructure repair and renovation; construction for facility fortification and humane treatment; and sustainment . . . ."[292] Congress should strike the words "**construction for facility fortification and humane treatment**" and insert the words "**small-scale construction**."[293] The CTEF already includes purpose language limiting its use for groups countering or preparing to counter ISIS. The current language unnecessarily adds limitations to construction projects by requiring them to be for "facility fortification" or "humane treatment." The CTEF appropriation's original purpose language is sufficient. Making this proposed change would broaden the CJTF's ability to respond to counter-ISIS requirements, as originally intended by the appropriation, and still minimize the potential for financial waste by limiting projects to small-scale construction. Practitioners could then reference section 1236 to determine what constitutes "small-scale construction."

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[290] *Id.*

[291] Various vetting requirements for supported groups and individuals are already part of the MOR process (CTEF (terrorist associations and the Government of Iran) and Leahy (human rights violations)). This article does not advocate for the removal or amendment of any currently required vetting processes.

[292] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317, 2372 (2019).

[293] All recommended legislative changes are noted in bold typeface.

Section 1236 currently permits "infrastructure repair and renovation, small-scale construction of temporary facilities necessary to meet urgent operational or force protection requirements with a cost less than $4,000,000."[294] Section 1236(m) states, "[t]he aggregate amount of construction, repair, and renovation projects carried out under this [authority] in any fiscal year may not exceed $30,000,000."[295] Congress should strike section 1236(m) and eliminate the aggregate annual cap. An annual cap unnecessarily forces the command to make value determinations on projects and rank them against each other. It also forces the command to be too cautious in validating projects. If a highly needed unforeseen requirement arises in the latter part of the year, it might be sacrificed at the expense of a lower priority requirement earlier in the year that exceeded the cap.

Making these changes in language would help the CJTF meet the current need on the ground by adding flexibility. It would also allow the CJTF the ability to react to needs in a timely manner, without having to rely on the lengthy budget request and notification process. For example, all of the projects referenced above at the BRC would qualify for funding[296] under the recommended language without going against an artificial annual cap, and all without exceeding the $1 million threshold for notification to Congress.[297] Making these small amendments will align CTEF with the current mission and empower CJTF commanders by giving them the flexibility to match the ever-changing OIR mission.

2. Broaden CTEF Eligibility

In order to achieve its goal, the CJTF needs the ability to train and equip groups that are not actively engaged in "kinetic" or "counter" ISIS operations. For example, local police forces are vital to combating terrorism at a local level and securing the territory of Iraq. With the understanding that CTEF is available in several different countries, Congress should amend the CTEF appropriation to include the following definition of the term "Counter-ISIS":

A foreign security force, irregular force, group, or individual is participating, or preparing to participate

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[294] National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1222(c)(1), 131 Stat. 1283, 1652 (2017).
[295] *Id.* § 1236(m).
[296] All are under $4 million.
[297] § 1222(c)(2), 131 Stat. at 1652.

> **in activities to counter the Islamic State of Iraq and Syria (ISIS), and their affiliated or associated groups when:**
>
> **(1) Their mission is to defeat ISIS through combat operations,**
>
> **(2) Their mission is to prevent the resurgence of ISIS in an area affected by ISIS, or**
>
> **(3) Their mission is to promote stability in an area affected by ISIS through the implementation of legitimate and traditional governmental functions.**

"Legitimate functions" are those functions legally chosen by the governed population, including police activities. "Traditional functions" are those recognized by the international community as being a well-established and required function of a democratically elected government (e.g., law and order, elections, utilities, education).

The section 1236 authorization should retain most of its original language regarding groups eligible for support, with several minor changes:

> . . . to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces, with a national security mission, through **December 31, 202X**, for the following purposes:
>
> (1) Defending Iraq, its people, allies, and partner nations from the threat posed by the Islamic State of Iraq and Syria (ISIS) **and their affiliated or associated groups**, **or**
>
> (2) Securing the territory of Iraq **in areas affected by ISIS**.

Making these amendments will allow the CJTF to fully support the ISF and the GoI as their fight against ISIS continues and stability operations become more imperative. This would permit CTEF funding for many of the stability and social media missions Iraq currently requires.

B. The DoD OGC Should Broaden Its Current Interpretation of CTEF

The current OGC interpretation of CTEF and section 1236 is unnecessarily strict. The OGC and OSD should issue formal guidance to fiscal law practitioners in the field regarding its interpretation of these authorities. Judge advocates, logisticians, comptrollers, and commanders are accustomed to limitations from higher commands. However, higher commands generally formalize these limitations in a written order, delegation, or guidance. In this case, verbal guidance has been issued by OGC to CENTCOM, and then from CENTCOM to the CJTF Office of the Staff Judge Advocate.[298] While not prohibited, verbal direction that seems to contradict the plain language of the written Congressional appropriation and authorization creates multiple issues in practice. Commanders rely on the advice and guidance of their staff sections. When the judge advocate cannot produce a written instruction regarding a significant limiting factor from higher command, the commander loses confidence in his or her advisor. At a minimum, this frustration causes unnecessary staffing, consternation, and a lack of ability to interpret the instruction. Written directions cause less confusion and are more likely to provide clear guidance regarding the proposed course of action.

Here, OGC's interpretation of "counter-ISIS" activities requires an MOR to result in some "kinetic" effect. As discussed previously, the OSD and OGC should interpret CTEF and section 1236 to match the plain language of the legislation and intent of Congress. Stability operations designed to prevent the resurgence of ISIS can and should reasonably be included in the definition of counter-ISIS activities. The OCG should then issue this opinion in written guidance so units and fiscal law practitioners can better empower their commanders.

C. Incorporate Previously Purchased ITEF and STE Equipment into CTEF

Congress should amend CTEF to allow the "re-purposing" of undistributed equipment purchased under ITEF to be reallocated under current CTEF programs. This would permit the transfer of equipment purchased under ITEF from Iraq to Syria and legitimize the distribution of previously stockpiled equipment.

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[298] *See* sources cited *supra* note 16.

Currently, CTEF allows the DoD to take unused or returned ITEF and CTEF purchased equipment into DoD stocks.[299] Congress also recently allowed the transfer of unused equipment from Syria to Iraq.[300] However, CTEF still does not permit the transfer of unused equipment from Iraq to Syria.[301] Congress should amend CTEF by adding the following language:

> **That equipment procured using funds provided under this heading, or under the headings, "Iraq Train and Equip Fund," or "Counterterrorism Partnership Fund" in prior Acts, under the authority of either section 1209 or 1236 of the Fiscal Year 2015 National Defense Authorization Act, and not yet transferred to security forces, irregular forces, or groups participating, or preparing to participate in activities to counter the Islamic State of Iraq and Syria, may be redirected for use in any other authorized purpose under section 1209 or 1236 of the Fiscal Year 2015 National Defense Authorization Act, when determined by the Secretary to no longer be required for transfer to such forces or groups and upon written notification to the congressional defense committees.**

Adding this language to CTEF would permit the CJTF to transfer unused equipment purchased under ITEF for use in Syria. It would also allow the CJTF to transfer unused equipment purchased under STE for use in Iraq.

D. Improve the Process

1. Transfer Iraq CTEF Responsibility to OSC-I

The CJTF currently has authority over the train and equip mission for the ISF. Once CENTCOM determines the CJTF and ISF have completed the first phase of the Coalition mission and defeated the physical ISIS caliphate, the authority to use CTEF should move from the CJTF to OSC-I.[302] The OSC-I should also remain as the enduring DoD security

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[299] Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 3037 (2018).
[300] *Id.* § 9016.
[301] *Id.*
[302] The 2018 U.S. National Defense Strategy states the physical ISIS caliphate has been defeated and the U.S. is in a period of consolidating its gains in Iraq. U.S. DEP'T OF DEF.,

cooperation presence in Iraq until the GoI achieves regional stability. The OSC-I is better suited to handle long-term stability operations and security assistance in Iraq for two reasons.

First, security assistance is a DoS responsibility. The CTEF appropriation and section 1236 are a security assistance program.[303] According to Joint Doctrine, the DoS is responsible for security assistance programs and the DSCA manages the programs.[304] Under DSCA, the OSC-I already plans for long-term security cooperation with the GoI. Taking on short-term assistance planning using CTEF is already in line with its current functions. Based on the FY19 NDAA regarding the OSC-I, Congress also intends the DoS to regain its traditional role of security assistance in Iraq, as early as 2020.[305] It appears from this language, OSC-I's focus is on eventually shifting the security assistance mission back to the DoS, where it is appropriate. The OSC-I is also already nested within the DoS and the Chief of Mission at the U.S. Embassy in Iraq.

Second, the OSC-I is better suited to determine what effect particular types of security assistance will have during a period of stability operations and ensure they are in line with U.S. national interests. Moreover, they

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SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf. However, from an operational perspective this is not the case yet. The CJTF is still engaged in daily operations supporting the ISF in combat operations against ISIS pockets in Iraq using A3E, joint fires, intelligence, aerial surveillance, training and equipping. David Vergun, *Task Force Commander: ISIS Forces Degraded from Caliphate to Caves*, U.S. DEP'T OF DEF. (Dec. 11, 2018), https://dod.defense.gov/News/Article/Article/1710543/task-force-commander-isis-forces-degraded-from-caliphate-to-caves. For example, in October 2018, ISF forces began Operation Last Warning to clear pockets of ISIS forces from the desert around the Anbar province. C. Todd Lopez, *5 Things to Know About Operations in Iraq*, U.S. DEP'T OF DEF. (Dec. 11, 2018), https://www.defense.gov/explore/story/Article/1710650/5-things-to-know-about-operations-in-iraq. Also, the FEDPOL are still "conducting large-scale clearance operations in Hawijah." *Id.*

[303] JOINT CHIEFS OF STAFF, *supra* note 224.

[304] 22 U.S.C. §§ 2304(d)(2), 3927.

