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OF WAR AND PUNISHMENT: "TIME OF WAR" IN MILITARY JURISPRUDENCE AND A CALL FOR CONGRESS TO DEFINE ITS MEANING

Lieutenant Commander Joseph Romero, JAGC, USN*

> *"When one sovereign attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search -- he does not stand on ceremony or wait for technical niceties."*[1]

Sensus verborum est anima legis.[2] This simple phrase embodies the great strength, and the equally great weakness, of our Western legal practice. The ability of the judiciary to interpret laws provides an incredible degree of flexibility that allows the law to accommodate reality. It creates, however, a paradoxical danger. This flexibility can, and does, lead to *ad hoc* decisions between different courts that contradict one another, sowing confusion among practitioners and the public. This is exemplified when applying "time of war" provisions found within the Uniform Code of Military Justice (UCMJ).[3] Consider, for example, the following scenario. Three individuals are in Afghanistan supporting ongoing operations against al Qaeda and the Taliban. One is a Sailor, one a Soldier, and one a civilian contractor. All three are involved in procurement and logistics for U.S. forces in the field. They become entangled in a conspiracy to defraud the U.S. Government by manipulating procurement documents and funneling supplies into the Afghan

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* The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. Lieutenant Commander Romero is an active duty Navy judge advocate presently serving as the Administrative Law Division Officer and instructor at the Naval Justice School. He obtained a J.D. from St. John's University School of Law and a B.A. from Manhattan College. The author specifically extends his appreciation and gratitude to his wife, Kirsten Romero, MS, RD for her support in editing this article and her patience during its drafting. The author would also like to thank LCDR Peter Koebler, JAGC, USN, and Maj Rick Belliss, USMC, for their assistance.

[1] United States v. Ayers, 4 C.M.A. 220, 224 (C.M.A. 1954), *citing* Stankus v. New York Life Ins. Co., 44 N.E.2d 687 (Mass. 1942).

[2] [Lat.]The meaning of words is the soul of the law.

[3] 10 U.S.C. §§ 801-946 (2005) [hereinafter UCMJ].

black market for kickbacks, while forward-deployed forces lack for the needed supplies. In fact, some missions are not completed as a result. Six years later, the conspiracy is uncovered. The service members are tried at individual general courts-martial. The Sailor argues at trial that the statute of limitations for his offense has expired.[4] Nonetheless, the Military Judge takes judicial notice[5] that operations in Afghanistan at the time of the offense constituted "time of war" for purposes of Article 43 of the UCMJ and that, therefore, the statute of limitations is tolled during this period. The court-martial trying the Soldier, on the other hand, comes to the opposite conclusion, finding that operations in Afghanistan at the time of the offense did not rise to the level of "time of war" for purposes of military justice. The Military Judge finds that the statute of limitations has thus expired and dismisses the charges. The civilian is still in Afghanistan performing military contracting work. The U.S. Attorney declines to prosecute the civilian, who then successfully bribes local officials not to prosecute him. Therefore, the cognizant General Court-Martial Convening Authority, incensed that the contractor will otherwise go untried, brings charges against him under the auspices of Article 2(a)(10) of the UCMJ.[6] The civilian is convicted of the offense, but appellate defense counsel successfully argues that current case law does not allow for court-martial jurisdiction over civilians absent a declared war by Congress.[7] The Court of Criminal Appeals dismisses the charges and the civilian effectively evades prosecution.

In this hypothetical, three individuals are equally culpable of fraud against the Government, one which materially impacted the military's ability to perform vital missions. Despite their equal involvement, however, only one of the three co-conspirators is convicted. This unequal outcome does not appear to serve the needs of the military justice system, nor does it satisfy our common notion of fairness. Nevertheless, the current state of the law with regard to wartime provisions in the UCMJ lends itself to an uneven and inequitable application of military justice. Congress has never defined "time of war" in the Code, thus leaving it as a matter of statutory construction by the judiciary.[8] The President has defined "time of war" in the Manual for Courts-

[4] UCMJ art. 43. Article 43(b)(1) states, "Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command."

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 201 (2002) [hereinafter MRE]. *See* United States v. Castillo, 34 M.J. 1160, 1163 (N.M.C.M.R. 1992).

[6] UCMJ art. 2(a)(10) states, "(a) The following persons are subject to this chapter: . . . (10) In time of war, persons serving with or accompanying an armed force in the field."

[7] *See infra* notes 16 and accompanying text.

[8] *Castillo*, 34 M.J. at 1162.

Martial (MCM),[9] but has limited that definition to Parts IV and V of the MCM.[10] The result is a paradigm where "time of war" has taken on various meanings depending on the Article of the UCMJ that is being analyzed. In addition, "time of war" determinations are made on an ad hoc basis by the military judge, or subsequently by the appellate courts. This leaves the military justice practitioner, the convening authority, and the accused guessing as to whether "time of war" applies. The determination of "time of war" in a case can be of great consequence. It can impact the statute of limitations,[11] authorized punishment,[12] the elements of the offense,[13] and whether persons other than active duty military can be tried before a court-martial.[14] Such a critical determination should be afforded more import by the legislature.

This article will analyze "time of war" and conclude that congressional definition of this term for purposes of military justice is long overdue. Part I of this article will discuss the "time of war" provisions found in the UCMJ and MCM and provide a history of their application in military law. Part II will analyze and attempt to categorize, at least for purposes of application to military justice, the current "Global War on Terror"(GWOT), including a comparison to U.S. military and political undertakings of the past. It will then endeavor to determine if the GWOT invokes the Code's wartime provisions. In Part III, this article will conclude that legislative action to define "time of war" is necessary, and has long been so, in order to uniformly apply the concept to military legal practice.

I. "TIME OF WAR."

A. UCMJ and MCM

The term "time of war" is found in various articles of the UCMJ. Article 2(a)(10) provides that military courts-martial jurisdiction extends to

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[9] Rules for Courts-Martial 103(19), Manual for Courts-Martial, United States (2002) [hereinafter RCM].

[10] RCM 103(19) states in pertinent part:

> "War, time of." For purposes of . . . implementing the applicable paragraphs of Parts IV and V of this Manual only, 'time of war' means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists for purposes of . . . Parts IV and V of this Manual.

[11] *See* UCMJ art. 43; *see infra* notes 17-19 and accompanying text.

[12] *See* UCMJ arts. 71, 77-134.

[13] *See* UCMJ art. 106.

[14] *See* UCMJ art. 2(10).

persons other than active duty military who, "in time of war," are "serving with or accompanying an armed force in the field."[15] This would include civilian employees, dependents, and contractors of the Department of the Defense (DOD).[16] "Time of war" provisions appear in several sections of Article 43. Under Article 43(a), the statute of limitations is tolled in "time of war" for persons charged with "absence without leave or missing movement."[17] Under Article 43(e), the statute of limitations for any offense committed in "time of war," that is "certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security," is extended for six months after the termination of hostilities as proclaimed by the President or Congress.[18] Article 43(f) likewise extends the statute of limitations for three years after the cessation of hostilities for cases involving fraud against the U.S., offenses associated with the acquisition or control of U.S. real or personal property, and fraud offenses involving procurement or acquisition related to prosecution of the war.[19] A little known provision of the UCMJ, Article 71(b) allows the Secretary of the service concerned to commute a sentence of dismissal of an officer to

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[15] *Supra* note 6.

[16] *But see* United States v. Averette, 41 C.M.R. 363 (C.M.A. 1968), "time of war" means a declared war by Congress when discussing military criminal jurisdiction over civilians.

[17] UCMJ art. 43(a) (2002), which states, "A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried at any time without limitation."

[18] UCMJ art. 43(e) (2002) states:

> For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

[19] UCMJ art. 43(f) (2002), which states:

> When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter-- (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not; (2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or (3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency; is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

reduction to any enlisted paygrade in "time or war."[20] Moreover, said individual would be required to serve in that grade "for the duration of the war … or six months thereafter."[21] "Time of war" is also present in seven punitive articles of the UCMJ. With respect to Articles 85 (Desertion), 90 (Assaulting or Willfully Disobeying Superior Commissioned Officer), and 113 (Misbehavior of a Sentinel or Lookout), commission of the offense during "time of war" increases the maximum punishment to death. Articles 101[22] (Improper Use of a Countersign), 105[23] (Misconduct as a Prisoner), and 106[24]

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[20] UCMJ art. 71(b) (2002) states:

> If in the case of a commissioned officer, cadet, or midshipman, the sentence of a court-martial extends to dismissal, that part of the sentence providing for dismissal may not be executed until approved by the Secretary concerned or such Under Secretary of Assistant Secretary as may be designated by the Secretary concerned. In such a case, the Secretary, Under Secretary or Assistant Secretary, as the case may be, may commute, remit, or suspend the sentence, or any part of the sentence, as he sees fit. In time of war or national emergency he may commute a sentence of dismissal to reduction to any enlisted grade. A person so reduced may be required to serve for the duration of the war or emergency and six months thereafter.

[21] *Id.*

[22] UCMJ art. 101 (2002) states:

> Any person subject to this chapter who in time of war discloses the parole or countersign to any person not entitled to receive it or who gives to another who is entitled to receive and use the parole or countersign a different parole or countersign from that which, to his knowledge, he was authorized and required to give, shall be punished by death or such other punishment as a court- martial may direct.

[23] UCMJ art. 105 (2002) states:

> Any person subject to this chapter who, while in the hands of the enemy in time of war-
> (1) for the purpose of securing favorable treatment by his captors acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or
> (2) while in a position of authority over such persons maltreat them without justifiable cause; shall be punished as a court-martial may direct.

[24] UCMJ art. 106 (2002) states:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the Unites States, or elsewhere, shall be tried

(Spies) make commission of the offense in "time of war" an element of the offense. Article 112a (Wrongful Use, Possession, etc., of Controlled Substances) provides that an offense committed in "time of war" increases the maximum period of confinement by five years.[25]

Despite the ubiquitous nature of "time of war" in the UCMJ, the drafters of the statute did not define it, thus leaving the responsibility of construing its meaning to the courts.[26] The difficulty in this task lies in the fact that the legislative history surrounding this term of art "is not particularly enlightening."[27] The one source in military jurisprudence that has explicitly defined "time of war" is the Rules for Courts-Martial (RCM).[28] In RCM 103, the President has defined "time of war" as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists."[29] However, for reasons unexplained in the MCM, or in the accompanying analysis to RCM 103,[30] the President has limited the application of this definition to Parts IV[31] and V[32] of the MCM, and to RCM 1004(c)(6),[33] thus effectively limiting application of this definition to the punitive articles and Article 15 proceedings. It is arguable that this may be a mere omission in drafting, and the definition found in RCM 103(19) should be applicable to "time of war" whenever it appears in the Code. However, the specificity of the limiting language in RCM 103 makes this argument untenable.[34] It is more likely that, during

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by a general court-martial or by a military commission and on conviction shall be punished by death.

[25] MCM, ¶ 37e(2)(b).

[26] *Castillo*, 34 M.J. at 1162. "The code does not define 'time of war,' and Congress has not generally defined the term elsewhere . . . ." *See* MCM, app. 2¶ 1, RCM 103(19).

[27] *Castillo*, 34 M.J. at 1162. "The legislative history of the code contains few references to this matter. The only direct reference, related to the deletion of the phrase from Article 102, indicates that the working group which initially drafted the code considered 'time of war' to mean a 'formal state of war.' *Hearings on H.R. 2498 Before the Subcomm. of the H. of Comm. on Armed Services*, 81st Cong. 1228-29 (1949). This reference is not cited in any of the decisions of the Court of Military Appeals construing "time of war." MCM, app. 21; RCM 103(19).

[28] RCM 103(19).

[29] *Id*. *See supra* note 10.

[30] MCM, app. 21, RCM 103(19).

[31] Part IV of the MCM contains the President's implementing regulations to the punitive articles of the UCMJ as authorized by UCMJ arts. 18, 19, 20, 56.

[32] Part V of the UCMJ contains the President's implementing regulations to UCMJ art. 15, nonjudicial punishment.

[33] RCM 1004 provides for aggravating factors that must be found before a sentence of death may be imposed upon an accused. RCM(c)(6) in pertinent part states, "That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war . . . ."

[34] RCM 103(19) states, "For purposes of RCM 1004(c)(6) and of implementing the applicable paragraphs of Parts IV and V of this Manual *only*, ..." (emphasis added).

drafting, RCM 103(19) was limited in scope to those areas where the President had been given clear authority by the legislature to issue clarifying and implementing regulations.[35] For example, there is no language in UCMJ Article 2 that would purport to give the President the authority to prescribe implementing regulations in the area of personal jurisdiction. Thus, it is appropriate that RCM 202, which is the President's regulation regarding personal jurisdiction, succinctly states, "courts-martial may try any person when authorized to do so under the code."[36] This is again seen in Article 43. The article itself does not contain any specific language that would give the President the authority to further interpret terms within that article of the UCMJ. The one location where the President prescribed rules regarding the statute of limitations is found in RCM 907, which provides that a motion to dismiss one or more charges may be made if the statute of limitations has expired.[37] RCM 907 does not otherwise define any terms created by Congress. RCM 907 finds its foundational authority in UCMJ Article 36, not Article 43, which allows the President to prescribe rules governing trial procedure.[38] The authority to implement rules of procedure does not, by itself, denote an authority to define the underlying substantive statute. Thus, it would appear that RCM 103(19) was purposely limited in order to respect the constitutional separation of powers between the legislative and executive branches.

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[35] The President's authority to issue implementing regulations for the punitive regulations of the UCMJ, and for nonjudicial punishment, is clear. Article 56 establishes the President's responsibility to set the maximum punishments for offenses established by Congress under the UCMJ. "The punishment which a court-martial may direct for an offense may not exceed such limits *as the President may prescribe for that offense*." UCMJ art. 56 (2002) (emphasis added). UCMJ Articles 18, 19, and 20 clearly grant the President the authority to establish the maximum jurisdiction for each of the three forms of court-martial. All three articles provide that the court-martial in question may, "*under such limitations as the President may prescribe*, adjudge any punishment not forbidden by this chapter." *See* UCMJ arts. 18, 19, 20 (2002) (emphasis added). *See also* United States v. Greco, 36 C.M.R. 559, 561 (A.B.R. 1965) ("Inherent in the President's authority to prescribe limitations on punishments which may be imposed by courts-martial for violations of the Uniform Code of Military Justice is authority to remove those limitations as he sees fit.").

[36] UCMJ art. 2(a)(2002).

[37] RCM 905(b)(2)(B).

[38] UCMJ art. 36(a).

> Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, *may be prescribed by the President* by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

Id. (emphasis added).

This delineation between the punitive articles and the non-punitive articles is recognized in two cases that arose during the Vietnam War. In *United States. v. Greco*,[39] the accused was convicted of being "drunk upon his post" in violation of UCMJ Article 113.[40] In his pretrial advice, the Staff Judge Advocate advised the Convening Authority that the offense charged was capital because it occurred during "time of war."[41] The court, however, found that the Staff Judge Advocate's advice was erroneous insofar as it concluded that "time of war" was applicable to the case at hand. The court found that Article 56 authorizes the President to implement limitations on punishments for violations of the UCMJ.[42] The court then highlighted that "[i]nherent in the President's authority to prescribe limitations on punishments which may be imposed by courts-martial . . . is the authority to remove those limitations as he sees fit."[43] It took judicial notice that, as of the date of the offense in the case concerned, neither the President nor Congress had taken action to remove the limitations upon punishment.[44] The SJA was in error because, although wartime conditions may have prevailed in the area of operations, the President had not freed enhanced punishments. In effect, in order to impose enhanced punishment, there is a two-step process. First, the offense must occur during "time of war." Second, the President or Congress must then affirmatively act to remove punishment limitations.[45] Therefore, it made no difference in the case if the offense occurred during "time of war" because one of the two criteria was absent.[46]

The analysis regarding "time of war" was markedly different in *United States v. Anderson*.[47] In *Anderson*, the accused was convicted of

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[39] 36 C.M.R. 559 (A.B.R. 1965).

[40] *Greco*, 36 C.M.R. 559 (A.B.R. 1965). UCMJ art. 113 (1950), stated:

> Any sentinel . . . who is found drunk . . . upon his post . . . shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

A more detailed analysis of the case is found in Part II of this article.

[41] *Greco*, 36 C.M.R. at 560.

[42] *Id* at 561.

[43] *Id*.

[44] *Greco*, 36 C.M.R. at 561. *See also* United States v. Bancroft, 11 C.M.R. 3 (C.M.A. 1953), United States v. Sanders, 21 C.M.R. 147 (C.M.A. 1956).

[45] *Id*.

[46] *Id*.

[47] *Anderson,* 38 C.M.R. at 386 (C.M.A. 1968).

desertion in violation of UCMJ Article 85.[48] On review, the question was raised whether the statute of limitations for the charged offense had run.[49] The Court of Military Appeals analyzed the military's involvement in Vietnam and concluded that "the current military involvement of the United States in Vietnam undoubtedly constitutes a 'time of war' in that area, within the meaning of Article 43's suspension of the running of the statute of limitations."[50] Conspicuously absent from the court's analysis, however, is any discussion regarding the President's ability to limit or control the meaning of "time of war" in Article 43. While the court did review executive and legislative action against North Vietnam, it did so in order to characterize the nature of the war, not the nature of the Article.[51] There was no discussion regarding any need for presidential action specifically applicable to Article 43, as opposed to the need for such action when discussing the punitive articles. In other words, Article 43 is not bound by any requirement that the President implement the "time of war" provisions found within it. The courts can make that determination.[52] That is not the case when discussing punishment limitations, where affirmative Presidential action is required in accordance with the legislature's grant of such authority to the President in Article 56.[53]

Both *Greco* and *Anderson* were decided before enactment of RCM 103(19). However, their rationales are highly suggestive that the limitation of applicability written into RCM 103(19) was not accidental. Thus, with the definition of "time of war" found in the RCM having limited applicability to the Code, and in the absence of Legislative definition or intent, the judiciary has created a patchwork of judicial decisions that have, as highlighted below, shifted the focus from actually defining "time of war" for purposes of the entire code, to applying an individualized "time of war" standard to the various affected UCMJ articles.

B. Judicial Construction of "time of war"

1. Laying the Foundation

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[48] *Id.*

[49] The Board of Review affirmed findings of guilty to the lesser included offense of unauthorized absence in violation of Article 86 because the Government had failed to prove that the accused intended to remain absent permanently. The Board of Review then found that the offense occurred in "time of war" within the meaning of UCMJ Article 43 for purposes of analyzing applicability of the statute of limitation. Thus, the offense could be prosecuted "at any time without limitation. *Id.* at 387. A more detailed analysis of the case is found in Part II of this article.

[50] *Id.*

[51] *Id.* at 387.

[52] *See Castillo*, 34 M.J. at 1163.

[53] *Greco,* 36 C.M.R. at 561, *accord Castillo*, 34 M.J. at 1167.

The judiciary has a long history of reviewing what manifests "war" for purposes of statutory construction and of finding that war may exist in fact, even if it is not formally declared by the legislature. In *Bas v. Tingy*,[54] for example, the Supreme Court held that the limited war-at-sea between the U.S. and France at the turn of the 18th century constituted a "war" for purposes of resolving salvage claims. Of note, the court found that a formal declaration of war by Congress, which is one means of establishing hostilities between nations, was not the exclusive means of doing so.[55] Instead, the law allowed for a review of the underlying hostilities in order to determine if war exists in fact, even if the conflict is otherwise intentionally limited in scope.[56] Again, the Supreme Court in *Brig Amy Warwick*[57] had to decide whether the Civil War constituted a "war" for purposes of salvage claims. The court found that "war" existed in fact, even in the absence of a formal declaration.[58] Indeed, the court questioned whether Congress has the constitutional authority to declare war against internal insurgents.[59] In sum, the court recognized that

[54] Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).
[55] *Id.* at 40.
[56] *Id.* As Justice Washington most eloquently explained:

> The decision of this question must depend upon another; which is, whether, at the time of passing the act of congress of the 2d of March 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down, *that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war*. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised [sic] to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorised [sic] to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised [sic] by the legitimate powers. It is a war between the two nations, though all the members are not authorised [sic] to commit hostilities such as in a solemn war, where the government restrains the general power.

Id. (emphasis added). This concept, that we may be in a *de facto* state of war without a Congressional declaration, is summed up by Justice Washington when he declares, "In fact and in law we are at war . . . ." *Id.* at 42.
[57] Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1863).
[58] *The Prize Cases*, 67 U.S. at 666 (1862).
[59] *Id.*

war's "existence is a fact . . . which the Court is bound to notice and to know."[60]

Military jurisprudence before enactment of the UCMJ[61] has a long history analyzing the nature of "war" and its application to military justice. In *Hamilton v. McClaughry*,[62] the court was required to determine whether the Boxer Uprising in China constituted "time of war" for purposes of conferring jurisdiction over the accused.[63] By the turn of century, extensive foreign exploitation of China created widespread resentment among younger Chinese.[64] This resentment eventually led to the creation of a secret organization, which the Western powers called the "Boxers" and which attacked foreigners.[65] With the tacit approval and support of the Chinese Dowager Empress, the Boxer revolt eventually lead to the murder of the German Minister and the siege of foreign nationals in Peking by Boxers and Chinese forces.[66] In response, the Western powers amassed a force of approximately 19,000 men to quell the uprising and protect foreign nationals.[67] The United States itself raised a force of 15,000 men, of which 5,000 actually proceeded to China to participate in the operation.[68] During his deployment to China, Army Private Fred Hamilton was tried and convicted of murdering a fellow Soldier in violation of the 58th Article of War.[69] This article conferred general court-martial jurisdiction over a service member for murder only in times of war.[70] On appeal, Private

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[60] *Id.* at 667.
[61] The UCMJ was enacted on May 5, 1950.
[62] Hamilton v. McClaughry, 136 F. 445 (C.C.D.K. 1905).
[63] *Id.* at 447.
[64] Foreign nationals actively involved in China included Italians, French, Japanese, Russian, British, German, Austrian, and United States citizens. By early 1900, this movement brought China to the verge of revolution. Boxers did not limit their attacks against foreigners, but included anything Chinese that smacked of foreign influences. Boxers in the northern provinces attacked and killed hundreds of Chinese Christians. AMERICAN MILITARY HISTORY, VOLUME 1: 1775 – 1902, 340 (Maurice Matloff, ed., Combined Books 1996) [hereinafter AMERICAN MILITARY HISTORY].
[65] *Id.*
[66] *Id.*
[67] *Id.*; *Hamilton*, 136 F. at 450.
[68] *Hamilton*, 136 F. at 450.
[69] *Id.* at 446.
[70] *Id.* The fifty-eight article of war, under which petitioner was tried and convicted, reads as follows:

> "In time of war, insurrection or rebellion, larceny, robbery, . . . murder, . . . shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the state, territory, or district in which such offense may have been committed."

Hamilton's counsel argued "that at the time of the homicide there prevailed neither war, insurrection, nor rebellion, as required by the article . . . to confer jurisdiction upon a general court-martial to try petitioner for the offense charged against him, and therefore the military court was without jurisdiction in the premises and its judgment void."[71]

In concluding whether "time of war" existed for purposes of general court-martial jurisdiction, the court proceeded to analyze the Boxer Uprising and the U.S. Government's response to it. In laying the foundation for its analysis, the court noted that "the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination and are bound thereby."[72] The court also noted at the very outset that "[i]n the present case, at no time was there any formal declaration of war by the political department of this government against either the government of China or the 'Boxer' element of that government. A formal declaration of war, however, is unnecessary to constitute a condition of war."[73] War does not exist solely when Congress issues a declaration. Instead, "war has been well defined to be that state in which a nation prosecutes its right by force."[74] In other words, a factual review of what is occurring determines if the nation is in "time of war."[75] The court then proceeded to review the actions of the political departments. It noted that the Department of War deployed thousands of soldiers to China, who engaged in combat operations against approximately 30,000 armed Chinese, the fighting produced considerable loss of life, Peking was besieged and captured, military zones were formed, and operations continued until the

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Id.

[71] *Id.*

[72] *Id.* at 449.

[73] *Hamilton*, 136 F. at 449.

[74] *Id., citing The Prize Cases*, 67 U.S. at 666 (1862).

[75] *Id.* at 450.

> [T]he question here is whether this government was, at the time of the commission of the homicide by petitioner, prosecuting its right in Chinese territory by force of arms." *Id.* In describing what rights the U.S. was acting to protect, the Court noted, "It has been well said the safety of the people is the supreme law of the land. The first duty of a state is the protection of the lives and property of its citizens, wherever lawfully situate, by peaceable means, if possible; if not, by force of arms. More especially must this protection be afforded the accredited representatives of this government in a foreign country."

Id.

Dowager Empress sued for peace.[76] In addition, Congress authorized military pay for personnel involved in the Boxer Uprising to be increased to the amount paid in "actual war."[77] Based on all these factors, the court concluded that war "did and must of necessity be held to have existed."[78]

Subsequent to enactment of the Code, the U.S. Court of Military Appeals[79] examined "time of war" in a number of cases. One of the first cases, which became a benchmark for "time of war" considerations, is *United States v. Bancroft*.[80] In *Bancroft*, the accused was tried by a special court-martial for sleeping on post in violation of UCMJ Article 113.[81] The Board of Review[82] determined that the case was indeed capital and concluded that the court had no jurisdiction over the offense since a general court-martial convening authority did not concur with referral of charges to a special court-martial prior to referral of the charges.[83] On certification from the Judge Advocate General of the Navy, the court was required to decide whether the charged offense was committed during "time of war," making it a capital offense.[84]

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[76] AMERICAN MILITARY HISTORY, *supra* note 64, at 341. U.S. forces suffered over 200 casualties.
[77] *Hamilton*, 136 F. at 451.
[78] *Id.*
[79] UCMJ art. 67 (1950) established the Court of Military Appeals as a three-judge civilian court. In 1968, Congress redesignated the Court as the United States Court of Military Appeals. In 1989, Congress enacted comprehensive legislation to enhance the effectiveness and stability of the Court. The legislation increased the Court's membership to five judges, consistent with the American Bar Association's Standards for Court Organization. In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces. *See* http://www.armfor.uscourts.gov/Establis.htm.
[80] *Bancroft*, 3 C.M.A. 3 (C.M.A. 1953).
[81] *Id.* at 4.

> Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct.

Id.
[82] Until 1920, court-martial convictions were reviewed either by a commander in the field or by the President, depending on the severity of the sentence or the rank of the accused. The absence of formal review received critical attention during World War I. Following the war, in the Act of June 4, 1920, Congress established Boards of Review, consisting of three lawyers, to consider cases involving death, dismissal of an officer, an unsuspended dishonorable discharge, or confinement in a penitentiary, with limited exceptions. The legislation further required legal review of other cases in the Office of the Judge Advocate General. *See* http://www.armfor.uscourts.gov/Establis.htm.
[83] *Bancroft,* 3 C.M.A. at 4. *See infra* note 97 and accompanying text regarding the Government's subsequent attempt to cure the jurisdiction defect by obtaining a general court-martial convening authority order subsequent to the trial.
[84] *Id.*

The court began its analysis by noting that the President, pursuant to UCMJ Article 56, suspended the limitation on punishments for certain offenses, including the offense in question.[85] The court further noted that "under the express language of Article 113, regardless of the President's action, punishment may not extend to the death penalty unless the offense is committed in time of war."[86] Therefore, "[w]hile he has freed the punishment from executive limitations, a finding by us that the offense herein is capital or noncapital depends solely upon the nature of the operations now being carried on in Korea."[87]

Adhering to the practical approach in *Hamilton* and *Bas*, the court in *Bancroft* held that "war" was determined by reviewing the factual nature of the conflict itself and was not limited to any formalized action by Congress to this end.[88] In sum, "practical considerations were more important" than abstract analysis of whether the nation was involved in a technically recognized war.[89] In what has become a guidepost for "time of war" questions in military jurisprudence, the court established a number of factors to consider when analyzing UCMJ wartime provisions. Specifically, the court considered the manner in which the conflict is carried on, the movement to and the presence of large numbers of American men and women on the battlefield, the casualties involved, the sacrifices required, the drafting of recruits to maintain the large number of persons in the military service, any national emergency legislation enacted and being enacted, the executive orders promulgated, and the

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[85] On August 8, 1950, by Executive Order No. 10149, the President suspended the limitation upon the punishment for certain offenses when committed within a specified area in the Far East, including Korea, and this suspension was extended by Executive Order No. 10247, dated May 29, 1951, to cover Article 113. *Id.* at 5. The Court conceded that, "The President has the authority under Article 56 of the Code, 50 USC § 637, to lift the maximum sentence set by him for any offenses so long as he does not exceed the limits imposed by Congress." *Id*.

[86] *Id.* at 5.

[87] *Id*. Although addressed in prior cases, whether Korea qualified as a "war" had never been in dispute before the court. The Court noted:

> Although this Court has never categorically set out its views on the exact nature of the Korean conflict, we have for purposes of disposing of certain issues, where a state of war was conceded by all parties, accepted the concession. *See* United States v. Horner, 9 C.M.R. 108 (1953), and United States v. Young, 9 C.M.R. 100 (1953), both decided May 8, 1953. Concessions have not been made in this case and the issue is in sharp dispute. We must, therefore, dispose of the respective contentions.

Id.

[88] *Id.*

[89] *Id.*

tremendous sums being expended for the purpose of keeping an Army, Navy and Air Force in the theater of operations.[90] Of note, the court held:

> For our purpose, it matters not whether the authorization for the military activities in Korea springs from Congressional declarations, United Nations Agreements or orders by the Chief Executive. Within the limited area in which the principles of military justice are operative, we need consider only whether the conditions facing this country are such as to permit us to conclude that we are in a state of war within the meaning of the terms as used by Congress.[91]

Given the existing conditions in Korea at the time, the United States was in fact in a "highly developed state of war . . . . It would indeed be an insult to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail."[92] Although the court was consistent with prior judicial decisions in holding that a formal declaration by Congress was not required,[93] it correctly noted that it could not "arrive at a decision contrary to the clear intent of Congress."[94] To this end, the court found that:

> [I]n view of the historical development of this phase of military law, previous impositions of wartime penalties during conflicts which were not clearly authorized by a Congressional declaration, the wording of the Code, and the interpretation Congress itself has placed on the hostilities by re-establishing certain wartime rights, cause us to believe that

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[90] *Bancroft*, 3 C.M.A. at 5.
[91] *Id.*
[92] *Id.* at 5. The Court noted:

> A reading of the daily newspaper accounts of the conflict in Korea; an appreciation of the size of the forces involved; a recognition of the efforts, both military and civilian, being expended to maintain the military operations in that area; and knowledge of other well-publicized wartime activities convinces us beyond any reasonable doubt that we are in a highly developed state of war. Moreover, we believe that battle conditions, where many lives depend upon the proper performance of hazardous duty by each and every individual, require that peacetime sentences with regard to military offenses be discarded and the more severe wartime sentences be invoked.

Id. at 5, 6.
[93] *See supra* notes 85, 87, 92, and accompanying text.
[94] *Id.* at 6.

> when The President, as Commander-in-Chief, ordered members of the armed services into the conflict, he involved this country in hostilities to such an extent that a state of war existed; and that Congress, when it used the phrase "in time of war" in the military Code, intended the phrase to apply to that state regardless of whether it was initiated or continued with or without a formal declaration.[95]

Specifically with regard to Korea, the court highlighted congressional acquiescence to this pragmatic approach when it noted the following:

> [I]n the case of United States v. Gilbert, 9 BR-JC 183 (1950), the Judicial Council held that the present conflict in Korea was a war within the meaning of Article of War 75, *10 USC § 1547*. That case was decided after enactment, but almost a year prior to the effective date, of the Uniform Code of Military Justice, and Congress has not seen fit to narrow the interpretation placed on the phrase "in time of war." It may well be that the holding was not called to the attention of Congress, but many individual members of the Senate and the House were well aware of it.[96]

Based on this finding, the court held that "time of war" existed and the offense was capital. Therefore the special court-martial which tried the accused was without jurisdiction and the special court-martial proceedings were "a nullity."[97]

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[95] *Id.* at 6.

[96] *Bancroft*, 3 C.M.A. at 7. The Court went on to note that the Judicial Counsel reviewed the, "background, extent and nature of the hostilities between the United States and North Korean forces . . . and the inevitable results of such hostilities up to that time in terms of casualties, again matters of common knowledge and therefore proper subjects of judicial notice, are genuine proof of the existence of a state of public war between the two governments on that date." *Id.* The Court also noted that, with respect to the Korean conflict, Congress had enacted combat zone pay exclusions for military personnel. *Id.*

[97] *Id.* at 9. The Government argued that the accused waived any objection regarding jurisdiction when the accused failed to object at trial. However, the Court dismissed that contention by noting that jurisdiction can never be acquired solely by consent of the accused. *Id.* at 11. The Government attempted to cure the jurisdictional defect by obtaining an order by a general court-martial convening authority subsequent to trial concurring with the proceedings. However, the court found the effort was in vain.

> [N]either the fact that he was sentenced to less than life nor the stamp of approval by the officer exercising general court-martial authority would cure the defect. . . . An order entered by general court-martial authority antedated before trial could not breathe life into the proceedings as

The considerations established in *Bancroft* would be echoed in nearly every subsequent military case addressing "time of war" considerations, several of which followed very quickly on the heels of *Bancroft*. One such case was *United States v. Ayers*.[98] In *Ayers*, the court reviewed whether the underlying offense was committed during "time of war," thus tolling the statute of limitation. In this particular case, the accused allegedly absented himself without authority on 23 December 1950.[99] The sworn charges on which the accused was arraigned and tried were received by the officer exercising summary court-martial authority on March 18, 1953.[100] The Army Board of Review held that the offense was tried after the statute of limitation expired and directed that the charges be dismissed.[101] The issue before the Court of Military Appeals was whether the offense was committed during "time of war," thus removing the statute of limitation for unauthorized absence offenses under UCMJ Article 43(a).[102]

Unlike *Bancroft* and *Hamilton*, however, the alleged offense "originated at a place far removed from the conflict."[103] In fact, the accused absented himself while in the continental United States.[104] Now faced with this novel issue, the court had to determine whether the Korean conflict invoked the "wartime provisions of the Uniform Code as to military personnel within the confines of the continental United States."[105] Was *Bancroft* therefore even relevant? The court answered with a clear affirmative. The court reasoned that the issue before it was not at all different from *Bancroft*.[106] At play was whether the military's involvement in Korea, both within and without the theater of operations, satisfied the Congressional purpose for having wartime provisions in the Code. To put it differently, were "the reasons underlying certain provisions of military criminal law operative only in time of war" fully

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> jurisdiction of the offense must be acquired before trial and not afterwards. To hold otherwise would destroy the rights of many in a vain hope of protecting the rights of one.

Id.

[98] *Ayers*, 4 C.M.A. 220 (C.M.A. 1953).

[99] *Id.* at 221.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Ayers,* 4 C.M.A. at 225.

[104] *Id.* at 225. "Yet it is insisted that we must restrict the ambit of Article 43(*a*) to absences and desertions having their origin in the Korean zone of operations." *Id.*

[105] *Id.* at 221.

[106] *Id.* at 222.

served by the Korean situation?[107] Faced with this question, the court reasoned that *Bancroft's* pragmatic approach to determining whether war exists in fact was just as pertinent to the question at hand.[108]

Since the issue depended heavily on congressional intent with regard to the Code, the court focused its pragmatic analysis on congressional actions that recognized the Korean conflict as a state of war, even if Congress did not "baptize the Korean conflict by giving it the name of 'war.'"[109] To that end, the court proceeded to document a plethora of examples where congressional action recognized Korea as a "war."[110] All told, "Congress has seen fit to provide money necessary to carry on the conflict, furnish arms, munitions, ships and troops and to proceed in the same manner as if there had been a

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[107] *Id*.

[108] *Ayers,* 4 C.M.A. at 222. "It would appear, therefore, that the two cited cases furnish us at the same time with the resolution of an analogous issue and an approach to the one before us now -- that of practicality, of broad realism, as distinguished from narrow legalism." *Id.*

[109] Weissman v. Metropolitan Life Ins. Co., 112 F. Supp. 420, 422 (D. Cal. 1953).

[110] The Court noted a number of acts by Congress recognizing Korea as a "war," short of a declaration. The court emphasized that:

> Congressional support of the action in Korea, which we know was in fact war on a large scale, was necessary, and was freely and generously given in many Acts of Congress by which provision was made for support of the armed forces employed, for increased military man power and equipment, and for economic stabilization. Many of those Acts of Congress, including vast appropriations for the support of the armed forces in Korea, are referred to in the dissenting opinion of Chief Justice Vinson in the steel mill seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952) (Vinson, J., dissenting). Reference is made to the one hundred thirty billion dollars appropriated by Congress for our armed defense and for military assistance to our Allies since the June, 1950, attack in Korea, to the Mutual Security Act of 1951, 22 U.S.C.A. § 1651, to the grant by Congress of authority to draft men into the armed forces, to the increase in appropriations to the Department of Defense, which had averaged less than thirteen billion dollars per year for the three years before the attack in Korea, to forty-eight billion dollars for the year 1951. There were other Acts of Congress recognizing the existence of war in Korea and enabling the government to prosecute it with vigor and efficiency, such as the Servicemen's Indemnity Act, 38 U.S.C.A. § 851 (2004), a new GI Bill of Rights, 38 U.S.C.A. § 694 (2004), the 1950 Amendment to the Revenue Act, 26 U.S.C.S. § 1 (and again more appropriations. Those Acts were in acknowledgment of the fact of war in which the Nation was engaged. And to use the language of Justice Grier in his opinion in the *Prize* cases above quoted, "if it is necessary to the technical existence of war that it have legislative sanction, the Acts of Congress above referred to gave sanction."

Id., *citing* Western Reserve Life Ins. Co. v. Texas, 261 S.W.2d 554 (Tex. 1953), *cert. denied*, 347 U.S. 928 (1954).

formal declaration of war . . . ."[111] Based on Congress's actions, the court "certainly is justified in finding that if such a declaration were necessary, nonetheless, the conflict has received the sanction of Congress."[112] Of note, the court drew attention to an Iowa Supreme Court case that poignantly highlighted:

> The unreality of adopting an interpretation which would hold the Korean struggle not to be a war within any reasonable meaning is pointed up by the fact that as of March 28, 1952, total United States casualties were 106,956, with 16,739 killed and 77,651 wounded and 9,916 missing in action. Of all wars in which this country has been engaged, only the two World Wars and the Civil War exceeded the Korean struggle in cost, in casualties, and money.[113]

With the Korean conflict established as a *de facto* war, the court then felt it necessary to address the second prong of this issue: whether Congress intended for "time of war" provisions to apply away from the theater of battle absent a declaration of war. To that end, the court had no difficulty finding that the practical concerns that warranted wartime provisions within the Code were not diminished simply because the offense occurred away from the battlefield. The court could "discern no difference in seriousness between a desertion from a main line of resistance in the Korean area and one from front line combat in the course of a fully declared war."[114] As the court went on to say:

> When asked -- as now -- to differentiate in result between an unauthorized absence occurring within the continental United States and one arising in Korea, we recognize immediately that, whether the defection occurs at a port of embarkation on the eve of a shipment of personnel, or following a unit's arrival in Korea, we are faced with essentially the same problem. In either instance the Armed Forces are deprived of a necessary -- perhaps vitally necessary -- combat replacement. In both instances the military is faced with a dilemma. Either its authorities must organize a costly search for the absence, or the Armed Force concerned is required to risk the loss of his services permanently. Clearly, too, the

[111] *Weissman,* 112 F. Supp. at 423.
[112] *Ayers*, 4 C.M.A. at 223.
[113] *Id.* at 223, *citing* Langlas v. Iowa Life Ins. Co., 63 N.W.2d 885 (Iowa 1954).
[114] *Id.* at 226.

> deleterious effect on morale of unauthorized absence is more substantial when the absentee may be escaping the hazards and risks of transfer to the Korean conflict than when -- as in "peacetime" -- he can evade no more than the comparatively minor inconveniences of service life.[115]

This impact on the ability and mission of the unit, regardless of where the offense occurred, "might easily disturb the most placid student of the problem, and appears to have disturbed the Congress as well."[116] The court also analyzed the issue under the prism of modern warfare. Specifically, "modern integrated war operates to subject troops to the possibility of rapid transfer" and that "atomic-age warfare [was] thought by the Congress to require measures which would insure combat readiness even of units located within the United States."[117]

However, before one can accept *Ayers* as a wholesale endorsement of *Bancroft*, there are two interesting points of divergence between the two cases. One point is the discussion by the *Ayers* court regarding the analytical framework when reviewing individual UCMJ articles that contain wartime provisions. Specifically, the court noted, "in view of the fact that the phrase 'time of war' appears in several distinct Articles in the Uniform Code, … we are constrained to point out that its meaning, as it may be used in any particular Article, must be determined with an eye to the goal toward which that Article appears to have been directed."[118] The court based this opinion on its perceived Congressional intent that Congress intends a "war" to end for some purposes, but not for others.[119] However, the court goes no further in explaining this holding. Indeed, this holding does not appear to apply to any issue relevant to the case since there was only one article in question before it, Article 43(a), and it did not provide a ruling different from that of any prior

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[115] *Id.*
[116] *Id.*
[117] *Ayers*, 4 C.M.A. at 226.
[118] *Id.* at 227. The Court stated in an accompanying footnote:

> The cases construing 'war' within the meaning of insurance policies form a close parallel to our present problem. There the courts are inquiring into the basic purpose of the insurer and insured in excluding the payment of double indemnity benefits for death arising from military service in time of 'war.' . . . . We are concerned with the purpose of Congress in conditioning various legal consequences on a state of "war."

Id. See also Langlas, 63 N.W.2d 885.
[119] *Id.* at 227.

case. As such, this portion of the opinion appears to be dicta.[120] However, the verbiage is not couched in terms of dicta. The court was not musing about future issues but determined that this was the most effective means of interpreting "time of war" in the UCMJ.

The second point of divergence from *Bancroft* is the existence of a dissenting opinion, specifically that of Chief Judge Quinn. Chief Judge Quinn did join in the majority opinion in *Bancroft*. Nevertheless, the Chief Judge took issue with the court's finding that legislature intended for wartime provisions of the UCMJ to apply outside of the Korean area of operations. Although "hostilities in Korea produced the consequences of war in that area,"[121] Quinn opined that "the entire genius of our Government's policy in the Korean crisis was to confine the hostilities and its consequences to the combat zone. This was made clear by congressional action, following the engagement of American forces as part of the United Nations command."[122]

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[120] "Dicta" is defined as "[o]pinions of the judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before the court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY 454 (6th ed. 1990).

[121] *Ayers*, 4 C.M.A. at 228 (Quinn, C.J., dissenting).

[122] *Id.* Chief Judge Quinn highlighted statements by various Congressmen regarding the Korean conflict. For example, he noted that Senators Taft and Douglas made repeated public pronouncements that, "in spite of the Korean conflict, the continental United States was not in a state of war." *Id.* He also highlighted other Congressional actions that evidenced a desire to treat Korea in a much more limited fashion. Specifically, he noted:

> Congressional understanding of the delimited nature of the hostilities also appears in its action on specific legislation. Congress was considering an extension of the Selective Service Act of 1948, when the Communist aggression began in Korea. It is significant that the bill was extended for only one year. 64 Stat 318. Equally significant is the limitation written into the Universal Military Training and Service Act on June 19, 1951, which expressly prohibits extension of certain enlistments without consent, in the absence of a war or national emergency declared by Congress. 65 Stat. 75, 88. Similar in nature to these actions is the grant of the free mail privilege. During general wartime conditions, the privilege was extended to military personnel within, as well as without, the continental limits of the United States. 56 Stat. 176, 181, 59 Stat. 538, 542. However, when Congress reinstated the privilege on July 12, 1950, it was expressly limited to the forces in Korea and such areas as may be designated by the President as combat zones. 64 Stat. 336, 65 Stat. 90; *50 USC App § 892.* Also in the same category is the grant, in September 1950, of certain income tax advantages in the form of exclusions of pay from gross income. In time of general conflict this exclusion was authorized for all personnel on active duty, wherever the place of their service. 61 Stat 917, 918. In the present situation the grant is only to those serving in a combat zone, as designated by the President. 65 Stat. 920, 26 U.S.C. § 22(b)(13).

He also highlighted executive actions that appeared to evidence a desire to limit the effects of the Korean conflict to that particular area. Specifically, the Table of Maximum Punishments was "suspended only in the Far East command."[123] Quinn would have limited the application of wartime UCMJ provisions to the Korean battlefield and nowhere else.

Following *Ayers*, the court once more analyzed "time of war" in *United States v. Taylor*.[124] Much like the cases before it, the *Taylor* court was required to analyze whether Korea invoked the wartime provisions of Article 43.[125] Like *Ayers*, the *Taylor* case involved a novel question. Specifically, the court was required to analyze whether subsection (f) of Article 43 was triggered by the Korean conflict.[126] Article 43(f) provided "that the running of the statute of limitations will be suspended 'when the United States is at war' -- as to any offense under the Code 'involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not.'"[127] The court noted that there were no prior cases interpreting "at war" in Article 43. In addition, there existed an additional wrinkle. Article 43(f) contained, as it does today, very specific language extending the statute of limitations for the prosecution of certain fraudulent activity until three years after the "termination of hostilities *as proclaimed by the President or by a joint resolution of Congress*."[128] This language, the defense counsel argued, could only mean that Congress intended for wartime provisions in Article 43(f) to apply only when Congress or the President formally declared or acknowledged hostilities.[129] To address this *de novo* question, much like in *Ayers* and *Bancroft*, the court proceeded in a pragmatic review of the facts surrounding the Korean conflict and the legislative purpose behind the wartime provision in Article 43(f). Of note, the court highlighted:

> The legislative hearings reveal clearly that the Congress was deeply concerned over the possibility that wartime frauds might not quickly be discovered, and distinctly desired an extensive term of amenability to prosecution therefor.

Id. at 228, 229.
[123] *Id.*
[124] United States v. Taylor, 4 C.M.A. 232 (C.M.A. 1954).
[125] *Id.* at 235.
[126] *Id.*
[127] *Id.* Although not directly pertinent to the discussion in this article, the Court struggled with other aspects of Article 43(f). The Court noted that the definition of "fraud" found in the Article was "other than lucid." *Id.* The Court looked to various Supreme Court holdings interpreting the word and ultimately concluded that the offense of fraudulent enlistment was included within the meaning of the statute. *Id.*
[128] UCMJ art. 43(f) (1950) (emphasis added).
[129] *Taylor*, 4 C.M.A. at 236.

> Moreover, it was pointed out to Congress "that the official termination of the war is usually not declared until a considerable period after the cessation of actual hostilities." We are sure, therefore, that the reference in Article 43(*f*) to a proclamation of termination of hostilities *was made for the purpose of affording the Government an additional period within which to discover and prosecute 'frauds' by means of deferring the running of the statute for three years following a formal proclamation of termination of hostilities -- rather than the actual date of the ceasefire*. [130]

The court proceeded to explain the practical reasons why the language found in Article 43(f) was intended to enhance, not detract, the scope of potentially chargeable conduct. Congress, for one thing, recognized that during periods of hostilities huge sums of money are spent for material and equipment, offering a temptation to the unscrupulous.[131] Moreover, in such instances, there would be a sense of urgency, and thus the use of normal safeguards would be diminished.[132] Another factor to consider is the frequent turnover of personnel in administrative posts, which could also breed temptation to fraud.[133] Finally, law-enforcement in periods of hostility is busily engaged in many other duties, including the prevention of espionage and sabotage.[134] When reviewing the legislative intent and practical realities of the conflict in question, the court found "scant basis for holding that the recent hostilities in Korea did not satisfy every requirement of Article 43(f)."[135] The court also fully adopted *Ayers* and rejected "all distinction between offenses occurring in Korea and those taking place in the zone of the interior."[136]

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[130] *Id*. (emphasis added).
[131] *Id.* at 237.
[132] *Id*.
[133] *Taylor*, 4 C.M.A. at 237.
[134] *Id*.
[135] *Id.*
[136] *Id.* The Court illustrated that:

> such a distinction would operate to make Article 43(*f*) virtually inapplicable to the Korean episode, for most of the Armed Service contracts -- which provide the chief opportunity for fraud -- were consummated far from Korea. Indeed, it is normal that the base from which an Army is supported and maintained be kept at a reasonably safe distance from enemy forces, for the purpose of avoiding destruction in the event of a breakthrough.

Id. Chief Judge Quinn dissented for the same reasons he expressed in *Ayers*. *Id*.

The Court of Military Appeals in *Bancroft*, *Ayers*, and *Taylor* established the practical considerations used to determine whether "time of war" exists as a matter of fact.[137] In a subsequent line of cases, the court next had to address another *de novo* issue; when does a "time of war" end? In *United States v. Sanders*,[138] the court was faced with an issue analogous to that in *Bancroft*, to wit: was the charged violation of UCMJ Article 113 [139] committed during "time of war?" If so, the jurisdiction of the Special Court-Martial that tried the accused would have been fatally defective since the Convening Authority did not obtain concurrence of the General Court-Martial Convening Authority before referring a capital case to a special court-martial.[140] In *Sanders*, the offense was committed on June 4, 1955. The court reiterated that "time of war" exists when "our armed forces are engaged in actual combat against an organized armed enemy. Necessarily, if the relations between the opposing forces are substantially altered the change can terminate the war."[141] The armistice that legally ended the conflict was signed on July 27, 1953. Since the signing, both sides of the conflict took affirmative steps to end it. [142] In addition, the President took certain administrative actions indicating that the conflict had ended.[143] Thus, "[t]aking into consideration all the circumstances existing on June 4, 1955, the date the offense in this case was committed, the inescapable conclusion is that a 'time of war' condition had ended. The Special Court-Martial, therefore, had jurisdiction of the offense." [144] It is clear that the court adopted the pragmatic approach established in *Bancroft*. To determine whether "time of war" existed, one needed to look at the realties of the situation. "In other words, if a 'time of

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[137] *See also* United States v. Christensen, 4 C.M.A. 22 (C.M.A. 1954) (Korea was "time of war" for purposes of officer prosecution); United States v. Anderten, 4 C.M.A. 354 (C.M.A. 1954) (Korean conflict was "time of war" to determine that desertion was a capital offense).

[138] *Sanders*, 7 C.M.A. 21 (C.M.A. 1956).

[139] UCMJ art. 113 provides:

> Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as court-martial may direct.

[140] RCM 201(f)(1)(C).

[141] *Sanders*, 7 C.M.A. at 21.

[142] *Id*.

[143] *Id*. The Court noted that the President ended the period of eligibility of entitlement to certain veterans' benefits for those members of the armed forces participating in the Korean conflict and also terminated certain income tax benefits for those engaged in combat activities in the Far East.

[144] *Id*. It should be noted that the majority opinion was written by Chief Judge Quinn, who dissented in the *Ayers* case.

war' situation depends upon the existence of actual armed hostilities . . . the cessation of hostilities ends the condition."[145]

This question was more thoroughly analyzed in *United States v. Shell*.[146] In *Shell*, the charged offense of unauthorized absence commenced on August 4, 1953. On appeal, the defense counsel argued that the two-year statute of limitation applied because the "time of war" ended on July 27, 1953, the day the armistice was signed, and several days before the commission of the offense.[147] Like the cases before it, the court held that the issue was to be determined by reviewing the "realities of the situation as distinguished from legalistic niceties."[148] "Of crucial importance in all of the cases, …was the existence of armed hostilities against an organized enemy."[149] As of July 27, 1953, the court saw the conditions as "that of immediate readiness, not armed conflict."[150] The court determined that the most important factor to the court's conclusion that "time of war" had ended on July 27, 1953 was that the purpose for our presence in Korea changed with the signing of the Armistice. We were no longer there to repel aggression; we were there to maintain a peaceful status quo.[151] This is not to say that the court relied on the "legal nicety" of the armistice alone. On the contrary, it was of critical importance in the court's analysis that "[a]rmed combat ended and battlefield conditions ceased; there was no more shooting and there were no more battle casualties; a Demarcation Line and Demilitarized Zone were established; and war prisoners were repatriated."[152]

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[145] *Id., citing* United States v. Gann, 3 C.M.A. 12 (C.M.A. 1953).
[146] United States v. Shell, 7 C.M.A. 646 (C.M.A. 1957).
[147] *Shell,* 7 C.M.A. at 649.
[148] *Id*. at 650.
[149] *Id.*
[150] *Id.* at 651.
[151] *Id.*
[152] *Id.* The Court took great pains to highlight all of the changes in Korea that ultimately supported the finding that the "war" had ended. The Court stated:

> Assessing the situation existing as of that time, we note the absence of many of those factors upon which we predicated our previous holdings that we were at war. Thereafter, it was no longer necessary to provide the logistical support essential to maintain combat operations in terms of both quality and quantity. American troops no longer had to be rotated to equalize combat duties. Patrolling, while no doubt still intensive, no longer was aimed at penetration into enemy territory. A buffer zone was established to prevent just that sort of activity. The kind of medical support required in a combat situation no longer had to be furnished.

Id. While the signing of the armistice was "perhaps most important" of these factors, it was far from the only one. *Id.* It should be noted that Chief Judge Quinn again dissented to the entire premise that the Korean conflict invoked the wartime provisions in the UCMJ. *Id.* at 654.

2. Vietnam and beyond.

Bancroft and its progeny through *Shell* firmly established that the practical reality of a particular situation, and not a formal or legal recognition of "war" by the Executive or Congress, was sufficient to determine whether "time of war" existed for purposes of military jurisprudence. The Court of Military Appeals was relatively straightforward up to this juncture for two reasons. First, the Korean War was arguably a simple case in determining that "war" existed absent formal declaration.[153] In Korea, there were large, standing armies on both sides of the conflict, both sides sustained massive casualties, land was seized, cities were besieged, large quantities of resources were expended, and hostilities began and ended at relatively clear time periods. In sum, it was a national war that required tremendous societal mobilization.[154] Second, there was no need to conduct a separate analysis regarding wartime provisions in the punitive articles of the UCMJ, as opposed to wartime provisions elsewhere in the code.[155] During the Korean War, President Truman suspended the Table of Maximum Punishments of the Code for certain offenses committed in the Far East.[156] Thus, there was only one issue in question, was the military engaged in a "war"? The cases subsequent to *Bancroft* begin to demonstrate the fickle and sometimes arbitrary development of "time of war" jurisprudence.

"Time of war" application came before the court a little more than a decade after Korea as the U.S. became increasingly mired in Vietnam.[157] U.S.

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[153] Chief Judge Quinn's dissent in *Ayers, Taylor,* and *Shell* would indicate that this is clearly not a universally accepted premise.

[154] When North Korea invaded the South on June 25, 1950, it had a force of 135,000 troops, many of whom had served in land battles in China and in Soviet armies during World War II. The South maintained 95,000 ill-trained and ill-equipped troops. The U.S. Army, which only a few years before exceeded nearly 8 million soldiers, was sharply reduced after WWII and had a total force of 519,000 when Korea invaded. In the first month of the war, the U.S. had suffered over 6,000 casualties, while the South Koreans suffered over 70,000. Within 4 months of the war's initiation, over 300,000 Chinese troops had entered the war as well. During the war, both sides of the conflict had at one point or another occupied nearly the entire peninsula. By war's end, casualties for all United Nations forces opposing North Korea exceeded 550,000, of whom 95,000 were dead. U.S. forces alone suffered 142,091 casualties, of which 33,629 were deaths. Enemy casualties were estimated at 1,500,000, of which 900,000 were Chinese. *See* AMERICAN MILITARY HISTORY, VOLUME 2: 1902-1996, 203 (Maurice Matloff, ed., Combined Books 1996).

[155] *See supra* notes 31-38 and accompanying text.

[156] *Bancroft*, 3 C.M.A. at 5.

[157] The U.S. involvement in Vietnam resulted mainly from France's failure to suppress a "communist-dominated revolutionary movement" led by Ho Chi Minh known as the Viet Minh. AMERICAN MILITARY HISTORY, *supra* note 154, at 273. In the ideologically charged and militarily tense Cold War years following World War II and Korea, Vietnam was seen as another

involvement in Vietnam began very gradually, as early as 1950, with a handful of military advisors being sent to aid France.[158] France's failure and subsequent withdrawal, and the successes of the Viet Cong (as the Viet Minh were later known) in infiltrating and undermining the South Vietnamese Government, led to President Kennedy's sharp increase in military support to the South.[159] This support also involved the participation of U.S. forces in direct combat against insurgent forces.[160] With U.S. policy in Vietnam showing little success of defeating an ever bolder and better resourced insurgency,[161] President Johnson committed the full spectrum of U.S. conventional forces in Vietnam.[162]

One of the first "time of war" issues that arose in Vietnam involved the application of wartime provisions in the punitive articles. In a short decision issued by the Army Board of Review in *Greco*,[163] the board highlighted that there were "only two methods by which the limitations upon punishments" could be lifted pursuant to the 1951 MCM.[164] One was by formal declaration of war by Congress, and the second was by presidential action.[165] In the Korean War, President Truman took such action.[166] However, this was not the case in Vietnam. Without this threshold requirement, the board was not required to determine whether "war" existed.[167]

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communist challenge to the U.S. national security and non-communist nations. By this time, the U.S. had adopted the "flexible response" strategy that allowed it to avoid a massive, and likely annihilating, engagement with the Soviet Union by engaging in small scale military operations, such as the U.S. military intervention in Lebanon in 1956 and show of force in the Straits of Taiwan. *Id.*

[158] *Id*. at 275. This group was known as the Military Assistance Advisory Group (MAAG), Indochina. In 1955, MAAG Indochina was replaced by MAAG, Vietnam and consisted of approximately 324 Americans.

[159] U.S. troop strength in Vietnam increased from under 700 at the start of 1960 to over 24,000 by 1964. AMERICAN MILITARY HISTORY, *supra* note 154, at 288.

[160] By 1964, U.S. forces were providing direct air support. At this point, however, there was still lingering hesitation to commit large scale U.S. ground forces directly into the land war. *Id*. at 292.

[161] North Vietnamese regular forces had begun to infiltrate the South in order to participate in the insurgency, and their training helped the Viet Cong counter many of the new tactics and weaponry being used by the South. *Id.*

[162] By July 28, 1965, President Johnson announced plans to deploy additional combat units and increased the size of the U.S. presence in Vietnam to 175,000 troops by year's end. The Army, which struggled in Korea after its massive cuts following WWII, now surpassed 1.5 million soldiers, relying heavily on the draft to maintain such a force. By the end of 1967, U.S. military forces in Vietnam surpassed 490,000 and were engaged in combat operations throughout Vietnam. *Id*. at 298.

[163] *Greco,* 36 C.M.R. at 559 (A.B.R. 1965).

[164] *Greco*, 36 C.M.R. at 561.

[165] *Id.* This requirement is found in the current MCM in RCM 103. *See supra* notes 31-38 and accompanying text.

[166] *See supra* note 85.

[167] *Greco,* 36 C.M.R. at 561.

Greco begins to highlight the difficulty in analyzing UCMJ wartime provisions. As described above, the SJA in *Greco*, relying on *Bancroft*, assumed that the ever increasing U.S. involvement in Vietnam warranted a finding of "time of war."[168] As a result, the accused negotiated a plea agreement from the initial position that he faced capital charges.[169] According to the board, therefore, the accused was prejudiced by this error because he failed to negotiate with a full appreciation of his position before the law.[170] The board held that the case was in fact not capital and set aside the findings of guilt.[171] The board determined that the SJA erred in his reliance on *Bancroft* because *Bancroft* applied only in determining if war conditions existed.[172] Before this determination need be made for the punitive articles, however, it is necessary to determine whether the prerequisite requirements found in the MCM for the punitive articles have been met. In Vietnam by 1965, they had not. With regard to the punitive articles, Congress has bestowed upon the President the inherent authority to establish and remove the maximum punishments.[173] Even if the Code allows for greater punishment, the court-martial may not award any sentence in excess of what the President, pursuant to Article 56, has prescribed for the offense.[174] For example, if the Code establishes that an offense can be capital if committed in "time of war," the court is nonetheless prohibited from imposing a capital sentence if the President has not permitted imposition of death for the offense.[175] In the case at hand, since the limitations on punishment were not lifted by the President, the case was not capital regardless of whether "war" conditions prevailed.

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[168] The Staff Judge Advocate amended his pretrial advice to the convening authority that the charged offense was capital. *Greco,* 36 C.M.R. at 560.

[169] *Id.* at 562.

[170] *Id*. In fact, the accused agreed to plead guilty in return for an assurance that the convening authority would approve a sentence no greater than the maximum noncapital sentence authorized for the charged offense. The Board would not believe, absent an explanation in the record, that the accused would have knowingly agreed to plead guilty in return for an agreement to approve any sentence in excess of what was lawfully permitted, since such a sentence would be legally void. *Id*.

[171] *Id*.

[172] *Id*. at 561. The Board noted that, since the President suspended limitations on punishments in Korea, the only issue before the Court in *Bancroft* was whether "war" therefore existed. Since no such action was taken in Vietnam by 1965, the Board in *Greco* therefore had to address the threshold question of whether the procedural requirements established by the President had been met.

[173] *See supra* note 35 and accompanying text.

[174] Legal and Legislative Basis, Manual for Courts-Martial, United States (1951). *See also supra* notes 35, 85 and accompanying text.

[175] *Id.*

Greco established that the punitive articles, as distinguished from the non-punitive Articles in the UCMJ, must be reviewed differently and under the prism of presidential action pursuant to the MCM. This stands in contrast to the issue before the Court of Military Appeals in *Anderson*.[176] *Anderson* involved applicability of the wartime statute of limitations provisions found in Article 43 for unauthorized absence offenses. As opposed to the punitive articles, the President's proscriptions in the MCM regarding the punitive articles were inapplicable to Article 43.[177] Consequently, the court was faced with the sole question posed in *Bancroft*: did "time of war" exist at the date of the charged offense?

To this end, the majority fully embraced *Bancroft's* pragmatic approach in determining whether "the nature of the military commitment in Vietnam as of November 3, 1964, the date of the commission of the offense of which the accused stands convicted," constituted "time of war."[178] One factor that weighed heavily in the court's analysis, much as it did on the court in *Shell*, was the existence of congressional and executive actions, short of a declaration of war, which evidenced their recognition of the nature of the conflict.[179] In particular, the "Gulf of Tonkin resolution by Congress on August 10, 1964, constituted 'official recognition' that the United States was engaged in an 'overt confrontation of arms between opposing powers.'"[180]

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[176] *Anderson*, 17 C.M.A. at 588.

[177] *See supra* note 19 and accompanying text. Although the MCM has been amended regularly since 1965, the basic text of the article has not materially changed in subsequent versions of the Manual.

[178] *Anderson*, 17 C.M.A. at 589.

[179] *Id.* In Judge Kilday's concurring opinion, which was joined in part by Judge Ferguson, he expressed a concern with the majority opinion that the Gulf of Tonkin Resolution was tantamount to a Congressional declaration of war. *Id.* at 594 (Kilday, J. concurring). In a well written and succinct opinion, he stated:

> I do not, however, agree that the Gulf of Tonkin resolution amounts to or constitutes a declaration of war. . . . It is, in essence, a congressional appraisal of world happenings, a recognition of events that, when considered with other equal compelling facts, leads to the necessary conclusion a state of war exists."

Id.

[180] *Id.*, *citing* the Joint Resolution to promote the maintenance of international peace and security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964). The Resolution states, in pertinent part:

> *Resolved* by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the

Irrelevant was the fact that the Gulf of Tonkin incident and a subsequent attack on U.S. forces in Pleiku, standing alone, were relatively small affairs.[181] Likewise, it was irrelevant that the U.S. officially described retaliatory attacks against the North as defensive, vice offensive.[182] The North Vietnamese attacks, and the U.S. response, "enlarged the area and the intensity of the military hostilities[.]"[183] Both the Executive and the Legislature regarded the Resolution as a "functional way . . . contemplated by the Founding Fathers to 'invoke the . . . war powers.'"[184] In sum, "the Gulf of Tonkin attack

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> United States and to prevent further aggression. Section 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom. Section 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.

[181] On 4 August 1964, the USS MADDOX (DD 731), a U.S. Navy destroyer conducting intelligence gathering 4 nautical miles off the North Vietnamese coast, was attacked by North Vietnamese patrol boats in the Gulf of Tonkin. AMERICAN MILITARY HISTORY, *supra* note 154, at 293; Dale Andradé & Kenneth Conboy, *The Secret Side of the Tonkin Gulf Incident*, NAVAL HISTORY (Aug. 1999), *available at* http://www.usni.org/navalhistory/Articles99/NHandrade.htm. During the engagement, the North Vietnamese boat launched torpedoes and the MADDOX badly damaged at least one boat. The battle was over in 22 minutes. That evening, President Johnson claimed that another group of boats again attacked both the MADDOX and the USS C. TURNER JOY (DD 951). *Id.* There has always been a shadow over the incident, particularly the second attack. "Today, it is believed that this second attack did not occur and was merely reports from jittery radar and sonar operators, but at the time it was taken as evidence that Hanoi was raising the stakes against the United States." *Id. See also* Wikipedia, *Gulf of Tonkin Incident*, *available at* http://en.wikipedia.org/wiki/Gulf_of_Tonkin_Resolution, ("The Pentagon Papers, which were revealed at great personal risk by Daniel Ellsberg and later revealed that the Johnson administration of the United States had virtually fabricated the attacks, as dissident researchers subsequently showed"). On 7 February 1965, Communist forces attacked an American compound, killing eight Americans, wounding 126, and destroying ten aircraft. THE HISTORY PLACE, THE JUNGLE WAR 1965-1968, *available at* http://www.historyplace.com/unitedstates/vietnam/bw-index-1965.html.

[182] Although listed as defensive in nature, the U.S. immediately launched a series of air strikes against the North in response to the attacks in the Gulf of Tonkin. AMERICAN MILITARY HISTORY, *supra* note 154, at 293. Several weeks later, President Johnson approved operation Rolling Thunder, a massive and sustained bombing campaign against military and industrial targets in North Vietnam. AMERICAN MILITARY HISTORY, *supra* note 154, at 293.

[183] *Anderson*, 17 C.M.A. at 590.

[184] *Id.*, citing United States Commitments to Foreign Powers: Hearings on S.R. 151 Before the Senate Foreign Relations Committee, 90th Cong. 161-162 (1967).

precipitated a state of armed conflict between the United States and North Vietnam."[185] As such, the court found "the current military involvement of the United States in Vietnam undoubtedly constitutes a 'time of war' in that area, within the meaning of Article 43's suspension of the running of the statute of limitations."[186]

The opinion in *Anderson* raises questions of "time of war" application, although not because it injects divergence from precedent. On the contrary, it follows *Bancroft* fully. Surprisingly, it creates circumspection because of who wrote the majority opinion. It was none other than Chief Judge Quinn, the same judge who adamantly opposed extending the impact of a wartime finding in Korea outside of the theater of operations and who took every opportunity to express this view after *Bancroft*.[187] This is pertinent for two reasons. One, by 1965, U.S. involvement in Vietnam was, by design, still very much limited in nature and paled in comparison to the total war underway in Korea when *Ayers* was decided.[188] Two, the language used by Chief Judge Quinn was extraordinarily expansive and absolute in describing the Vietnam conflict and the Gulf of Tonkin Resolution, in contrast to his more cautious views on Korea a decade earlier. For example, he states most broadly that the Gulf of Tonkin attacks "precipitated a *state of armed conflict between the United States and North Vietnam.*"[189] It must be assumed that the Chief Judge of the Court of Military Appeals would appreciate the impact of using the words "state of armed conflict," both in view of international and domestic law, when defining the relationship between two nations. In fact, his language was so expansive that it convinced his two fellow judges to break away from the majority opinion and issue more limited, albeit supportive, opinions of their own.[190] Chief Judge Quinn did omit any discussion regarding the court's holding

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[185] *Id*.
[186] *Id*. at 589.
[187] *See supra* note 161.
[188] *See supra* notes 121, 122, 136, 144, 152, 153, and accompanying text; *compare* notes 152, 156 with the circumstances of the *Ayers* case, *supra* note 1. By 1965, there were 24,000 U.S. troops in Vietnam engaged in a politically limited conflict where the focus was still a reinforcement of local forces. During *Ayers*, there were hundreds of thousands of troops engaged in the full spectrum of combat.
[189] *Anderson*, 17 C.M.A. at 590 (emphasis added).
[190] *See supra* note 188.