[305] Section 1235(d)(1) of the FY19 NDAA requires the Secretary of Defense to submit a report to Congress regarding the OSC-I. John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019, Pub. L. No. 115-232, § 1235(d)(1), 132 Stat. 1636, 2041 (2018). The NDAA requires the report to include "the enduring planned size and missions of the [OSC-I] after the cessation of major combat operations against [ISIS, a] description of the relationship between [OSC-I] and any planned enduring presence of other United States forces in Iraq[, and a] plan and timeline for the normalization of [OSC-I] to conform to other offices of security cooperation, including the transition of funding from the [DoD] to the [DoS] by the beginning of fiscal year 2020." *Id.* § 1235(d)(2)(A)–(D).

have had responsibility for this function in the recent past. Their planning horizon looks beyond three years, and longer-term stability in Iraq is the ultimate goal. Also, OSC-I and the DoS are better able to partner with Iraqi MoI because the DoD is generally limited to security cooperation engagements with the MoD.[306] Long term stability train and equip missions will need to focus more and more on local police training and law and order courses. Transferring CTEF authority and administration responsibility would require additional manpower resources within OSC-I. Both Congress and the DoD should allocate appropriate resources to the OSC-I with this in mind.

2. Enable the ACSA

The ACSA process is potentially a very useful tool to fulfill ISF capability gaps when the CJTF cannot use CTEF. United States Central Command should reengage the GoI and MoD leadership to standardize the use of the ACSA under certain conditions. While the Iraqis may not have excess funds to pay for ACSA transactions, they do have other resources they can use to pay for ACSA support. The supported party in an Iraq ACSA transaction can pay for the requirement in three ways. The supported entity can pay in cash, do an equal value exchange, or replace in kind.[307] In this case, the equal-value-exchange option is underused. Here, the MoD can use the resources they do have—manpower—in exchange for the support. For example, the MoD could agree to provide a certain amount of perimeter security for a set period. The value of this service should be easily quantifiable by any contracting office.

VII. Conclusion

The continued "threat of ISIS attacks remains, and the Iraqi Security Forces continue to aggressively pursue these remnants where they are hiding."[308] Much work is left to be done, lest we repeat the mistakes of our past by leaving before the fight is fully won. To ensure the lasting defeat of ISIS, CTEF requires change. Congress must amend CTEF to

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[306] Interview with Anthony C. Adolph, *supra* note 121.

[307] Memorandum of Acquisition and Cross Servicing Agreement Between the United States Department of Defense and the Iraqi Ministry of Defense (Aug. 2014) (on file with author).

[308] Colonel Jonathan Byrom, *Joint Operations Command-Iraq Briefing*, U.S. DEP'T OF DEF., (Dec. 11, 2018), https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/1710791/joint-operations-command-iraq-briefing.

support the current fight, one that includes stability operations designed to combat the resurgence of ISIS. Until and unless that happens, the DoD OGC should loosen its restrictive interpretation on "counter-ISIS" activities. It should remove its requirement for "kinetic" effects and include activities designed to prevent the return of ISIS. Forsaking all other recommendations, this singular act has the potential to make the greatest, most meaningful, and immediate impact on the fight in OIR.

These recommended actions will give OIR commanders the flexibility and resources to support the GoI in the current fight against ISIS, as well as the fragile time of transition found in stability operations. The continued use of CTEF after implementing the proposed changes is the most effective, efficient, and responsible way to finally defeat ISIS and permanently prevent it from returning. United States interests are also critical in this region. If the United States does not support the efforts for regional stability in Iraq, multiple other bad actors are in the area, ready to destabilize the region and set conditions for ISIS, or the next iteration of ISIS, to return.[309]

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[309] Seth J. Frantzman, *Iranian-Backed Militias Playing Key Role In Anbar Against ISIS*, JERUSALEM POST (Apr. 26, 2020, 4:31 PM), https://www.jpost.com/middle-east/iranian-backed-militias-playing-key-role-in-anbar-against-isis-625925; Jennifer Griffin & Vandana Rambaran, *Rocket Fire Hits Base in Iraq Housing US Troops, Killing 2 Americans, 1 Briton, Military Says*, FOX NEWS, https://www.foxnews.com/world/rocket-fire-hits-base-in-iraq-housing-us-troops-killing-2-americans-1-briton-military-says (last updated Mar. 12, 2020); Devan Cole, *Two US Service Members Killed in Iraq*, CNN, https://www.cnn.com/2020/03/09/politics/us-service-member-killed-iraq-isis/index.html (last updated Mar. 9, 2020, 6:58 PM); Russlan Mamedov, AL-MONITOR, *In Moscow, Iraqi Foreign Minister Talks 'Strategic Cooperation' with Russia* (Feb. 4, 2019), https://www.al-monitor.com/pulse/originals/2019/02/in-moscow-iraqi-foreign-minister-is-talking-strategic-cooperatio.html.

EXERCISING JURISDICTION AT THE EDGE—WHAT HAPPENS NEXT? AN ANALYSIS OF INTERNATIONAL CRIMINAL COURT SUBSTANTIVE LAW AS APPLIED TO NON-PARTY STATE NATIONALS

MAJOR KEVIN M. JUNIUS*

The Charter by which this Tribunal has its being, embodies certain legal concepts which are inseparable from its jurisdiction and which must govern its decision. . . . International law is not capable of development by the normal processes of legislation, for there is no continuing international legislative authority.[1]

I. Introduction

On 10 December 2002, an Afghan man "known only as Dilawar, was hauled from his cell at the detention center in Bagram, Afghanistan" where he died after being repeatedly struck during his final interrogation by U.S. Army Soldiers.[2] From January to May 2010, 2d Infantry Division Soldiers murdered Afghan civilians on three separate occasions, covering their

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* Judge Advocate, United States Army. Presently assigned as Group Judge Advocate, 5th Special Forces Group (Airborne), Fort Campbell, Kentucky. LL.M., 2019, Military Law with National Security Law Concentration, The Judge Advocate General's Legal Center and School. J.D., 2009, University of St. Thomas School of Law; B.A., 2005, University of Wisconsin-Milwaukee. Previous assignments include Chief of Administrative Law, Stuttgart Law Center, 21st Theater Sustainment Command, Stuttgart, Germany, 2016–2018; Battalion Judge Advocate, 3d Battalion, 10th Special Forces Group (Airborne), Fort Carson, Colorado, and Special Operations Command Forward-Central Africa, Entebbe, Uganda, 2014–2016; Trial Counsel, 3d Brigade Combat Team, 82d Airborne Division, Fort Bragg, North Carolina, 2012–2014; Operational Law Attorney, Headquarters, 82d Airborne Division, Fort Bragg, North Carolina, and Regional Command-South, Kandahar Airfield, Afghanistan, 2011–2012; Legal Assistance Attorney, Headquarters, 82d Airborne Division, Fort Bragg, North Carolina, 2010–2011. Member of the bar of Minnesota, the United States Army Court of Criminal Appeals, and the Supreme Court of the United States. This paper was submitted in partial completion of the Master of Laws requirements of the 67th Judge Advocate Officer Graduate Course.

[1] Robert H. Jackson, Chief of Couns. for the U.S., Opening Statement Before the International Military Tribunal (Nov. 21, 1945), https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal.

[2] Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES (May 20, 2005), https://www.nytimes.com/2005/05/20/world/asia/in-us-report-brutal-details-of-2-afghan-inmates-deaths.html.

crimes by planting weapons and manufacturing allied false narratives.[3] Two years later, while deployed to Kandahar, Afghanistan, Staff Sergeant (SSG) Robert Bales left Camp Belambay and murdered sixteen Afghan civilians in the early morning hours.[4] As the United States exercised jurisdiction over these Soldiers, there was little question as to what substantive law applied to prosecuting the above war crimes.[5] However, the issue of what substantive law would apply if the International Criminal Court (ICC) exercised jurisdiction is less clear, as the above individuals are nationals of a state not party to the Rome Statute of the ICC (Rome Statute).

For instance, on 5 March 2020, the Appeals Chamber of the ICC approved a 2017 request from the Prosecutor of the ICC to initiate an investigation

> in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties [to the Rome Statute] in the period since 1 July 2002.[6]

While the Prosecutor of the ICC reports a reasonable basis to believe crimes were committed by the Taliban, members of the Haqqani Network, and Afghan forces, the report also finds such a basis for crimes alleged to

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[3] Mark Boal, *The Kill Team: How U.S. Soldiers in Afghanistan Murdered Innocent Civilians*, ROLLING STONE (Mar. 28, 2011, 2:00 AM), https://www.rollingstone.com/politics/politics-news/the-kill-team-how-u-s-soldiers-in-afghanistan-murdered-innocent-civilians-169793.

[4] Peter Finn, *Staff Sgt. Robert Bales Admits to Killing 16 Afghans*, WASH. POST (June 5, 2013), https://www.washingtonpost.com/world/national-security/staff-sgt-robert-bales-admits-to-killing-16-afghans/2013/06/05/31ea3406-ce29-11e2-8845-d970ccb04497_story.html.

[5] *Id. See* Daniel Schorn, *The Court-Martial of Willie Brand*, CBS NEWS (Mar. 2, 2006), https://www.cbsnews.com/news/the-court-martial-of-willie-brand; *see also* Boal, *supra* note 3.

[6] Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_00828.pdf.

have been committed by "members of the US armed forces . . . and members of the [Central Intelligence Agency (CIA)]."[7]

Though there has been much debate regarding whether the ICC could subject non-party state nationals to its jurisdiction, and the allied implications of such action, the question of what substantive law would apply in such a scenario remains.[8] This question is apt as, while the Rome Statute[9] generally mirrors customary international law (CIL), it fails to do so completely. Instead, the Rome Statute overreaches the bounds of CIL and unlawfully purports to impose new obligations on non-party states by applying those overreaching portions of the Rome Statute to those non-party states.

Additionally, the mechanisms by which the ICC purports to assert jurisdiction over non-party state nationals infringe upon fundamental fairness concerns—specifically, notice of the applicable substantive law. Furthermore, party states possess the ability to increase the Rome Statute's overreach of CIL by amending and defining additional substantive crimes within the ICC's core crimes[10] of genocide, crimes against humanity, war crimes, and the crime of aggression. This article argues that if the ICC asserts jurisdiction over non-party state nationals, it must limit the substantive law to those portions of the Rome Statute that constitute CIL or are consistent with applicable non-party state treaty obligations.

Part II of this article provides background on the United States' relationship with the ICC and details the mechanisms by which the ICC purports to exercise jurisdiction over non-party state nationals. Part III

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[7] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 241 (2017), https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf.