> In my opinion, it is unnecessary to consider the resolution or to characterize it either as a declaration of war -- as does the Chief Judge -- or as evidence of the existence of conflict, as does my brother Kilday. Regardless of the resolution, the fact remains that we are at war, even though it has not been solemnly declared in the Constitutional sense.

Anderson, 17 C.M.A. at 594 (Ferguson, J., concurring).

outside of the immediate theater of operations,[191] and it will remain a mystery whether he would have limited *Anderson* in the same fashion. Additionally, it must be noted that Chief Judge Quinn joined the majority in *Bancroft* and dissented when the application of "time of war" extended beyond the Far East. Nevertheless, he based his earlier dissent on what he perceived as Congress's intent to specifically limit the impact of Korea outside the Far East.[192] In Vietnam at the time of *Anderson*, in contrast to Korea, it was clearly the Administration's policy to limit U.S. involvement directly within Vietnam itself by limiting the scope of authorized combat operations.[193] To then use such expansive verbiage in light of this may lead to a conclusion that the analytical outcome of a "time of war" question is, to some extent, unsystematic and highly subjective.

If *Greco* reinforces the premise that "time of war" is triggered differently depending on the individual code provision, and *Anderson* raises the specter of the potential for subjective judicial application of the *Bancroft* criteria, then *United States v. Averette*[194] may have to be described as the most divergent, inconsistent, and questionable decision to arise from the Court of Military Appeals with regard to UCMJ wartime provisions. It also further complicates consistent application of military justice in the face of wartime conditions.

In a *de novo* review of Article 2(a)(10),[195] the court was faced with the court-martial conviction of a civilian employee of an Army contactor who was charged with conspiracy to commit larceny.[196] In a surprisingly short opinion, considering the dramatic departure from precedent, the court held that "time of war" in Article 2(a)(10) means "a *declared* war."[197] The court determined, "[d]espite the existence of statutory provisions for the exercise of court-martial jurisdiction over civilians in certain circumstances, the Supreme Court in a series of cases . . . has disapproved the trial by courts-martial of persons not members of the armed forces."[198] The court adopted the approach

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[191] Any such discussion would not have addressed a relevant issue in the case and could therefore have been considered dicta regardless.
[192] *See supra* note 85.
[193] *See supra* note 92.
[194] *Averette*, 19 C.M.A. at 363 (C.M.A. 1970) (Quinn, C.J., dissenting).
[195] *See supra* note 6.
[196] *Averette*, 19 C.M.A. at 363. The accused was convicted of attempted larceny of 36,000 United States Government-owned batteries. After earlier appellate review, his sentence before the court stood as confinement at hard labor for one year and a fine of $500.00. *Id.*
[197] *Averette*, 19 C.M.A. at 363.
[198] *Id.* at 364. The cases relied on by the Court were Toth v. Quarles, 350 U.S. 11 (1955), Reid v. Covert, 354 U.S. 1 (1957), Kinsella v. Singleton, 361 U.S. 234 (1960), Grisham v. Hagan, 361 U.S. 278 (1960), Wilson v. Bohlender, 361 U.S. 281 (1960).

it did because it felt that "the most recent guidance in this area from the Supreme Court" dictated that "a strict and literal construction of the phrase 'in time of war' should be applied."[199] However, even a cursory review of the opinion reveals its shaky foundations. Despite the fact that the issue before the court was application of Article 2(a)(10) *during time of war*,[200] the cases cited by the court espoused Supreme Court holdings during *time of peace*[201] and therefore were not pertinent to the issue at hand. The court attempted to distinguish *Anderson* "in at least two ways. First, Anderson was a soldier, while Averette was a civilian at the time of his alleged offenses. Second, the statute in question in the present case subjects civilians to courts-martial, while the statute in *Anderson* affected the statute of limitations . . . ."[202] Both these points are immaterial.

Addressing the court's first point, it is true that the accused was indeed a civilian. Is this not the type of accused envisioned by Congress when it enacted Article 2(a)(10)? The court was not saying that Congress could not extend jurisdiction over civilians, only that "time of war" should take on a new meaning. In other words, the court was accepting that Congress can, in fact, extend military jurisdiction over civilians, only that it must do so after declaring war. This reasoning flies in the face of the rationale underpinning every decision regarding "time of war" up to this point. The court had taken special pains to emphasize that "time of war" should not depend on such "legal niceties" because that would serve to frustrate congressional intent.[203] The same can be said here. Congress intended certain persons to be subject to military jurisdiction when wartime conditions prevailed.[204] Yet the court now established that the existence of these same wartime conditions was irrelevant. The court's second point was that the case dealt with a punitive article. However, the question should be whether the triggering event of "time of war" had been met by the realities on the ground in Vietnam, and thus satisfied

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[199] *Averette*, 19 C.M.A. at 366.

[200] This same Court only two years earlier held that Vietnam fully qualified as "time of war" in *Anderson*. *See supra* note 39.

[201] *Quarles*, 350 U.S. at 11 (although the offense occurred on active duty, member severed all connections to the military and prosecution was brought during time of peace when accused was not accompanying or part of armed forces); Reid v. Covert, 354 U.S. 1 (1957) (a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace); McElroy v. United States, 361 U.S. 281 (1960), ("That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace . . . ."); Kinsella v. Singleton, 361 U.S. 234 (1960) (civilian dependent's court-martial during time of peace unconstitutional).

[202] *Averette*, 19 C.M.A. at 365.

[203] *See supra* note 39 and accompanying text.

[204] *See supra* notes 17-19 and accompanying text.

congressional intent for having wartime provisions present in the Article. The criteria in *Bancroft* should be held as dispositive in making this determination.

It is noteworthy that the cautious Chief Judge Quinn of *Ayers, Taylor,* and *Shell* dissented. He stated, "In my opinion, there is no compelling or cogent reason to construe the phrase 'time of war' as used in Article 2(a)(10) of the Uniform Code differently from the construction we have accorded the same phrase in other Articles of the Code, such as Articles 43 and 85(c)."[205] It is even more noteworthy when he highlighted that the court's "disposition of the application for a Writ of Habeas Corpus in *Latney v Ignatius, 17 USCMA 677 (1967),* was predicated upon rejection of the petitioner's contention that court-martial jurisdiction over civilians under Article 2(a)(10) depended upon a specific declaration of war by Congress."[206] In sum, the court segregated Article 2(a)(10) not because Supreme Court decisions held congressional extension of military jurisdiction over civilians in time of war invalid, nor because it made an independent judgment that Congress surpassed its Constitutional powers by enacting Article 2(a)(10), but simply because applying a more restrictive meaning would satisfy a perceived trend of questionable application.

We now arrive at the most recent military case addressing "time of war" in military law, *United States v. Castillo*.[207] In a thorough opinion, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) in *Castillo* concisely summarizes military law on the issue as it currently stands and addresses the matter in light of the more modern versions of the MCM. The accused was charged with willfully violating a lawful order in violation of UCMJ Article 90 during the Persian Gulf conflict to liberate Kuwait in 1991.[208] The appellate defense counsel, using "time of war" as a shield,

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[205] *Averette*, 19 C.M.A. at 366 (Quinn, C.J., dissenting).
[206] *Id.*
[207] United States v. Castillo, 34 M.J. 1160 (N.M.C.C.A. 1992).
[208] *Castillo,* 34 M.J. at 1161.

> On 20 January 1991, the appellant was assigned to the 3rd Tank Battalion, 1st Marine Division (Reinforced), Fleet Marine Force, then located in Saudi Arabia. The appellant was assigned as the Battalion's Preventive Medicine Technician. The Officer-in-Charge of the Battalion Aid Station, appellant's superior commissioned officer, had a requirement to replace a corpsman in Company "A." He selected the appellant. The appellant willfully refused his order to report and serve in that capacity. Accordingly, the charge and specification alleging willful disobedience of this order were referred to trial by special court-martial by the Commanding Officer, 3rd Tank Battalion. That officer was a special court-martial convening authority, not a general court-martial convening authority.

argued that the offense was committed during such.[209] Therefore, the "appellant contends that his offense occurred 'in time of war,' that the offense was a capital offense, and that, since no officer exercising general court-martial convening authority consented to his trial by special court-martial on this offense, the Special Court-Martial before which he was tried and sentenced lacked jurisdiction."[210] The court was thus faced with two issues; "[d]id the 1991 Persian Gulf conflict qualify as 'time of war' within the meaning of the Code? If so, was capital punishment in fact authorized for Article 90 violations occurring during that conflict?"[211] In this sense, the issues before the court in *Castillo* are similar to those faced by the court in *Greco*.[212] Since the review is of a punitive article, the court must first establish what executive limitations are in place upon the article. *Castillo* differs from *Greco*, however, in one very important respect. The MCM by 1991 no longer had a Table of Maximum Punishments. Instead, "the President's limitations on punishments are set out in various places in Part IV of MCM, 1984."[213] In addition, "the President has further restricted the imposition of capital punishment for those offenses carrying the death penalty only 'in time of war' by defining 'time of war' to mean a period of war declared by Congress or a period of hostilities determined by the President to constitute a time of war for this purpose."[214] Consequently, the court was required to determine if the President or Congress took action that satisfied the edicts of RCM 103(19).

Where the *Greco* court declined to analyze whether "time of war" existed in Vietnam because there was no triggering executive action releasing the potential enhanced punishment, the court in *Castillo* took the opposite road and proceeded to analyze the "time of war" issue first. There was "no formal declaration of war by Congress against Iraq."[215] "Since there have been only five declared wars since the founding of the Republic and none since the adoption of the UCMJ, . . . the question most frequently has been whether a

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Id.

[209] *Id.* "At the time of the offense and the trial, hostilities were underway in the Persian Gulf region."

[210] *Id.* at 1162. If the appellate defense counsel was correct, then the defect would be jurisdictional. As such, the "trial by special court-martial cannot now be retroactively ratified by a general court-martial convening authority, and that the error cannot be cured by affirming the non-capital, lesser offense of failing to obey a lawful order." *Id.*

[211] *Id.*

[212] *See supra* notes 5, 35 and accompanying text.

[213] *Castillo,* 34 M.J. at 1167.

[214] *Id.*

[215] *Id.* at 1164.

particular conflict was a war in fact."[216] To this end, the court looked at the factors established in *Bancroft* and applied them to the facts at hand. Moreover, if there was ever confusion regarding what mechanism is available for having a "time of war" question addressed at the trial level, the court made clear that "[j]udicial notice may be taken of those factors present for a specific conflict."[217]

The court cataloged innumerable factors which demonstrated that the conflict more than satisfied *Bancroft's* practical considerations. As the court observed:

> [T]his conflict required the movement of very large numbers of personnel and materials to the field of battle and involved the use of the most powerful instruments of conventional warfare. Recruits were not drafted, however, the recall of large numbers of reserves was required to maintain a large number of personnel in the military service. National emergency legislation was enacted and emergency, wartime executive orders were promulgated. Substantial sums were expended to maintain armed forces in the theater of operations. Most significantly, tremendous casualties and sacrifices were suffered. It is patently obvious this conflict was a war in fact, hence a 'time of war' for purposes of the UCMJ.[218]

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[216] *Id.* at 1163. "However, either the *de jure* or *de facto* tests may be used to determine whether a particular conflict is 'in time of war' within the meaning of the Code's punitive articles, e.g., Article 90." *Id.*

[217] *Id.*

[218] *Id.* at 1166. In more detail, the court highlighted the following statistics:

> The United States, together with a coalition of 32 nations… fielded … an armed force of 725,000 personnel, 2,600 aircraft, 1,900 helicopters, 3,000 tanks, 3,600 Armored Personnel Carriers (APCs), 1,100 artillery pieces, and 110 combatant ships, including 2 battleships and six aircraft carriers. … The President authorized the activation of 1,000,000 reservists, and over 200,000 reservists (47,000 Navy and Marine Corps) were actually recalled to active duty. . . . [A]llied coalition forces commenced a 42-day air campaign over Iraq and Kuwait. . . . In the course of the air campaign, over 110,000 sorties were flown by coalition air forces against Iraqi bases, weapons plants, refineries, command and control centers, missile launchers, tanks, and regulars. . . . Both the President and the Secretary of Defense declared the Persian Gulf region a combat zone for various pay and tax purposes. On 23 February 1991, the allied coalition forces invaded Iraq and Kuwait. . . . As a result of the conflict, Iraq lost or suffered damage to 4,000 tanks, 1,900 APCs, 2,100 artillery pieces, 100 aircraft, 7 helicopters and 100 vessels. . . . In human terms, Iraq suffered 80,000 to 100,000 killed

"Having concluded the Gulf conflict qualified as 'time of war' for purposes of the Code," the court was now required to determine "whether capital punishment was authorized."[219] Like *Greco*, the court reviewed whether the President authorized the death penalty for the offense. Article 90 authorized death only in "times of war."[220] For purposes of the punitive articles, the President created a mechanism for making a finding of "time of war," to wit: there must be a congressional declaration of war, or a Presidential determination that war exists *for purposes of the punitive articles*.[221] Therefore, like in *Greco*, even if the offense occurred during a period that could be considered a "war," as it did here, enhanced punishment under the punitive articles is not available until released by the President. Since there was no "formal determination by the President that the Gulf conflict constituted a 'time of war' for purposes of Part IV of the Manual," the case could not be capital.[222]

From *Bancroft* to *Castillo,* "time of war," has developed into a concept that requires diverse application for each of the individual articles where it is found, despite the fact that the words themselves are the same. This, in turn, prevents easy application of the concept and leaves the military justice practitioner effectively guessing whether "time of war" applies or not. The punitive articles require presidential action to first loosen their limits regardless of whether the practical considerations existing at the time warrant a finding of "time of war."[223] The other articles, and the punitive articles when unshackled, may be triggered by conducting a pragmatic appraisal of a situation to determine whether wartime conditions exist as a matter of fact.[224] This pragmatic appraisal, however, relies on the subjective determinations by

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> in action, and more than 80,000 Iraqis surrendered. . . . The war cost the coalition partners $ 40-50 billion. American casualties included 139 killed in action, 357 wounded in action and 6 missing in action.

Id. at 1165. In their attempts to prevent a finding of "time of war" by the Court, and thus preserve the underlying case's jurisdiction, the Government submitted an ill-considered, even silly, argument that the war should not be considered "time of war" because of the lack of "an enemy fighting back." *Id.* at 1167. Wisely, the Court rejected this argument in short order, warranting no more than a mere footnote in the case. It would have created a precedent tying a determination of whether we are at war for purposes of military justice to the competence of the enemy, as opposed to the objective facts of a case.

[219] *Castillo*, 34 M.J. at 1167.

[220] UCMJ art. 90 (1984).

[221] *Id.* at 1167. *See* RCM 103(19).

[222] *Id.* Consequently, the Special Court-Martial that tried the accused had jurisdiction to do so despite the lack of a General Court-Martial Convening Authority's concurrence.

[223] *See supra* notes 31, 35 and accompanying text.

[224] *See supra* notes 92 and accompanying text.

individual military judges, who could easily arrive at divergent findings on the same facts, and who can nevertheless be overturned on appeal. This leaves the convening authority, the accused, and counsel guessing as to whether "time of war" applies and whether the issue will be revisited at a later date on appeal. Article 2(a)(10) stands alone and in contradiction to all other cases on the matter in requiring a formal declaration of war by Congress.[225] In addition, "time of war" in Article 106[226] likely has a more restrictive meaning than otherwise found in R.C.M. 103(19) in light of *Averette*. In other words, despite a presidential action pursuant to R.C.M. 103(19) that would trigger applicability of enhanced punishments under the punitive articles, Article 106 would remain dormant until a formal declaration of war by Congress if the accused was anyone other than an active duty military member. Finally, in all cases, there appears to be no geographic limitation to application of "time of war."[227] With the current state of the law here presented, we now proceed to a review of the Global War on Terror.

II. THE "GLOBAL WAR ON TERROR"

A. "We are at War"

An analysis of the Global War on Terror (GWOT) naturally begins on September 11, 2001. September 11th "was a day of unprecedented shock and suffering in the history of the United States."[228] Islamic extremists, who had infiltrated the United States at various times between 1996 and 2000,[229] hijacked four commercial airliners and crashed them into the New York City

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[225] *See supra* notes 56, 110, 179, 190, and accompanying text.
[226] UCMJ art. 106 states:

> Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death.

[227] *See supra* notes 1, 5, 35, 39, 44, 54, 57, 62, 80, 87, 98, 109, 124, 137, 138, 145, 146, 194, 198, 201, 207, and accompanying text.
[228] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) [hereinafter THE 9/11 COMMISSION REPORT] *available at* http://www.gpoaccess.gov/911/. The 567-page 9/11 Commission Report, released July 22, 2004, was prepared over nineteen months by a ten-member nonpartisan panel headed by Thomas Keane, former governor of New Jersey (1982-1990).
[229] *Id.* at 215.

World Trade Center and the Pentagon.[230] As a result of the attacks, 2,973 people were killed,[231] "the largest loss of life" on U.S. soil as a result of hostile foreign attack in our history.[232] On September 11th, President George W. Bush began a meeting with his principal advisors with the words, "We're at war."[233]

Early signs after the attack indicated that al Qaeda, a "sophisticated, disciplined, and lethal" terrorist organization whose purpose was to "rid the world of religious and political pluralism, the plebiscite, and equal rights for women" and which made no distinction between civilian or military targets, was responsible for its execution.[234] September 11th, in turn, had its origin as far back as 1998. A Saudi exile named Usama Bin Ladin[235] issued a fatwa[236] claiming that the United States had declared war against God and thus, it was the duty of every Muslim to murder any American, anywhere on earth.[237] To repel the Soviet invasion of Afghanistan in 1979, Usama Bin Ladin helped create a shadowy organization that recruited disaffected Muslim youths from mosques, schools, and boarding houses and channeled them into the Afghani conflict.[238] This organization became known as al Qaeda. When the Soviets withdrew in 1988, al Qaeda had grown into an effective and highly organized organization with Bin Ladin its undisputed leader.[239]

As early as 1992, Bin Ladin had begun to denounce the U.S. for its "occupation" of Islamic land, including its entrance into Somalia and the U.S. presence in Saudi Arabia.[240] He planned and executed attacks against the U.S. almost immediately, sometimes with the assistance from local terrorist organizations. Al Qaeda funneled money, supplies, and fighters into Somalia to help attack U.S. forces in 1993; a car bomb exploded outside a joint Saudi-U.S. training facility, killing five Americans; in 1996, an enormous truck

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[230] *See* THE 9/11 COMMISSION REPORT, *supra* note 228, ch. 1. Exhibiting extreme bravery, the passengers on one of the aircraft attacked the hijackers, which caused the aircraft to crash in a field in Pennsylvania. *Id.*

[231] *Id.* at 311.

[232] *Id.*

[233] THE 9/11 COMMISSION REPORT, *supra* note 228, at 326.

[234] *Id.* at xvi.

[235] Although there are various spellings for the name, the author has chosen to use the spelling found in the official Commission Report.

[236] A "fatwa" is normally an interpretation of Islamic law by a respected Islamic authority. It is interesting to note that Bin Ladin was not a scholar of Islamic law when he issued his 1998 fatwa. THE 9/11 COMMISSION REPORT, *supra* note 228, at 47.

[237] *Id.* Asked in a subsequent interview by ABC-TV whether this included civilians, Bin Ladin stated that he did not differentiate between military and civilian. *Id.*

[238] *Id.* at 55.

[239] *Id.* at 58.

[240] THE 9/11 COMMISSION REPORT, *supra* note 228, at 59.

bomb exploded outside the Khobar residential complex in Saudi Arabia that housed U.S. Air Force personnel, killing 19 and wounding 327; in 1998, bomb-laden trucks attacked the U.S. Embassy in Nairobi, destroying the embassy, killing 12 Americans and 201 Kenyans, and injuring over 5,000 people; that same day, al Qaeda forces attacked the U.S. Embassy in Tanzania, killing 11 people, none American; in October of 2000, al Qaeda operatives exploded a small boat next to the USS COLE (DDG 67) while she was engaged in refueling operations in Yemen waters, ripping a hole in her port side, killing 17 Sailors and wounding at least 40 more.[241] One of Bin Ladin's goals was to have the U.S. retaliate against a Muslim nation in what he hoped would be the catalyst for a general uprising by the Islamic world against the West. When the COLE attack failed to solicit such a response, Bin Ladin began planning a more dramatic attack directly against the U.S.[242]

U.S. responses to these attacks had been limited. U.S. officials began exploring ways to capture or kill Bin Ladin as a result of al Qaeda's escalating attacks against U.S. interests, particularly after the Africa embassy bombings in 1996.[243] In addition, law enforcement efforts to disrupt terrorist plots garnered some success.[244] The most overt military response was a missile attack launched by President Clinton in 1998 against targets in Afghanistan and Sudan that intelligence linked to Bin Ladin.[245]

Bin Laden's ambition for a massive attack came to fruition on September 11th, an attack that defined a new enemy and method of warfare.[246] This enemy was able to conduct devastating attacks with only a handful of operatives, and at minimal cost.[247] The immediate focus after September 11th was to attack and destroy the enemy that had attacked the U.S., namely al Qaeda. When the Taliban regime in Afghanistan, which had long harbored Bin Ladin, refused to surrender him, they fell into the crosshairs of U.S. military planning as well. On September 17th, the President held a meeting with his principal advisors to "assign tasks for the first wave of the war against terrorism."[248] On September 18, 2001, Congress passed a joint resolution

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[241] *See generally* THE 9/11 COMMISSION REPORT, *supra* note 228, ch. 6.
[242] THE 9/11 COMMISSION REPORT, *supra* note 228, at 191.
[243] *Id.* at 174.
[244] The most notable of these successes is the disruption of a series of Year 2000 terrorist attacks. *See generally* THE 9/11 COMMISSION REPORT, *supra* note 228, ch. 6.
[245] THE 9/11 COMMISSION REPORT, *supra* note 228, at 116. Ironically, the attacks at the time were roundly criticized by public commentators as too aggressive and were deemed an intentional distraction by the Administration to focus the public's view away from the simmering Lewinsky scandal. *Id.* at 118.
[246] *Id.* at 46.
[247] *Id.* at 169. Al Qaeda spent approximately $500,000.
[248] *Id.* at 333.

authorizing the President to "use … United States Armed Forces against those responsible for the recent attacks launched against the United States."[249] On October 25, 2001, the President issued National Security Presidential Directive 9, which directed the Secretary of Defense to plan for military options "against Taliban targets in Afghanistan, including leadership, command-control, air and air defense, ground forces, and logistics" and "against al Qaeda and associated terrorist facilities in Afghanistan, including leadership, command-control-communications, training, and logistics facilities."[250] In fact, the President had approved military plans to attack Afghanistan on October 2nd.[251] On October 7th, 26 days after the 9/11 attacks, U.S. military forces began the air campaign and launched special operations forces raids against Taliban and al Qaeda targets in Afghanistan.[252] By October 19th, U.S. ground forces were operating in Afghanistan and began ground combat operations with Afghan forces.[253] By December, all major cities had fallen to the U.S. coalition and, on December 22nd, Hamid Karazai was installed as the chairman of the Afghan interim administration.[254] Within two months, the U.S. and coalition partners had "killed or captured about a quarter of the enemy's known leaders."[255] Today, there remain nearly 13,000 U.S. troops in Afghanistan continuing their ongoing hunt for the remnants of the Taliban, al Qaeda, and for Usama Bin Ladin.[256]

Since the U.S. invasion of Afghanistan, the Global War on Terror has matured into a multi-faceted campaign to protect U.S. national security against a broad spectrum of terrorists. The facets include diplomacy,[257] economics,[258]

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[249] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[250] The specifics of the directive are classified, but the existence of the directive is not. The portions quoted in this article were obtained from public testimony by administration officials and by White House press releases. *See* Scott McClellan, Press Briefing (Apr. 1, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/04/20040401-4.html#16; Secretary of Defense Donald H. Rumsfeld, Testimony Prepared for Delivery to the National Commission on Terrorist Attacks Upon the United States (Mar. 23, 2003), *available at* http://www.9-11commission.gov/hearings/hearing8/rumsfeld_statement.pdf [hereinafter Rumsfeld Testimony to the Commission]. The war in Afghanistan had already begun when the directive was signed. THE 9/11 COMMISSION REPORT, *supra* note 228, at 333.

[251] THE 9/11 COMMISSION REPORT, *supra* note 228, at 337.

[252] *See* Rumsfeld Testimony to the Commission, *supra* note 250.

[253] Rumsfeld Testimony to the Commission, *supra* note 250, at 4.

[254] THE 9/11 COMMISSION REPORT, *supra* note 228, at 338.

[255] *Id.*

[256] Office of Management and Budget, Department of Defense, *available at* http://www.whitehouse.gov/omb/budget/fy2005/defense.html.

[257] *See* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.html [hereinafter NATIONAL SECURITY STRATEGY], ch. II: Champion Aspirations for Human Dignity; ch. III: Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends; ch. IV: Work with others to Defuse Regional Conflicts; ch. VII: Expand the Circle of Development by Opening

law enforcement,[259] and the military. The military facet of this campaign has taken on an aggressive tone that, at times, has rattled the world community.[260] Dubbed the "Bush Doctrine" by public commentators,[261] this policy has been captured officially in the 2002 National Security Strategy.[262] The strategy calls for "preemptive actions to counter a sufficient threat to our national security."[263] This preemptive strategy calls for "taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack."[264] Perhaps the most visible and controversial embodiment of this preemptive strategy is the U.S. invasion of Iraq.

Societies and Building the Infrastructure of Democracy; ch. VIII: Develop Agendas for Cooperative Action with the Other Main Centers of Global Power.

[258] *See Id.* at ch. VI: Ignite a New Era of Global Economic Growth through Free Markets and Free Trade.

[259] *See Id.* at ch. III: Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks Against Us and Our Friends. The U.S. has prosecuted a number of individuals in the name of the War on Terror. This includes the prosecutions of Zacarias Moussaoui and John Walker Lindh, the prosecution of Portland and Tampa terrorist cells, and the indictment of Richard Colvin Reed. *See generally* http://www.usdoj.gov/ag/moussaouiindictment.htm. In addition, the U.S. enacted the USA PATRIOT Act, "which provides law enforcement officials with essential tools needed to track down terrorists. The USA PATRIOT Act allows investigators and prosecutors to use laws originally designed to prosecute embezzlers and drug traffickers to bring international terrorists to justice - enabling Federal law enforcement to better share information, track terrorists, disrupt their cells, and seize their assets." U.S. TAKING DECISIVE ACTION TO WIN WAR ON TERROR, WHITE HOUSE FACT SHEET ON THE STATE OF THE UNION (Jan. 20, 2004), *available at* http://usinfo.state.gov/mena/Archive/2004/Feb/04-215742.html.

[260] *See, e.g.,* Thomas E. Ricks & Vernon Loeb, Bush Developing Military Policy Of Striking First; New Doctrine Addresses Terrorism, WASH. POST, June 10, 2002, at A01; Sonya Ross, Associated Press, Cheney: United States Could Strike First Against Terrorists, ASSOCIATED PRESS WORLDSTREAM, June 10, 2002; John King, Bush Outlines First Strike Doctrine (Sept. 20, 2002), available at http://archives.cnn.com/2002/ALLPOLITICS/09/20/bush.national.security/; Associated Press, *Bush outlines strategy of pre-emptive strikes, cooperation* (Sept. 20, 2002), *available at* http://www.usatoday.com/news/washington/2002-09-20-bush-military-strategy_x.htm.

[261] *See, e.g.*, Richard Deats, *Bush 'Doctrine' too Narrow*, U.S.A. TODAY (Jan. 31, 2002), *available at* http://www.usatoday.com/news/opinion/2002/02/01/ncoppf.htm; Jaime Glazov, *The Bush Doctrine*, FrontPageMagazine.Com (Oct. 7, 2002), *available at* http://www.frontpagemag.com/Articles/Printable.asp?ID=3652; Laurence McQuillan, *'Bush Doctrine' sets up rules of engagement*, U.S.A. TODAY (Oct. 8, 2001), *available at* http://www.usatoday.com/news/sept11/2001/10/09/bush.htm.

[262] NATIONAL SECURITY STRATEGY, *supra* note 257, ch. V. Although dubbed the "Bush Doctrine," the concept of anticipatory self-defense has been discussed and recognized as a theory long before September 11th and the issuance of the National Security Strategy. In fact, such a concept was relied on by the United States in justifying attacks against Libya in response to terrorist bombings against U.S. forces. *See, e.g.*, George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321 (1998); Sean M. Condron, *Justification For Unilateral Action In Response To The Iraqi Threat: A Critical Analysis Of Operation Desert Fox*, 161 MIL. L. REV. 115 (1999).

[263] *Id.*

[264] *Id.*

On March 19, 2003, the United States and a collection of coalition partners launched Operation Iraqi Freedom. The U.S. justification for the invasion centered on the assertion that Saddam Hussein continued to research and produce weapons of mass destruction (WMDs), in violation a series of U.N. Security Council Resolutions.[265] These WMDs were considered a direct threat to the U.S. because they were in the hands of an individual with a history of overt hostility against the United States and liberal WMD use. As a result, these WMDs might be found in the hands of the U.S.'s immediate enemies, al Qaeda and Islamic extremists.[266] Approximately 300,000 U.S. and coalition troops invaded Iraq through their staging areas in Kuwait.[267] Despite predictions of massive casualties that would result from a confrontation with an Iraqi military that were still considered formidable,[268] the invasion proceeded swiftly and U.S. forces secured Baghdad on April 9.[269] On May 1, President Bush declared an end to "major combat operations."[270] By this time, the

[265] S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. U.N. Doc. S/RES/687 (1991) (outlining provisions of cease-fire and setting up inspections); S.C. Res. 699, U.N. SCOR, 46th Sess., 2994th mtg. U.N. Doc. S/RES/699 (1991) (approving UN Secretary-General plan to eliminate Iraq's WMD programs); S.C. Res. 707, U.N. SCOR, 46th Sess., 3004th mtg. U.N. Doc S/RES/707 (1991) (demanding that Iraq halt all nuclear activities and provide full disclosure of weapons programs); S.C. Res. 715, U.N. SCOR, 46th Sess., 3012th mtg. U.N. Doc S/RES/715 (1991) (approving plans for system of ongoing monitoring to verify Iraqi compliance and to detect WMD reconstitution); S.C. Res. 1441, U.N. SCOR, 57th Sess., 4644th mtg. U.N. Doc. S/RES/1441 (2002) (calling on Iraq to comply with previous resolutions or face further action). U.N. SCOR resolutions *available at* http://www.un.org/documents/scres.htm. In the findings of fact to the Joint Resolution authorizing use of force in Iraq, Congress noted, "Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary…" Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No 107-243, 116 Stat. 1498 (2002).

[266] "In another way, September the 11th provided a warning of future dangers -- of terror networks aided by outlaw regimes, and ideologies that incite the murder of the innocent, and biological and chemical and nuclear weapons that multiply destructive power." President Bush, Discusses War on Terror at the National Defense University (Mar. 8, 2005), *available at http://www.whitehouse.gov/news/releases/2005/03/20050308-3.html*.

[267] Wikipedia, 2003 Invasion of Iraq, *available at* http://en.wikipedia.org/wiki/2003_invasion_of_Iraq#Invasion.

[268] The regular Iraqi army was estimated at 280,000 to 350,000 troops, with four Republican Guard divisions with 50,000 to 80,000 troops, and the Fedayeen Saddam, a 20,000 to 40,000 strong militia, which used guerilla tactics during the war. There were an estimated thirteen infantry divisions, ten mechanized and armored divisions, as well as some Special Forces units. *Id.*

[269] *Id.*

[270] President Bush Announces Major Combat Operations in Iraq Have Ended (Mar. 1, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html.

coalition suffered approximately 174 deaths,[271] while Iraqi forces may have suffered upwards of 30,000 casualties.[272] The end of major combat operations evolved into an occupation and an ongoing effort by the U.S. and its coalition partners to transform Iraq into a self-sustaining democracy. At current count, there are over 120,000 coalition troops in Iraq battling a persistent insurgency that originates in part from remnants of the old Baath regime and from foreign fighters seeking to battle the U.S.[273] Casualties from this insurgency mount daily, with the current tally equaling over 11,808 as of May 7, 2005,[274] 1,450 of which have been deaths.[275] In addition, ongoing commitments require that the U.S. expend extraordinary amounts of money. "In fact, in constant 2004 dollars, defense spending has only been higher twice since World War II–during the Korean War and at the peak of the Cold War buildup."[276]

B. A War Like No Other: Applying "Time of War" to the GWOT

Clearly, the GWOT is a massive undertaking by the U.S., involving nearly every aspect of the Government to eliminate the global terrorist threat against it. Within this undertaking is an enormous military effort aimed at satisfying this goal through the use of force. The issue now before us is whether the GWOT, as it currently stands, invokes the wartime provisions of the UCMJ.

We first look to see if the GWOT satisfies the *de jure* test for "time of war." Congress has not issued a formal declaration of war with regard to the GWOT, but has issued at least two different joint resolutions authorizing the use of force in support of its aims. The first is the Authorization for the Use of Military Force against "those responsible for the recent attacks launched

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[271] Wikipedia, Casualties of the conflict in Iraq since 2003, *available at* http://en.wikipedia.org/wiki/Casualties_in_the_conflict_in_Iraq#Coalition_military_casualties. Although the numbers from Wikipedia are far from official sources, they derive their numbers from such sources and these numbers are consistent with numbers available through a variety of sources. U.S. forces suffered 139 deaths. Military Casualty Information, *available at* http://web1.whs.osd.mil/mmid/casualty/castop.htm.

[272] The statistics on Iraqi casualties vary widely from source to source. *See generally* Wikipedia, Casualties of the conflict in Iraq since 2003, *available at* http://en.wikipedia.org/wiki/Casualties_in_the_conflict_in_Iraq#Coalition_military_casualties.

[273] Office of Management and Budget, Department of Defense, *available at* http://www.whitehouse.gov/omb/budget/fy2005/defense.html; http://www.defendamerica.mil Weekly Progress Reports.

[274] Military Casualty Information, *available at* http://web1.whs.osd.mil/mmid/casualty/OIF-Wounded-After.pdf.