[8] *Compare* Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNAT'L L. 371 (2016) (defining the limitations of the ICC's jurisdiction and dangers associated with its expansion) *with* Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the* Nemo Dat Quod Non Habet *Doctrine—A Reply to Michael Newton*, 49 VAND. J. TRANSNAT'L L. 443 (2016) (arguing in response that robust ICC jurisdiction fosters a system of accountability). *See also* Jay Alan Sekulow & Robert Weston Ash, *An Unlawful Overreach: Trying Nationals of Non-Consenting, Non-Party States Before the International Criminal Court*, 26 FLA. J. INT'L L. 1 (2014) (asserting that the ICC's jurisdictional reach is unlawful under the Rome Statute).

[9] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[10] *Id.* art. 5(1). Article 121 of the Rome Statute sets forth amendment procedures. *Id.* art. 121.

identifies portions of the Rome Statute that overreach the limits of CIL and details party states' ability to increase such overreach via legislation. Part IV details the implications of applying the entire body of crimes available under the Rome Statute when trying non-party state nationals. Specifically, this part addresses how such overreaches constitute an unlawful attempt to impose new obligations on non-party states and result in non-party states' inability to acquire notice of the applicable law at the time of alleged violations. Ultimately, the article will detail why, when prosecuting non-party state nationals, international law requires the ICC to apply only those portions of the Rome State that also constitute CIL.

II. Introducing Uncertainty: ICC Mechanisms of Jurisdiction Over Non-Party State Nationals

Despite the United States' antagonistic relationship with the ICC,[11] as ultimately detailed by the United States' decision not to become party to the Rome Statute,[12] the ICC asserts the ability to exercise jurisdiction over U.S. citizens and nationals of other non-party states. While the question of whether the ICC can exercise jurisdiction over a non-party state is not the focus of this paper, an abbreviated understanding of the proposition is required for the ensuing analysis and argument; these arguments stem from the mechanisms the ICC purports to possess in exercising jurisdiction over non-party state nationals. The ICC asserts the ability to exercise jurisdiction over non-party state nationals via three mechanisms: territorial jurisdiction, referral by the United Nations Security Council (UNSC), and ad hoc consent.

A. Mechanism One: Territorial Jurisdiction

First, the Rome Statute maintains the ICC can assert jurisdiction over non-party state nationals when non-party state nationals within the territory of a party state commit a crime enumerated in article 5 of the Rome Statute.[13] As an example, the Prosecutor of the ICC has concluded that pursuant to Afghanistan having "deposited its instrument of

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[11] *E.g.*, Owen Bowcott et al., *John Bolton Threatens War Crimes Court with Sanctions in Virulent Attack*, THE GUARDIAN (Sept. 10, 2018, 2:49 PM), https://www.theguardian.com/us-news/2018/sep/10/john-bolton-castigate-icc-washington-speech.

[12] Rome Statute of the International Criminal Court 3 & 15 n.12 (July 17, 1998), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf (showing the that the United States has only signed the Rome Statute and explaining its "intention not to become a party").

[13] Rome Statute, *supra* note 9, art. 12(2)(a).

ratification to the Rome Statute on 10 February 2003[, t]he ICC . . . has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards."[14] Consequently, and as an example, the Prosecutor of the ICC purports to possess the ability to exercise jurisdiction over U.S. Armed Forces if such crimes were committed in Afghanistan during the pertinent time frame.[15] The ICC maintains such jurisdiction despite both the unsettled nature of the claim[16] and presence of U.S.-Afghan bilateral agreements prohibiting the transfer of "members of the force and of the civilian component"[17] to the ICC. As such, in the event the ICC exercises jurisdiction over members of the U.S. Armed Forces, CIA, or other non-party state nationals alleged to have committed crimes in violation of the Rome Statute while "on the territory of Afghanistan" pursuant to this mechanism,[18] this article argues the substantive law applied should be limited to those portions of the Rome Statute that also constitute CIL.

B. Mechanism Two: UNSC Referral

Alternatively, the ICC can exercise jurisdiction over non-party state nationals pursuant to article 13(b) of the Rome Statute in "[a] situation in which one or more [crimes referred to in article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations[.]"[19] The ICC first exercised jurisdiction pursuant to this mechanism when the UNSC referred President Omar Al Bashir's involvement in the Sudan crisis to the ICC.[20] As the United States is a permanent member of the UNSC,[21] and thus able to exercise an unconditional veto of any substantive resolution before it, a U.S. citizen cannot be subjected to ICC jurisdiction without the

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[14] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 76 (2014), https://www.icc-cpi.int/iccdocs/otp/otp-pre-exam-2014.pdf [hereinafter 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES].

[15] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., *supra* note 7.

[16] *See, e.g.*, sources cited *supra* note 8.

[17] Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 13, Sept. 20, 2014, T.I.A.S. No 15-101, https://www.state.gov/wp-content/uploads/2019/02/15-101-Afghanistan-Defense-Cooperation.pdf.

[18] 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 14.

[19] Rome Statute, *supra* note 9, art. 13(b).

[20] Sascha Dominik Dov Bachmann & Eda Luke Nwibo, *Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC Within the African Union: Opportunities and Challenges*, 43 BROOK. J. INT'L L. 457, 474 n.84 (2018).

[21] *Current Members*, UNITED NATIONS SEC. COUNCIL, https://www.un.org/securitycouncil/content/current-members (last visited Aug. 21, 2020).

United States' consent, though the United States could abstain from voting on such a measure.[22] However, this is not the case for states lacking UNSC veto power. As such, this mechanism creates the potential for an inequitable exercise of jurisdiction, and allied application of substantive law, between states possessing UNSC veto power and those states without such power. More importantly, this mechanism poses the risk of implicating issues of fundamental fairness—specifically, notice of the applicable substantive law. As a result, and among further reasons detailed in Part IV, this article argues that in such a circumstance the ICC should apply only those portions of the Rome Statute that also constitute CIL.

C. Mechanism Three: Ad Hoc Consent

Finally, the ICC purports to possess the ability to exercise jurisdiction over non-party state nationals when non-party states consent to such jurisdiction.[23] Considering the United States' controversial relationship with the ICC,[24] it is unlikely the ICC could exercise jurisdiction over a U.S. national pursuant to U.S. consent.[25] But what about subjecting non-party state nationals to ICC jurisdiction pursuant to the consent of another non-party state? While Rome Statute parties are limited to states, as detailed by the Office of the Prosecutor of the ICC's rejection of Palestine's 2009 attempted ad hoc submission to ICC jurisdiction,[26] the ICC maintains the ability to exercise jurisdiction over non-party state nationals pursuant to another non-party state's consent.

This occurs through article 11 of the Rome Statute. Though article 11 limits ICC jurisdiction to crimes committed after the Rome Statute goes into effect for a state, it allows non-party states to accept ICC jurisdiction "with respect to the crime in question" via an ad hoc declaration.[27] Despite seeming contrary to the intent of the Rome Statute, this "appears to permit the territorial state and state of nationality to consent to the ICC's jurisdiction with respect to 'the crime in question' on an ad hoc basis

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[22] U.N. Charter art. 27, ¶ 3.

[23] Rome Statute, *supra* note 9, art. 12(3).

[24] *E.g.*, Steve Holland et al., *Trump Authorizes Sanctions over ICC Afghanistan War Crimes Case*, REUTERS (June 11, 2020, 9:34 AM), https://www.reuters.com/article/us-warcrimes-afghanistan-trump/trump-authorizes-sanctions-over-icc-afghanistan-war-crimes-case-idUSKBN23I23A.

[25] *E.g.*, Bowcott et al., *supra* note 11.

[26] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., SITUATION IN PALESTINE ¶ 7 (Apr. 3, 2012), https://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf.

[27] Rome Statute, *supra* note 9, arts. 11(2), 12(3).

without subjecting themselves to the ICC's jurisdiction over their own citizens' actions within the situation giving rise to the crime."[28] As such, this mechanism does not merely contemplate a non-party state's ability to subject other non-party state nationals to ICC jurisdiction on an ad hoc basis for crimes alleged to have occurred in its territory, but also the ability to do so without subjecting one's own nationals to ICC jurisdiction. Even more pertinent to this discussion are the potential implications concerning notice of the applicable substantive law as applied to non-party state nationals.[29]

III. Overreaching the Edge of CIL: Applying the Rome Statute to Non-Party State Nationals

Having addressed the mechanisms by which the ICC purports to assert jurisdiction over non-party state nationals, this part details those portions of the Rome Statute that overreach the bounds of CIL and ICC party states' ability to expand the degree by which the Rome Statute overreaches.

Even though the ICC represents a continuation of the recent lineage of international tribunals in its effort to hold responsible those that commit atrocities,[30] it also represents a remarkable and nuanced departure from such lineage. By largely contemplating prospective prosecutions (i.e., prosecuting those crimes occurring after a state becomes party to the Rome Statute), the ICC breaks from the precedent of international tribunals that were generally established "in reaction to atrocities that had already occurred."[31] As these tribunals were established following the commission

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[28] Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 L. & CONTEMP. PROBS. 67, 78 n.56 (2001).

[29] *See* discussion *infra* Part IV.

[30] Rome Statute, *supra* note 9, pmbl.

[31] Song Sang-Hyun, *Preventive Potential of the International Criminal Court*, 3 ASIAN J. INT'L L. 203, 206 (2013). *E.g.*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 (establishing the Internal Military Tribunal to prosecute "crimes against peace", "war crimes", and "crimes against humanity" previously committed during World War II); S.C. Res. 827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia following the Bosnian genocide); S.C. Res. 955, (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda following the Rwandan genocide). Article 11 of the Rome Statute details the statute's *ratione temporis*, stating, "[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute" and "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless

of crimes, they necessarily relied on CIL to prosecute the respective parties.[32]

Conversely, unlike previous tribunals, when Rome Statute party states envisioned prospective prosecution of party states at the ICC, they rightly regarded themselves as unconstrained by CIL.[33] Unfortunately, when applied to non-party states, this application proves problematic.

A. Identifying Overreach: The Rome Statute and CIL

While the Rome Statute closely resembles CIL, it does not perfectly reflect CIL. Instead, those parties responsible for drafting the Rome Statute elected to exercise jurisdiction over specifically defined crimes, extensively defined those substantive crimes, and ratified a Rome Statute in which portions of the substantive law exceed the bounds of CIL.[34]

As an example, article 8(2)(b)(viii) of the Rome Statute overreaches CIL by defining a war crime as including, among other things, "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."[35] While article 8(2)(b)(viii) of the Rome Statute is largely similar to articles within the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Geneva Convention IV) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International

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that State has made a declaration under article 12, paragraph 3." Rome Statute, *supra* note 9, art. 11.

[32] Hortensia D. T. Gutierrez Posse, *The Relationship Between International Humanitarian Law and the International Criminal Tribunals*, 88 INT'L REV. RED CROSS 65, 67 (2006) ("These are international bodies that do not make law or legislate in respect of the law; their role is to apply existing law.").

[33] *Report of the International Law Commission to the General Assembly*, 49 U.N. GAOR Supp. No. 10, at 1, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 187, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2). The draft statute shows when defining the principle of *nullum crimen sine lege*, or principle of legality, drafting parties originally considered prosecuting only that which "constituted a crime under international law." *Id.* at 36. However, per article 22 of the Rome Statute, this was subsequently amended as parties settled on a principle of *nullum crimen sine lege* restricted to those "crime[s] within the jurisdiction of the Court." Rome Statute, *supra* note 9, art. 22.

[34] *See* Rome Statute, *supra* note 9, art. 5 (detailing ICC jurisdiction over genocide; crimes against humanity; war crimes, and the crime of aggression). *Id.* arts. 6–8 *bis*. *See generally* INT'L CRIM. CT., ELEMENTS OF CRIMES (2011) https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

[35] Rome Statute, *supra* note 9, art. 8(2)(b)(viii).

Armed Conflicts (Additional Protocol I), it differs via the addition of "language referring to the transfer of civilian population to occupied territory 'directly or indirectly.'"[36]

Some may argue the Rome Statute's inclusion of "directly or indirectly," as it pertains to the transfer of nationals of an occupying power, fits within CIL. However, such a skewed interpretation equivocates, for example, forcibly displacing one's population via cattle cars into an occupied area with an occupying power's inaction concerning a national's freely exercised decision to rent a house within occupied territory. Characterizing the use of "directly or indirectly" as a clarification of CIL, instead of an addition to CIL, belies the fact that the change criminalizes conduct that previously failed to constitute a war crime under CIL.[37] Neither Geneva Convention IV nor Additional Protocol I contemplate that an "occupying power['s]" indirect transfer of their civilian population into occupied territory could constitute a war crime.[38] Furthermore, Jean Pictet's commentary to Geneva Convention IV, article 49, makes clear the "indirect" transfer of an occupying power's nationals was not intended to constitute a war crime as "transfer" is used in conjunction with deportation and described as "compulsory movement."[39] As such, article 8(2)(b)(viii) of the Rome Statute exceeds CIL, and the discrepancy should not receive dismissive treatment.

Illustrating this point, and emphasizing the relevance of the "directly or indirectly" discrepancy, is a recent Human Rights Watch report about Airbnb's and Booking.com's business practices in Israeli West Bank settlements.[40] This report highlights the importance of the "directly or indirectly" discrepancy by detailing the Israeli government's role, via inaction, in facilitating Israeli settlement of the occupied area.[41] Specifically, the Human Rights Watch report details that Israeli

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[36] *See* Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 865–66 (1999).

[37] Rome Statute, *supra* note 9, art. 8.

[38] Brown, *supra* note 36.

[39] JEAN S. PICTET, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: A COMMENTARY 283 (1958).

[40] KEREM NAVOT & HUMAN RIGHTS WATCH, BED AND BREAKFAST ON STOLEN LAND: TOURIST RENTAL LISTINGS IN WEST BANK SETTLEMENTS (2018), https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf.

[41] *Id.* at 21. *See also* S.C. Res. 2334, ¶ 1 (Dec. 23, 2016) (reaffirming Israel as an "occupying Power" and that "the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law . . . .").

"authorities ultimately refrained from interfering when settlers built homes and community buildings" in occupied territory.[42] When taken in conjunction with the ICC's ongoing preliminary examination into, among other things, "Israeli authorities hav[ing] allegedly been involved in the settlement of civilians onto the territory of the West Bank, including East Jerusalem,"[43] the need to clarify the substantive law against which nationals of non-party states will be measured is necessary—especially when the pertinent portion of the Rome Statute exceeds CIL. In this case, even if the ICC finds that Israeli officials "indirectly" transferred Israeli citizens into occupied Palestine, there is no way these officials could have known such inaction constituted a crime at the time it occurred. As such, it would violate international law to hold those Israeli officials to such a standard.

However, not all instances of the Rome Statute's overreach of CIL appear in such a forthright fashion. For example, the Rome Statute and CIL appear nearly identical in addressing the mental element required to hold commanders accountable for war crimes committed by their subordinates. Commanders may be held responsible under the Rome Statute when they "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes . . . ."[44] Similarly, Additional Protocol I states superiors may be held accountable when "they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or going to commit" war crimes.[45] "By contrast, under the Rome Statute, to prove a violation, it is enough to show that commander

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[42] NAVOT & HUMAN RIGHTS WATCH, *supra* note 40, at 21.

[43] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 269 (2018), https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf [hereinafter 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES].

[44] *See* Rome Statute, *supra* note 9, art. 28(a)(i).

[45] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86(2), June 8, 1977, 1125 U.N.T.S. 3. *See* Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment, ¶ 239 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) ("A superior may only be held liable for the acts of his subordinates if it is shown that he 'knew or had reason to know' about them."); *see also* Prosecutor v. Bagilishema, Case No. ICTR-95-1A-A, Judgment, ¶ 35 (July 3, 2002) ("References to "negligence" in the context of superior responsibility are likely to lead to confusion of thought . . . . The law imposes upon a superior a duty to prevent crimes which he knows or has reason to know were about to be committed . . . . A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wil[l]fully disregarding them.").

'ha[d] merely been negligent in failing to acquire knowledge of his subordinates illegal conduct.'"[46]

While the above examples do not encompass all the substantive discrepancies between the Rome Statute and CIL, they show the relevance of such discrepancies given ongoing investigations into situations concerning non-party state nationals, including the United States and Israel, and the breadth of the types of discrepancies possible. However, non-party state nationals' concerns are not limited to discrepancies between the substantive law contained in the Rome Statute and CIL. Instead, ICC party states' legislative activities have shown non-party state nationals may rightfully feel uneasy regarding the Rome Statute's potential to further overreach the bounds of CIL.

B. Reaching Further: Legislating Beyond the Bounds of CIL at the ICC

This part details how ICC party states can legislatively expand the Rome Statute's overreach of CIL. This amendment process, via article 121 of the Rome Statute, has the potential to create fragmented and unequal substantive law both among party states and between party states and non-party states. Of specific concern are party states' ability to grow the body of substantive law available to the ICC, via amendment to the Rome Statute, and subsequently subject nationals of non-party states to that body of law while potentially not being subjected themselves.

Consistent with the Rome Statute's break from past international tribunals' reliance on CIL, the Rome Statute details party states' ability to amend the statute by consensus or, in the event consensus cannot be reached, approval by a two-thirds majority.[47] However, article 121 contains an exception that, though not swallowing the rule, authorizes individual party states to create a fragmented body of substantive law. Article 121(5) states:

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[46] James T. Hill, The Korean Situation and the Law of War 29 (2018) (unpublished manuscript) (on file with author) (citing Prosecutor v. Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 432 (June 15, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF). Under the United States' command responsibility standards, a "commander can only be held liable if his violation was manifest—if 'every reasonable official would have understood that what he is doing violates the law.'" *Id.* (citing U.S. DEP'T OF ARMY, OFF. OF THE JUDGE ADVOC. GEN., TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT ¶ 6.C.(1)–(2)).

[47] Rome Statute, *supra* note 9, art. 121(3).

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.[48]

By constructing a system in which the ICC exercises jurisdiction over different bodies of crimes for those states that either accept and ratify Rome Statute criminal amendments or decline to do so, the ICC creates distinct bodies of law among party states.

More important, given the ICC's purported ability to assert jurisdiction over the nationals of non-party states, are the implications for non-party state nationals. Of note, the provision of article 121 quoted above is silent regarding how amendments to Rome Statute crimes will impact non-party states. Party states have attempted to neutralize such criticism by noting in a Rome Statute resolution on amendments their "understanding that . . . the same principle that applies in respect of a State Party which has not accepted this amendment applies also in respect of States that are not parties to the Statute. . . ."[49] However, these "understanding[s]" lack any binding effect, which could be accomplished by an amendment to the Rome Statute, and open the door for a "[mis]understanding" tomorrow despite today's "understanding."[50]

If party states intend to treat non-party states on the same footing as party states who decline to adopt an amendment and satisfy international jurisprudential norms, party states could amend the Rome Statute to state as much. Instead, by paying lip service to equal treatment while failing to guarantee such treatment via an amendment to the Rome Statute, ICC party states leverage non-party states to become party to the Rome Statute because, once a party, states are able to limit their criminal liability by

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[48] *Id.* art.121(5).

[49] Assembly of the States Parties, *Resolution ICC-ASP/16/Res.4: Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court*, INT'L CRIM. CT. (Dec. 14, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf. *See also* Review Conference, *Resolution RC/Res.5: Amendments to Article 8 of the Rome Statute*, INT'L CRIM. CT. (June 10, 2010), https://treaties.un.org/doc/source/docs/RC-Res.5-ENG.pdf.

[50] *See* Assembly of the States Parties, *supra* note 49; Review Conference, *supra* note 49.

declining amendments to the Rome Statute. By not enacting such an amendment, party states can continue to expand the scope of substantive law beyond the bounds of CIL in an effort to illegally subject non-party state nationals to substantive law that is prohibited by international jurisprudence and to which they are not themselves bound. While such an amendment is not the core of this article, ICC party states' failure to ratify such an amendment speaks to its heart—that ICC party states are working to subject ICC non-party states to new obligations in violation of international law.

IV. Consequences of Overreach: ICC Violations of International Law

This part explains why applying those portions of the Rome Statute that exceed CIL to non-party state nationals violates international law. Specifically, it details how those portions of the Rome Statute that exceed CIL impermissibly purport to constitute new obligations for non-party state nationals in violation of international law and subsequently violate international law and judicial norms of fundamental fairness by skirting notice requirements.

A. Illicitly Creating Obligations at the ICC

As members of a treaty-based organization, ICC party states are free to hold themselves to a standard more restrictive than CIL. However, absent a requirement by CIL or other international agreements, international jurisprudence prohibits the practice in which bilateral treaties purport to create binding obligations on third parties.[51] As such, when an exercise of jurisdiction over non-party state nationals implicates actions that constitute crimes under the Rome Statute but not under CIL, such an exercise of jurisdiction purports to create new obligations for non-party state nationals. Such actions are impermissible as these purported new obligations for non-party state nationals violate international law.