[275] Military Casualty Information, *available at* http://web1.whs.osd.mil/mmid/casualty/OIF-Deaths-After.pdf.

[276] Office of Management and Budget, Department of Defense, *available at* http://www.whitehouse.gov/omb/budget/fy2005/defense.html.

against the United States,"[277] and which served as the basis for the U.S. invasion of Afghanistan and ongoing operations against al Qaeda. The second was the Authorization for Use of Military Force Against Iraq Resolution of 2002.[278] These resolutions, however, do not rise to the level of a declaration of war and do not transform any ongoing military endeavors into a *de jure* war. Within the resolutions, "Congress did not leave us to speculate as to the resolution's character."[279] Both resolutions state that the authority granted to the President "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution."[280] In fact, Congress went further in the Iraq resolution when it stated, "Nothing in this joint resolution supersedes any requirement of the War Powers Resolution."[281] For purposes of determining congressional intent, "Congress' explicit reference to the War Power Resolution is illuminating for our purposes here."[282] Specifically, the War Powers Resolution limits the President's authority to introduce U.S. armed forces into hostilities except for: 1) a declared war; 2) when specifically authorized by statute; or 3) national emergency created by an attack on the U.S.[283] Section 5(b) of the Resolution "obliges the President to terminate the use of United States Armed Forces within 60 days of the report unless Congress declares war or unless it has enacted a 'specific authorization for the use of United States Armed Forces.'"[284] In the case at hand, Congress specifically referred to section 5(b) in both resolutions. By explicitly characterizing the resolutions as statutory authorizations under the War Powers Resolution, and not declarations of war, Congress very clearly signaled the resolutions were not a declaration of war.[285] Consequently, the GWOT is not a *de jure* war and we must therefore determine if the GWOT is nonetheless a war in fact.

We turn to the pragmatic considerations established by *Bancroft* to help make this determination.[286] The military aspect of the GWOT is currently being accomplished through the use of active combat operations throughout the world, but primarily in Afghanistan and Iraq.[287] There are over 170,000 U.S.

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[277] Authorization for Use of Military Force, *supra* note 249.
[278] Authorization for Use of Military Force Against Iraq Resolution of 2002, *supra* note 265.
[279] *Castillo*, 34 M.J. at 1164.
[280] Authorization for Use of Military Force, *supra* note 249, § (b)(1); Authorization for Use of Military Force Against Iraq Resolution of 2002, *supra* note 265, § (c)(1).
[281] Authorization for Use of Military Force Against Iraq Resolution of 2002, *supra* note 265, § (c)(2).
[282] *Castillo*, 34 M.J. at 1164.
[283] 50 U.S.C. §1541(c).
[284] *Castillo*, 34 M.J. at 1164, *citing* 50 U.S.C. §1544(b).
[285] *See Castillo*, 34 M.J. at 1165.
[286] *See supra* note 94 and accompanying text.
[287] *See supra* notes 218, 250, 265-272, and accompanying text.

troops stationed in the Far East actively combating the Taliban, al Qaeda, and insurgent forces, using every instrument of war available to them.[288] The following is a listing of the factors supporting "time of war" application to the GWOT: thousands of troops continue to rotate in and out of the theater of operations in support of these efforts; U.S. armed forces have suffered thousands of casualties, including 1,700 coalition deaths in Iraq alone, in these operations and continue to suffer casualties on a daily basis,[289] a casualty rate that far surpasses the number of casualties suffered by coalition forces during the first iteration of the Iraq War;[290] Iraqi and Afghani deaths can be measured in the tens of thousands, and U.S. civilian casualties equaled almost 3,000;[291] among the Armed Forces currently engaged in combat, there is a substantial percentage of Reservists who have been recalled, many at terrible sacrifice to themselves; [292] Congress has passed two pieces of emergency legislation invoking the war powers, both of which refer directly to the terrorist attacks;[293] the President has issued two service medals specifically denoting service by military personnel in support of the GWOT;[294] the theaters of operation have been declared combat zones for purposes of military pay;[295] Department of Defense spending has increased thirty-five percent since 2001 and continues to climb as U.S. military commitments continue; [296] the military continues to maintain one of the largest military services in the world, with discussions in Congress of increasing the authorized end strength of the military even further;[297] military equipment is degrading at an accelerated rate as a result of

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[288] *See* U.S. Forces Order of Battle-4, GlobalSecurity.org, *available at* http://www.globalsecurity.org/military/ops/iraq_orbat.htm (last visited Mar. 29, 2005).

[289] As of March 10, 2005, coalition forces were suffering 2.3 casualties per day, not including Iraqi Government forces. Wikipedia, Casualties of the conflict in Iraq since 2003, *supra* note 271. Although not in the news nearly as often, casualties still continue to mount in Afghanistan. *See, e.g.*, Associated Press, *Afghan land mine kills U.S. troops,* CNN.com (Mar. 26, 2005), *available at* http://www.cnn.com/2005/WORLD/asiapcf/03/26/afghan.troops.killed.ap/index.html.

[290] *See supra* note 218.

[291] *See supra* notes 218, 250, 289, and accompanying text.

[292] Reserves account for over 40% of the total Army force and 20% of the Marine Corps. U.S. Forces Order of Battle-4, *supra* note 288.

[293] Authorization for Use of Military Force, *supra* note 249; Authorization for Use of Military Force Against Iraq Resolution of 2002, *supra* note 265.

[294] Exec. Order No. 13,289, 68 Fed. Reg. 12,567 (Mar. 12, 2003).

[295] Exec. Order No. 12,744, 56 Fed. Reg. 2,663 (Jan. 23, 1991).

[296] *See supra* note 256 and accompanying text.

[297] The U.S. maintains over 2.5 million personnel in uniform. Office of Management and Budget, Department of Defense, *available at* http://www.whitehouse.gov/omb/budget/fy2005/defense.html; Tom Squitieri, *Congress Pushes for Larger Military,* U.S.A. TODAY (Dec. 12, 2003), *available at* http://usatoday.printthis.clickability.com/pt/cpt?action=cpt&title=USATODAY.com+-+Congress+pushes+for+larger+military&expire=&urlID=8513053&fb=Y&url=http%3A%2F%2Fwww.usatoday.com%2Fnews%2Fwashington%2F2003-12-12-army_x.htm&partnerID=1660; Associated Press, *Rumsfeld: Military Size OK,* U.S.A. TODAY

combat operations, likely requiring large supplements by Congress to maintain an effective fighting force in the future;[298] and the U.S. is facing an organized and determined enemy bent on defeating its forces on the battlefield and on destroying the U.S. as a viable sovereign.[299]

By any measure, it appears abundantly clear that the GWOT, at present, satisfies the pragmatic considerations of *Bancroft*. The debate arises when one asks, however, whether the GWOT itself is the proper subject of analysis, or whether the individual military campaigns carried on under its name are the proper targets of "time of war" analysis. In other words, is the GWOT really a political label or focus point intended to marshal the full measure of U.S. might against our enemies, but is otherwise not really a "war" in its own standing?[300] This would make it akin to the Cold War. The Cold War was not itself a "war" in the word's literal meaning, and no court has ever found that the Cold War itself triggers wartime UCMJ provisions. This is despite the fact that the Cold War required the maintenance of a large standing military; troops were subject to "the possibility of rapid transfer -- often by air -- to any point on the world's surface at which hostilities are blazing."[301] U.S. forces were used under its banner, particularly in Korea, Vietnam, and Grenada.[302] These campaigns combined caused tens of thousands of casualties.[303] Moreover, like the GWOT, the Cold War had many facets other than military. The difficulty in truly categorizing the GWOT is that the word "war" is used generously to describe nearly any endeavor that requires effort beyond the everyday.[304] Is the GWOT a rallying cry by the U.S. Government or a true military campaign? There remains

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(Aug. 5, 2003), *available at* http://www.usatoday.com/news/washington/2003-08-05-rumsfeld-army_x.htm; Cpl. Susan Smith, *Marine Corps to Increase in Size,* MARINE CORPS NEWS SERVICE (Jan. 24, 2005), *available at* http://usmilitary.about.com/od/marines/a/usmcsizeincreas.htm.

[298] Douglas Holtz-Eakin, Director before the Committee on Armed Services U.S. House of Representatives, statement on the Ability of the U.S. Military to Sustain an Occupation in Iraq (Nov. 5, 2003), *available at* http://www.cbo.gov/showdoc.cfm?index=4706&sequence=0.

[299] *See* THE 9/11 COMMISSION REPORT, *supra* note 228, ch. 2.

[300] Of note, the Executive Branch relented to public pressure calling for the recognition of the campaigns in Iraq and Afghanistan individually and approved campaign medals for each of them. Exec. Order 13,363, Fed. Reg. 70, 175 (Nov. 29, 2004).

[301] *Ayers*, 4 C.M.A. at 227.

[302] A Cuban supported coupe installed a radical regime in the Caribbean island. Receiving only a week's notice, U.S. military forces swiftly overran the opposition and ejected Cuban forces from the island. AMERICAN MILITARY HISTORY, *supra* note 154, at 354. Eighteen American men died and 116 were wounded.

[303] *See supra* notes 76, 154, 218, 271, 289, and accompanying text. *See also supra* notes 283, 284.

[304] Take for example the Lyndon B. Johnson's "War on Poverty." Lyndon B. Johnson, Special Message to Congress (Mar. 16, 1964), *available at* http://www.fordham.edu/halsall/mod/1964johnson-warpoverty.html, or the "War on Drugs" instituted by President Reagan.

another practical consideration if one were to consider the GWOT as the trigger for wartime provisions. The ongoing challenge is to identify who poses a threat to U.S. security. Naturally, al Qaeda remains an ongoing threat despite defeats in Afghanistan and elsewhere. However, the U.S. has made clear that the enemy is not just any one group, but "terrorism— premeditated, politically motivated violence perpetrated against innocents."[305] So, assuming we can defeat al Qaeda, does the GWOT, and by extension the application of "time of war" provisions in the UCMJ, continue until all such groups are defeated? Which groups would qualify: Hezbollah, Islamic Jihad, the Spanish separatist group ETA, the IRA? It is likely that the GWOT will last an extraordinarily long time.[306] In fact, the U.S. has been engaged in low level hostilities with terrorist groups for decades.[307] While the current effort far exceeds anything to date, it is still anticipated that the war will last far into the future.[308] In effect, we could be in "time of war" *ad infinitum.* Without question, there will be stretches of time during the execution of the GWOT that there will be little overt military activity as the next enemy is identified.

Congress and the President have taken great pains to ensure that the GWOT is painted in the color of "war" as the word is commonly understood.[309] In fact, the President has gone so far as to state that "attacks on United States [have] created a state of armed conflict that requires the use of the United States Armed Forces."[310] The President, under authority of Congress, has established military tribunals to review the cases of those

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[305] *Id.*

[306] *See, e.g.*, Scott Lindlaw, *Bush Suggests Anti-Terror War Cannot Be Won, Igniting Controversy*, WJLA.com (Aug. 30, 2004), *available at* http://www.wjla.com/headlines/0804/169324.html.

[307] Over 300 U.S. Marines were killed in Lebanon during a peacekeeping mission when terrorists detonated a truck bomb in their barracks. On April 15, 1985, President Reagan ordered air attacks against Libya in response to their complicity with a disco bombing in Germany that killed two U.S. service members. AMERICAN MILITARY HISTORY, *supra* note 154, at 353.

[308] *See, e.g.*, *War Will Be Long And Hard*, BILOXI SUN HERALD (June 20, 2004), *available at* http://www.military.com/NewsContent/0%2C13319%2CFL_war_062004%2C00.html; *Rumsfeld's War-On-Terror Memo,* U.S.A. TODAY (Oct. 22, 2003), *available at* http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm; James Jay Carafano, *The Long War Against Terror*, WASH. TIMES (Sept. 20, 2003), *available at* http://www.washtimes.com/commentary/20030920-111414-7585r.htm.

[309] *See, e.g.*, President Bush, statements at Signing of H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004 (Nov. 24, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/11/print/20031124-2.html; President Bush, statements at Signing of HR 3289 - the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan (Nov. 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/11/print/20031106-4.html; President Bush Signs Iraq Resolution (Oct. 16, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/10/print/20021016-1.html.

[310] Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, § 1(a), 66 Fed. Reg. 57, 833 (2001).

captured during the conflict, something not done since World War II. In fact, the President stressed repeatedly that the GWOT is a rejection of the Cold War strategy of passive containment.[311] Instead, we now operate under a paradigm of aggressive preemption when deemed necessary.[312] In the face of this, "When a state of hostilities is expressly recognized by both Congress and the President, it is incumbent upon the judiciary to accept the consequences that attach to such recognition."[313]

Fortunately, the edicts of *Bancroft* and the practical considerations necessary to determine if war exists do not require an analysis of a conflict's name, only of the realities of the moment. Indeed, in all the cases analyzing "time of war" in the UCMJ, not a single case dealt with a declared war, or even a conflict called a "war." At the time, the exact nature of the Korean War was in question.[314] Regardless of the labels affixed to these conflicts, the courts had no difficulty in finding that "time of war" existed nonetheless. The same will be true for the GWOT. The name Global "War" on Terror does not, in and of itself, invoke the wartime provisions of the UCMJ. For that matter, it could be called the Global Conflict on Terror, the Global Struggle Against Terror, or the Armed Conflict against al Qaeda. Wars are all too often awarded the title retroactively, after historians have had the opportunity to study the event. What matters for purposes of triggering wartime provisions of the code in the present, absent a formal declaration of war by Congress, is the presence of factual sufficiency. Recognition of hostilities by the political branches of Government is one factor, albeit a weighty one, that must be considered. Thus, during periods of "immediate readiness," but not active

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[311] NATIONAL SECURITY STRATEGY, *supra* note 257, ch. V.

> The nature of the Cold War threat required the United States—with our allies and friends—to emphasize deterrence of the enemy's use of force, producing a grim strategy of mutual assured destruction. With the collapse of the Soviet Union and the end of the Cold War, our security environment has undergone profound transformation. . . . [T]he United States can no longer solely rely on a reactive posture as we have in the past. . . . In the Cold War, especially following the Cuban missile crisis, we faced a generally status quo, risk-averse adversary. Deterrence was an effective defense. But deterrence based only upon the threat of retaliation is less likely to work against leaders of rogue states more willing to take risks, gambling with the lives of their people, and the wealth of their nations.

Id.

[312] *Id.*

[313] *Anderson,* 17 C.M.A. at 590.

[314] *Bancroft,* 3 C.M.A at 5 ("[T]his Court has never categorically set out its views on the exact nature of the Korean conflict . . . .").

combat, the finding of "time of war" would not be appropriate.[315] *Bancroft's* pragmatic approach effectively negates the danger of having "time of war" in perpetuity. Viewed through this lens, the current state of the conflict of today, which we currently call the GWOT, as embodied by operations in Iraq and Afghanistan, with tens of thousands of troops committed against an organized enemy, and with the vast commitment of U.S. resources to its undertaking, is clearly a "time of war."[316]

III. CONCLUSION: A CALL TO CONGRESS

Bancroft provides the necessary flexibility to determine whether a war exists in fact, regardless of the political titles or contemporary labels affixed to the conflict. Nevertheless, this flexibility depends on an individual determination by the military judge and the appellate courts. Since the determination cannot be known in advance, the convening authority, accused, and military justice practitioner need to engage in cautious speculation as to whether "time of war" will apply in every individual case. There are two proposed solutions to this dilemma. One would be for the President to extend the definition of RCM 103(19) to the entire Code. This is the less desirable solution for two reasons. One, it is questionable whether the President has the authority to extend the RCM's application beyond its current limitations.[317] Two, extending the RCM's definition does not resolve another significant discrepancy with "time or war" application, specifically the application of the UCMJ's jurisdiction to civilians. Extension of a presidential definition does not clarify specifically what congressional intent is behind "time of war," and whether the legislature intended for civilians to be brought before military courts absent a formal declaration.[318] Since *Averette* did not base its holding on the inability of Congress to bring civilians under the umbrella of military jurisdiction, congressional action would be required to specifically overturn the dubious outcome in that case.

By far, the more desirable solution to the unpredictability of "time of war" application is for Congress to define the term in the Code. A definition

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[315] *See Ayers,* 4 C.M.A. at 651.

[316] Even if a Military Judge were to concur with this finding, the President has not issued any Executive finding or order pursuant to RCM 103(19). As such, those provision of the Code dependent on this action, namely the enhanced punishments in part IV and the wartime provisions in part V of the MCM, remain dormant. *See Castillo,* 34 M.J. 1160. In addition, since there is no declared war, military courts do not have jurisdiction over civilians pursuant to Article 2(10). *See Averette,* 19 C.M.A. 363.

[317] *See supra* notes 31-35, 85, and accompanying text.

[318] *Anderson*, 17 C.M.A. at 590 ("The Administration is not always correct in interpreting the will of the Legislature").

would resolve any speculation as to whether "time of war" would apply to any particular case. Modeled on the definition found in RCM 103(19), the following definition is proposed for insertion into the UCMJ:

> 801. ART. 1. DEFINITIONS.
>
> In this chapter.
>
> (15) "Time of war" means a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists for purposes of this chapter.

This simple definition provides a mechanism to trigger UCMJ wartime provisions. There would have to be a declaration of war by Congress, or the issuance by the President of an Executive Order or some other form of directive that declares the existence of "time of war." Additionally, the definition does not leave open the danger of random presidential statements in public, using war-like verbiage, inadvertently triggering the wartime provisions. Any presidential finding would have to be made specifically for purposes of invoking "time of war" in the Code, hence the qualifying language "for purposes of this chapter." Thus, a President is free to make any statement he wishes regarding a particular situation without the fear of triggering "time or war." Specifically using language already present in RCM 103(19) allows for reliance on judicial precedence interpreting those words, thus providing further precision in "time of war" application.[319] This simple definition offers clarity to military justice practitioners. They now know exactly when they will find themselves practicing under the rubric of "time of war."

The meaning of a word is the soul of the law. The meaning of "time of war" in the UCMJ is currently ambiguous. Proper application of this term of art by a judge advocate depends on a review of congressional and executive actions, factual realities of a situation, a determination of the accused's status, and, subsequently, requires the concurrence of the analysis by the military judge or the appellate courts. At every step, reasonable minds may differ on the matter. The current state of affairs does not provide the level of confidence to counsel, the convening authority, or the accused necessary when making the weighty decisions that impact an individual's freedom. It also sows the seeds for the inequitable application of military justice. Some

[319] *See generally Castillo*, 34 M.J. 1160.

accuseds may go free, while others do not, depending on individual conclusions based on the same facts. This does not serve the needs of military justice and calls into question the integrity of the system. This level of uncertainty is quite simply unnecessary. With a straightforward definition using verbiage already familiar to military jurisprudence, Congress can greatly ease the unpredictability in applying "time of war." The wars of the future will likely take on more untraditional characteristics as the GWOT carries forth. The need for clarity has never been greater.

CONSEQUENCES OF A COURT-MARTIAL CONVICTION FOR UNITED STATES SERVICE MEMBERS WHO ARE NOT UNITED STATES CITIZENS

Major Richard D. Belliss, USMC*

I. Introduction

Currently, the United States military has over 30,000 active duty service members who are not United States citizens.[1] These non-citizens are called lawful permanent residents (LPRs) of the United States. LPRs are allowed to permanently live, work, join the military, retire and live the balance of their lives in the United States.[2] In many cases, the often called "Green Card" holder (because of the color of the lawful permanent resident identification card)[3] is an individual who knows no other life than that of living as an American. An LPR who has immigrated to the United States at a young age has likely learned English as a first language, attended U.S. public schools, gained employment, paid income and social security taxes for several years, owns personal and/or real property, and upon retirement will collect social security benefits and perhaps a pension. The LPR may also serve on active duty in the U.S. armed forces as an enlisted service member.[4] Enlistment into

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* The positions and opinions expressed in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, the United States Navy, or the United States Marine Corps. Captain Belliss (A.B., State University of New York, College at Geneseo, 1992; J.D., Albany Law School, 1996; M.B.A. Union University, 1997), is an active-duty Marine Corps judge advocate, presently serving as an Instructor at Naval Justice School, Naval Station Newport, where he teaches operational law, criminal law and trial advocacy. The author would like to thank Lieutenant Commander Peter Koebler, JAGC, USN, for reviewing and editing this article.

[1] Department of Defense Manpower Data Center, 13 January 2005. As of November, 2004 there were a total of 30,541 non-U.S. citizens serving on active duty in the United States military. A by service breakdown: 7,078 in the Army; 2,308 in the Air Force; 6,474 in the Marine Corps; and 14,681 in the Navy. Additionally, there were 8,900 service members serving on active duty whose citizenship was "unknown."

[2] 8 U.S.C. § 1101(a)(20) (2004).

[3] LPR identification cards were originally green in color but are actually now pink.

[4] 10 U.S.C. § 3253 (2004); 10 U.S.C. § 8253 (2004). These are the statutory provisions limiting the Army and Air Force to enlisting individuals who are either U.S. citizens or lawful permanent residents. *Id*. The Navy and Marine Corps have no statutory limitations, however, by virtue of Department of Defense Directive, the Navy and Marine Corps have the same restrictions as the

any Armed Forces Reserve component is also permissible assuming the enlistee meets the same requirements.[5] An LPR who has lived almost all of his or her life in the United States and who elects to risk his or her life in defense of our nation should be considered as much of an American as hot dogs, baseball, and Grandma's apple pie.

Lawful permanent resident service members are paid, rewarded, honored, and disciplined in the exact same manner as their U.S. citizen counterparts. However, an LPR who is court-martialed is, in addition to facing the authorized punishments that may be awarded by a court-martial,[6] likely to face two particularly devastating consequences following imposition of the court-martial sentence. The first devastating consequence is mandatory detention in an immigration detention facility until an Immigration Judge can issue the second devastating consequence: an order of permanent deportation / removal from the United States based upon a court-martial conviction for criminal misconduct.[7]

The United States Supreme Court in *Ng Fung Ho v. White*[8] recognized the harsh and severe consequences an individual facing deportation is forced to endure: "It may result . . . in loss of both property and life; or of all that makes life worth living."[9] Despite our nation's highest court's appreciation for the devastating consequences of deportation, the United States Congress has turned a virtual deaf ear towards the egregious immigration consequences stemming from criminal convictions. By passing the Illegal Immigration

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Army and Air Force. U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT AND INDUCTION encl. 1, para. E1.2.2.1 (4 Mar. 1994).

[5] 10 U.S.C. § 12102(b) (2004). No person may be enlisted as a Reserve unless he/she is a citizen of the United States or has lawfully been admitted to the United States for permanent residence under the Immigration and Nationality Act. *Id*.

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003 (2002) [hereinafter MCM].

[7] The terms "deportable" and "removable" are practically interchangeable, however the distinction comes to light in cases of non-U.S. citizens who are already inside the territorial boundaries of the United States versus non-U.S. citizens who are outside the United States or at a port of entry and seek to enter the United States. 8 U.S.C. § 1227(a)(2) makes the former individuals "deportable" by placing them in "removal proceedings" whereas 8 U.S.C. § 1182(a)(2) makes the latter "inadmissible" and thus subject to "removal proceedings." 8 U.S.C. § 1182(a)(2) (2004); 8 U.S.C. § 1227(a)(2) (2004). *See also* MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, A PRACTITIONER'S GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 53-57 (2003).

[8] 259 U.S. 276 (1922).

[9] Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CALIF. L. REV. 541, 544 (2004) (citing Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

Reform and Immigrant Responsibility Act of 1996[10] (IIRAIRA), the United States Congress imposed very severe sanctions and consequences for non-U.S. citizens engaged in criminal misconduct.

This article serves four purposes. First, this article will offer a basic primer on U.S. immigration laws and the potential immigration consequences stemming from a criminal conviction of a service member who is a lawful permanent resident. Second, this article will argue that military defense counsel who do not inquire about their clients' citizenship or investigate the potential immigration consequences of a court-martial conviction are not, despite contrary military appellate court decisions, competently and effectively representing their clients. Third, this article will argue that even if military defense counsel do not advise an LPR client of potential immigration consequences, the military judge, during a providency inquiry, should give a short warning concerning the potential deportation consequences of a plea of guilty. Last, this article will offer guidance on how to (1) fashion a plea in an attempt to avoid the aforementioned devastating immigration consequences and (2) make an effective case in mitigation during pre-sentencing proceedings.

II. United States Immigration Laws

A. History of U.S. Immigration Statutes

In 1907, Congress first gave attention to the deportation of criminal aliens (non-U.S. citizens) when it passed the first of a series of immigration laws.[11] Under this law, only one type of criminal alien was deportable: those engaging in prostitution.[12] In 1952, Congress consolidated all federal immigration laws into one statute called the Immigration and Nationality Act (INA).[13] The INA established numerous criminal acts that could provide a basis for an alien's deportation from the United States.[14] Congress expanded the bases for deportation even further when it passed the Anti-Drug Abuse Act

[10] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of titles 8 and 18 of the U.S. Code) [hereinafter IIRAIRA]. As will be seen in this article, under certain circumstances a criminal conviction is not the only prerequisite for deportation: pleas of *nolo contendre*, and sometimes oral or written admissions of the non-U.S. citizen can be enough to trigger deportation consequences.

[11] Welch, *supra* note 9, at 547. *See also* Christina LaBrie, *Lack of Uniformity in the Deportation of Criminal Aliens*, 25 N.Y.U. L. REV. & SOC. CHANGE 357, 359-60 (1999) (citing Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898).

[12] Welch, *supra* note 9, at 547.

[13] *Id*. Immigration and Nationality Act (INA), Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1557 (1982)).

[14] Welch, *supra* note 9, at 547.

of 1988 (ADDA).[15] Under the ADDA, a new category of deportation was created based upon aliens who had committed "aggravated felonies" such as murder, drug trafficking, or firearms trafficking.[16] The aggravated felony category was greatly expanded in 1990 with the passage of the Immigration Act of 1990[17] and again in 1994 with the Immigration and Nationality Technical Corrections Act of 1994 (INTCA).[18] Under these two laws, traditional felonies like rape, assault, and theft were deemed "aggravated felonies" For the purposes of immigration law. Finally, in 1996 Congress passed what many immigration practitioners consider the harshest and widest impacting immigration laws ever enacted: the IIRAIRA.[19] When the statutes above are viewed collectively, the bases upon which a non-U.S. citizen can be deported for criminal conduct or convictions is expansive.

B. Determining if a "Conviction" Exists

Most adverse immigration consequences are triggered only upon criminal conviction, and most, but not all, convictions will result in deportation and final removal from the United States. What convictions meet the definition of "conviction" under United States immigration laws is not always easily answered. Under the INA, the term "conviction" includes "a formal judgment of guilt of the alien entered by a court,"[20] deferred adjudications,[21] or pleas of *nolo contendre* where the alien accused has "admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."[22] While the U.S. military justice system does not provide for deferred adjudications or pleas of *nolo contendre*, the imposition of a sentence at a special or general court-martial upon an LPR service member will be enough to meet the statutory definition of a conviction under the United

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[15] *Id*. at 548. Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered titles of the U.S. Code).
[16] Welch, *supra* note 9, at 548. *See* ADAA 7342, 102 Stat. at 4469 (codified as amended at 8 U.S.C. § 1101(a)(43) (2004)).
[17] Welch, *supra* note 9, at 548. *See* Immigration Act of 1990, Pub. L. No. 101-649, 501, 104 Stat. 4978, 5048 (1990) (codified as amended at 8 U.S.C. § 1101(a)(43) (2004)) [hereinafter Immigration Act of 1990].
[18] Welch, *supra* note 9, at 548-49. Pub. L. No. 103-416, 108 Stat. 4305 (1994) (codified in scattered sections of title 8 of the U.S. Code); *see also* 8 U.S.C. § 1101(a)(43) (2004)).
[19] Welch, *supra* note 9, at 549. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of titles 8 and 18 of the U.S. Code).
[20] 8 U.S.C. § 1101(a)(48) (2004).
[21] KRAMER, *supra* note 7, at 36. *See also* Matter of Punu, 22 I&N Dec. 224 (BIA 1998*); In re* Salazar-Regino, 23 I&N Dec. 223 (BIA 2002).
[22] 8 U.S.C. § 1101(a)(48)(A)(i) (2004).

States's immigration laws.[23] Thus, once a trial counsel generates a Results of Trial,[24] there is sufficient documentation for U.S. immigration authorities to proceed before an Immigration Judge and seek the deportation of the service member if the conviction qualifies as a basis for deportation.[25]

C. Determining if the Conviction Amounts to a Basis for Deportation

Determining which convictions qualify as bases for deportation can be challenging. Under the INA, immigration law has two major classifications of crimes which can serve as bases for deportation: those crimes involving "moral turpitude"[26] and those crimes considered to be "aggravated felonies."[27] In addition to the two major classifications mentioned above, the INA has separate provisions making convictions for specific types of offenses such as those involving controlled substances,[28] domestic violence,[29] firearms,[30] and alien smuggling[31] potential bases for deportation.

1. Does the Conviction Involve a Crime of Moral Turpitude?

Because there is no statutory definition of a crime of "moral turpitude," a practitioner must turn to case law for a conceptual definition. The Bureau of Immigration Appeals (BIA) has held that a crime involving moral turpitude is an offense that "shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in

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[23] *Id*. § 1101(a)(48)(A) (2004). Whether the finding of guilty and imposition of punishment by a summary court-martial officer against an accused amounts to a conviction for immigration purposes is likely answered in the negative. *See* Middendorf v. Henry, 425 U.S. 25, 40-42 (1976). In *Middendorf*, the Supreme Court held that "a summary court-martial is procedurally quite different from a criminal trial" and thus is not a criminal prosecution within the meaning of the Sixth Amendment. *Id*. at 40. *See* 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 8-31.30 (2d ed.). *See also* United States v. Kelly, 45 M.J. 259 (1996).

[24] MCM, *supra* note 6, R.C.M. 1101(a).

[25] 8 U.S.C. § 1229(a)(3)(B)(ii) (2004).

[26] *Id*. § 1227(a)(2)(A)(i) (2004). KRAMER, *supra* note 7, at 76. "The term 'moral turpitude' is not defined by statute, but rather by case law. . . . The phrase 'moral turpitude' refers generally to acts that are inherently evil or wrong by any society's standards (*malum in se*), rather than acts which are regulated by society (*malum prohibitum*)." *Id*.

[27] 8 U.S.C. § 1101(a)(43)(A)-(U) (2004); 8 U.S.C. § 1227(a)(2)(A)(iii) (2004).

[28] 8 U.S.C. § 1227(a)(2)(B) (2004).

[29] *Id*. § 1227(a)(2)(E) (2004).

[30] *Id*. § 1227(a)(2)(C) (2004).

[31] *Id*. § 1227(a)(1)(E) (2004).

general."[32] An offense of moral turpitude "will generally, (although not always) include specific intent[33] to do harm, or knowledge of the act's illegality."[34] An act of moral turpitude is an act "offensive to American ethics and accepted moral standards."[35] Thus, a service member whose conduct runs contrary to either the military's or the general public's accepted standards of morality and ethics has likely engaged in an act of moral turpitude. Typical offenses under the Uniform Code of Military Justice (UCMJ) involving moral turpitude are crimes against the person (e.g. simple assault (to include assaults against superior commissioned officers, warrant officers, non-commissioned officers and petty officers),[36] assault consummated by a battery,[37] aggravated assaults,[38] voluntary and involuntary manslaughter,[39] murder,[40] maiming,[41] or communicating a threat);[42] crimes against property (e.g. larceny,[43] robbery,[44] knowingly receiving, buying, or concealing stolen property,[45] willfully damaging, destroying, or losing military property, willfully suffering military property to be lost, damaged, destroyed, or sold,[46] or taking mail);[47] crimes involving a level of fraud (e.g. fraudulent enlistment or separation;[48] false official statements;[49] making, drawing, uttering, or delivering bad checks;[50] making or presenting a false claim against the United States;[51] or fraudulent

[32] *In re* Short, Int. Dec. 3125 (BIA 1989).
[33] In some decisions, the BIA has held that an accused who engages in criminally reckless conduct has committed an offense involving moral turpitude despite the absence of specific intent or knowledge. *See, e.g.,* Matter of Franklin, 20 I&N Dec. 867, 869-71 (BIA 1994) (holding that an alien's conviction for involuntary manslaughter under a statute that required reckless conduct on the part of the defendant is a crime of moral turpitude).
[34] KRAMER, *supra* note 7, at 77.
[35] *Id*. at 76. Matter of L-V-C, 22 I&N Dec. 594 (BIA 1999); Matter of Tran, 21 I&N Dec. 291 (BIA 1996); Matter of Danesh, 19 I&N Dec. 669 (BIA 1988); *see* Castle v. Immigration and Naturalization Serv., 541 F.2d 1064, 1066 (4th Cir. 1976).
[36] MCM, *supra* note 6, pt. IV, ¶¶ 14(b)(1), 15(b)(1), 54 (b)(1).
[37] *Id*. at ¶¶ 14(b)(1), 15(b)(1), 54(b)(2).
[38] *Id*. at ¶ 54(b)(4).
[39] *Id*. at ¶¶ 44(b)(1), (2).
[40] *Id*. at ¶ 43(a).
[41] *Id*. at ¶ 50(b)(3).
[42] MCM, *supra* note 6, pt. IV, ¶ 110(b).
[43] *Id*. at ¶ 46(a)(a)(1).
[44] *Id*. at ¶ 47(a).
[45] *Id*. at ¶ 106(b).
[46] *Id*. at ¶¶ 32(b)(2), (3).
[47] *Id*. at ¶ 93(b)(1).
[48] MCM, *supra* note 6, pt. IV, ¶¶ 7(a)(1), (2).
[49] *Id*. at ¶ 31(a).
[50] *Id*. at ¶¶ 49(b)(1), (2).
[51] *Id*. at ¶¶ 58(b)(1), (2).

use of a credit card or bank card to obtain services);[52] and crimes involving "trafficking" of controlled substances.[53]

With crimes of moral turpitude, the seriousness of the underlying offense and the actual severity of any sentence imposed matter little. The key is to identify the existence of any knowledge or evil intent (*malum in se)* on the part of the accused. Learning what UCMJ offenses rise to the level of crimes of moral turpitude and what offenses, despite their severity, do not, can be surprising.