The tenet that treaties cannot create obligations for non-party states is well settled international law dating over 2,000 years.[52] Concisely stated, "[s]ince international organizations are constituted by the common will of states through the act of transferring powers to them, the resulting legal

[51] Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331.
[52] Newton, *supra* note 8, at 373–74, 374 n.4.

creatures cannot acquire more powers than their creators . . . ."[53] Consequently, as a treaty-based organization, the ICC possesses only those powers conferred to it by party states. Likewise, the ICC's ability to impose obligations is limited by the powers granted it by party states. As such, if the ICC were to impose a portion of the Rome Statute that exceeds CIL on a non-party state, such action would constitute a violation of international law. Article 34 of the Vienna Convention supports this conclusion, stating a "treaty does not create either obligations or rights for a third State without its consent."[54]

Even critics of the U.S. position on ICC jurisdiction agree that "[a]s a non-party to the Treaty of Rome, the U.S. would not be obligated to provide evidence or surrender accused persons within its territory to the ICC . . . ."[55] Nonetheless, the ICC has maintained an aggressive posture regarding non-party state nationals by continuing to assert the ability to exercise jurisdiction over non-party state nationals and investigating alleged violations of the Rome Statute that exceed CIL.[56] In response, the United States enacted legislation acknowledging the "fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound."[57] In codifying this principle, U.S. domestic law reflects international legal jurisprudence by reaffirming a treaty's inability to create new obligations for non-parties,[58] while the ICC ironically moves away from the international jurisprudential norm.

However, ICC party states' inability to create obligations binding on third parties without their consent is not the only limitation on ICC prosecution of non-party state nationals. Indeed, bilateral agreements between party states and non-party states represent existing obligations "between sovereign states" despite the Rome Statute's requirement that

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[53] August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858 (2001).

[54] Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 U.N.T.S. 331.

[55] Scharf, *supra* note 28, at 69.

[56] *E.g.*, 2014 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 14. *See also* 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 43, ¶ 271 (discussing alleged Israeli involvement in indirectly transferring portions of its civilian population into occupied Palestinian territory).

[57] 22 U.S.C. § 7421 (2012).

[58] *Id.*

party states cooperate with the ICC.[59] These bilateral agreements generally prohibit the transfer of "members of the force and of the civilian component" to the ICC.[60] As such, party states' compliance with the Rome Statute may come at the cost of violating treaty obligations to non-party states. As the Rome Statute lacks a supremacy clause,[61] such as that contained within the U.N. Charter,[62] party states and non-party states ought to "seek interpretations that harmonize the two sets of treaties."[63] Such an interpretation is vital given the Rome Statute's requirement that party states "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[64]

As this requirement fails to except those portions of the Rome Statute that exceed the bounds of CIL, it has the effect of requiring party states to facilitate the prosecution of non-party state nationals even when the applicable law exceeds the bounds of CIL. Given the aforementioned, non-party states are justifiably cautious of the ICC's attempt to enforce Rome Statute obligations and discard separate treaty obligations. However, the adverse effects of imposing those overreaching portions of the Rome Statute on non-party state nationals is not limited to violating international law by imposing new obligations but extends to ensuring non-party state nationals are unaware of the applicable law at the time of an alleged offense.

B. Notice Violations: When Non-Party States Do Not Know the Rome Statute Applies

This part addresses those portions of the Rome Statute that stand to violate another tenet of international jurisprudence: that accused have notice of the applicable law at the time of an alleged crime. Specifically, it addresses the unsettled state of ICC jurisdiction over non-party state nationals and the ICC's purported ability to retroactively apply the Rome

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[59] *See generally* Newton, *supra* note 8 (dissecting the ICC's overly ambitious strides to expand its jurisdictional reaches).

[60] *E.g.*, Security and Defense Cooperation Agreement Between the United States of America and the Islamic Republic of Afghanistan, Afg.-U.S., art. 13, Sept. 20, 2014, T.I.A.S. No 15-101, https://www.state.gov/wp-content/uploads/2019/02/15-101-Afghanistan-Defense-Cooperation.pdf.

[61] Mike Newton, *Treaty Based Limitations on the Article 12 Jurisdiction of the Int'l Criminal Court*, JUST SEC. (Apr. 23, 2018), https://www.justsecurity.org/55318/treaty-based-limitations-article-12-jurisdiction-icc.

[62] U.N. Charter art. 103.

[63] Newton, *supra* note 8, at 422.

[64] Rome Statute, *supra* note 9, art. 86.

Statute's substantive law to non-party state nationals via the mechanisms of ad hoc jurisdiction and jurisdiction via the United Nations Security Council Resolution (UNSCR) referral in contravention of CIL. Given the above, the unsettled nature of ICC jurisdiction over non-party state nationals wholly permeates the issue of whether such concerned nationals have proper notice of whether they are subject to the ICC's jurisdiction and allied substantive law.

While Part II detailed how the ICC purports the ability to assert jurisdiction over non-party state nationals via the mechanisms of ad hoc consent and UNSCR, this part details how such an aggressive exercise of jurisdiction would allow party states to abuse the Rome Statute in violation of international law. Article 22 of the Rome Statute purports to establish the principle of non-retroactivity, stating "[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[65] However, by implicating jurisdictional issues, article 22 requires analysis of articles 11, 12, and 13. These articles[66] fail to clarify whether, when pursuant to the mechanisms of ad hoc consent and UNSCR referral, ICC jurisdiction over the nationals of non-party states is limited to those crimes committed after the provision of such consent or UNSCR referral. While such a constrained application is consistent with international jurisprudential norms and certain provisions of the Rome Statute, other provisions of the Rome Statute and ICC practice suggest otherwise.

A reading in which the ICC possesses jurisdiction over crimes alleged to have occurred prior to the provision of such ad hoc consent or UNSCR referral is consistent with the intent of the Rome Statute to ensure "the most serious crimes. . . [do] not go unpunished"[67] and precedent set by

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[65] *Id.* art. 22(1).

[66] *Id.* art. 11(1) ("This Court has jurisdiction only with respect to crimes committed after the entry into force of [the Rome] Statute."); *id.* art. 12(2) ("[A non-party] State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question."); *id.* art. 13(b) ("The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations . . . .").

[67] *Id.* pmbl.

international tribunals, despite the ICC's treaty-based departure from such precedent that largely contemplates prospective prosecution.[68]

However, ICC practice provides the most telling insight regarding how the ICC may treat non-party state nationals pursuant to an exercise of jurisdiction via ad hoc consent or UNSCR referral. Palestine's first attempted ad hoc submission to ICC jurisdiction was rejected on grounds pertaining to Palestine's statehood status.[69] However, after gaining UN non-member observer state status,[70] the ICC accepted Palestine's 31 December 2014 grant of ad hoc ICC jurisdiction which purports to extend to crimes "committed in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014."[71]

Here, Palestine purports to grant the ICC jurisdiction over crimes occurring six months before Palestine's grant of jurisdiction. In such an instance, non-party state nationals in Palestine lack notice of the Rome Statute's purported application during those six months. The implications of disregarding such international jurisprudential norms are not constrained to the theoretical, as the ICC is investigating alleged Rome Statute violations, which exceed the bounds of CIL, occurring during this period in Palestine.[72]

Palestine was not the first state to have the ICC accept temporal jurisdiction beginning on a date that preceded the date of submission of ad hoc consent. On 18 April 2003, the Ivory Coast declared, via ad hoc consent, their submission to ICC jurisdiction dating to 19 September 2002.[73]

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[68] *E.g.*, Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion on Jurisdiction, ¶ 65 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995) ("The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international of national . . . . Imposing criminal responsibility upon individuals for these violations does not violate the principle of *nullum crimen sine lege*.").

[69] THE OFF. OF THE PROSECUTOR OF THE INT'L CRIM. CT., *supra* note 26.

[70] G.A. Res. 67/19, ¶ 2 (Nov. 29, 2012).

[71] Mahmoud Abbas, *Declaration Accepting the Jurisdiction of the International Criminal Court*, INT'L CRIM. CT. (Dec. 31, 2014), https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf. *See also* Herman von Hebel, *Ref: 2015/IOR/3496/HvH*, INT'L CRIM. CT. (Jan. 7, 2015), https://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf (accepting President Abbas's declaration).

[72] 2018 REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, *supra* note 43.

[73] *Situation in Côte d'Ivoire*, INT'L CRIM. CT., https://www.icc-cpi.int/cdi (last visited Aug. 20, 2020).

To be clear, the ICC registrar's acceptance of states' ad hoc submissions to ICC jurisdiction, in which states retroactively submit to ICC jurisdiction, amounts to an administrative measure and does not constitute a judicial determination. However, the ICC accepted the Ivory Coast's ad hoc submission, conducted a preliminary examination, and initiated an investigation.[74] Furthermore, after receiving authorization from the pre-trial chamber pursuant to article 15 of the Rome Statute, ICC Pre-Trial Chamber III "expand[ed] its authorisation for the investigation in Côte d'Ivoire to include crimes within the jurisdiction of the Court allegedly committed between 19 September 2002 and 28 November 2010."[75]

The Court never made a formal judicial determination as to whether the ICC possessed jurisdiction over conduct occurring prior to the Ivory Coast's ad hoc consent submission, likely due to the subsequent cases' failure to implicate the pertinent time period. However, the Pre-Trial Chamber's expanded authorization remains significant, as article 15(4) of the Rome Statute states, "[i]f the Pre-Trial Chamber [finds] . . . that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case."[76] As such, despite not having made a formal determination regarding jurisdiction over conduct occurring prior to the Ivory Coast's ad hoc consent submission—and in expanding the temporal scope of the investigation—the ICC Pre-Trial Chamber presumably determined such action to be proper because the "case appears to fall within the jurisdiction of the court."[77]

The above detailed uncertainty pertaining to retroactive exercise of jurisdiction, and allied notice implications, extends beyond the mechanism of ad hoc consent. For example, on 31 March 2005 the UNSC referred "the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."[78] Subsequently, in deciding to issue an arrest warrant for President Omar Al Bashir, ICC Pre-Trial Chamber I noted the case fell "within the jurisdiction of the Court," stating "the 31

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[74] *Id.*

[75] Situation in the Republic of Côte d'Ivoire, ICC-02/11, Decision on the "Prosecution's Provision of Further Information Regarding Potentially Relevant Crimes Committed Between 2002 and 2010", ¶ 37 (Feb. 22, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03483.PDF.

[76] Rome Statute, *supra* note 9, art. 15(4).

[77] *Id.*

[78] S.C. Res 1593, ¶ 1 (Mar. 31, 2005).

March 2005 referral by the Security Council . . . and the 1 June 2005 Prosecution's decision to open an investigation . . . define the territorial and temporal parameters of the Darfur situation . . . since 1 July 2002."[79] Similar to article 15 concerning the authorization of an investigation, article 58(1)(a) of the Rome Statute requires the Pre-Trial Chamber to "issue a warrant of arrest of a person if . . . [t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[80] Despite the ICC not having formally taken up the matter, as President Al Bashir remains at large[81] and the ICC does not conduct trials in absentia, the Pre-Trial Chamber's action indicates the ICC is willing to prosecute President Al Bashir for actions prior to the UNSCR referral. In such a case, the ICC is required by international law to limit the substantive law of such prosecutions to that of CIL to ensure the accused possessed notice of the applicable law.

While Pre-Trial Chambers' findings are not final, ICC treatment of the situations in Afghanistan, Palestine, the Ivory Coast, and Sudan display the ICC's inclination to retroactively exercise temporal jurisdiction over the nationals of non-party states despite such parties not having notice of the applicable law at the time of the alleged crimes.

V. Conclusion: Addressing Overreach at the ICC

As a treaty-based organization, concerns about how the ICC conducts its affairs should be limited when its affairs are constrained to Rome Statute party states. However, the ICC's purported exercise of jurisdiction over non-party state nationals opens a Pandora's box of legal concerns due to the Rome Statute's use of substantive law that overreaches CIL, and party states' expansion of this overreach via legislative amendment only magnifies such legal concerns. What results are violations of international jurisprudence via the Rome Statute's purported imposition of new obligations on non-party states and an international tribunal whose structure fails to ensure all those under its purported jurisdiction have notice of the applicable law. As such, international law requires that the ICC use only those portions of the Rome Statute that constitute CIL when

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[79] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 37 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF.

[80] Rome Statute, *supra* note 9, art. 58(1)(a).

[81] *Al Bashir Case*, INT'L CRIM. CT., https://www.icc-cpi.int/darfur/albashir (last visited Aug. 22, 2020).

prosecuting non-party state nationals in order to avoid the "[u]nfairness [that] clearly results when an individual is held liable under a new rule that could never have been anticipated."[82]

United States Supreme Court Chief Justice Harlan Fiske Stone once criticized Supreme Court Justice Robert Jackson's prosecution of the Nuremberg trials, stating, "I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas."[83] Given the ICC's willingness to try non-party state nationals via retroactive prosecution using overreaching law, the international community would be wise to relook Chief Justice Stone's comments regarding international military tribunals, as it remains as relevant today as it was seventy years ago. By heeding such critiques, the ICC can avoid similar criticisms and ensure proceedings at The Hague comply with international legal standards.

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[82] Beth Van Schaack, Associate Professor, Santa Clara Law School, The Principle of Legality in International Criminal Law (Mar. 26, 2011) *in* 103 AM. SOC'Y OF INT'L L. PROCEEDINGS 101, 103.

[83] Noah Feldman, Opinion, *Nuremberg's Complicated Legacy*, BLOOMBERG (Nov. 22, 2015, 11:00 AM), https://www.bloomberg.com/opinion/articles/2015-11-22/nuremberg-s-complicated-legacy.

THE THIRTEENTH WALDEMAR A. SOLF AND MARC L. WARREN CHAIR LECTURE IN NATIONAL SECURITY LAW: DEFENDING DEFENSE IN THE LAW OF *JUS AD BELLUM*[*]

JOHN NORTON MOORE[†]

General Berger, Colonel McConnell, distinguished participants, and guests, it is a special pleasure and honor for me to deliver this Solf-Warren Lecture. A special pleasure because I delivered the first Solf lecture thirty-seven years ago. An even more special pleasure because I have known and worked with both Wally Solf and Marc Warren, two of the finest international lawyers our Nation has produced and each a testament to the high caliber of the Judge Advocate General's Corps.

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[*] This is an edited transcript of a lecture Professor John Norton Moore delivered on 11 March 2020 to members of the staff and faculty of The Judge Advocate General's Legal Center and School, their distinguished guests, and officers of the 68th Judge Advocate Officer Graduate Course. The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. On 16 August 2007, the Chair was renamed the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law. Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later. Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate, Eighth U.S. Army/U.S. Forces Korea/United Nations Command and U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General. After two years of lecturing with American University, COL Solf rejoined the Judge Advocate General's Corps in 1970 as a civilian. Over the next decade, he served as Chief of the International Law Team in the International Affairs Division, Office of The Judge Advocate General, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the International Committee of the Red Cross Conference Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea. He was a representative of the United States to all four diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979. In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

And to deliver this lecture is for me an honor because I have the highest regard for the Judge Advocate General's Legal Center and School. Since the School's permanent establishment at the University of Virginia in 1951, it has led in the quality of its legal training for both military and civilian officials. When I drafted a plan for a Democracy Training Institute for Africa, a dream of mine funded by Congress at the exploratory stage but unfortunately never implemented by the United States Agency for International Development, I had modeled the Institute on the Judge Advocate General's School.

I. Defending Defense in the Law of *Jus ad Bellum*: The Contemporary Crisis

Although nations are free to interact and seek change through peaceful means, they may not use force for change. This principle, introduced centrally into international law by the Kellogg-Briand Treaty in 1928,[1] subsequently became a cornerstone of the United Nations [when the Charter was adopted in 1945]. It is widely known as the prohibition against aggression, or within international law circles, a normative principle of *jus ad bellum*.

Correctly understood, modern *jus ad bellum* is not a blanket prohibition against use of force. Rather, it permits defense against aggression, actions lawfully authorized by the United Nations [Security Council], actions undertaken with sovereign consent, and certain other regional and humanitarian actions. Of particular importance, for *jus ad*

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† Professor John Norton Moore joined the University of Virginia School of Law faculty in 1966 and retired in February 2020. Professor Moore is an authority on international law, national security law, and the law of the sea. He helped lay the groundwork for the Law of the Sea Treaty, currently in force for 168 countries and the European Union. From 1991 to 1993, Professor Moore was the principal legal adviser to the Ambassador of Kuwait to the United States and the Kuwait delegation to the United Nations Iraq-Kuwait Boundary Demarcation Commission. From 1985 to 1991, Professor Moore chaired the board of directors of the United States Institute of Peace, one of six presidential appointments he has held. From 1973 to 1976, he was chair of the National Security Council Interagency Task Force on the Law of the Sea and Ambassador and Deputy Special Representative of the President to the Law of the Sea Conference. Previously, Professor Moore served as the counselor on international law to the State Department. With the Deputy Attorney General of the United States, he was co-chair in March 1990 of the U.S.-USSR talks in Moscow and Leningrad on the rule of law.

[1] General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. This treaty is commonly known as the Kellogg-Briand Pact or "Pact of Paris." John Norton Moore, *Strengthening World Order: Reversing the Slide to Anarchy*, 4 AM. U. J. INT'L L. & POL'Y 1, 9 (1989).

bellum as a normative principle to inhibit aggression, as is the very purpose of the norm, it must differentially impose costs on the aggression it seeks to deter. If, to the contrary, [the law] treats aggression and defense equally, by failing to effectively differentiate between them, or even worse, it effectively favors aggression by ignoring an aggressive attack while condemning a defensive response, then it will have turned this central normative principle into a cipher. Like an autoimmune disease, it will have turned the international order's own immune system against itself, thus encouraging aggression.[2]

Sadly, the right of effective defense is today under attack. And until this is reversed, *jus ad bellum* will offer little deterrence to aggressors and the world will continue to move further from the goal set forth in the United Nations Charter "to save succeeding generations from the scourge of war . . . ."[3]

There are, I believe, three principal causes of the current crisis. The first is new forms of clandestine aggression which make it harder for the general population to perceive that an attack is taking place. In turn, this creates confusion that the open defensive response is itself the attack.

The second cause is a steady erosion of the right of defense within the international law community. This stems from "minimalist" interpretations of the right of defense from both international law scholars and the International Court of Justice. In turn, these "minimalist" interpretations seem driven by a misunderstanding as to the meaning of the United Nations Charter, as well as "a naïve belief that the road to peace is to sanction all uses of force, whether defensive or otherwise."[4]

A third cause, though perhaps more an effect of the above two than an independent cause, is that totalitarian aggressors have increasingly understood that international institutions, such as the International Court of Justice, are open for the aggressor's use to attack the defensive response. That is, the aggressors have learned to use "lawfare" against the defensive response. Let us briefly exam each of these in turn.

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[2] The first two substantive paragraphs of Professor Moore's lecture are drawn from his 2012 article published in the *Virginia Journal of International Law*. See John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. INT'L L. 903 (2012), for a discussion of *jus ad bellum* as interpreted by the International Court of Justice.
[3] U.N. Charter pmbl.
[4] Moore, *supra* note 2, at 905.

A. Cause One: New Forms of Aggression

The United Nations Charter was adopted after two world wars, each begun by an aggressive attack carried out through an open massed invasion. True, Germany confused the world for a few days at the beginning of World War II through Operation Himmler by faking Polish attacks against Germany—including a false flag operation run by the SS against a German radio station, but the world soon knew that Germany was the aggressor. While we have continued to see open invasions subsequent to the Charter, such as the 1950 North Korean invasion of South Korea, or Saddam Hussein's invasion of Kuwait in the 1990 Gulf War, most contemporary aggression is carried out through clandestine support for "wars of national liberation," "secret warfare," terrorism, or arming of political movements and their paramilitaries. The North Vietnamese aggression against South Vietnam, Cuban and Sandinista aggression against El Salvador, support for terrorism from multiple aggressors, clandestine mining of international waterways such as the Iranian mining of the Persian Gulf, and, most recently, Iranian creation and arming of combined political/paramilitary movements such as Hamas in the Gaza Strip and Hezbollah in Lebanon and multiple groups in Iraq. This latest form of aggression particularly leads to confusion and effective "lawfare." It proceeds by supporting one or more political/social movements in the target state, and creating and arming a parallel military wing.