A service member who negligently discharges his firearm in violation of UCMJ Article 134,[54] or who negligently kills another human being in violation of UCMJ Article 134, [55] has probably not engaged in a crime of moral turpitude because of the absence of any specific intent element on the part of the accused. However, a service member who steals (larceny) a pack of chewing gum from the base exchange, who intentionally shoots a "spit ball" at his superior non-commissioned officer in charge but misses (attempt type assault), or who intentionally "screeches" the tires while operating his motor vehicle (reckless operation of a vehicle), has engaged in what many would call "petty offenses", yet convictions for these acts will serve as bases for deportation. Additionally a service member who has aided, abetted or conspired in a crime that involves moral turpitude, or who has served as an accessory before the fact for a crime involving moral turpitude, will likely be found to have engaged in an act of moral turpitude.[56]

2. Does the Conviction Amount to an "Aggravated Felony"?

Classifying an offense or conviction as an "aggravated felony"[57] under the INA is easier than determining whether a crime is one of moral turpitude. Through statute, Congress has given the term "aggravated felony" a reasonably precise definition by setting forth a long list of types of offenses

[52] *Id*. at ¶ 78(b).
[53] *Id*. at ¶ 37(b)(3). Trafficking in a controlled substance means not only distribution, but also possession with the intent to distribute, and importation, exportation, manufacture, etc. 21 U.S.C. § 841(a)(1) (2004); 21 U.S.C. § 952(a) (2004); 21 U.S.C. § 953(a) (2004). *See also* KRAMER, *supra* note 7, at 81.
[54] MCM, *supra* note 6, pt. IV, ¶ 80(b).
[55] *Id*. at ¶ 85(b).
[56] KRAMER, *supra* note 7, at 78. *See* Matter of Short, 20 I&N Dec. 136, 138 (BIA 1989) (citing Matter of F-, 6 I&N Dec. 783 (BIA 1955)).
[57] 8 U.S.C. § 1101(a)(43) (2004).

that qualify as aggravated felonies for immigration purposes.[58] The list is expansive, and case law continues to expand the aggravated felony definition by including a number of offenses that are not traditionally considered to be either a felony or aggravated.[59] Crimes universally considered heinous such as murder, rape, child sexual abuse,[60] child pornography,[61] kidnapping,[62] espionage,[63] and alien smuggling and transporting[64] are aggravated felonies. In cases where the term of confinement imposed by the court is one year or greater, theft crimes,[65] perjury and obstruction of justice,[66] and "crimes of violence"[67] are treated as aggravated felonies.

To understand "crimes of violence," one must look at 18 U.S.C. §16 which defines a crime of violence as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another. . . ."[68] Thus, a number of offenses under UCMJ Article 128,[69] to include simple assault with an unloaded firearm, assault consummated by a battery upon a child under 16 years of age, assault with a dangerous weapon, means or force likely to produce death or grievous bodily harm, or intentional infliction of grievous bodily harm will serve as an "aggravated felony" if the term of confinement imposed upon the service member is one year or greater. Simple assault and assault consummated by a battery will not qualify as aggravated felonies because the maximum term of confinement that may be imposed is statutorily capped at less than one year.[70] Case law has expanded the crime of violence definition to include operating a vehicle while under the influence of alcohol where personal injuries result.[71]

Controlled substance offenses under UCMJ Article 112a[72] that involve "trafficking" (distribution, possession with intent to distribute, importation, exportation, or manufacture) also will qualify as aggravated felonies for

[58] *Id*. § 1101(a)(43)(A)-(U) (2004).
[59] KRAMER, *supra* note 7, at 82.
[60] 8 U.S.C. § 1101(a)(43)(A) (2004).
[61] *Id*. § 1101(a)(43)(I) (2004).
[62] *Id*. § 1101(a)(43)(H) (2004).
[63] *Id*. § 1101(a)(43)(L) (2004).
[64] *Id*. § 1101(a)(43)(N) (2004).
[65] 8 U.S.C. § 1101(a)(43)(G) (2004).
[66] *Id*. § 1101(a)(43)(S) (2004).
[67] *Id*. § 1101(a)(43)(F) (2004).
[68] 18 U.S.C. § 16(a) (2004). *See* Matter of Martin, 23 I&N Dec. 491 (BIA 2002).
[69] MCM, *supra* note 6, pt. IV, ¶ 54.
[70] MCM, *supra* note 6, pt. IV, ¶ 54(e).
[71] KRAMER, *supra* note 7, at 90. *See* United States v. Vargas-Duran, 319 F.3d 194, 197 (5th Cir. 2003); United States v. Rubio, 317 F.3d 1240, 1243 (11th Cir. 2003); *see also* Leocal v. Ashcroft, 125 S. Ct. 377, 382-84 (2004).
[72] MCM, *supra* note 6, pt. IV, ¶ 37.

immigration law purposes.[73] Additionally, any attempt or conspiracy to commit an offense that is an aggravated felony will also be considered an aggravated felony.[74]

3. Does the Conviction Involve Controlled Substances, Domestic Violence, or Alien Smuggling?

While offenses involving narcotics, domestic violence, and alien smuggling may already be covered by either the "moral turpitude" or "aggravated felony" classifications, or both, the INA has independent provisions for these offenses.[75] A controlled substance offense may serve as a basis for deportation[76] where the accused is convicted of a violation of any state or federal law relating to controlled substances as defined under Section 102 of the Controlled Substances Act.[77] Controlled substances are those drugs or substances listed in Schedules I, II, III, IV, or V of the Controlled Substances Act.[78] A basis for deportation will exist in the case of an LPR service member convicted of use, possession, distribution, introduction, importation or manufacture of any of the controlled substances listed on Schedules I, II, III, IV, or V, no matter how little or large the amount of drug abuse or misconduct.[79] Thus, seemingly low level drug offense convictions–ingestion of one puff of a methamphetamine-laced cigarette, possession of one pill of methylenedioxymethamphetamine (a.k.a. Ecstasy), transfer of a marijuana cigarette from one service member to a fellow service member, or introduction of trace amounts of cocaine onto a United States military installation—will provide bases for deportation. What can also be significant is that an individual who admits, but is not convicted, of having violated any law or regulation of the United States relating to a controlled substance as defined in section 102 of the Controlled Substances Act is "inadmissible"[80] into the United States or its territories. Consequently, an LPR service member who admits to smoking marijuana at a UCMJ Article 15 proceeding or during an administrative separation board hearing, for example, may find that he or she will not be readmitted into the United States following a period of leave or vacation outside of the territorial limits of the United States.

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[73] 8 U.S.C. § 1101(a)(43)(B) (2004). KRAMER, *supra* note 7, at 84.
[74] 8 U.S.C. § 1101(a)(43)(U) (2004).
[75] KRAMER, *supra* note 7, at 75.
[76] 8 U.S.C. § 1227(a)(2)(B) (2004).
[77] 21 U.S.C. § 802(6) (2004).
[78] *Id*. § 812 (2004); 21 C.F.R. §§ 1308.11-1308.15 (2004).
[79] An exception has been created for simple possession of 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B) (2004).
[80] 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2004). 8 U.S.C. § 1182 lists all grounds for refusing entry to an alien seeking permission to enter the United States. *Id*.

Another separate classification of offenses which can serve as a basis for deportation is crimes of domestic violence.[81] Under U.S. immigration law, a "crime of domestic violence" is defined broadly, and a service member convicted of any violation under UCMJ Article 128,in which the victim is the accused's child, current or former spouse, individual with whom the accused shares a child in common, or an individual with whom the accused is cohabitating as a spouse, will be facing a basis for deportation.[82] Also included under the definition are convictions for child abuse, child neglect, and child abandonment.[83]

A basis for deportation will also exist where the service member is convicted for violating a protection order involving "protection against credible threats of violence, repeated harassment, or bodily injury to the person or person for whom the protection order was issued . . . ."[84] A "protection order" is any temporary or final order issued by a civil or criminal court of competent jurisdiction with the purpose of preventing acts or threats of violence against family members.[85] Whether a service member who is convicted of violating a command military protective order has triggered the immigration consequences found under the domestic violence classification for deportation is doubtful since the command is not a court of competent jurisdiction. The domestic violence classification does not make deportable an individual who violates a child support or child custody or visitation order.[86]

While a conviction for alien smuggling will amount to an aggravated felony under U.S. immigration laws,[87] U.S. immigration authorities may also seek an order of deportation against a person for the underlying activity of alien smuggling[88] regardless of whether he or she has been, or will be, criminally charged or convicted.[89] Alien smuggling is defined as knowingly encouraging, inducing, assisting, abetting, or aiding an alien (non-U.S. citizen) to enter, or to try to enter, the United States in violation of the law.[90] Thus, an LPR service member, whose automobile is stopped at a United States border checkpoint prior to entering the U.S. from Mexico and is found to have an

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[81] 8 U.S.C. § 1227(a)(2)(E) (2004). KRAMER, *supra* note 7, at 100.
[82] KRAMER, *supra* note 7, at 100.
[83] *Id*.
[84] 8 U.S.C. § 1227(a)(2)(E) (2004). KRAMER, *supra* note 7, at 100.
[85] 8 U.S.C. § 1227(a)(2)(E) (2004).
[86] *Id*.
[87] *Id*. § 1101(a)(43)(N) (2004).
[88] *Id*. § 1227(a)(1)(E) (2004).
[89] *Id*. § 1227(a)(1)(E) (2004); KRAMER, *supra* note 7, at 102.
[90] 8 U.S.C. § 1227(a)(1)(E) (2004).

illegal alien hiding in the trunk, might only be administratively fined by the U.S. authorities at the border and never criminally prosecuted. However, the act itself–attempting to bring an illegal alien into the United States–may serve as a basis for deportation. In addition to making it unlawful to bring or attempt to bring an illegal alien into the United States, the broad definition of "alien smuggling" also makes it a crime to knowingly, or with reckless disregard, assist an unlawful alien to (once inside the territorial limits of the United States) avoid detection by authorities.[91]

D. Will U.S. Immigration Authorities Learn about a Court-Martial Conviction?

Once a practitioner has identified whether a client's criminal activity or conviction falls under one of the classifications of a crime of moral turpitude, aggravated felony, or one of the independent classifications, the likelihood of adverse immigration consequences must be conveyed to the client. Whether U.S. immigration authorities find out about the offense may depend on the service of the accused, the confinement facility at which the accused serves confinement (if any), and the military law enforcement agency tasked with tracking the outcome of the allegations of misconduct against the service member. Take, for example, the case of an LPR service member whose case is referred to a special court-martial, and assume the accused is charged with two separate offenses: one specification of wrongful distribution of two tablets of Ecstasy in violation of UCMJ Article 112a and one specification of larceny of two music compact discs in violation of UCMJ Article 121. If the accused pleads guilty to the specifications as alleged, the conviction on the first specification for distribution of two ecstasy tablets could serve as basis for deportation under the crime of moral turpitude category, the aggravated felony category, and the independent controlled substance classification.[92] The conviction for larceny of two music compact discs would be a crime of moral turpitude,[93] and it would also serve as an aggravated felony if the sentence imposed included one year of confinement or more.[94]

If the above accused is sentenced to be reduced to pay grade E-1, confined for 60 days, and discharged with a Bad-Conduct Discharge, and either there was no pre-trial agreement or the pre-trial agreement had no effect

[91] *Id.*; 8 U.S.C. § 1324 (a)(1)(A)(iii) (2004). KRAMER, *supra* note 7, at 103.
[92] Matter of Khourn, 21 I&N Dec. 1041 (BIA 1997). 8 U.S.C. § 1101 (a)(43)(B) (2004); 8 U.S.C. § 1227(a)(2)(B) (2004).
[93] Matter of Scarpulla, 15 I&N Dec. 139 (BIA 1974); Matter of Withers, 5 Immig.Rptr. B1-95 (1987).
[94] 8 U.S.C. § 1101(a)(43)(G) (2004).

on the sentence of the court-martial, will U.S. immigration authorities ever find out about the accused's convictions if the local trial counsel takes no affirmative steps to inform the local office of U.S. immigration enforcement? The answer is probably, but not definitely.

1. Department of Defense Reporting Requirements.

The Department of Defense (DoD) mandates that each service's law enforcement organizations (i.e. the Air Force's Office of Special Investigations, the Army's Criminal Investigative Division, and the Navy and Marine Corps's Naval Criminal Investigative Service) report the "criminal history data" of service members to the Criminal Justice Information Services (CJIS) Division of the Federal Bureau of Investigation (FBI) so that the CJIS can include the information in its National Crime Information Center (NCIC) criminal history databases.[95] "Criminal history data" includes a service member's biographical data and fingerprints, plus information on investigations initiated by the services' law enforcement agencies into alleged misconduct, the subsequent initiation (referral of charges) of military judicial proceedings against a service member,[96] the taking of "command action"[97] in non-judicial proceedings under UCMJ Article 15 by officers in the rank of O-4 and higher, and the final disposition (completion of a results of trial) in a summary, special, or general court-martial or non-judicial proceeding under UCMJ Article 15.[98] While the reporting requirements are broad, only investigations, referral of charges, results of courts-martial, etc., involving traditional common law offenses found under the UCMJ such as rape, burglary, theft, assault, murder, narcotics, etc., require reporting.[99] Military-specific offenses like absence offenses under UCMJ Article 86, and disrespect or disobedience of orders under UCMJ Articles 91 and 92, respectively, do not require reporting.[100]

Once the criminal history data is in the possession of the respective military law enforcement agency, that agency must take the fingerprints of the individual service member at issue and complete all the biographical and background information required on Form FD-249 "Suspect Fingerprint Card"

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[95] U.S. DEP'T OF DEFENSE, INSTR. 5505.11, FINGERPRINT CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS (1 Dec. 1998) [hereinafter DOD INSTR. 5505.11].

[96] DOD INSTR. 5505.11, para. 5.2.2.1, *supra* note 95. Local commanders must report to their local DoD criminal investigative or police organization the referral of charges in any case involving a service member investigated by a DoD criminal investigative or police organization. *Id*.

[97] *Id*. at paras. 5.2.2.1, E2.1.3.1, *supra* note 95. Command action means the initiation of NJP. *Id*.

[98] *Id*. at paras 5.2.2.2, E2.1.2.2, *supra* note 95.

[99] *Id*. at encl. 3, *supra* note 95.

[100] *Id*.

before transmitting the information to the CJIS.[101] The FD-249 has a section requiring that the final disposition of the offense at issue be reported. If final disposition will not likely be known for more than 60 days from the initiation of court-martial or UCMJ Article 15 proceedings, then an additional form, the FBI/Department of Justice (DOJ) Form R-84 "Final Disposition Report", must also be completed by the law enforcement agency and sent to the CJIS.[102]

2. How Does the Federal Bureau of Investigation's Criminal Justice Information Services Division Process the Military's Criminal History Data Reports?

The CJIS is the largest division within the FBI.[103] CJIS, among its many responsibilities, is tasked with maintaining the NCIC 2000.[104] NCIC 2000 is a computerized database accessible by local, state, and federal criminal justice agencies 24 hours a day, 365 days a year. The FBI inputs the data on the FD-249s and Form R-84s such that the database contains the names, nicknames, fingerprints, mug shots, and records of arrests, convictions, and probation for any individual arrested, charged, convicted, or paroled in the United States of a felony or serious misdemeanor.[105] Using the hypothetical service member and case above, the service member will have, in addition to his biographical information, the fact that he was charged and convicted of drug distribution and larceny recorded in the NCIC 2000 system. Just because the service member's criminal information is maintained in the FBI's NCIC 2000 database does not necessarily mean that this information will be reported to immigration authorities. However, the likelihood of immigration authorities finding out about the convictions now becomes greater as a routine traffic stop of the accused will yield adverse information to a local police officer or deputy sheriff who may take it upon himself to forward this information to U.S. immigration authorities.

3. Do the Military Branches Have Separate Reporting Requirements to U.S. Immigration Authorities in Criminal Cases Involving Service Members Who Are Not United States Citizens?

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[101] *Id*. at para. 6.1, *supra* note 95.
[102] DOD INSTR. 5505.11, para. 6.2.3, *supra* note 95.
[103] Federal Bureau of Investigation, Criminal Justice Information Services Division, *at* http://www.fbi.gov/ hq/cjisd/about.htm (last visited January 30, 2005) (providing an overview of CJIS's duties).
[104] *Id*.
[105] *Id*.

It is reasonable to believe that if the local military law enforcement agency initiates an investigation against a service member, the necessary reporting requirements to the CJIS will be met. However, where the local command initiates an investigation or pursues charges leading to a conviction, without the assistance of the local military law enforcement agency, it is possible that the reporting requirements of DOD INSTR 5505.11 may either be unknown to the local command, or may simply fall by the wayside. If this is the case, can our hypothetical service member who is convicted, quietly serve his confinement time, go on appellate leave, await execution of the punitive discharge, and abide by all laws, thereby minimizing the chance that immigration authorities find out about the criminal convictions for drug distribution and larceny? The answer likely depends on the branch of service of the accused and the confinement facility in which he serves his sentence to confinement.

If our hypothetical service member is confined in a U.S. Army correctional facility, information on the nature of the charges, the results of the charges, final judicial action taken on the charges, and the place of incarceration will be forwarded to U.S. immigration authorities, specifically the Department of Homeland Security's (DHS) largest investigative bureau, the U.S. Immigration and Customs Enforcement (ICE).[106] AR 190-47 goes so far as to state that the Army confinement facility shall coordinate with U.S. immigration authorities to review prisoner records for the possible deportation of confinees who are not U.S. citizens.[107] If our hypothetical service member is confined in a U.S. Air Force correctional facility, final action taken on the service member's charges and place of incarceration are to be forwarded to the ICE.[108] Interestingly, if our hypothetical service member is confined in a U.S.

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[106] U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 10-3 (5 Apr. 2004) [hereinafter AR 190-47]. While AR 190-47 states that the Army confinement facility shall report the required information to the Investigations Division of the Bureau of Citizenship and Immigration Services (BCIS) (now known as the Bureau of U.S. Citizenship and Immigration Services), it is actually the bureau called U.S. Immigration and Customs Enforcement (ICE) and its operational division called the Office of Investigations that investigates the identity, status, and compliance of aliens with U.S. immigration laws. *See* United States Immigrations and Customs Enforcement (ICE), *at* http://www.ice.gov/graphics/about/ organization/index.htm (last visited January 30, 2005) (providing an overview of ICE's organization and duties). Later in this article there is a discussion of the immigration enforcement agencies which operate within the DHS. *See infra* notes 118-128 and accompanying text.

[107] AR 190-47, para. 10-3, *supra* note 106.

[108] U.S. DEP'T OF AIR FORCE, INSTR. 31-205, The AIR FORCE CORRECTIONS SYSTEM para 5.12 (7 Apr. 2004) [hereinafter AFI 31-205]. Paragraph 5.12 of AFI 31-205 states that the Air Force confinement facility shall report the required information to the U.S. Immigration and Naturalization Service (INS). When the Department of Homeland Security (DHS) came into existence on 1 March 2003, the INS was subsumed by the DHS. The ICE is now the agency which investigates the compliance of aliens with U.S. immigration laws. U.S. Department of Homeland

Navy brig[109] or U.S. Marine Corps brig,[110] the confinement facilities are under no obligation to report the presence or convictions of the service member to U.S. immigration authorities. However, if our hypothetical service member is a Marine, his Commanding Officer is required to notify the "nearest district office of the INS" of the Marine's pending separation from the Marine Corps and the prospective date so that the immigration authorities may "take such action as they may deem appropriate . . . ."[111] Our hypothetical service member is much less likely to have U.S. immigration authorities learn of his convictions if he is confined in a Navy or Marine Corps brig, vice an Army or Air Force confinement facility.

4. Are there Other Ways U.S. Immigration Authorities Could Learn that a Service Member Has a Qualifying Conviction?

If our hypothetical service member is fortunate enough that his military branch of service has not formally notified ICE of his convictions, there are other ways U.S. immigration authorities could learn of his qualifying convictions. First, if our hypothetical service member ever commits misconduct in the civilian world and is arrested and processed at a county jail, or sentenced to serve time in a county jail or state prison, that county jail or state prison may, as a matter of policy or regulation, notify U.S. immigration authorities that they have a non-citizen inmate in their custody. Second, if our hypothetical service member wants to apply for citizenship, seek some other immigration benefit, or simply receive a new Permanent Resident Card because his has expired, he will have to visit the DHS's local United States Citizenship and Immigration Services (USCIS) office.[112] The local USCIS agent could ask the applicant if he has any criminal convictions. Although the USCIS does not have an enforcement component and will not arrest the service

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Security, *at* http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited January 30, 2005) (providing information of the transformation of the former INS into the new DHS).

[109] U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1640.9B, DEPARTMENT OF THE NAVY CORRECTIONS MANUAL (2 Dec. 1996) [hereinafter SECNAVINST 1640.9B].

[110] U.S. MARINE CORPS, ORDER 1640.6, MARINE CORPS CORRECTIONS PROGRAM (8 Feb. 2001) [hereinafter MCO 1640.6].

[111] U.S. MARINE CORPS, ORDER P1900.16F, MARINE CORPS SEPARATION AND RETIREMENT MANUAL para. 1104(3) (10 Apr. 2000) [hereinafter MCO P1900.16F]. Because the INS is no longer in existence and because MCO P1900.16F does not state the manner in which this notification is to be completed, it is questionable as to whether U.S. immigration authorities would learn about our hypothetical service member's convictions if he is a U.S. Marine.

[112] KRAMER, *supra* note 7, at 7. *See* United States Citizenship and Immigration Services (USCIS), *at* http://uscis.gov/graphics/aboutus/index.htm (last visited January 30, 2005) (providing an overview of USCIS' duties).

member, the agencies do communicate with one another and a simple telephone call to ICE could lead to immediate arrest and detention.[113]

A third way in which U.S. immigration authorities could learn of our service member's convictions is if he travels outside the territorial limits of the United States for pleasure travel. Suppose our hypothetical service member takes a short vacation to Mexico's Baja Peninsula. Upon return to the United States, the individual will at some point have to pass through U.S. customs / U.S. immigration at either the U.S. – Mexican border or at a U.S. port of entry. The DHS's Customs and Border Protection (CBP)[114] unit, the agency tasked with U.S. border security, might ask the individual if he has any prior criminal convictions.[115] Lying triggers criminal consequences, and an honest answer could lead to immediate detention by CBP and a turnover to ICE.[116] Fourth, a service member with a qualifying conviction could lawfully be driving his vehicle along one of this country's many interstates and be stopped at one of the random CBP/ICE vehicle checkpoints positioned along several major U.S. highways, including those in the southwestern United States. At the checkpoint, an immigration officer could ask to see the individual's LPR card and then simply ask if the individual has been in trouble with the law. This could lead to the individual revealing a qualifying conviction, which could lead to immediate detention. Fifth, a service member could visit the local Department of Motor Vehicles (DMV) to renew a driver's license. The local DMV could discover the criminal history during a criminal record check and notify immigration authorities.[117]

Finally, if a service member has a "run-in" with his neighbor, who happens to be a spiteful individual, this could result in the neighbor calling ICE and giving ICE a "tip" that his neighbor is an alien with a qualifying conviction.[118] Thus, while our hypothetical service member can conceivably hope that the appropriate defense investigative agency or correctional facility will "drop the ball" and not report the qualifying convictions, there are a myriad of other ways that the service member's qualifying convictions could come to the attention of U.S. immigration authorities.

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[113] KRAMER, *supra* note 7, at 7.
[114] United States Customs and Border Protection (CBP), *at* http://cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml (last visited January 30, 2005) (providing an overview of CBP's duties).
[115] KRAMER, *supra* note 7, at 7.
[116] *Id*.
[117] *Id*. at 66.
[118] U.S. Immigration and Customs Enforcement, *at* http://www.ice.gov/graphics/index.htm (last visited January 30, 2005). ICE tip line telephone number is 1-866-DHS-2ICE.

E. What Will U.S. Immigration Authorities Do With Information Concerning a Service Member's Qualifying Convictions?

1. United States Immigration Enforcement Agencies.

If U.S. immigration authorities learn of a service member's criminal conviction, and that criminal conviction amounts to a basis for deportation, how will immigration authorities proceed? Before explaining the process, a brief introduction of the federal agencies tasked with enforcing U.S. immigration laws is necessary. On 1 March 2003 the Department of Homeland Security (DHS) was created pursuant to the Homeland Security Act of 2002.[119] With the creation of the DHS the former Immigration and Naturalization Service (INS) was divided into three separate agencies under the umbrella of DHS. The first agency, the United States Citizenship and Immigration Services (USCIS) has jurisdiction over residency, asylum and naturalization applications.[120] The second agency, Immigration and Customs Enforcement (ICE) enforces the immigration and customs laws within the United States (as opposed to at the borders).[121] ICE has six operational divisions, two that are of importance to this UCMJ Article: the Office of Investigations and the Office of Detention and Removal Operations (DRO).[122] The former is charged with investigating immigration law violations by individuals and has the authority to make immigration law arrests.[123] The latter is tasked with detaining and removing from the United States those aliens who have been charged with an immigration law violation and ordered deported.[124] The Office of Investigations works closely with local law enforcement agencies and makes its alien database, contained within the Law Enforcement Support Center (LESC) located in Williston, Vermont available 24 hours a day, 7 days a week to local, state and federal law enforcement agencies.[125] The LESC provides information from eight databases including the NCIC, Interstate Identification Index (III) and other state criminal history

[119] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2297 (codified at 6 U.S.C. § 101 et. seq. (2004)).
[120] 6 U.S.C. § 271 (2004). United States Citizenship and Immigration Services (USCIS), *at* http://uscis.gov/graphics/aboutus/index.htm (last visited January 30, 2005) (providing an overview of USCIS' duties).
[121] 6 U.S.C. § 251 (2004).
[122] United States Immigration and Customs Enforcement (ICE), *at* http://www.ice.gov/graphics/about/organization/ (last visited January 30, 2005) (providing an overview of ICE's duties).
[123] *Id*.
[124] *Id*.
[125] Joe Whitley, Department of Homeland Security's General Counsel, Remarks to the National College of District Attorneys (Oct. 7, 2003), *available at* http://www.dhs.gov/dhspublic/display?content=1875.

indices that show the immigration status and identity of aliens suspected, arrested or convicted of criminal activity.[126] The Office of Detention and Removal Operations (DRO) transports, detains and physically removes aliens with pending/adjudicated immigration cases.[127] The third agency under the DHS umbrella is the United States Customs and Border Protection (CBP).[128] CBP is tasked with border and transportation security at America's borders and ports of entry.[129]

2. The Notice to Appear–The Immigration Charging Document.

Once U.S. immigration authorities are aware of an individual's qualifying conviction(s), they will seek to serve a written Notice to Appear (the immigration charging document) on the non-citizen.[130] The Notice to Appear will state that the individual has previously been admitted to the United States, perhaps as a lawful permanent resident, is now deportable for being convicted of a qualifying crime(s) and must appear, at a particular location, date and time before an Immigration Judge of the United States Department of Justice.[131] The individual is afforded at least ten days between the date of service of the Notice to Appear and the date of the hearing.[132] If the individual's whereabouts are known, the Notice to Appear can be served in person, by certified mail or by regular mail.[133] Service by regular mail was implemented in IIRAIRA 96. This is important because all LPRs have an obligation (under the INA) to notify the CIS of all address changes within 10 days. ICE will not mail regular US mail to the last known address the NTA with a hearing date. On the day of the hearing the individual will be called by the clerk of the court and if absent an "in absentia deportation order" will be entered by EOIR and with that ICE will then issue a "Warrant for arrest – with final order of removal."[134] Not only do immigration officers have authority to arrest the alien once the warrant for arrest has been issued, but state and local

[126] U.S. Immigration and Customs Enforcement, Office of Investigations, Law Enforcement Support Center, *at* http://www.ice.gov/graphics/lesc/index.htm (last visited January 30, 2005) (providing an overview of the LESC's mission).
[127] 6 U.S.C. § 251 (2004). United States Office of Detention and Removal Operations (DRO), *at* http://www.ice.gov/graphics/dro/index.htm (last visited January 30, 2005) (providing an overview of DRO's duties).
[128] United States Customs and Border Protection (CBP), *at* http://cbp.gov/xp/cgov/toolbox/about/mission/cbp.xml (last visited January 30, 2005) (providing an overview of CBP's duties).
[129] *Id*.
[130] 8 U.S.C. § 1229(a) (2004). KRAMER, *supra* note 7, at 8.
[131] 8 U.S.C. § 1229(a) (2004). KRAMER, *supra* note 7, at 9, 233-35.
[132] KRAMER, *supra* note 7, at 235.
[133] 8 U.S.C. § 1229(a)(1) (2004).
[134] *Id*. § 1226 (2004); 8 C.F.R. § 287.5(e)(2) (2004).

law enforcement officers also can affect the arrest if properly delegated this authority by the Secretary of Homeland Security.[135]

3. Once the Notice to Appear is Served, Will the Alien be Detained?

Once the charging documents are properly served upon the alien, an initial custody determination is made by an immigration officer.[136] The alien can be detained in the custody of the ICE's Office of Detention and Removal Operations (DRO), released under a bond or released on the alien's own recognizance.[137] In certain cases, the alien can request that an Immigration Judge make a re-determination of the initial custody determination.[138] However, in several situations, as will be detailed later in this article, mandatory detention of the alien at a DRO detention facility will be required until the final outcome of the deportation case.

4. The Framework of the U.S. Immigration Court System.

The U.S. immigration court system is called the Executive Office for Immigration Review (EOIR) and it is under the jurisdiction of the Attorney General of the United States and the U.S. Department of Justice.[139] EOIR's primary mission is to adjudicate immigration cases including cases involving detained aliens and criminal aliens.[140] The EOIR is comprised of 52 immigration courts located in 22 U.S. States and Puerto Rico, and is staffed by over 210 Immigration Judges.[141] Procedural and hearing rules are standardized in the Code of Federal Regulations.[142]

Assuming the immigration charging document has been properly prepared and served, a criminal alien will ultimately have a deportation

[135] 8 U.S.C. § 1357(g) (2004). This section of the statute requires a written memorandum of understanding between the DHS and the particular law enforcement agency. In 2002 the Florida Department of Law Enforcement entered into the first agreement with the DHS, and in September, 2003 the State of Alabama signed an agreement to provide selected immigration authority to 21 Alabama State Troopers. *See supra* note 126 and accompanying text.
[136] 8 U.S.C. § 1226 (2004); 8 C.F.R. § 236.1 (2004).
[137] 8 U.S.C. § 1126 (2004); 8 C.F.R. subpt. C (2004).
[138] 8 C.F.R. subpt. C (2004).
[139] United States Department of Justice, Executive Office for Immigration Review (EOIR), *at* http://www.usdoj.gov/eoir/orginfo.htm (last visited January 30, 2005) (providing an overview of EOIR's primary mission).
[140] *Id*.
[141] *Id*.
[142] 8 C.F.R. pt. 1003, subpt. C (2004).

hearing, before an Immigration Judge, in a court of the EOIR.[143] The issue will be to determine whether the alien has a qualifying criminal conviction and whether the alien should be deported pursuant to the immigration laws of the United States. At the immigration hearing, the United States will be represented by a counsel from the ICE's Office of Chief Counsel–the legal office tasked with representing the Department of Homeland Security before the EOIR.[144] While an alien does have a right to hire private counsel at no expense to the U.S. government, there is no right to an immigration court appointed counsel.[145] At the hearing, the representative of the Office of Chief Counsel has a relatively straightforward job of presenting the grounds for deportability by offering an alien's certificate of conviction / results of trial and citing the applicable deportability provision of the INA. Once the government has offered sufficient proof of a qualifying conviction and a basis for deportation by clear and convincing evidence, there is often little that the alien can do other than to appeal the decision of deportation or explore the extremely limited avenue of a deportability waiver.[146]

Should the alien elect to appeal the Immigration Judge's findings or decision, the appeal is reviewed by the Board of Immigration Appeals (BIA) which is located in Falls Church, Virginia.[147] The BIA conducts appellate review of decisions rendered by Immigration Judges, including orders for removal / deportation.[148] While there is limited review of BIA decisions in the Federal Circuit Courts of Appeals, and ultimately the U.S. Supreme Court, there is no automatic stay of deportation connected to federal judicial review.[149]

5. How Active and Effective is the ICE in Enforcing U.S. Immigration Laws?

From the one year period 1 March 2003 to 28 February 2004, the ICE's Office of Detention and Removal Operations (DRO) and its 2,600 law enforcement officers and 800 support personnel detained more than 230,000 aliens in its facilities and removed/deported more than 78,000 aliens with

[143] 8 U.S.C. § 1229(a) (2004). KRAMER, *supra* note 7, at 7.
[144] KRAMER, *supra* note 7, at 7.
[145] 8 U.S.C. § 1229a(b)(4)(A) (2004).
[146] *Id*. § 1229a(c)(3) (2004).
[147] 8 C.F.R. § 1003.1 (2004). United States Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, *at* http://www.usdoj.gov/eoir/biainfo.htm (last visited January 30, 2005) (providing an overview of BIA's duties).
[148] 8 C.F.R. § 1003.1 (2004).
[149] 8 C.F.R. § 1003.6 (2004). KRAMER, *supra* note 7, at 10.

qualifying criminal convictions.[150] As of 6 October 2004, the DRO, since its creation on 1 March 2003, has deported more than 146,000 aliens with qualifying criminal convictions.[151]

To help ensure that aliens pending deportation hearings do in fact appear for their hearings and do not commit further misconduct while their cases are pending, the ICE and DRO operate eight secure detention facilities, called Service Processing Centers (SPCs), throughout the United States and its territories.[152] The DRO also has negotiated contracts with eight separate detention facilities to detain aliens and will also use state and local jails on a reimbursable detention day basis.[153]

Unfortunately for many aliens convicted of a crime that could amount to a qualifying conviction, the IIRAIRA, in most cases, requires that the alien be detained by the ICE/DRO, without bond, during the pendency of their deportation hearings.[154] The period of detention can be lengthy and cases of aliens being detained for years prior to a decision by the EOIR are common. The mandatory detention provisions were recently challenged and the U.S. Supreme Court in *Demore v. Hyung Joon Kim*[155] upheld the provisions as constitutional. The mandatory detention provisions of the IIRAIRA apply to aliens convicted of aggravated felonies, controlled substance offenses and firearm offenses.[156] The mandatory detention provisions also apply to aliens with certain convictions for crimes of moral turpitude: specifically convictions involving two or more crimes of moral turpitude or single crimes of moral turpitude in which more than one year of imprisonment was imposed.[157] Individuals with a conviction for a single crime of moral turpitude, for which

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[150] U.S. Immigration and Customs Enforcement, Office of Detention and Removal Operations (DRO), Fact Sheet of May 4, 2004, *available at* http://www.ice.gov/graphics/news/factsheets/dro050404.htm (last visited January 30, 2005).