As the political movement grows, it has the potential to take over through the electoral process despite the movement being externally controlled; as the paramilitary wing grows, it has the potential to replace or defeat the official state military. Each of these more contemporary forms of aggression carried out through sophisticated intelligence means—always clandestine and denied—pose a very real perception problem for the largely open and admitted defensive response. In these settings, it is all too easy to tar the defensive response as itself the attack. Supporters of the aggressor, as well as misled media, and critics in countless "teach-ins," pillory the defensive response while ignoring the aggressive attack. As with many in this audience, I have seen this effect here at home in wars such as Vietnam and Central America. For a democracy, the public can indeed be the "center of gravity" controlling

"the will to act" as Clausewitz taught us in *On War*.[5] To lose that center, and the "will to act," is to lose the defensive effort.

B. Cause Two: Eroding of the Right of Defense

Now, is the right of defense really being eroded? Let's look at a few "minimalist" interpretations of *jus ad bellum* law from the academic community, as well as the use of force decisions of the International Court of Justice.

1. Academic and Diplomatic "Minimalists"

Beginning with academic and diplomatic "minimalists," here are a few of many erroneous academic arguments eroding the effective right of defense.[6] Each is from one or more recognized international law scholars or diplomats.

- [A defensive] attack on the territory of a state perpetrating terrorism cannot be a "proportional" response and can hardly be a "necessary" response to defend against an act of terrorism already committed or even to deter future terrorist attacks. This is from a top international law scholar teaching at one of our finest law schools.

- The right of defense does not include a right of response against the territory of a state directing "indirect aggression" or "secret warfare" against another state.

- The right of defense ceases once an issue has been referred to the Security Council. This is from a former Legal Adviser to the United States Department of State prior to the United States' response against Saddam Hussein's invasion of Kuwait.

- The U.S. bombing of Afghanistan, beginning on October 7, 2001, was inconsistent with article 51 [of the Charter] because the bombings came long after the 9/11 attack [against the United States]. This is from an address to the Swedish Military Academy by a former Swedish

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[5] CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret trans., Princeton University Press 1984).

[6] Examples of statements from recognized international law scholars or diplomats collected by Professor Moore for his course in National Security Law at the University of Virginia and the Georgetown University Law Center.

Ambassador to the United Nations following the initiation by NATO of its post-9/11 action in Afghanistan.

- Following a successful aggressive blitzkrieg attack now occupying the victim state, there is no longer a right of defense because the victim state has no one that can lawfully request collective defense on their behalf. This is my favorite statement, which was made to declare unlawful any right of defense for Kuwait prior to the U.S. response against Saddam Hussein's invasion, and made by an American academic who had formerly worked in the Department of Defense General Counsel's office.

2. The International Court of Justice

Turning to the International Court of Justice, here are a few erroneous "minimalist" examples from decisions of the Court.[7]

- [T]he right of defense does not include the right to sweep mines clandestinely emplaced in an international waterway [transited by international] shipping (implicit in the *Corfu Channel* decision);

- [T]here is no right of . . . defense against . . . "less grave" . . . or "indirect aggression" (the *Nicaragua* decision) (also factually incorrect [as to] the seriousness of the multi-faceted covert Sandinista attack against neighboring states);

- [T]here is no right of individual or collective defense against indiscriminate attacks (implicit in the *Iran Platforms* case) (also factually incorrect . . . about the attacks not knowingly directed against U.S. shipping in the Persian Gulf);

- [T]here is no right of individual or collective defense against non-state actors (the *Israeli Wall* case) [(astoundingly rewriting the text of article 51 of the Charter by adding the phrase "by one State against another State" in making its pronouncement)];

- [T]here is no right of individual or collective defense against insurgent . . . attacks from the territory of a third state where that third state is . . . unwilling or unable to stop the attacks (implicit in the *Congo* decision); and

[7] See generally Moore, *supra* note 2, for a critique of the International Court of Justice use of force decisions.

- [T]here is no right of [individual or] collective defense until an attacked state has . . . declared itself to be attacked and has publicly requested assistance (the *Nicaragua* decision) (also factually incorrect as an assumption about the absence of declaration of an attack . . . .).[8]

The Court's rewriting of the use of force provisions of the Charter has also been accomplished with an all too frequent disregard for proper legal craftsmanship. Rewriting article 51 of the Charter in the *Israeli Wall* case by adding the phrase, "by one state against another state" in order to enable the Court to conclude that article 51 does not permit defense against non-state actors is not ignorant or careless—it is simply a scandalous disregard of the Charter. Or, as Judge Sir Robert Jennings noted in his dissenting opinion in the *Nicaragua* decision, how can the Court, jurisdictionally barred from applying the United Nations Charter in that case, decide the case based on asserted "customary international law" when such law could only be applicable if consistent with the Charter, which the Court was barred from interpreting?

C. Cause Three: The Aggressors Discover "Lawfare"

I will not repeat here the outstanding work done by Major General Charles J. Dunlap Jr. on "lawfare."[9] Let me just note, however, that it was the Sandanista aggressor in the *Nicaragua* case that took the case to the International Court of Justice against the defensive response by the United States. And, learning from this successful "lawfare" by the Sandinistas, it was the Iranians who took the *Iran Platforms* case to the International Court of Justice against a defensive response from the United States. Further, it was the terrorist attackers against Israel who successfully sought the General Assembly request for an advisory opinion from the Court in the *Israeli Wall* case in response to Israel simply building a wall to discourage ongoing terror attacks.

II. Restoring an Effective Right of Defense: Classic International Law to the Rescue

How do we restore an effective right of defense? We do so simply by a return to accurate, correct, classic international law, which has always recognized an effective right of defense.

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[8] *Id.* at 947–48.

[9] *See generally* Charles J. Dunlap Jr., *Lawfare: A Decisive Element of 21st-Century Conflict?*, 54 JOINT FORCES Q., 3d Quarter 2009.

A. The United Nations Charter

First, we must recognize the centrality of the United Nations Charter. The United Nations Charter, just as much today as at its adoption, governs the lawfulness of the initiation of force in international relations. Article 103 of the Charter makes clear that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[10] Though the Charter does not specifically mention the customary law requirements of "necessity" and "proportionality," it is well accepted that these principles of customary law apply to all uses of force other than those taken by Security Council actions under Chapter VII.[11] But absent clear evidence through widespread state practice of customary international law not inconsistent with the Charter, such as the long-accepted principles of necessity and proportionality, the Charter prevails. For if the Charter prevails over inconsistent international treaties, it certainly prevails over inconsistent customary international law. Moreover, none of the asserted "minimalist" restrictions on the right of defense are anywhere near demonstrating the level of state practice required for customary international law, whether or not inconsistent with the Charter.

B. Restoring the Meaning of the Charter

Second, we must restore the classic and correct meaning of the Charter from its history, text, and *travaux*.[12] "Minimalist" interpretations of the right of self-defense under the Charter tend to focus on the "if an armed attack occurs" text of article 51 of the Charter. From this singular textual focus, they conclude that much of the "secret warfare" spectrum does not qualify for a right of defense and that there is no right of anticipatory defense. But, in making these arguments, the "minimalists" ignore the history of the Charter, the *travaux* of the Charter, and the textual interrelationship between articles 2(4) and 51, as well as other ambiguities in the text of article 51.

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[10] U.N. Charter art. 103.

[11] *E.g.*, NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 4 (2020).

[12] "Travaux préparatoires is the name used to describe the documentary evidence of the negotiation, discussions, and drafting of a final treaty text." *What Are Travaux Préparatoires and How Can I Find Them?*, DAG HAMMARSKJÖLD LIBR. (May 14, 2018), https://ask.un.org/faq/14541.

The textual history of the use of force provisions of the United Nations Charter began where the 1928 Kellogg-Briand Pact left off. That is, as under Kellogg-Briand, there was no discussion in the text of the right of individual or collective defense. Rather, there was a simple prohibition of war as a modality of conducting foreign policy. Charter drafts simply wrote this concept into article 2(4), expanding Kellogg- Briand from "war" to "threat or use of force" and, thus banning force short of war and the "threat" of force as well, provided that such use or threat of force was "inconsistent with the Purposes of the United Nations." Just as with Kellogg-Briand, it was understood that this prohibition on force in article 2(4) did not ban individual or collective self-defense.

Initial drafts contained no article 51 or reference to the right of defense, following the example of Kellogg-Briand. Thus, the final draft of the Dumbarton Oaks Proposal, that is the final draft of the preparatory conference for the United Nations, simply provided, "All members of the organization shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the organization."[13]

It is important in understanding the *travaux* of the Charter to understand that the principal discussion concerning lawfulness of the use of force occurred in Committee 1 of Commission 1, dealing with the purposes and principles of the United Nations. This is the discussion in the most important committee, which produced article 2(4) of the Charter. Indeed, it was initially assumed that article 2(4) would be the only provision in the Charter concerning both the ban on the use or threat of force as a modality of change and implicitly retaining the lawfulness of defense and other uses of force not "inconsistent with the purposes" of the United Nations.

The only significant change to this formulation in Committee 1 was an addition suggested by Australia, adding the phrase "against the territorial integrity or political independence," so that the final article 2(4) provided, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[14] According to the head of the Australian delegation, H.V. Evatt, this addition was intended to clearly include "the most typical form of aggression . . . ." Subsequently, the Deputy Prime

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[13] Paragraph 4 of Section II, as modified by the Australian proposal, became article 2(4) of the UN Charter in the last minutes of the San Francisco Conference.

[14] U.N. Charter art. 2, ¶ 4.

Minister of Australia stated, "The application of this principle should insure that no question relating to a change of frontiers or an abrogation of a state's independence could be decided other than by peaceful negotiation."[15]

That is, the purpose of the Australian addition was to make clear that aggression for the purpose of altering territorial integrity or removing political independence—the two principle use of force concerns of the framers—was covered by the article 2(4) ban. There is no evidence that the purpose of this language was to serve as a determining criterion for all lawful uses of force. With respect to the right of defense under the final article 2(4), as adopted by the Conference, Commission I, Committee 1, stressed in its final report that "[t]he use of arms in legitimate self-defense remain admitted and unimpaired."[16] And Subcommittee I/1/A, responsible for drafting an acceptable proposal for what was adopted as article 2(4), reported that "it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished."[17]

The discussion leading to article 51 took place not in Committee 1, the most important committee, but in a subsidiary committee: Committee 4 of Commission III, which dealt with regional arrangements. Unlike Committee 1 of Commission I, Commission III and its subcommittees dealt with the "Security Council" and were not charged with the "Purposes and Principles" of the Charter. As such, the discussion leading to article 51 was a discussion focused on the relationship between regional arrangements and the Security Council, rather than a discussion focused on the right of defense under the Charter.