[151] U.S. Immigration and Customs Enforcement, Office of Detention and Removal Operations (DRO), Fact Sheet of Oct. 6, 2004 (Revised), *available at* http://www.ice.gov/graphics/news/factsheets/ 072204selected.htm (last visited January 30, 2005).

[152] U.S. Immigration and Customs Enforcement, Office of Detention and Removal Operations (DRO), Service Processing Centers and Detention Facilities, *at* http://www.ice.gov/graphics/dro/facilities.htm (last visited January 30, 2005) (providing an alphabetical list of the processing and detention centers).

[153] *Id*. The eight ICE operated service processing and detention centers are located in San Juan, Puerto Rico; Buffalo, New York; El Centro, California; El Paso, Texas; Phoenix, Arizona; Miami, Florida; Harlingen, Texas; and Los Angeles, California. The contract facilities are located in Denver, Colorado; Newark, New Jersey; Phoenix, Arizona; Houston, Texas; San Antonio, Texas; Seattle, Washington; Queens, New York; and San Diego, California.

[154] 8 U.S.C. § 1226(c) (2004).

[155] 538 U.S. 510, 527-32 (2003).

[156] 8 U.S.C. § 1226(c)(1)(B) (2004).

[157] 8 U.S.C. § 1226(c)(1)(B), (C) (2004).

the sentence imposed was less than one year, are not subject to mandatory detention.[158]

In situations where an LPR service member is confined in a military correctional facility that will affirmatively notify immigration authorities of the alien's presence and potential qualifying conviction, a service member is likely to be turned over to the DRO immediately upon being released from the military correctional facility. The service member may then face months, or possibly years, in one of the DRO's immigration detention facilities, awaiting adjudication of their deportation proceedings.

III. Obligations and Duties of Defense Counsel Who Represent Alien Accused

In order to competently represent a service member who is not a U.S. citizen, do military counsel have to possess (1) a basic knowledge of U.S. immigration laws, (2) an appreciation of the deportation consequences resulting from qualifying criminal convictions, and (3) an ability to pass this information on to an affected client? This article, as well as several national organizations that set forth model competency standards for defense counsel say yes. The military justice system seems to say otherwise.

A. Military Rules of Professional Responsibility

The Army,[159] Air Force,[160] and Navy and Marine Corps[161] impose upon their defense counsel an obligation to competently represent the client. Each of the services' rules of competency mandate that counsel shall provide competent representation–representation in which the attorney possesses the legal knowledge, skill, thoroughness and expeditious preparation necessary for skilled representation. Both the Army's and Navy and Marine Corps' rules of competency have advisory comments which say that "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a

[158] *Id*. KRAMER, *supra* note 7, at 60-61.
[159] U.S. DEP'T OF ARMY, REG 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 1.1 (1 May 1992) [hereinafter AR 27-26].
[160] U.S. DEP'T OF AIR FORCE, TJAGD STANDARDS – 2, AIR FORCE RULES OF PROFESSIONAL CONDUCT AND STANDARDS FOR CIVILITY IN PROFESSIONAL CONDUCT para. 1.1 (20 Dec. 02) [hereinafter TJAGD Standards – 2].
[161] U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803.1C, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL para. 1.1 (9 Nov. 2004) [hereinafter JAGINST 5803.1C].

situation may involve . . . ."[162] A reasonable reading of this passage suggests military defense counsel should appreciate the immigration consequences stemming from a conviction of an LPR service member.

In addition to the competency requirements, each of the services requires their counsel to serve as "advisors." Each service's Rule 2.1–Advisor states that in representing a client, an attorney shall "exercise independent professional judgment and render candid advice. In rendering advice, a covered attorney [lawyer] should [may] refer not only to law but also to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."[163] The Army and Navy and Marine Corps advisory comments to Rule 2.1 say that when the client proposes a course of action that will likely result in "substantial adverse legal consequences" counsel should advise the client of all the legal considerations and implications of the client's proposed course of action.[164] This exhortation directs counsel to not only advise their clients of the short term, or immediate consequences of a proposed course of action, but to advise their clients of long range impacts or collateral effects like adverse immigration consequences, sexual offender registration requirements, loss of potential economic or retirement benefits, etc.

B. Model Standards Set by Criminal Justice Associations

The American Bar Association (ABA) has adopted standards that specifically address how criminal defense counsel should handle the issue of collateral consequences resulting from a criminal conviction.[165] Standard 14-3.2(f) states "to the extent possible, criminal defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[166] The National Legal Aid & Defender Association (NLADA) imposes the same standard of competence and skilled advice on its criminal defense counsel through its performance guidelines.[167] However, its performance guidelines for criminal defense counsel go a step further than the

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[162] AR 27-26, Comment to para. 1.1, *supra* note 159; JAGINST 5803.1C, Comment to para. 1.1, *supra* note 161.
[163] AR 27-26, para. 2.1, *supra* note 159; TJAGD Standards – 2, para. 2.1, *supra* note 160; JAGINST 5803.1C, para. 2.1, *supra* note 161.
[164] AR 27-26, Comment to para. 2.1, *supra* note 159; JAGINST 5803.1C, Comment to para. 2.1, *supra* note 161.
[165] ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (3d ed. 1999).
[166] *Id*. at § 14-3.2.
[167] NATIONAL LEGAL AID & DEFENDER ASSOCIATION PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

ABA's and impose upon counsel a duty to inform a non-citizen client of possible deportation consequences. Guideline 6.3(a) states, "counsel should inform the client of any tentative agreement reached with the prosecution, and explain . . . the potential consequences of the agreement."[168] Guideline 6.2(a) states, "counsel should be fully aware of, and make sure the client is fully aware of . . . (3) other consequences of conviction such as deportation . . . ."[169] In the Matthew Bender treatise *Criminal Defense Techniques*, defense attorneys are urged to recognize that preserving a client's right to remain in the United States may be more important than any jail sentence, thus to effectively represent a client, counsel must convey possible deportation consequences to an alien client.[170]

C. Statutory Requirements of Various States within the United States

Over twenty state legislatures have recognized the devastating consequences of deportation and have enacted statutes or court rules that require their trial judges give basic advice about possible deportation consequences arising from an accused's pleas of guilty.[171] The advice is simple and straightforward and adds only a few seconds to the plea inquiry. For example, the State of California requires its trial judges to inform all aliens, on the record, before accepting pleas of guilty or *nolo contendre* to any misdemeanor or felony under California's penal code that "conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."[172] New York State requires a similar advisement to its defendants who are not U.S. citizens and who are pleading to any counts brought down through an indictment or information charging a felony, "[p]rior to accepting a defendant's plea of

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[168] *Id*. at § 6.3(a).
[169] *Id*. at § 6.2(a)(3).
[170] 3 KARI CONVERSE, CRIMINAL DEFENSE TECHNIQUES § 60A.01 (2005).
[171] ARIZ ST. RCRP R 17.2 (LEXIS 2004); CAL. PENAL CODE ANN. § 1016.5 (LEXIS 2004); CONN. GEN. STAT. § 54-1j (LEXIS 2003); D.C. CODE ANN. § 16-713 (LEXIS 2004); FLA. R. CRIM. PROC. § 3.172(c)(8) (LEXIS 2005); GA. CODE ANN. § 17-7-93 (LEXIS 2004); HAW. REV. STAT. ANN. § 802E-2 (LEXIS 2003); 725 ILCS 5/113-8 (LEXIS 2004); MD. R. CT. § 4-242 (LEXIS 2004); MASS. GEN LAWS ch. 278, 29D (LEXIS 2004); MINN. R. CRIM. PROC. § 15.01 (LEXIS 2003); MONT. CODE ANN. § 46-12-210 (LEXIS 2004); N.M. SUP. CT. R/ CRIM. Form 9-406 (LEXIS 2004); N.Y. CRIM. PROC. LAW § 220.50(7) LEXIS 2004); N.C. GEN. STAT. § 15A-1022 (LEXIS 2004); OHIO REV. CODE ANN. § 2943.031 (LEXIS 2004); OR. REV. STAT. § 135.385 (LEXIS 2003); R.I. GEN LAWS § 12-22-22 (LEXIS 2004); TEX. CRIM. PROC. CODE ANN., art. 26.13(a)(4) (LEXIS 2004); WASH. REV. CODE ANN. § 10.40.200 (LEXIS 2004); WIS. STAT. ANN. § 971.08 (LEXIS).
[172] CAL. PENAL CODE ANN. § 1016.5 (LEXIS 2004).

guilty . . . the court must advise the defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation . . . ."[173]

D. Federal Statutory Requirements

Despite several states having enacted laws requiring alien accused to be forewarned of the possible adverse immigration consequences stemming from their pleas of guilty, Federal District Court Judges and Magistrates, as well as military trial judges, have no similar requirement under federal statutes, the Federal Rules of Criminal Procedure, or the Uniform Code of Military Justice.[174] Perhaps the reluctance of federal judges and military judges to give a warning to alien defendants stems from an assumption, a potentially unrealistic assumption, that alien defendants are already well aware of potential adverse immigration consequences that may result from their convictions. In *United States v. St. Cyr*,[175] the Supreme Court held that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." For those alien accused who are not as well informed as the respondent in *St. Cyr*, who are not aware of the consequences of their convictions, or who have defense counsel that are unfamiliar with immigration law, federal courts are reluctant to find ineffective assistance of counsel for counsel who say nothing to their clients about potential deportation. However, as will be seen later this article, federal courts are beginning to hold that misadvice by defense counsel to non-citizen accused facing possible deportation i.e., "you don't have anything to worry about" does amount to ineffective assistance of counsel.

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[173] N.Y. CRIM. PROC. LAW § 220.50(7) (LEXIS 2004).
[174] FED. R. CRIM. P. 11. MCM, *supra* note 6, R.C.M. 910. United States v. Bedania, 12 M.J. 373, 376 (C.M.A. 1982); United States v. Gomezarroyo, No. 00286, 1999 CCA LEXIS 276 (N-M. Ct. Crim. App. Oct. 19, 1999); Downs-Morgan v. United States, 765 F.2d 1534, 1538 (11th Cir. 1985); United States v. Yearwood, 863 F.2d 6, 7 (4th Cir. 1988).
[175] 533 U.S. 289, 322 (2001).

IV. CONSEQUENCES WHEN CRIMINAL DEFENSE COUNSEL NEGLECT TO PROPERLY ADVISE, OR MISADVISE, THEIR CLIENTS OF ADVERSE IMMIGRATION CONSEQUENCES

A. The Doctrine of Collateral Consequences

Despite the plethora of States that require their trial judges to advise aliens of deportation consequences resulting from criminal convictions, there are few if any State appellate court decisions holding that an accused is entitled to relief when his/her defense counsel either fails to advise of adverse immigration consequences, or gives misinformation about deportation consequences.[176] Federal appellate courts have been equally tough in denying an appellant relief based upon a defense counsel's failure to recognize the existence of potential adverse immigration consequences or the deportation consequences certain pleas of guilty can bring to bear.[177] The reticence comes from a firmly entrenched belief in the collateral consequences rule.

Collateral consequences of a conviction are those that occur as a result of a conviction and sentence, but are not specifically imposed by the sentencing court.[178] The collateral consequences rule says that while a conviction for a crime may result in numerous legal consequences to the defendant/accused, the Due Process Clause of the Fifth Amendment is satisfied during a guilty plea so long as the accused understands the direct consequences of a plea such as length of imprisonment, forfeitures/fines, etc.[179] Collateral consequences such as the inability to register or own a firearm, the loss of a security clearance, the failure to obtain a promotion, the loss of student financial aid, the registration requirements for sexual offenders, and the risk of deportation are all consequences beyond the control of the sentencing court and are consequently not part of effective assistance of counsel.[180]

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[176] Gabriel J. Chin et. al., *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 CORNELL L. REV. 697, 709 (2002).
[177] *Id*.
[178] United States v. Shaw, 2004 U.S. Dist. LEXIS 15942 (E.D. Pa. Aug. 11, 2004).
[179] *Chin*, *supra* note 176, at 703-04. Brady v. United States, 397 U.S. 742, 755 (1970); United States v. Bedania, 12 M.J. 373 (C.M.A. 1982).
[180] *Chin*, *supra* note 176, at 704. *Bedania*, 12 M.J. at 376.

B. Military and Federal Appellate Courts' Treatment of the Collateral Consequences Doctrine As Applied to Cases Involving Accused who are not United States Citizens

Military appellate courts have consistently held firm to the belief that trial defense counsel need only explain to their clients the direct consequences of a plea. The Court of Military Appeals, in *United States v. Berumen*,[181] held that immigration consequences, including the consequence of deportation, are collateral and trial defense counsel can still competently represent an alien accused without uttering one word about possible deportation consequences. In *Berumen*, Army Private First Class (PFC) Berumen pled guilty to rape and forcible sodomy under UCMJ Articles 120 and 125 of the Uniform Code of Military Justice.[182] At the time of his trial, PFC Berumen was not a U.S. citizen and neither his trial defense counsel nor the military judge advised him of the deportation consequences of his guilty pleas.[183] PFC Berumen was convicted pursuant to his pleas at a general court-martial and on appeal he based two of his assignments of error on the failure of his trial defense counsel and the failure of the military judge to apprise him of possible deportation consequences.[184]

With respect to the duties of the military judge, the Court of Military Appeals held, "[i]t is difficult for us to imagine a more formidable obstacle to the orderly administration of military justice . . . than a military judge digressing to ascertain possible collateral consequences of a court-martial conviction and, should any be found, endeavoring to explain them to the accused."[185] In evaluating whether PFC Berumen's trial defense counsel provided competent assistance of counsel, the Court relied on the U.S. Supreme Court's two-part test established in *Strickland v. Washington*.[186] Under *Strickland*, the U.S. Supreme Court explained "[t]he benchmark for

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[181] 24 M.J. 737 (C.M.A. 1987).
[182] *Berumen*, 24 M.J. at 739.
[183] *Id.* at 740. At the time of PFC Berumen's pleas, he would have been processed by the former INS for deportation, however the immigration code at that time would have allowed PFC Berumen to (1) ask the military judge to make a recommendation on the record against deportation, and (2) to ask an immigration judge for a deportation waiver based upon the number of years he had resided in the U.S. and the hardship deportation would bring to himself and his family members. Under the immigration law reforms of 1996, not only would PFC Berumen's offenses still qualify as both aggravated felonies and crimes of moral turpitude, thereby triggering mandatory detention while deportation processing progressed, recommendations against deportation by trial judges no longer exist and the accused would not be permitted to apply for a hardship waiver to an immigration judge.
[184] *Id*.
[185] *Id*.
[186] *Id*. at 742; Strickland v. Washington, 466 U.S. 668 (1984).

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[187] To evaluate claims under this standard, the Court set forth a two part test: (1) counsel's representation must have been deficient under all the circumstances, and (2) the unprofessional errors of counsel must create a "reasonable probability" that but for counsel's incompetence, the result of the proceeding would have been different.[188] The Court of Military Appeals, relying on the collateral consequences rule, held that trial defense counsel's failure to advise PFC Berumen of possible adverse immigration consequences did not amount to "professionally unreasonable advice" and therefore the first part of the two part *Strickland* test was not satisfied.[189] Because the issue was not raised with the facts in PFC Berumen's case, the Court of Military Appeals reserved judgment "on whether misadvice by a defense counsel which is given in response to an accused's specific inquiry and which results in a guilty plea, necessarily constitutes ineffective assistance of counsel."[190]

Berumen was decided in 1987, well before the draconian provisions of the IIRAIRA were enacted in 1996, and well before the creation of many of the State statutes imposing a duty on trial judges to advise alien defendants of possible deportation consequences stemming from their pleas of guilty. *Berumen's* concern over courtroom inefficiency if military trial judges were to inform an alien accused of potential deportation consequences stemming from a plea of guilty seems unreasonable. *Berumen's* decision that military defense counsel have no duty to advise alien accused of potential adverse immigration consequences flies in the face of the model standards set by the ABA and other criminal defense organizations and runs counter to the plain language set forth in each of the Services' rules of professional responsibility.

Recently, the Second Circuit Court of Appeals, in *United States v. Couto*,[191] held that the defendant's argument that a federal district judge's failure to advise an alien defendant of potential deportation consequences during a guilty plea rendered that plea involuntary, was persuasive and deserved "careful consideration." Because the case could be decided on other grounds, the Court did not rule on the aforementioned argument. However, federal courts are beginning to hold that misadvice by defense counsel concerning the likelihood of an accused being deported does amount to

[187] *Strickland*, 466 U.S. at 686.
[188] *Id*. at 694.
[189] United States v. Berumen, 24 M.J.737, 742 (C.M.A. 1977).
[190] *Id*.
[191] 311 F.3d 179, 190 (2d Cir. 2002).

ineffective assistance of counsel. In 2002 the Second Circuit decided *Couto* and reversed a District Court's order denying Ms. Couto's (an alien defendant) motion to withdraw her plea of guilty and vacate her conviction for bribery of a public official (an aggravated felony for immigration purposes) when her trial defense counsel gave erroneous advice about the deportation consequences of her plea to an "aggravated felony."[192] The Seventh Circuit Court of Appeals has also held that it is ineffective assistance of counsel for an attorney to advise an alien defendant "not to worry" about the immigration consequences of a plea of guilty.[193] In *United States v. Shaw*, the Eastern District Court of Pennsylvania held that the fact that a defendant had been misled by his defense counsel as to the consequence of deportability resulting from his plea of guilt amounts to ineffective assistance of counsel.[194]

A more recent unpublished military case involving an alien accused is *United States v. Gomezarroyo*[195] in which Marine Lance Corporal (LCpl) Gomezarroyo, at a general court-martial, pled guilty to rape, forcible oral sodomy and indecent assault in violation of UCMJ Articles 120, 125 and 134 of the UCMJ. LCpl Gomezarroyo was found guilty pursuant to his pleas and his sentence included six years confinement and a Dishonorable Discharge.[196] On appeal, the appellant raised two issues, one of which was that his pleas were involuntary because the military judge did not advise LCpl Gomezarroyo that his convictions combined with his status as a lawful permanent resident would result in his deportation under the IIRAIRA.[197] Relying on *Berumen*, the Navy and Marine Corps Court of Criminal Appeals held that the military judge "had no duty to inform the appellant that deportation was a 'potential' collateral administrative consequence of his pleas of guilty."[198] In denying the accused relief, the Court refused to invalidate a voluntary guilty plea "on the basis of what 'might' occur to the appellant administratively long after his court-martial concluded."[199] The Court failed to recognize that each of the accused's pleas equaled "aggravated felonies" under immigration law and not only will LCpl Gomezarroyo definitely be deported, he will have to remain in the detention/custody of ICE/DRO while his deportation proceedings are conducted. The Court did recognize that "deportation would certainly be a

[192] *Id.* at 188.
[193] *See* Sandoval v. Immigration and Naturalization Serv., 240 F.3d 577, 578-79 (7th Cir. 2001).
[194] *Shaw*, 2004 U.S. Dist. LEXIS 15942 (E.D. Pa. Aug. 11, 2004).
[195] No. 00286, 1999 CCA LEXIS 276 (N-M. Ct. Crim. App. Oct. 19, 1999).
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*

major consequence of the appellant's court-martial conviction," yet the Court refused to waver from its adherence to the collateral consequence rule.[200]

C. Military Appellate Courts' Treatment of the Collateral Consequences Doctrine As Applied to Cases Involving Accused at, or near, Retirement Eligibility

Interestingly, military appellate courts, despite their strict adherence to the collateral consequences rule involving cases of possible deportation, have created an exception to the collateral consequences rule in situations where the accused might face a reduction or total loss of retirement benefits based upon conviction. In *United States v. Griffin*, [201] Air Force Technical Sergeant (E-6) Griffin, contrary to his plea, was convicted by members, at a general court-martial, of rape under UCMJ Article 120 of the UCMJ. At the time of the trial, the accused had over twenty years of active service and was eligible for retirement. The trial counsel asked the military judge to give a sentencing instruction that addressed the effect a reduction in rank without a punitive discharge would have on the appellant's retirement benefits.[202] The instruction was given by the military judge to the members without defense objection.[203] During deliberations on sentence, the members asked a number of questions concerning how their sentence would impact the accused's military retirement benefits.[204] The trial judge only answered some of the members' questions and eventually said that decisions concerning the accused's military retirement benefits would ultimately be made by the Secretary of the Air Force.[205] The members sentenced the accused to five years of confinement and a Dishonorable Discharge.[206] On appeal, the appellant argued that the military judge's instructions were prejudicially erroneous because the instructions did not specifically address what would happen to the accused's retirement benefits if he was punitively discharged from the Air Force.[207] The Court of Military Appeals held that while the trial judge should ordinarily simply inform the members that collateral consequences are not germane, if the accused agrees, it is not error for a trial judge to answer inquiries from "court members regarding collateral consequences of particular sentences."[208]

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[200] *Id*.
[201] 25 M.J. 423 (C.M.A. 1988).
[202] *Id*. at 424.
[203] *Id*.
[204] *Id*.
[205] *Id*.
[206] *Id*. at 424.
[207] United States v. Griffin, 25 M.J. 423, 423-25 (C.M.A. 1988).
[208] *Id*. at 424.

In *United States v. Greaves*,[209] Air Force Technical Sergeant (E-6) Greaves had 19 years and 10 months of creditable service at the time of his trial for wrongful use of cocaine in violation of Article 112a of the UCMJ. Technical Sergeant Greaves pled guilty at a general court-martial and was sentenced by a panel of officer and enlisted members to confinement for 90 days, reduction to pay grade to E-4 and a Bad-Conduct Discharge.[210] During deliberations on sentence, the members asked two questions concerning the impact a punitive discharge would have on the accused's ability to retire and receive retirement benefits.[211] Despite defense counsel objection, the military judge refused to answer the members' questions, ruling that the questions were "collateral issues that may not be a matter of your concern."[212] On appeal, the Court of Appeals for the Armed Forces (CAAF) held that where a service member is "perilously close to retirement" and both the members and accused desire an instruction addressing an important collateral matter, discretion should be given to the military judge to determine whether such an instruction is appropriate.[213] In this case, the CAAF held that the military judge abused his discretion when he instructed the members that any impact on the accused's retirement was a collateral matter that should not be considered during their deliberations.[214]

Trial defense counsel have taken the *Greaves* decision and built upon it. In *United States v. Boyd*,[215] the accused, Air Force Captain Gregory Boyd, pled guilty before a panel of officer members at a general court-martial to charges of destruction of government property, wrongful use of controlled substances, larceny of military property and conduct unbecoming an officer in violation of Articles 108, 112a, 121 and 133 of the UCMJ. At the time of his conviction, Capt Boyd possessed 15 ½ years of creditable service for retirement. Defense counsel requested a sentencing instruction that said if the accused was not dismissed, he would likely be able to stay in the service and reach retirement age eligibility.[216] The military judge refused to give the instruction and the accused was sentenced to Dismissal, confinement for 90 days and forfeitures. In holding that the trial judge erred by refusing to give an instruction concerning the impact a Dismissal might have on retirement benefits, the CAAF held that military judges should be liberal in granting instructions on the impact of a punitive discharge on retirement benefits unless

[209] United States v. Greaves, 46 M.J. 133, 134 (1997).
[210] *Id*. at 134.
[211] *Id*.
[212] *Id*.
[213] *Id*. at 139.
[214] *Id*. at 139.
[215] 55 M.J. 217, 218 (2001).
[216] *Id*. at 219.

neither party requests the instruction or the "possibility of retirement is so remote as to make it irrelevant to determining an appropriate sentence."[217]

If military appellate courts are willing to permit trial judges to instruct members upon the impact their sentences will have on potential losses of retirement benefits with accused who are three, four or five years away from retirement, it seems reasonable to permit military judges to give an instruction, upon request of counsel, that members specifically consider the fact that there is a near certainty that an accused, who is a lawful permanent resident, will be deported from the United States based upon the court-martial conviction?

V. WAYS TO MINIMIZE AN ACCUSED'S EXPOSURE TO POSSIBLE DEPORTATION

A. Crafting a Plea Agreement that Avoids Adverse Immigration Consequences

In cases where a plea of guilty will be in an accused's best interest or the accused simply desires to plead guilty, defense counsel normally strive to reach a plea agreement with the government. There are ways to craft a plea agreement such that the accused avoids some or all of the potential adverse immigration consequences. The best avenue for defense counsel is to keep the case from being adjudicated at a special or general court-martial. Adjudications and convictions at summary courts-martial, as well as findings of guilty at UCMJ Article 15, proceedings, are not considered criminal convictions under immigration law.[218]

1. Avoiding a Conviction Involving a Crime of Moral Turpitude

If a defense counsel is unsuccessful at getting a case litigated at a forum lower than a special court-martial, every attempt should be made to use mixed pleas and/or pleas to lesser included offenses so as to avoid a conviction on a charge and specification that involves moral turpitude. Thus, plead to an offense that does not have elements that include specific/evil intent or reckless conduct. An accused alleged to have taken a musical compact disc belonging to his barracks' roommate, and then absented himself from his unit for six months might be charged with unauthorized absence under UCMJ Article 86, and larceny under UCMJ Article 121. A plea to larceny would likely be

[217] *Id*. at 221.
[218] *See* Middendorf v. Henry, 425 U.S. 25, 32, 40-42 (1976).

considered a conviction for a crime involving moral turpitude because one of the elements of the offense is that the accused took the property of another with "the intent to permanently deprive" the rightful owner of use and benefit of the property.[219] Returning the compact disc and pleading to the lesser included offense of wrongful appropriation is an option because the BIA has held that a theft crime which does not have an element requiring a permanent taking of property is not a crime of moral turpitude.[220] However, this approach should be viewed with skepticism given that over 50 years have elapsed since the BIA's decision in *Matter of P-*, and wrongful appropriation under UCMJ Article 121, does have specific intent as an element of the offense. A safer course would be to offer a plea of guilty only to the UCMJ Article 86, charge/specification since it is clearly not a crime involving moral turpitude.[221]

Similarly, an accused charged and convicted with the offense of burglary under UCMJ Article 129, would have a conviction for a crime involving moral turpitude because one of the elements for burglary is that the accused, while breaking and entering into the dwelling house of another, had the "intent to commit therein" another offense.[222] However, a plea to the lesser included offense of unlawful entry under UCMJ Article 134, which lacks the element of specific intent, would likely not be considered a crime of moral turpitude.[223]

If a conviction for an offense considered a crime of moral turpitude is unavoidable, attempt to avoid multiple convictions to crimes of moral turpitude and attempt to avoid a conviction that carries with it a maximum possible sentence of one year or more of confinement. A lawful permanent resident who is convicted of only one crime of moral turpitude that carries a maximum authorized sentence to confinement of less than one year, and if the conviction is handed down more than five years after the accused was granted lawful permanent residency, is not deportable.[224] In comparison, the same accused, if convicted of two offenses involving moral turpitude is subject to deportation

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[219] U.S. DEP'T OF ARMY, PAM. 27-9 LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-46-1 (16 Sept. 2002) [hereinafter BENCHBOOK].
[220] Matter of P-, 2 I&N Dec. 887, 887-88 (BIA 1947) (holding that wrongful appropriation is not a crime of moral turpitude because no permanent taking of property is required).
[221] *In re* S-B-, 4 I&N Dec. 682, 682-83 (BIA 1952).
[222] BENCHBOOK para. 3-55-1, *supra* note 219.
[223] MCM, *supra* note 6, pt. IV, ¶ 111(b). *In re* M-, 9 I&N Dec. 132, 138 (BIA 1960) (holding that a foreign conviction for entering a dwelling without permission was not a crime of moral turpitude).
[224] 8 U.S.C. § 1227(a)(2)(A)(i) (2004). KRAMER, *supra* note 7, at 191.

regardless of the authorized maximum punishment.[225] Thus, a defense counsel who represents a lawful permanent resident who has had lawful permanent residency status for more than five years, and who is charged with three separate specifications under Article 121 of the UMCJ for stealing his roommates' baseball mitt, ATM card and $50.00 cash–all within a narrow window of time–should seek to plead to a single specification of larceny on diverse occasions of the baseball mitt, ATM card and cash, thereby limiting his total number of convictions to one, and rendering the maximum authorized confinement to be less than one year.[226]

2. Avoiding a Conviction Classified as an "Aggravated Felony"

Convictions classified as "aggravated felonies" under U.S. immigration laws usually trigger the most severe consequences because not only is the accused now facing a basis for deportation, but "aggravated felony" convictions result in mandatory detention at an immigration holding facility with no opportunity to apply for bond and no opportunity to apply for relief from removal proceedings should an order of deportation be issued by the immigration court.[227]

Defense counsel who represent service members charged with aggravated assaults must remember that "crimes of violence" such as aggravated assaults under UCMJ Article 128, are "aggravated felonies" for immigration law purposes only if the sentence to confinement imposed is one year or greater.[228] Defense counsel should seek to plead to the lesser included offenses of simple assault or assault consummated by a battery since these offenses carry no more than three or six months of confinement, respectively. If defense counsel is unsuccessful at pleading to a lesser included offense, every effort should be made to convince the sentencing authority to sentence the accused to no more than 364 days of confinement. Also, when representing service members charged with UCMJ Article 111, driving a vehicle while under the influence of alcohol where personal injuries resulted, attempt to plead not guilty to the personal injury language as the lesser included offense of driving while under the influence of alcohol is not a crime of violence.[229]

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[225] 8 U.S.C. § 1227(a)(2)(A)(i) (2004). KRAMER, *supra* note 7, at 191.
[226] 8 U.S.C. § 1227 (a)(2)(A)(i) (2004). MCM, *supra* note 6, pt. IV, ¶¶ 46(c)(1)(h)(ii), (e)(1)(b).
[227] 8 U.S.C. § 1226 (c)(1)(B) (2004). KRAMER, *supra* note 7, at 193.
[228] 8 U.S.C. § 1101(a)(43)(F) (2004).
[229] Leocal v. Ashcroft, 125 S. Ct. 377, 382-84 (2004).

When representing service members alleged to have committed offenses resulting in economic harm, consider the amount of money lost to the victim. Offenses involving fraud or deceit such as obtaining services under false pretenses under Article 134 of the UCMJ will be aggravated felonies only if the amount of loss to the victim exceeds $10,000.00.[230] Unfortunately for an accused, conviction of any of the UCMJ's drug offenses under UCMJ Article 112a, which are akin to "trafficking," will be considered an "aggravated felony."

B. Create a Record that May Mitigate Adverse Immigration Consequences in Later Proceedings

Despite the tightening of U.S. immigration laws in the past decade, politics in the future may push Congress to reinstate some of the hardship waivers to deportation it has eliminated. Congress may also realize the draconian impact of the IIRAIRA and narrow the definitions and scope of crimes of moral turpitude or aggravated felony.

As with any case, defense counsel should seek to present his client, on the record, in the most favorable light. By using stipulations of fact or through the statements of the accused during providency, the record can be clarified to show the extent of a client's involvement in a criminal enterprise, or lack thereof, the negligible amount of economic loss or physical harm to a victim, the lack of knowledge on the part of the accused or the cooperation an accused gave to the government. Other extenuating circumstances such as conduct that involved self defense, or conduct that was provoked can all work to the client's benefit at a later deportation proceeding.

Defense counsel may also want to consider relaxing the rules of evidence and offering mitigation evidence that shows the near certain consequence of deportation and the emotional and financial hardship that are to follow on the accused and the accused's family members. Fleshing out the far reaching impacts of deportation can only strengthen defense positions against trial counsel arguments for severe sentences to forfeitures and confinement. Should the military judge rule that this evidence is collateral, counsel should consider the unpublished decision of *United States v. Richardson*.[231] In *Richardson*, the Court allowed a defense counsel, during the defense case in mitigation, to offer evidence to members concerning the prospect of deportation where the accused was an LPR.[232] Counsel may also want to cite

[230] 8 U.S.C. 1101§ (a)(43)(M)(i) (2004). KRAMER, *supra* note 7, at 194.
[231] No. 20010197, 2003 CCA LEXIS 180 (N-M. Ct. Crim. App. Aug. 22, 2003)
[232] *Id*.

the CAAF's decision in *United States v. Washington*[233] by analogy. In *Washington*, the CAAF held that it was error to deny admission to a defense counsel demonstrative exhibit that showed the complete picture of financial loss a Bad-Conduct Discharge would cause an Air Force Senior Airman (E-4) who was convicted at a special court-martial when she had over 18 years of creditable service for retirement.[234]

C. Seek to Work with an Attorney Experienced in Immigration Matters

Until cases involving adverse immigration consequences draw the attention they deserve, military counsel should, at a minimum, endeavor to gain a basic understanding of immigration law and the deportability provisions found under the INA. A practitioner must realize that immigration law is complex and the consequences of an imprudent plea can be devastating. The inherent complexity of U.S. immigration laws is already well recognized by the courts. The Ninth Circuit has held that "[w]ith only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'"[235] The Second Circuit has also held that U.S. immigration laws resemble "King Minos's labyrinth in ancient Crete."[236]

Because an intelligent plea decision cannot be made by an accused who does not fully understand the possible consequences of a conviction, and because the U.S. immigration laws are so complex, a competent defense counsel should inquire into the accused's citizenship early on in the representation. If the accused is an LPR, a defense counsel who does not possesses the necessary competency to effectively represent the accused needs to work closely with an experienced immigration attorney in developing a plea or strategy that ameliorates adverse immigration consequences. A defense counsel unable to locate an experienced immigration attorney would be well served to: (1) review a immigration hornbook such as Mary Kramer's *Immigration Consequences of Criminal Activity, A Guide to Representing Foreign-Born Defendants*,[237] (2) contact the Defending Immigrants Partnership (DIP)[238] which is an umbrella organization of four entities dedicated to training

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[233] 55 M.J. 441 (2001).
[234] *Id*. at 442.
[235] Castro-O'Ryan v. Immigration and Naturalization Serv., 847 F.2d 1307, 1312 (9th Cir. 1988) (quoting Elizabeth Hull, Without Justice for All 107 (1985)).
[236] Lok v. Immigration and Naturalization Serv., 548 F.2d 37, 38 (2d Cir. 1977).
[237] KRAMER, *supra* note 7.
[238] Defending Immigrants Partnership (DIP), *at* http://www.nlada.org/Defender/Defender_Immigrants/ Defending_Immigrants_About (last visited

defense counsel to represent non-citizens, and (3) remember that with immigration law "the issues are seldom simple and the answers are far from clear."[239]

VI. CONCLUSION

Within the first 30 days of the launch of Operation Iraqi Freedom in March, 2003, five U.S. Marines and one U.S. soldier, who were not U.S. citizens, were killed in action in Iraq.[240] If these service members were willing to make the ultimate sacrifice for a country of which they were not citizens, it stands to reason that the deportation of a non-citizen service member who loves the United States would be a life altering event. Yet, within the realm of military justice, deportation continues to be viewed as an insignificant and remote consequence of a court-martial conviction, deserving of no more than fleeting attention.[241] The time has come for either a military appellate court,

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January 30, 2005) (providing an overview of DIP's services). Telephone number: (202) 452-0620. *Id*.

[239] Alanis-Bustamante v. Reno, 201 F.3d 1303, 1308 (11th Cir. 2000).

[240] Valerie Alvord, *USA Today*, April 8, 2003, *available at* http://www.usatoday.com/news/world/iraq/ 2003-04-08-noncitizen-usat_x.ht (last visited January 30, 2005).

[241] Military appellate courts' refusal to bend the collateral consequences rule for deportation consequences has already been detailed in this article. And, in this author's opinion, immigration

or the Flag and General Officers responsible for promulgating the rules of professional responsibility for the Services, to specifically decide that deportation is such a significant collateral consequence of a court-martial conviction that a military defense counsel, in order to competently represent an LPR service member, must advise that client of potential deportation consequences stemming from the conviction.

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law is viewed in the same light as tax law: an area that is extremely complex and an area that most attorneys would prefer to avoid. It is also an area of the law that the Services afford little attention. As an example, neither the Navy nor the Marine Corps permits its judge advocates to earn, through the military advanced degree programs, a Masters of Law (LL.M) with a concentration in immigration law. Navy judge advocates are limited to specialties in military / operational law, trial advocacy, international/ocean law, tax, health care, labor, or environmental law. U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 1520.1, NAVY FULLY FUNDED POSTGRADUATE LEGAL EDUCATION AT CIVILIAN INSTITUTIONS PROGRAM para. 2 (7 Mar. 2000). For Fiscal Year (FY) 2005, Marine judge advocates are limited to specialties in environmental law, labor, international, criminal, and military law. MARADMIN 463/04 of Oct. 25, 2004, *available at* http://www.usmc.mil/maradmins/maradmin2000.nsf/maradmins (last visited January 30, 2005) (limiting the Marine Corps' Advanced Degree Program (ADP) and Special Education Program (SEP) to the aforementioned specialties). U.S. MARINE CORPS, ORDER 1560.19E, ADVANCED DEGREE PROGRAM (25 Jun. 2003); U.S. MARINE CORPS, ORDER 1520.9G, SPECIAL EDUCATION PROGRAM (31 Jul. 2003).

THE INFORMATION QUALITY ACT: AN ENVIRONMENTAL PRIMER

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Science is one of the soundest investments the nation can make for the future. Strong science provides the foundation for credible environmental decision-making.[1]

I. INTRODUCTION

The Information Quality Act (IQA),[2] also referred to as the Data Quality Act,[3] was most likely enacted at the behest of industry in an attempt to hinder environmental rulemaking.[4] Introduced by Congresswoman Jo Ann Emerson[5] as a legislative rider to the Treasury and General Government Appropriations Act of 2001, the IQA is the result of lobby efforts by Dr.

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[1] National Research Council, Strengthening Science at the U.S. Environmental Protection Agency, Research - Management and Peer - Review Practices, National Research Council, 25 (2000).

[2] Section 515 of the Treasury and General Government Appropriations Act of 2001, Pub. L. No. 106-554, 144 Stat. 2,763A-153 to 2,763A-154 (2000), is informally referred to as the Information Quality Act or IQA. The Office of Management and Budget (OMB) refers to the Act as the IQA, because it addresses more than just quantitative data. *See* Paul Noe, Frederick R. Anderson, Sidney A. Shapiro, James Tozzi, David Hawkins, and Wendy Wagner, *Learning to Live With the Data Quality Act*, 33 ENVT. L. REP. 10,225 (2003). *See also* Dr. John D. Graham, Speech at the American Bar Association Section on Environment, Energy, and Resources, 11th Section Fall Meeting (Oct. 8, 2003)(transcript available at http://www.whitehouse.gov/omb/inforeg/speeches/031008graham.html) (last visited November 20, 2004).

[3] Frederick R. Anderson, *Data Quality Act*, NAT'L L.J., Oct. 14, 2002, at B9.

[4] Interview by Brooke Gladstone with Alan Morrison, Public Citizen Litigation Group and Dr. James Tozzi, Center for Regulatory Effectiveness, National Public Radio (Apr. 20, 2002).

[5] Congresswoman Jo Ann Emerson filled a vacancy in the 104th Congress when her husband, Congressman Bill Emerson, a Missouri Republican, died on June 22, 1996. Unable to meet the primary filing deadline, she ran in the special election as an independent candidate. She won the special election and subsequently changed her party affiliation to Republican on January 7, 1997. http://www.joannemerson.com/biography.htm (last visited November 20, 2004).

James Tozzi,[6] Multinational Business Services, Incorporated[7] and the Center for Regulatory Effectiveness (CRE).[8] Many commentators believe the true purpose of the Act is to impede rulemaking by providing industry with a venue to attack the science on which environmental regulations are based.[9]

The IQA requires a systemic approach to information quality and requires all federal agencies to implement guidelines that ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated to the public.[10] Each agency must also establish administrative mechanisms for affected persons to seek correction of the information maintained and disseminated by the agency that is not in compliance with the Act.[11] The public, in addition to exercising its right to

[6] Dr. Tozzi, the former Deputy Administrator, Office of Information and Regulatory Affairs (OIRA), OMB, has extensive experience with reviewing proposed federal agency rulemaking. His federal service at OMB spanned five consecutive presidential administrations from President Lyndon B. Johnson to President Ronald Reagan and included a position as Chief of the Environmental Branch, where he reviewed EPA regulations. Dan Davidson, *Nixon's Nerd Turns Regulations Watchdog*, FEDERAL TIMES, Nov. 11, 2002, at 12.

[7] Multinational Business Services is an industry supported lobbying firm in Washington, D.C. It represents numerous interests including the tobacco and auto industries. Sheldon Rampton and John Stauber, *How Big Tobacco Helped Create the Junkman*, 7 PR Watch Archives 3 (2000), *and* Warren Brown and Cindy Skrzycki, *Opposing Sides Pull Out Statistical Stops in Air Bag Battle; Federal Officials Move Closer to Issuing a Final Rule on Deactivating the Safety Devices*, WASH. POST, Sep. 24, 1997, at C-9.

[8] The CRE was established in 1996 by Dr. James Tozzi to counter what he perceived to be a lack of regulatory review under the Clinton administration. Davidson, *supra* note 6. The CRE's self-stated goals are "(t)o ensure that the public has access to data and information used to develop federal regulations," and "that information which federal agencies disseminate to the public is of the highest quality." http://www.thecre.com/about.html (last visited November 20, 2004). The CRE is "industry-supported" and "conservative and business oriented." JOHN D. ECHEVERRIA and JULIE B. KAPLAN, POISONOUS PROCEDURAL REFORM: IN DEFENSE OF ENVIRONMENTAL RIGHT TO KNOW 2 (2002), *citing* Bureau of National Affairs, Daily Environment Report, at A-1 (November 26, 2001), *and* Cynthia Skrzycki, *The Regulators*, WASH. POST, Apr. 24, 2001, at E-1. CRE represents chemical and utility clients. *EPA Under Increased Pressure to Release Modeling Data For Highly Anticipated Multi-Pollutant Air Controls*, InsideEPA.com, Today (Jan. 29, 2002), *at* http://www.insideepa.com. The CRE maintains the foremost industry oriented website on the IQA at http://www.thecre.com (last visited November 20, 2004).

[9] *See* Anderson, *supra* note 3, *and* Robert Gellman, *What? You Haven't Heard About Section 51?,* GOVERNMENT COMPUTER NEWS 26 (Aug. 20, 2001).

[10] Appropriations Act, *supra* note 2. The IQA guidelines for all federal agencies may be reviewed at http://www.whitehouse.gov/omb/inforeg/agency_info_quality_links.html (last visited November 20, 2004).

[11] Appropriations Act, *supra* note 2.

participate in rulemaking,[12] can now question the science and data relied upon by an agency before rulemaking[13] commences.

Decision-making at the Environmental Protection Agency (EPA)[14] can now be challenged by questioning: (1) the scientific data upon which the National Ambient Air Quality Standards (NAAQS)[15] are based; (2) the scientific studies and environmental agency statements on global warming;[16]

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[12] The public has a right to participate in rulemaking through public hearings and submission of relevant comments under the Administrative Procedures Act, 5 U.S.C.A. §§ 500 *et seq*. (2004).

[13] Regulations, or rules, are agency statements of general applicability and future effect, which the agency intends to have the force of and effect of law, and that are designed (1) to implement, interpret, or prescribe law or policy, or (2) to describe the procedure or practice requirements of an agency. Rulemaking is synonymous with regulatory action.

Science to Support Rulemaking, EPA's Office of the Inspector General Pilot Study, Report 2003-P-00003, pp. 1-2, and 64 (Nov. 15, 2002). Regulations and rules at the EPA are initiated by executive direction, statute, court order, or citizen petition urging action on a particular issue. *Id.* EPA's Office of Policy, Economics, and Innovation estimated that 1,000–1,300 environmental rules are published in the Federal Register on a yearly basis, with 20 of those rules categorized as "significant" under Executive Order Number 12,866. "Significant" rules are those that have a $100 million or more impact on the economy or adversely affect the economy; create an inconsistency with an action taken by another federal agency; materially alter the impact of budgetary entitlements; or raise novel legal or policy issues. "Significant" rules must be reviewed by OMB unless a specific waiver is granted. Exec. Order No. 12,866, 58 Fed. Reg. 51,740 (Sept. 30, 1993). Approximately 200 rules of national scope, but of lesser impact, are passed by the EPA annually. The most highly regulated statute is the Clean Air Act. *Science to Support Rulemaking*, EPA's Office of the Inspector General Pilot Study, Report 2003-P-00003, pp. 2, 4, and 64 (Nov. 15, 2002). The Small Business Administration estimated that the yearly cost of the "regulatory state" is $8,000.00 per household. Dr. John D. Graham, Speech at the Heinz School, Carnegie Mellon University (Oct. 4, 2002)(transcript available at http://www.whitehouse.gov/omb/inforeg/print/graham_cmu_100402.html) (last visited November 20, 2004).

[14] The Environmental Protection Agency was established by President Richard M. Nixon as an independent agency of the executive branch on December 2, 1970. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623, 84 Stat. 2,086 (1970).

[15] The Air Pollution Prevention and Control Act, 42 U.S.C.A. §§ 7401 to 7671q (1990), often referred to as the Clean Air Act of 1990, authorized EPA to set NAAQS "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare." 42 U.S.C.A. § 7401(b) (1990). EPA established NAAQS for six criteria pollutants to include carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter (10), and particulate matter (2.5). *See also* http://www.epa.gov/air/criteria.html (last visited November 20, 2004).

[16] The CRE petitioned the United States Global Climate Change Research Program and the Office of Science and Technology Policy to withdraw the National Assessment on Global Climate Change, alleging it violated the objectivity requirements of the Act. CRE argued that the report was published without development of the underlying science. CRE criticized and petitioned EPA's global warming website at http://yosemite.epa.gov/oar/globalwarming.nsf/content/index.html (last visited November 20, 2004). Letter from the Center for Regulatory Effectiveness to the Honorable Carol M. Browner, Administrator, EPA (May 26, 2000).

(3) the reports from the EPA's Toxic Release Inventory (TRI);[17] (4) the health summary information on the EPA's Integrated Risk Information System (IRIS);[18] (5) the National Toxicology Program Report on Carcinogens;[19] (6) the Emergency Response Notification System[20] information on oil discharges and releases of hazardous substances; (7) risk information for industrial chemicals reported to the EPA under the Toxic Substances Control Act;[21] and (8) data from the EPA's Aerometric Information Retrieval System (AIRS)[22] regarding the levels of airborne pollution in the United States.[23]

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[17] The TRI, established by the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.A. §§ 11001 *et seq*. and expanded by the Pollution Prevention Act of 1990, 42 U.S.C.A. §§ 13101, *et seq*., is a publicly accessible, nationwide database maintained by the EPA. It contains over 650 toxic chemicals that are used, manufactured, treated, transported, or released into the environment. The TRI Model contains facility identifications, reported chemical information, known releases to environmental media, information on wastes transferred to off-site locations, onsite treatment, energy recovery, recycling activities, and source reduction. http://epa.gov/enviro/html/tris/ (last visited November 20, 2004). *See also* http://www.epa.gov/triexplorer (last visited November 20, 2004).

[18] The EPA's IRIS database is used by federal, state, and local officials in the risk assessment process, to identify hazards, and as part of the dose-response evaluations. IRIS contains qualitative and quantitative health information outlining EPA's scientific position regarding the adverse human health effects that might result from repeated exposure to a particular chemical. http://www.epa.gov/iriswebp/iris/index.html (last visited November 20, 2004). *See also* Pat Phibbs, *OMB Guideline on Quality of Information Seen As Having Profound Impact On Agencies. Guidance Seeks to Ensure Accuracy, Clarity of Information From Agencies*, 33 ENVTL. REP. (BNA) 152 (2002).

[19] The National Toxicology Program Report on Carcinogens is a congressionally mandated list of known human carcinogens, substances that may reasonably be anticipated to be human carcinogens, and substances to which a significant number of U.S. residents are exposed. National Toxicology Program; Availability of the Report on Carcinogens, Eighth Edition, 63 Fed. Reg. 26,818 (May 14, 1998).

[20] The Emergency Response Notification System is a national system used to respond to the release of oil and hazardous substances that occur above federally mandated trigger levels. Individuals and organizations responsible for the release of oil or hazardous substances must notify the federal government through the National Response Center. http://www.epa.gov/superfund/programs/er/nrs/index.htm (last visited November 20, 2004). *See also* http://www.nrc.uscg.mil/erns/epa.html (last visited November 20, 2004). The EPA established or proposed reportable quantities for approximately 800 Superfund substances designated pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601 *et seq*. Reportable quantities were also established for 360 extremely hazardous substances under the Emergency Planning and Community Right to Know Act of 1986, 42 U.S.C.A. §§ 11001 *et seq*. (1986).

[21] Toxic Substances Control Act, 15 U.S.C. § 2607 (1976).

[22] AIRS is an air quality system database which contains measurements of criteria air pollutants throughout the 50 United States, Puerto Rico, the District of Columbia, and the Virgin Islands. Criteria pollutants are regulated by EPA based on scientific based health criteria. Primary standards protect human health, while secondary standards prevent environmental and property damage. Air Pollution Prevention and Control Act, 42 U.S.C.A. §§ 7401-7671q. The AIRS system is under the jurisdiction of EPA's Office of Air Quality Planning and Standards. http://www.epa.gov/air/data/aqsdb.html (last visited November 20, 2004).

[23] Phibbs, *supra* note 18, at 146.

Part I of this thesis examines the scant legislative history of the appropriations rider known as the IQA and industry's support of this ambiguous Act. The broad statutory language contained in the IQA was never subjected to Congressional and/or public debate, leaving much of the Act open to question and interpretation. This ambiguity will inure to the benefit of industry, allowing extensive participation in disclosure programs and forcing scarce agency resources to be focused on administrative disputes.[24] A review of the political history reveals extremely close ties to the lobbying efforts of the CRE, Dr. James Tozzi, paying industrial clients, and Congresswoman Joanne Emerson.

Part II discusses the government-wide IQA implementing guidelines issued by the Office of Management and Budget (OMB). These guidelines define the new information quality act standard, outline the IQA regulatory mandates to be followed by all federal agencies, and create an administrative appeals process for non-compliance. The IQA is also examined within the context of a draft peer review standard for regulatory science that was released by OMB in 2003.[25] Citing the need to reduce lawsuits and increase regulatory consistency, OMB proposed "a standardized process by which all significant regulatory documents will be subjected to peer review by qualified specialists in appropriate technical disciplines."[26] This new standard, along with the IQA, will place yet another arrow in OMB's quiver of control over regulations.[27]

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[24] Echeverria, *supra* note 8, at 4.

[25] Press Release, OMB, OMB Proposes Draft Peer Review Standards for Regulatory Science (Aug. 29, 2003)(available at http://www.whitehouse.gov/omb/pubpress/2003-34.pdf) (last visited November 20, 2004).

[26] *Id.* OMB also expressed concern that "too much federal science is being vetted by individuals with close ties to rulemaking agencies." Marty Coyne, *White House Calls For External Review of Science Behind Agency Rules*, Greenwire (Sep. 4, 2003), *available at* http://www.eenews.net/Greenwire/searcharchive/test_search-display.cgi (last visited November 20, 2004).

[27] There is a danger in the Bush administration's focus on "sound science." It can quickly turn into a debate about "what's sound, how sound and who's science." Eryn Gable, *Experts See Diminished Value In International Megaconferences*, Greenwire (Nov. 4, 2002), *available at* http://ncseonline.org/Updates/page.cfm?FID=2239 (last visited November 20, 2004)(quoting Amy Fraenkel, Senate Commerce Committee staff member and former EPA employee). There is even movement afoot by the American Legislative Council to endorse state laws similar to the IQA. The model state information quality bill, as drafted by the CRE, is designed to ensure and maximize the quality, objectivity, utility, and integrity of information provided by State agencies to its citizens, entities who engage in business, or other activities in the state. CRE support for such a measure will depend on the level of interest and the availability of funding. David Stafford, *Drive Under Way to Enact Legislation on Data Quality, Access at State Level*, 34 ENVTL. REP. (BNA) 374 (2003).

The IQA will be the foundation upon which further executive influence is exerted over the regulatory process.

Part III examines the EPA's implementation of the OMB guidelines with a focus on the key principles and the EPA's mechanism to ensure and maximize the quality of influential scientific risk assessment information.[28] The EPA elected to "adapt" rather than "adopt" the principals[29] of the Safe Drinking Water Act (SDWA) Amendments of 1996[30] and has maintained that petition decisions under the Act do not constitute a final agency action and, therefore, are not subject to judicial review.[31]

Part IV examines the type and number of IQA petitions filed at the EPA.[32] A review of the petitions will show that in its infancy, the IQA has yet to produce the onslaught of environmental petitions once predicted. Although a majority of the petitions filed at the EPA were by industry, a cross-section of society has submitted requests for correction.[33] The paucity of petitions filed thus far does not make the IQA a "toothless tiger." Unlike a similar law, the Freedom of Information Act,[34] where public requests for information can easily be submitted, the IQA requires a much more sophisticated and scientifically oriented petitioner to ensure successful challenge. Only members of industry and publicly supported interest groups typically possess the time, scientific resources, and financial backing to initiate a challenge to scientific data. Regulated industry, which is acutely aware of the need to obtain industry favorable precedents, carefully selects the IQA petitions to be filed at the EPA. In fact, the U.S. Chamber of Commerce held meetings with industry associations and company representatives to ensure that petitions were filed in a coordinated manner.[35] The number of IQA requests will likely rise as industry becomes more familiar with the nuances of the petition process.

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[28] EPA's Information Quality Guidelines can be reviewed at http://www.epa.gov/quality/informationguidelines/ (last visited November 20, 2004).

[29] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Environmental Protection Agency, EPA/260R-02-008, Oct. 2002 at 22.

[30] Safe Drinking Water Act Amendments of 1996, 42 U.S.C. §§ 300g-1(b)(3)(A) and (B) (1996).

[31] EPA Guidelines *supra* note 29, at 4.

[32] Office of Environmental Information, *Information Quality FY03 Annual Report*, EPA, Jan. 1, 2004.

[33] *See* http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004).

[34] Freedom of Information Act, 5 U.S.C. § 552 (2003).

[35] *Courts Face Key Test on Jurisdiction of EPA Data Quality Decisions*, 20 Inside EPA Environmental Policy Alert, issue: 29 (Jan. 8, 2003).

The IQA's overall influence on the regulatory state, at the EPA, and within the government as a whole, will depend on OMB's continued proactive role in providing oversight. The use of the IQA by industry to thwart rulemaking through petition and eventually suit, and the court's role in judicially reviewing agency decisions under the Act will also play predominant roles. It is only a matter of time before the IQA becomes an industrial lever by which environmental rulemaking is hindered.

II. ORIGINS OF THE INFORMATION QUALITY ACT

A. Legislative History

The IQA is an unfunded and un-codified[36] legal mandate that amends the Paperwork Reduction Act (PRA) of 1980.[37] Its origins are contained in House Report language[38] that accompanied the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999.[39] The report states:

> Reliability and Dissemination of Information. The committee urges the Office of Management and Budget (OMB) to develop, with public and Federal agency involvement, *rules* providing policy and procedural guidance

[36] Appropriations Act, *supra* note 2.

[37] The following "purposes" of the PRA, as outlined in § 3501, contain references to the quality of information disseminated by the Federal Government:

> (2) to ensure the greatest possible public benefit from and maximize the utility of information . . . disseminated by or for the Federal Government; (4) . . . improve the quality and use of Federal information to strengthen decision-making, accountability, and openness in Government and society; (7) . . . provide for the dissemination of public information on a timely basis, on equitable terms, and in a manner that promotes the utility of the information to the public and makes effective use of information and technology; (9) . . . ensure the integrity, quality, and utility of the Federal statistical system; and (11) . . . improve the responsibility and accountability of the Office of Management and Budget and all other Federal agencies to Congress and to the public for implementing the . . . policies and guidelines established under this chapter.

Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 *et seq*. (1980).

[38] "The conference agreement on the Treasury and General Government Appropriations Act, 1999, incorporates some of the language and allocations set forth in House Report 105-592 and Senate Report 105-251. The language in these reports should be complied with unless specifically addressed in the accompanying statement of managers." H.R. CONF. REP. NO. 105-825, at 1471 (1998).

[39] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2,681-1 (1999).

> to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the Federal government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P.L. 104-13). The Committee expects issuance of these rules by September 30, 1999. The OMB *rules* shall also cover the sharing of, and access to, the aforementioned data and information, by members of the public. Such OMB rules shall require Federal agencies to develop, within one year and with public participation, their own rules consistent with the full text of the applicable portions of the House Report is as follows: OMB rules. The OMB and agency rules shall contain administrative mechanisms allowing affected persons to petition for correction of information which does not comply with such rules; and the OMB rules shall contain provisions requiring the agencies to report to OMB periodically regarding the number and nature of petitions or complaints regarding Federal, or Federally-supported, information dissemination, and how such petitions and complaints were handled. OMB shall report to the Committee on the status of implementation of these directives no later than September 30, 1999.[40]

OMB failed to act on the urging contained in the House Report by the September 30, 1999, deadline.

Representative Jo Ann Emerson, during a House Appropriations Subcommittee markup, introduced an amendment that was adopted by voice vote on July 11, 2000. [41] The amendment, entitled Treasury-Postal Appropriations/Government Website Information, required the "Office of Management and Budget to issue *rules* to allow the public to formally challenge any information disseminated by the government on a website." The Clinton Administration objected to the House Report language directing OMB to develop data quality "rules."[42] In response to White House opposition, the

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[40] This House Report language differs from the IQA in two regards: it urges OMB to issue rules vice guidelines and does not contain references to specific sections of the PRA. H.R. REP. NO. 105-592, at 49-50 (1998)(emphasis added).

[41] *House Panel Puts Stamp of Approval on Treasury-Postal*, CQ Committee Coverage, House Appropriations Subcommittee Markup, Jul. 11, 2000.

[42] "The original version of the rider called for adoption of a government-wide *rule*, but at the insistence of OMB, a requirement for government-wide *guidelines* was substituted for the

Committee on Appropriations changed the language and directed OMB to develop "guidelines."[43] The Committee on Appropriations, as part of the Treasury and General Government Appropriations Act for Fiscal Year 2001,[44] submitted a conference report with the following directive:

> The Committee directs OMB to expedite this review and submit the study, which is now a year late, as soon as possible. Data Quality. The Committee has included statutory language (Section 515) which requires the Office of Management and Budget to develop, with public and federal agency involvement, *guidelines* providing policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by Federal agencies, and information disseminated by non-Federal entities with financial support from the government, in fulfillment of the purposes and provisions of the Paperwork Reduction Act of 1995 (P. L. 104-13). Committee reconfirms its instructions with language directing OMB to issue such *guidelines* no later than the end of the fiscal year 2001, with a copy forwarded to the Committee on Appropriations.[45]

Unlike the report language, the rider does not apply to non-Federal entities receiving financial support from the government.[46]

A political impasse halted passage of the Treasury and General Government Appropriations Act for Fiscal Year 2001, for reasons unrelated to the IQA.[47] On December 15, 2000, the Treasury and General Government

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rulemaking provision." Dr. John D. Graham, Remarks at the Meeting of the Public Working Committee on Information-Quality Guidelines, National Research Council/National Academy of Sciences, (Mar. 21, 2002) (emphasis added)(transcript available at http://www.whitehouse.gov/omb/inforeg/info-quality_march21.pdf) (last visited November 20, 2004). *See also* Noe, *supra* note 2.

[43] Noe, *supra* note 2.

[44] H.R. REP. NO. 106-756, at 216-20 (2000).

[45] H.R. CONF. REP. NO. 106-1033, at 362 (2001)(emphasis added).

[46] *Background on Data Quality Guidelines*, OMB Watch, May 28, 2002. http://www.ombwatch.org/article/articleview/773/ (last visited November 20, 2004).

[47] In an attempt to avoid difficult votes and to speed the process, Republican leaders added a negotiated version of the Treasury and General Government Appropriations Act for Fiscal Year 2001 to the conference report on the legislative branch spending bill. The House adopted the conference report on September 14, 2000. 146 CONG. REC. H7626–27 (daily ed. Sept. 14, 2000). The conference report was rejected by the Senate on September 20, 2000, due to a lack of debate on gun control and the inclusion of a Congressional pay raise. 146 S. CONG. REC S8800 (daily ed.

Appropriations Act for Fiscal Year 2001 was included in the conference report for Making Omnibus Consolidated and Emergency Supplemental Appropriations for Fiscal Year 2001.[48] The House and Senate adopted the House Conference Report[49] and the IQA was passed without debate or change[50] as Appendix C of the Consolidated Appropriations Act of 2001.[51]

With scant legislative history, the Act was signed during the waning days of the Clinton presidency[52] and went virtually unnoticed. A mere 227-word provision[53] in an eight hundred-page appropriations bill,[54] the IQA reads as follows:

> Sec. 515
> (a) In General -- The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.
>
> (b) Content of Guidelines. -- The guidelines under subsection (a) shall --

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Sept. 20, 2000). The Senate eventually approved a bi-partisan version of the bill on October 12, 2000.
146 CONG. REC. S10333 (daily ed. Oct. 12, 2000). President Clinton vetoed the bill on October 30, 2000, blocking funding for the Congress and the White House when the remaining portions of the appropriations bill remained deadlocked. 146 CONG. REC. H11675–81 (daily ed. Oct. 30, 2000).

[48] Appropriations Act, *supra* note 2. *See also* http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR04577:lTOM:/bss/d106query.html (last visited November 20, 2004).

[49] H.R. CONF. REP., *supra* note 45, at 1.

[50] Noe, *supra* note 2.

[51] Appropriations Act, *supra* note 2.

[52] Rebecca Adams, *OIRA Directs Guidelines on Data Quality*, CQ WEEKLY, Mar. 23, 2000, at 827.

[53] Rebecca Adams, *Federal Regulations Face Assault on Their Foundation*, CQ WEEKLY, Aug. 10, 2002, at 2182.

[54] Appropriations Act, *supra* note 2.

> (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
> (2) require that each Federal agency to which the guidelines
> apply --
>
> > (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information)
> > disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
> >
> > (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
> >
> > (C) report periodically to the Director
> >
> > > (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
> > >
> > > (ii) how such complaints were handled by the agency.[55]

The Act requires the Director, OMB, to issue guidelines in accordance with §§ 3504(d)(1) and 3516 of the PRA. Section 3504(d)(1) outlines the authorities and functions of the Director, OMB "with respect to information dissemination, the Director shall develop and oversee the implementation of policies, principles, standards, and guidelines to – (1) apply to Federal agency dissemination of pubic information, regardless of the form or format in which such information is disseminated."[56] Section 3516 charges the Director, OMB

[55] Appropriations Act, *supra* note 2.
[56] Paperwork Reduction Act, *supra* note 37, at § 3504(d)(1).

with promulgating "rules, regulations, or procedures necessary to exercise the authority provided by this chapter."[57]

B. Continued Congressional Interest

Congressional interest in the IQA continues. The House Appropriations Committee, the same Committee that proposed the IQA and the committee on which Congresswoman Jo Ann Emerson is still a member, questioned the agency-wide implementation of the Act in a 2004 House Conference Report. The Report states:

> Implementation of the Federal Data Quality Act – The conferees are concerned that agencies are not complying fully with the requirements of the Federal Data Quality Act (FDQA). The conferees agree that the data endorsed by the Federal Government should be of the highest quality, and that the public should have the opportunity to review the data disseminated by the Federal Government for its accuracy and have available to it a streamlined procedure for correcting inadequacies. The Administrator for the Office of Information and Regulatory Affairs (OIRA) is directed to submit a report to the House and Senate Committees on Appropriation by June 1, 2004 on whether agencies have been properly responsive to public requests for correction of information pursuant to the FDQA, and suggest changes that should be made to the FDQA or OMB guidelines to improve the accuracy and transparency of agency science.[58]

The legislative language clearly reinforces the power of the Administrator, OIRA,[59] in carrying out the IQA and signals continued congressional interest in the Act.

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[57] *Id.* at § 3516.

[58] Making Appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for Fiscal Year Ending September 30, 2004 and For Other Purposes (2003), H.R. CONF. REP. NO. 108-401 (2003).

[59] The regulatory review function was vested in OMB's OIRA during President Ronald Reagan's presidency. "Intended by Congress to be the primary implementing agency for the Paperwork Reduction Act, it soon became the institutional home of the most ardent anti-regulators in the Administration." Thomas O. McGarity, *Jogging in Place: The Bush Administration's Freshman Year Environmental Record*, 32 ENVTL. L. REP. 10,709 (Jun. 2002).

C. Political Underpinnings Of The Information Quality Act

An examination of the political underpinnings of the IQA revealed strong ties to industry and lobby groups affected by the rulemaking of the EPA. Proposed by Congresswoman Jo Ann Emerson,[60] a Republican from Missouri and a member of the House Appropriations Committee, [61] the Act was primarily the result of lobby efforts by Dr. James Tozzi, [62] Director, Multinational Business Services and Advisory Board Member, CRE.

Theories abound as to the true agenda of those behind the IQA. "The widely accepted explanation is that corporate interests slipped the Data Quality Act through Congress to counter indiscriminate data dumps of corporate information into federal Internet sites."[63]

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[60] Congresswoman Emerson, serving a predominantly agricultural and rural constituency, favors state rights over federal land management decisions and the rights of individual property owners over environmental protection. She believes state and local communities should be more empowered to address environmental issues, as the farmer, rancher, and property owner have a pecuniary interest in protecting the land, guaranteeing environmental stewardship. Congresswoman Emerson did not support the American Heritage Rivers Initiative, implementation of the Kyoto Protocol, wetland protection measures, or the Total Maximum Daily Load rules contained within the Clean Water Act. She supports opening a portion of the Artic National Wildlife Refuge for oil exploration. http://www.vote-smart.org/npat.php?can_id=BC040549#10 (last visited November 20, 2004) and http://www.joannemerson.com/issues.asp (last visited November 20, 2004). Congresswoman Emerson is a native of suburban Washington who for two decades lobbied Congress on behalf of the American Insurance Association and the National Restaurant Association. http://www.cq.com/members.do?memberCode=H2252 (last visited November 20, 2004). She also served as the Deputy Communications Director, National Republican Congressional Committee from 1983-90. http://www.vote-smart.org/bio.php?can_id=BC040549 (last visited November 20, 2004).

[61] The Committee on Ways and Means was first established in 1789 to fulfill the mandate under the United States Constitution, Article I, Section 9, which states, "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." On March 2, 1865 the U.S. House of Representatives bifurcated the Committee on Ways and Means, establishing the Committee on Appropriations and the Committee on Banking and Currency. http://appropriations.house.gov/index.cfm (last visited November 20, 2004). Congresswoman Emerson has served on the United States House Appropriations Committee, United States House of Representatives since her election to office in 1996. http://www.cq.com/members.do?memberCode=H2252 (last visited November 20, 2004).

[62] Dr. Tozzi, and his wife, Barbara Ann Tozzi, donated to Congresswoman Emerson's campaigns, on behalf of Multinational Business Services, in 1999, 2000, 2001, 2002, and 2003. Mr. Charles Fromm, Center for Regulatory Effectiveness, donated to Congresswoman Jo Anne Emerson's campaign in 1999. http://www.opensecrets.org/indivs/search.asp?NumOfThou=0&txtName=tozzi&txtState=%28all+states%29&txtZip=&txtEmploy=&txtCand=&txt2004=Y&txt2002=Y&txt2000=Y&Order=N (last visited November 20, 2004).

[63] Anderson, *supra* note 3.