As was just noted, the right of individual and collective defense was accepted as implicit in article 2(4) and had been dealt with in Committee 1 of Commission I. Article 51 emerged in Committee 4 of Commission III as an initiative of the American states in view of their recently concluded Act of Chapultepec, a predecessor to the collective security Rio

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[15] Verbatim Minutes of the Second Plenary Session, U.N. Doc. 20 P/6 (Apr. 28, 1945), *in* 1 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SAN FRANCISCO 1945, at 174 (1945), https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-1-E-F.pdf.

[16] MYERS S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 599–600 (1961).

[17] Report of Rapporteur of Subcommittee I/1/A to Committee I/1, U.N. Doc. 739 (June 1, 1945), *in* 6 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SAN FRANCISCO 1945, at 721 (1945), https://digitallibrary.un.org/record/1300969/files/UNIO-Volume-6-E-F.pdf.

Treaty for the American States. These states were simply seeking clarity that their Act of Chapultepec regional defense system would be consistent with the UN Charter being negotiated, and that their right of individual and collective defense would not be taken away by the Security Council. There is no indication in the *travaux* that article 51 was drafted to represent the entire right of defense under the Charter, a core issue which was within the province of Commission I, not Commission III.

To summarize, there is no indication in the *travaux* that delegates to the San Francisco Conference discussed within the conference sessions narrowing the customary right of self-defense, banning the customary right of anticipatory self-defense,[18] banning the customary right of use of force for the protection of nationals, or banning whatever preexisting right of humanitarian intervention might have existed at the time. Further, there is strong evidence in the *travaux* that the framers intended that "the right of self-defense against aggression should not be impaired or diminished," for they said exactly that in the most important drafting committee dealing with the use of force. Moreover, there is strong evidence that the meaning of the addition in article 2(4) of "against the territorial integrity or political independence" suggested by the Australian delegation to the San Francisco Conference was not to add a condition qualifying all lawful uses of force, but rather to clarify that the most historically concerning threats—those of altering a frontier or removing political independence—were included in the article 2(4) ban. For this latter interpretation was that presented to the San Francisco Conference by the Australian Delegation itself.

Now the "minimalists" do not want us to look at the history and *travaux* of the Charter. They assert that examining the history and *travaux* just presented is impermissible because, they argue, if a treaty text is clear—as they assert is the case with the article 51 language of "if an armed attack occurs"—then the text alone controls.

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[18] See Daniel G. Donovan, The International Legal Right to Use Armed Force in Anticipatory Defense: The Iranian Nuclear Threat to Israel as a Case Study (2019) (S.J.D. dissertation, University of Virginia), for the best analysis to date of the right of anticipatory defense. Pages 69 through 80 of this dissertation set out a superb overview of what Donovan refers to as the "Restrictionist" versus the "Counter-Restrictionist" interpretations of the use of force provisions of the United Nations Charter. *Id*. at 69–80. Donovan supports the "Counter-Restrictionist" interpretation. *Id.* at 73. The first 125 pages of this dissertation address the right of anticipatory defense from Medieval Canon Law through 2017 and 2018 contemporary interpretations of the right of anticipatory defense under the United Nations Charter. *Id.* at 1–125.

There are two major problems with this "minimalist" argument for American international lawyers. First, the American view, as reflected in Supreme Court decisions and American practice, is that it is always permissible, indeed desirable, to consult the negotiating history of a treaty in interpreting provisions of that treaty. The "minimalist" focus on textualism is predominantly a European view of treaty interpretation as embodied today in the Vienna Convention on the Law of Treaties.

I will always remember the outrage expressed against this approach by my professor of international law at Yale, Myres McDougal, who had been a member of the U.S. Delegation to the Vienna Convention negotiations. In large part because of this difference in treaty interpretation, over fifty years after the conclusion of the Vienna Convention, the United States is still not a party to this Convention.

But there is a second and even more obvious reason why the "minimalist" effort to avoid the history and *travaux* of the Charter is wrong. For, even under the extreme textualist approach embodied in the Vienna Convention on the Law of Treaties, under article 32 of that Convention "the preparatory work of the treaty [(i.e., *travaux*)] and the circumstances of its conclusion [(i.e., history)]" may be examined when the "meaning [is] ambiguous or obscure."[19]

Now, it is obvious that the correct meaning of article 51 under the United Nations Charter is at minimum "ambiguous." But, before demonstrating this ambiguity from the text of the use of force provisions of the Charter, let me share with you a great story about the importance of not overlooking the obvious.

Sherlock Holmes and Dr. Watson were in their tent one night, camping under the stars. In the middle of the night, Holmes poked Watson awake and asked, "Watson, look at all those stars. What do you deduce?" A sleepy Watson responds, "Well, there must be billions of stars. Perhaps there are planets like Earth, and perhaps there is life elsewhere. A disgusted Holmes responded, "Watson, you idiot, someone stole our tent!"[20]

In their blinkered, textual focus the "minimalists" fail to note the obvious semantic and syntactic ambiguities in the text of the Charter itself.

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[19] Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.

[20] Jill Lawless, *The World's Funniest Joke*, CBS NEWS (Oct. 3, 2002, 12:39 PM), https://www.cbsnews.com/news/the-worlds-funniest-joke.

First, would not article 2(4), negotiated in Commission I on the purposes and principles of the Charter and which was clearly felt by the framers to be the general provision concerning the scope of the right of defense, prevail if in conflict with article 51, negotiated in Commission III on regional arrangements? That is, at minimum, there are two articles in the Charter dealing with the use of force, and they must be interpreted together. Second, the language of article 51 itself, counter to the "minimalists," is not clear. For if the right of individual or collective self-defense is an "inherent" or "natural" right as set out in article 51, can such a right be limited by the subsequent phrase in the same article of "if an armed attack occurs"? Third, the equally authentic French version of article 51 uses "aggression armée" rather than "armed attack". This language seems to point to the broader traditional terminology of "aggression." Finally, does the language in article 51 of "if an armed attack occurs" mean "if, and only if, an armed attack occurs," or is it simply one critically important example as to where the right of defense is preserved—that of the occurrence of an armed attack. A clear and unambiguous way of expressing the "minimalist" interpretation, easily available to the framers, is to have phrased article 51 precisely as "if, and only if, an armed attack occurs." But absent this truly clear language, even article 51 taken alone can also equally clearly simply be presenting one obvious example of a lawful right of defense.

Thus, in addition to the history and *travaux* of the Charter, it is simply myth to believe that the text of the Charter either prevents our examining the history and *travaux* of the Charter or that it best supports the "minimalist" interpretation of the right of defense.

C. Limitations of International Court of Justice

Third, we must understand the limitations of International Court of Justice decisions and, importantly, that decisions of the International Court of Justice cannot amend the United Nations Charter. The International Court of Justice has decided five major cases implicating *jus ad bellum.* It should be understood, however, that except between the parties to each of these cases, these decisions have no binding force. Thus, article 59 of the Statute of the Court itself provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."[21] Further, article 38 of the Statute of the Court, setting out the law to be applied by the Court, specifically qualifies the effect of prior "judicial

[21] Statute of the International Court of Justice, June 26, 1945, art. 59.

decisions" as "subject to the provisions of Article 59," which says that they have no precedential effect.[22] Most importantly, the provisions concerning amendment of the United Nations Charter, which include amendment of the use of force provisions at the core of the Charter, contain no provisions for amendment by judicial decision. Instead, as provided in article 108 of the Charter, amendments of the Charter—including change in the use of force provisions—would require participation of two thirds of the members of the General Assembly and all the permanent members of the Security Council.[23] Let me emphasize this point. Any amendments to the Charter's use of force provisions would require unanimity among the permanent members of the Security Council, including agreement by the United States.

D. Coordinated Public Response

As a fourth possibility in ending the erosion in the right of defense, another classic tool of international law available to the United States in rejecting an erroneous judicial decision is simply to coordinate with American allies and other interested nations in preparing a public response rejecting the erroneous view. There is no reason that the United States could not take the lead in a widely adhered declaration by governments, for example, that there is a full right of individual and collective defense against non-state actors. Indeed, despite the decision of the International Court of Justice in the *Israeli Wall* case, following the 9/11 attacks, the Security Council itself has clearly recognized the right of defense against non-state actors. A practice of such declarations against erroneous decisions might also have a generally useful effect on future use of force decisions of the Court itself.

Related to this fourth approach, and of possible help in restoring sanity in *jus ad bellum* law, I am pleased to inform this distinguished audience that Professor Yoram Dinstein of Tel Aviv University and I have been working with David Graham and scholars and practitioners from eleven countries in preparing a manual on *jus ad bellum*, tentatively titled *The Virginia Manual on the Law Concerning the Use of Force and the Exercise of Self-Defense*. Once in draft form, the manual will be circulated to governments—most particularly to include the United States Department of Defense—for incorporation of comments before finalization. The manual is well along, with agreement on multiple black letter rules, and is

[22] *Id*. art 38.
[23] U.N. Charter art. 108.

in the process of adding commentary to the rules. As this audience knows well, such manuals have been useful in dealing with *jus in bello* issues.

III. Conclusion and Thanks

With your leadership, we can restore the law of *jus ad bellum* to its classic and correct meaning. That meaning was supported by many of the finest international law minds in the world—including Professors Myres McDougal,[24] C.M.H. Waldock,[25] and Derek W. Bowett.[26] A fully effective right of defense is an essential element in deterring aggression. In a world of sophisticated secret warfare, that right is needed more than ever.

We have a choice today. We can support the Charter framework as it supports defense and works against aggression, or we can avert our eyes as that framework is dismantled piece by piece.

In concluding, I would be remiss if I did not extend my thanks to all in this audience for your important service to the Nation, to freedom, and to the rule of law. May God be with each of you and may God be with the greatest Nation on earth, the United States of America.

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[24] *See* MCDOUGAL & FELICIANO, *supra* note 16.

[25] 81 C.M.H. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, HAGUE ACAD. RECUEIL DES COURS 451, 498 (1952).

[26] D.W. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 188–89 (1958).