> Rumor has it that a lobbyist dreamed up the original idea [of the data quality rider] and sold it to a paying client and a gullible member of Congress. The chief beneficiaries of the new rule will be lobbyists. They will now have a new device for sucking money from clients who don't like the latest bit of data from an agency and who are stupid enough to think that filing a complaint will accomplish something other than enriching the lobbyists. The whole process is guaranteed to be meaningless. It is Washington at its worst. Take a disagreement and turn it into a procedural nightmare that will resolve nothing and take forever. Don't forget to include standards like quality, objectivity, utility and integrity that have no clear definitions.[64]

Frank O'Donnell, Executive Director, Clean Air Trust, believes the Act was passed to allow industry polluters access to confidential health records used by the EPA in setting the 1997 fine-particle soot standards.[65] Others argue the Act "advances some key elements of the industry agenda to obtain greater opportunities to intercede in and challenge the administration of disclosure programs.[66] William Kovacs, Vice President of the U.S. Chamber of Commerce, argues that industries subject to the EPA's air pollution regulations, specifically the NAAQS, will now ensure that the EPA follows the information-quality guidelines as outlined by the OMB.[67] Mr. Kovacs believes the close oversight afforded by the IQA might slow the regulation process, but will improve regulations issued by the EPA, because it will ensure that affected parties understand the science, assumptions, mathematical calculations, and other tools used to determine the risk imposed.[68]

The chief beneficiaries of the Act will be lobbyists.[69] Mr. Gary Bass, Executive Director, OMB Watch,[70] believes there is room for "mischief."[71]

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[64] Gellman, *supra* note 9.
[65] Maureen Lorenzetti, *Watching Government, Data Quality*, OIL AND GAS J., Oct. 7, 2002, at 31.
[66] ECHEVERRIA, *supra* note 8, at 5.
[67] Phibbs, *supra* note 18, at 150.
[68] *Id.*
[69] ECHEVERRIA, *supra* note 8, at 2, n.8, *citing* Gellman, *supra* note 9.
[70] "OMB Watch is a nonprofit research and advocacy organization dedicated to promoting government accountability and citizen participation in public policy decisions. Their mission centers on four main areas: the federal budget; regulatory policy; public access to government information; and policy participation by nonprofit organizations." http://www.ombwatch.org/article/archive/269(last visited November 20, 2004). OMB Watch has an outstanding public interest group website on the IQA at http://www.ombwatch.org/ (last visited November 20, 2004).
[71] Phibbs, *supra* note 18, at 150.

He and Mr. Wesley Warren, Senior Fellow, Natural Resource Defense Council, believe a "mosaic of actions . . . will thwart the dissemination of information and federal efforts to protect human health, safety, and the environment."[72] The Shelby Amendment,[73] the information-quality guidelines, and compliance with Executive Order 12866[74] comprise this mosaic.[75] The public is unaware that the sum of these rule-blocking measures, which will be used by industry to slow regulation, will force the EPA and other federal agencies to endlessly analyze data.[76]

Mr. Alan Morrison, Public Citizen Litigation Group, during a National Public Radio interview of Dr. Tozzi on April 20, 2002, stated:

> My real concern is that this bill is aimed largely, but not exclusively at the Environmental Protection Agency. It's a scientific agency; it produces a large amount of information every year. Eventually it bases its regulations and other activities on that information. Much of it is uncertain and sometimes it adversely affects businesses, and my fear is that the industries are going to come in and challenge and drive down the level of information dissemination under the guise that they're getting more accuracy. My understanding is that Jim Tozzia [sic] who is a highly regarded lobbyist for interests that are principally concerned about what's going on at EPA is at least one of the drafters of this legislation. I think the parentage, assuming that it is Jim Tozzia [sic] and his colleagues, gives you a good idea of what the purpose of this law was supposed to be.[77]

Dr. Tozzi, in his capacity as the Director, Multinational Business Services and Board Member, CRE, consistently challenged federal agency

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[72] *Id.*

[73] The "Shelby Amendment" amends the Freedom of Information Act and requires greater public access to research data developed under a federal grant. The IQA and the Shelby Amendment are compatible and mutually reinforcing. Dr. Graham's Remarks, *supra* note 43. Many experts predicted the Shelby Amendment would "unleash a deluge of petitions that will clog the wheels of the federal bureaucracy." The number of petitions filed to date is minimal at best. Noe, *supra* note 2, at 10,227.

[74] Issued in 1993 by President William J. Clinton, the Regulatory Planning and Review Executive Order "enhance(d) planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal regulatory review and oversight; and to make the process more accessible and open to the public." Exec. Order No. 12,866, *supra* note 13.

[75] Phibbs, *supra* note 18, at 150.

[76] *Id.*

[77] Gladstone, *supra* note 4.

action on behalf of his industry clients by linking the procedures of regulatory rulemaking to sound science. In the mid-1990s he promoted the use of "Good Epidemiology Practices (GEP)," a movement initiated by the tobacco industry to shape the scientific standards of proof.[78] The goal was to make it scientifically impossible to "prove" the dangers of secondhand smoke.[79] He drafted a similar "GEP" agenda for wireless technology research on behalf of the Cellular Telecommunications and Internet Association.[80]

> While every practicing scientist agrees that scientific work should be rigorously done, the scientific, public health and regulatory communities need to be more aware that the sound science and GEP movement is not simply an effort from within the profession to improve the quality of science discourse. This movement reflects sophisticated public relations campaigns controlled by industry executives and lawyers to manipulate the scientific standards of proof for the corporate interests of their clients.[81]

Multinational Business Services, at the time of enactment of the IQA, was a registered lobbyist[82] for several companies with interests that run counter to environmental protection and government regulation. These included TRW, Incorporated,[83] Philip Morris Management Corporation,[84] Aventis (formerly

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[78] *How Big Tobacco Defines Wireless and EMF Health Debates*, MICROWAVE NEWS, Nov. 2001.
[79] In 1994, Philip Morris paid Dr. Tozzi as much as $610,000 to promote GEP. *Id.*
[80] *Id.*
[81] Elisa Ong and Stanton Glantz, *Constructing Sound Science and Good Epidemiology: Tobacco, Lawyers and Public Relations Firms*, AM. J. PUB. HEALTH, Nov. 2001, at 1,749.
[82] http://sopr.senate.gov/cgi-win/opr_viewer.exe?2000426160REG~0 (last visited November 20, 2004).
[83] TRW, Incorporated, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Jan. 2, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/376/000376866|2 (last visited November 20, 2004). TRW, Incorporated provides advanced technology products and services internationally. TRW and its subsidiaries design, manufacture and sell products and perform systems engineering, research and technical services for industry and the United States government in the automotive, aerospace, and information systems markets. http://www.trwauto.com/othertrwsites/home/0,,4^1^4^4,00.html (last visited November 20, 2004).
[84] Multinational Business Services provided Philip Morris Management Corporation with lobbying services in the areas of "Analysis of issues pertaining to risk assessment. Development of paradigm evaluating federal agency compliance with Paperwork Reduction Act, Unfunded Mandates Reform Act, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act. Information policy issues." Philip Morris Management Corporation, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Aug. 17, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/367/000367309|5 (last visited November 20, 2004). At the time of enactment of the IQA, Philip Morris Companies Incorporated owned Philip Morris Incorporated; Philip Morris International Incorporated; Kraft

Rhone-Poulenc), [85] Goodyear Tire and Rubber Company, [86] Beverly Enterprises, [87] and the American Forest and Paper Association. [88] The CRE

Foods, Incorporated; and the Miller Brewing Company. They were engaged in the manufacture and sale of various consumer products. Philip Morris U.S.A. was the largest cigarette company in the United States and was a leading exporter of cigarettes abroad. Marlboro, the principal cigarette brand, has been the world's largest-selling cigarette since 1972. Report Securities and Exchange Commission, Philip Morris Companies, Incorporated, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 1999, Commission Number 1-8940. http://www.sec.gov/Archives/edgar/data/764180/0000912057-00-009516-index.html (last visited November 20, 2004).

[85] The Multinational Business Services, Incorporated lobbying disclosure report indicates lobbying activities on behalf of Aventis at the EPA, with a focus on human testing and EPA's establishment of tolerance levels for pesticides. Aventis (formerly Rhone-Poulenc), Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi- win/opr_gifviewer.exe?/2000/01/000/405/000405203|2 (last visited November 20, 2004). Aventis was primarily engaged in the discovery, development, manufacture, and marketing of pharmaceutical products for human use. http://www.aventis.com/main/page.asp?pageid=7785659853127485 68&folderid=2646158680875 4517&lang=en (last visited November 20, 2004).

[86] Multinational Business Services represented Goodyear Tire and Rubber Company in their lobbying efforts with the Department of Labor. Goodyear sought favorable requirements for the approval of a flame-resistant conveyor belt and pursued mining safety issues. Goodyear Tire and Rubber Company, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/405/000405205|2) (last visited November 20, 2004). Goodyear Tire and Rubber Company developed, manufactured, distributed and sold tires to industrial, commercial, and consumer markets in the United States and abroad. They also manufactured rubber-related chemicals for varied application and provided automotive repair services at retail and commercial outlets. Securities and Exchange Commission, Goodyear Tire and Rubber Company, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the Fiscal Year Ended December 31, 1999, Commission Number 1-1927. http://www.sec.gov/Archives/edgar/data/42582/0000950152-00-001479-index.html (last visited November 20, 2004).

[87] Multinational Business Services reported lobbying activity on behalf of Beverly Enterprises, Incorporated, which focused on compliance with regulations issued by the Department of Health and Human Services. Beverly Enterprises, Incorporated, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Aug. 17, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/367/000367316|2) (last visited November 20, 2004). Beverly Enterprises, Incorporated operated nursing facilities, assisted living centers, hospice and home care centers, and outpatient therapy clinics. They also provided rehabilitation therapy and general healthcare services. They are one of the leading operators of nursing care facilities in the United States. http://www.hoovers.com/beverly-enterprises/--ID 10211--/free-co-factsheet.xhtml (last visited November 20, 2004).

[88] Multinational Business Services lobbied on behalf of the American Forest and Paper Association with a specific focus on EPA's dioxin risk assessment and EPA's sector facility indexing project. American Forest and Paper Association, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 20, 2001). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/2000/01/000/405/000405200|2) (last visited November 20, 2004). The American Forest and Paper Association sustained and enhanced the U.S. forest products industry

listed as their primary lobbying objective in 1999, "federal data access and quality" and "OMB compliance with (the) Paperwork Reduction Act."[89] It is clear from the political history of the Act that this legislation was proposed and supported by industry principally to further their business interests.

The IQA was enacted during the democratic presidency of President Clinton,[90] with implementation vesting in Dr. John D. Graham,[91] a President George W. Bush political appointee. Narrowly confirmed by the Senate in July 2001,[92] Dr. Graham "is a leading advocate of cost-benefit analysis - weighing the costs of a regulation for business, and ultimately the consumer, against the benefits to society - and risk assessment, which analyzes the likelihood that a particular problem . . . will occur."[93] Many environmentalists and consumer groups feared Dr. Graham would try to "dismantle" vital federal protections on behalf of industry.[94] The Bush administration continues its strong public commitment to vigorous implementation of the IQA[95] and has "moved aggressively to establish basic quality performance goals for all information disseminated by Federal agencies,

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through lobbying and effecting favorable legislative, regulatory, administrative, and trade actions. http://www.afandpa.org (last visited November 20, 2004).

[89] Center for Regulatory Effectiveness, Secretary of the Senate Lobbying Report, Lobbying Disclosure Act of 1995, Section 5 (Feb. 14, 2000). http://sopr.senate.gov/cgi-win/opr_gifviewer.exe?/1999/01/000/291/000291929|2 (last visited November 20, 2004).

[90] Adams, *supra* note 52.

[91] Dr. John Graham, Administrator, OIRA, OMB, supports "cost-effective, science based regulations that promote public health and welfare." He founded the Harvard Center for Risk Analysis, a think tank that consistently argues that government regulations are misguided. The Harvard Center for Risk Analysis is funded by industry groups and business entities. Rebecca Adams, *Regulating the Rule-Makers: John Graham at OIRA*, CQ WEEKLY, Feb. 23, 2002, at 520–21. It consistently received extensive funding from industry, including firms faced with dioxin liability for contamination of the environment. Linda Greer and Rena Steinzor, *Bad Science*, Environmental Forum, 38 (January/February 2002). Dr. Graham is aggressive in the regulatory review process, rejecting 17 regulations in his first 6 months at OMB via the "return letter." The return letter contains a summary of the reasons for rejection and has most commonly cited cost considerations. Rebecca Adams, *Graham Reasserts White House Regulatory Review*, OMB WATCH, Feb. 20, 2002. *See also* http://www.whitehouse.gov/omb/inforeg/bio.html (last visited November 20, 2004)(Dr. Graham's biography.).

[92] Dr. Graham was confirmed by a 61-37 margin, facing opposition from Democrats and liberal groups, who viewed him as a regulatory enemy. Michael Grunwald, *Business Lobbyists Asked to Discuss Onerous Rules*, WASH. POST, Dec. 4, 2001, at A-03.

[93] Adams, Regulating the Rule-Makers, *supra* note 91, at 520.

[94] *Id.* at 521.

[95] Dr. John D. Graham, Remarks to the Committee on National Statistics, National Research Council/National Academy of Sciences, (May 10, 2002)(transcript available at http://www.whitehouse.gov/omb/inforeg/graham_infoquality051002.html)(last visited November 20, 2004).

including information disseminated in support of proposed and final regulations."[96]

Under Dr. Graham's direction, the OMB leads three major conservative initiatives which are clearly targeted at the EPA: (1) the role of sound science in risk assessments; (2) the quality of data used to support regulatory decision making;[97] and (3) the role of cost/benefit analysis in shaping environmental programs.[98]

> Below the waterline of politically divisible debate, mid-level bureaucrats, and regulated industries are actively engaged in efforts to change the rules of law and economics that determine whether the government intervenes in pollution-producing commerce. Talk of enacting so-called second generation legislation has subsided to a murmur. But at the administrative level, the debate over how to best streamline the system and eliminate distasteful regulatory requirements proceeds with unchecked vigor and enthusiasm.[99]

The key for the EPA will be to avoid regulatory indecision through a forced over-analysis of data. The EPA must now balance its regulatory mandate to protect health, safety, and the environment[100] with the new statutory obligations created under the IQA.

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[96] Introduction to the Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions, 68 Fed. Reg. 72,409 (Dec. 22, 2003).

[97] Representative Henry Waxman, ranking member of the House Government Reform Committee, charged the Bush administration with "stacking scientific advisory panels with people who hold fringe viewpoints or have ties to industry, and distorting scientific data to suit administration policy objectives." The EPA removed a climate change chapter from their 2003 Report on the Environment after the White House made so many changes that EPA scientists no longer believed the chapter was scientifically sound. The politicizing of science in policymaking will continue to be a heated debate. Andrew Freedman, *House Member Presses White House for Better Explanation of Science Policies*, Greenwire, Apr. 14, 2004, *available at* http://www.eenews.net/Greenwire/Backissues/041404/04140402.htm (last visited November 20, 2004).

[98] Rena I. Steinzor, *Toward Better Bubbles and Future Lives: A Progressive Response to the Conservation Agenda for Reforming Environmental Law*, 32 ENVTL. L. REP. 11,421 (2002).

[99] *Id.*

[100] "EPA's mission is to protect human health and to safeguard the natural environment - air, water, and land - upon which life depends." http://www.epa.gov/epahome/aboutepa.htm#mission (last visited November 20, 2004).

III. INFORMATION QUALITY ACT IMPLEMENTING GUIDELINES OF THE OFFICE OF MANAGEMENT AND BUDGET

A. Government Wide Implementing Guidelines

Implementation of the IQA by OMB will determine whether the Act becomes a government statute that actually improves federal regulatory decision-making or becomes a law that protects stakeholders.[101] The "White House Office of Management and Budget guidance on the quality of information distributed by federal agencies will have the most profound impact on federal regulations since the Administrative Procedure Act was enacted in 1946 . . . ."[102] OMB's final guidelines entitled, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies*, were issued on February 22, 2002.[103] They direct each federal agency to adopt a basic standard of information quality.[104] Each agency was required to establish their IQA guidelines by October 1, 2002, to create an administrative mechanism for "affected persons" to seek correction of information not in compliance with the guidelines, and to report to the Director, OMB, the number and nature of complaints received and how such complaints were handled.[105] The report to OMB is an annual

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[101] Anderson, *supra* note 3.

[102] Phibbs, *supra* note 18, at 146.

[103] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452–60 (Feb. 22, 2002). The proposed guidelines were published at Proposed Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 34,489 (Jun. 28, 2001). The final guidelines were published at Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 66 Fed. Reg. 49,718 (Sep. 28, 2001). The final guidelines requested additional public comment on the "capable of being substantially reproduced" standard and the definition of "influential scientific or statistical information," which were issued on an interim final basis. The supplemented final guidelines were promulgated at Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369–78 (Jan. 3, 2002), but due to numerous errors were corrected at 67 Fed. Reg. 5,365 (Feb. 5, 2002). The final guidelines were reprinted in their entirety at 67 Fed. Reg. 8,452–60 (Feb. 22, 2002). Questions concerning the guidelines may be directed to Brooke J. Dickson, Office of Information and Regulatory Affairs, OMB, Washington, D.C. 20,503. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

[104] OMB Guidelines, *supra* note 103, at 8,458.

[105] *Id*. at 8,452-58. Several federal agencies, including EPA, set what the public perceived to be too short of a public comment period on their draft IQA guidelines. OMB extended their deadline for agency submission from July 1, 2002 to August 1, 2002. *Comment Salvos Exchanged in Data Quality War*, OMB Watch, Jun. 10, 2002.

fiscal year report with the first report scheduled for January 1, 2004.[106] OMB will not play a "major" role in resolving case-by-case IQA disputes. Their role will be one of agency oversight with a focus on the design of agency procedures.[107]

1. Key Principles

The OMB guidelines are based on three underlying principles. First, they apply to a variety of government information-dissemination activities ranging in scope and importance.[108] Secondly, the guidelines ensure that agencies can meet basic information quality standards before their information is disseminated. The more important the information, the higher the quality standards to which the information should be held.[109] OMB recognized that information quality comes at a cost, and each agency should conduct a cost/benefit analysis in the development of quality information.[110] Agencies must consider the "social value" of better information in various scenarios.[111] Third, OMB designed the guidelines to allow agencies to apply them in a "common-sense and workable manner."[112] Agencies are encouraged to continue using the Internet and other technologies to disseminate information to the public.[113] Although openness in government can be a great benefit to society, it also increases the risk of harm that might result from the posting of erroneous information on the Internet. There is concern that the Internet allows federal agencies to communicate information quickly and easily to large audiences.[114] OMB "encourages agencies to incorporate the standards and procedures required by these guidelines into their existing information resources management and administrative practices, rather than create new and potentially duplicative or contradictory processes."[115]

OMB provided agencies an awkward flexibility during rulemaking to thwart collateral attacks on the regulatory process via the IQA.[116] If an agency denies a complaint during rulemaking and subsequently on administrative

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http://www.ombwatch.org/article/articleview/820/1/124/ (last visited November 20, 2004). The OMB October 1, 2002 deadline for overall completion remained firm.

[106] OMB Guidelines *supra* note 103, at 8,453-59.

[107] Dr. Graham's Remarks, *supra* note 42.

[108] OMB Guidelines, *supra* note 103.

[109] *Id.*

[110] OMB Guidelines *supra* note 103, at 8,453.

[111] Noe, *supra* note 2.

[112] OMB Guidelines, *supra* note 103, at 8,453.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Noe, *supra* note 2, at 10,230.

appeal, the matter could become subject to judicial review as a final agency action. OMB allows the agencies to apply a two-prong test: (1) agencies can use established safeguards if they allow the timely resolution of IQA complaints and (2) the agency must respond within 60-days if there is a reasonable likelihood that dissemination of the information, during the rulemaking, will harm the petitioner, and if the agency's response will not cause undue delay in issuing the rule.[117]

2. To Whom Does The Information Quality Act Apply?

The IQA, by reference to the PRA,[118] applies to the dissemination of information by all federal agencies.[119] The term "agency" does not apply to the General Accounting Office, Federal Election Commission, the government of the District of Columbia, the governments of the territories and possessions of the United States and their various subdivisions, or government owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.[120]

The IQA does not apply to scientific research conducted by federally employed scientists or by scientists acting under a Federal grant who communicate their research findings similar to their academic colleagues.[121] It is suggested that these scientists provide a disclaimer advising the reader that the materials are expressly their own views and not the views of the United States government.[122] This same information could be subject to the guidelines if an agency "represents the information as, or uses the information in support of, an official position of the agency."[123] The Act also does not include personal opinions provided in agency presentations when the view does not constitute an agency position.[124]

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[117] OMB Guidelines, *supra* note 103, at 8,453.
[118] "[T]he term agency means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . ." Paperwork Reduction Act, 44 U.S.C. § 3502 (1995).
[119] OMB Guidelines, *supra* note 103. *See also* http://www.thecre.com/quality/agency-database.html (last visited November 20, 2004).
[120] Paperwork Reduction Act, *supra* note 37.
[121] OMB Guidelines, *supra* note 103, at 8,453.
[122] *Id.*
[123] *Id.*
[124] *Id.*

3. What Information Activities Are Subject To The Information Quality Act?

The Act applies to "information" that is "disseminated" by an agency.[125] The term "information" was generically defined by OMB to include communications or representations of knowledge that include facts or data.[126] The information can be presented in any media, including printed, electronic, or other formats.[127] "Dissemination" means the distribution to the public of agency initiated and sponsored information.[128] This includes risk assessments prepared for regulatory decision-making; information prepared by a third party, but disseminated by the agency in a manner in which it appears the agency agrees; information released by a third party at the direction of the agency; and third party information the agency has the authority to review and approve prior to release.[129] Dissemination does not include press releases, archival records, correspondence with individuals, and subpoenas or adjudicative processes.[130]

4. Information Quality Standard

Per OMB guidance, agencies must develop internal processes for reviewing the quality of their data before it is disseminated to the public.[131] The Act further requires "federal agencies to ensure and maximize the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by federal agencies."[132] Some argue the four critical terms of quality, objectivity, utility, and integrity are impossible to define, creating enough ambiguity to adequately arm industry with a new tool to halt environmental rulemaking.[133]

OMB guidance states that "quality" is an "encompassing term, of which utility, objectivity, and integrity are the constituents."[134] "Utility" is the usefulness of the information to its intended user.[135] The term "objectivity" focuses on both presentation and substance.[136] To be objective, the

[125] *Id.* at 8,454.
[126] *Id.*
[127] *Id.* at 8,452.
[128] *Id.* at 8,460.
[129] *Id.* at 8,454.
[130] *Id.* at 8,454, 8,460.
[131] *Id.* at 8,453.
[132] *Id.*
[133] Gellman, *supra* note 9.
[134] OMB Guidelines, *supra* note 103, at 8,452, 8,453, 8,459.
[135] *Id.*
[136] *Id.* at 8,459.

disseminated information must be presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, be accurate, reliable, and unbiased."[137] Information should be presented within the proper context and if it involves a scientific, financial, or statistical context, the supporting data or models should be presented to the public so they may determine whether there is reason to question the objectivity.[138] If information was subjected to "formal, independent, external peer review, the information may be presumed to be of acceptable objectivity."[139] In order to meet the presumption of objectivity, the peer review must include peer reviewers selected based on their expertise, peer reviewer disclosure of technical or policy positions previously taken on the issue, disclosure of private and public funding received by the peer reviewer, and a peer review conducted in an open and rigorous forum.[140] The peer review presumption is rebuttable and journal peer review typically requires additional quality checks.[141] The level and intensity of peer review is defined by the significance of the risk or its management implications.[142]

"Integrity" refers to the protection of the information from unauthorized access, tampering, or corruption.[143] Agencies can rely on the security measures instituted under the computer security provisions of the PRA to ensure the integrity of their data.[144]

The guidelines require a higher quality standard when the information is scientific, financial, or statistical information of an "influential" nature.[145] "Influential information" is that which will have or does have a clear and substantial impact on important pubic policies or important private sector decisions.[146] Each agency is to define "influential" in a way they deem appropriate.[147] Industry supports a broad definition of "influential" and does not want the term tied to the "economically significant" rule under Executive Order 12866.[148]

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[137] *Id.* at 8,452, 8,453, 8,459.
[138] *Id.* at 8,459.
[139] *Id.*
[140] *Id.* at 8,459, 8,460.
[141] *Id.* at 8,454.
[142] *Id.* at 8,455.
[143] *Id.* at 8,452, 8,453, 8,459.
[144] *Id.*
[145] *Id.* at 8,453, 8,460. The definition of "influential" in OMB's draft guidelines was criticized as being too stringent and too broad. 67 Fed. Reg. 372 (Jan. 3, 2002). *See also* Michelle V. Lacko, Comment, *The Data Quality Act: Prologue to a Farce or a Tragedy?*, 53 EMORY S.C.L.J. 305 (2004).
[146] OMB Guidelines, *supra* note 103, at 8,455, 8,460.
[147] *Id.* at 8,455.
[148] OMB Watch, *supra* note 46.

Influential scientific, financial, or statistical information disseminated by an agency shall also include a high degree of transparency and must be capable of reproduction.[149] Independent analysis of the original data and use of identical test methods should generate similar analytic results, subject to an acceptable degree of imprecision or error.[150] Transparency allows the public to determine how much of the agency's decision depended on analytic choices made by that agency.[151] Each agency is to determine which categories of original and supporting data should be subject to the reproducibility standard.[152] The Act does not override privacy, trade secret, intellectual property, and other confidentiality protections.[153]

An even higher standard of quality is required for agency analysis of risks to human health, safety, and the environment.[154] This information requires agencies to adopt or adapt the quality principles outlined in the SDWA amendments of 1996.[155] The SDWA guidelines require an agency, when it proposes a regulation, to outline for the public the risks the rule hopes to thwart. This would include an assessment of the population at risk, how the population would be affected, and the uncertainties surrounding the risk evaluation.[156] Those agencies tasked with the dissemination of vital health and medical information must interpret the peer review and reproducibility standards within the context of the need to forward timely information to medical personnel and the public.[157] The IQA standards can be waived during times of "urgency."[158]

5. Administrative Process For Petition And Appeals To Correct Information

Each agency is to establish an administrative process whereby "affected persons" can submit petitions to correct information maintained and disseminated by the agency not in compliance with the OMB or agency guidelines.[159] "Affected parties" might include private citizens, industry, or

[149] OMB Guidelines, *supra* note 103, at 8,456.
[150] *Id.*
[151] *Id.*
[152] *Id.* at 8,455.
[153] *Id.* at 8,456.
[154] *Id.* at 8,460.
[155] Safe Drinking Water Act Amendments, *supra* note 30.
[156] Adams, *supra* note 53, at 2,184. *See also* OMB Watch, *supra* note 46.
[157] OMB Guidelines, *supra* note 103, at 8,460.
[158] *Id.*
[159] *Id.* at 8,459.

public interest groups. "There is no reason to expect the act to be powered solely by industry; public interest groups can also file data-quality petitions."[160]

An internal administrative appeals process must also be established within the agency to allow appeal of requests when denied.[161] The agency should establish timeframes for both the petition and appeals processes.[162] The agency shall designate an official responsible for overall compliance with the guidelines.[163]

OMB considers implementation of the IQA as an "evolutionary process."[164] An annual fiscal-year report must be submitted to OMB by each federal agency, outlining the number and nature of complaints received and how the complaints were resolved. The first report was due January 1, 2004.[165] OMB also directed federal agencies to develop a "thematic" description of the types of complaints received by the agency and the nature of their resolution.[166] If agencies receive only a few complaints, OMB would like a brief description of each complaint and the ultimate resolution by the agency.[167] If a "substantial volume of complaints" are received, OMB requested a description of the different categories of the complaints and the resolution thereof.[168] The reporting should be more detailed when the information involves "influential, scientific, financial, or statistical information, or [if it] concerns information in an agency's Notice of Proposed rulemaking."[169] In order to gauge public interest in the IQA, OMB directed each agency to provide a copy of every accepted complaint if it is within one of the following categories: (1) petitions involving major policy questions that are likely to be of strong interest to two or more Federal agencies; (2) complaints involving "influential" information when it is alleged that the dissemination violated one or more provisions of the OMB guidelines; (3) complaints involving novel procedural, technical, or policy issues involving the IQA; or (4) petitions in an agency public comment process where the petitioner alleges a "reasonable likelihood of suffering actual harm" from

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[160] Anderson, *supra* note 3.
[161] OMB Guidelines, *supra* note 103, at 8,459.
[162] *Id.*
[163] *Id.*
[164] OMB's Statistical and Science Policy Branch, OIRA, will provide oversight and guidance under the IQA. Memorandum from Dr. John D. Graham, OIRA, OMB to President's Management Council (Oct. 4, 2002)(on file with author).
[165] OMB Guidelines, *supra* note 103, at 8,459.
[166] Graham memo, *supra* note 164.
[167] OMB Guidelines, *supra* note 103, at 8,452, 8,459.
[168] Graham memo, *supra* note 164.
[169] *Id.*

dissemination of the information in question.[170] If agencies meet with petitioners who fall within any of the four aforementioned categories, OMB would like to attend the meeting.[171] If an agency posts the IQA petitions and responses on the agency website, the agency does not have to forward the documents to OMB.[172]

Industry's most thorough and aggressive public comments on the IQA were submitted by the CRE. In a 26-page submission, 16 major points were addressed ranging from retroactive application of the IQA to inclusion of rulemaking data in the petition process to third party petition status.[173] As anticipated, CRE's goals were to make the IQA guidelines legally binding, applicable to a broad range of information, and as encompassing as possible.[174] Citizen oriented groups, such as the Natural Resource Defense Council and Citizens for Sensible Safeguards, submitted comments recommending narrow application of the IQA and reinforcing the fact that the guidelines were not legally binding. These "pro-government" groups also urged agencies to "adapt" vice "adopt" the SDWA principles.[175]

IV. INFORMATION QUALITY ACT GUIDELINES OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

The EPA's IQA guidelines are a balance between the requirements of the Act and the agency's role in protecting human health and safety. There is nothing in the legislative history of the IQA that indicates a congressional intent to alter the agency's substantive mandates.[176]

> Unlike the Office of Management and Budget (OMB), which has no statutory responsibility (or authority) to implement the nation's laws regarding health, safety, the environment and many other objects of public concern, regulatory agencies, including the Environmental Protection Agency, must balance their statutory obligations under the Data Quality Act with their statutory obligations to implement their substantive mandates.[177]

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[170] Graham memo, *supra* note 164.
[171] *Id.*
[172] *Id.*
[173] *Comment Salvos Exchanged in Data Quality War*, OMB Watch, Jun. 10, 2002. http://www.ombwatch.org/article/articleview/820/1/124/ (last visited November 20, 2004).
[174] *Id.*
[175] *Id.*
[176] Letter from Center for Progressive Regulation to EPA (May 31, 2002) (on file with author).
[177] *Id.*

It is crucial that the EPA implement guidelines that avoid regulatory paralysis through the over-analysis of scientific data. The EPA "must take into account the impact of data quality activities on the agency's substantive mission and the role of disseminated data in the implementation of that mission. The potential benefits of administrative procedures, including accuracy and objectivity, must be balanced against the efficient disposition of agency business."[178]

The EPA's guidelines take into account the evolutionary nature of scientific research and policy formulation. Policy decisions are not based upon finite, discrete information sets, but rather involve the integration of numerous data sets, models, and the findings of hundreds of studies.[179] Agencies must act even when the data is incomplete in order to protect the public against risk. This includes taking agency action without knowing everything about a particular matter.[180]

> The absence of uncertainty is not an excuse to do nothing . . . . Environmental policy should always be based on the soundest information available at the time. The reality is, the business community is driven to distraction by the fact that the EPA must make most decisions on the basis of incomplete or uncertain science.[181]

A. The Guidelines

1. Key Principles

The EPA's guidelines start with the premise that it is a core agency mission to disseminate environmental information in order to strengthen environmental protection.[182] "One of our goals is that all parts of society – including communities, individuals, businesses, State and local governments, Tribal governments – have access to accurate information sufficient to effectively participate in managing human health and environmental risks."[183] The EPA's stated performance goals include dissemination of information in adherence to a basic standard of quality, incorporation of information quality

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[178] *Id.*

[179] *Ogmius Exchange: Chuck Herrick Responds*, Ogmius No. 2 (Center for Science and Technology Policy Research, Boulder, Colorado), May 2002.

[180] *Quoting* Sean Moulton, Senior Policy Analyst, OMB Watch. Adams, *supra* note 53, at 2,183.

[181] Greer and Steinzor, *supra* note 91, at 28-29.

[182] *Agency Data Quality Guidelines Issued*, OMB Watch, May 13, 2002. http://www.ombwatch.org/article/articleview/731/1/115/ (last visited November 20, 2004).

[183] EPA Guidelines, *supra* note 29, at 3.

principles into each stage of the EPA's development of information, and use of timely and flexible administrative mechanisms to correct information.[184] The EPA clearly indicates the guidelines are not regulation, but are merely "non-binding policy" not intended to bestow additional legal rights.[185]

2. What Is Quality?

Consistent with the OMB guidelines, "quality" includes the objectivity, utility, and integrity of disseminated information. "Objectivity" requires the information to be disseminated in an accurate, clear, complete, and unbiased manner.[186] "Integrity" refers to the security of the information and its protection from corruption or compromise.[187] "Utility" refers to the information's usefulness for the intended user.[188]

3. When Do The Guidelines Apply?

The guidelines apply when the EPA "disseminates information"[189] to the public. Information is "disseminated" when the EPA prepares the information and distributes it in support of the agency's viewpoint or in support of a regulation, guidance, or decision.[190] Dissemination could also include distribution of information prepared by an outside party if distributed in a manner that suggests the EPA is endorsing it, the EPA does expressly endorse it, or if in the distribution, the EPA proposes to use the information to formulate a regulation, policy, or guidance.[191] The EPA, as a policy matter, will explain the status of the information to users by indicating if the information is being distributed in support of the EPA viewpoints.[192]

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[184] *Id.*
[185] *Id.* at 4.
[186] *Id.* at 15.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 15, 16.
[191] Information is not considered "disseminated" if intended only for government employees; it constitutes a response by EPA to a FOIA request; the information is contained in correspondence directed towards an individual; is presented to Congress as part of a legislative or oversight function; is ephemeral in nature (press releases, fact sheets); is background information that implies that EPA has not adopted or endorsed the material; is a distribution of public filings submitted to EPA either voluntarily or as mandated by a statute; or constitutes distribution of information contained in documents prepared for judicial matters or administrative adjudication. The guidelines also do not apply to EPA contract or grant recipients unless the information is disseminated on behalf of EPA. This remains true even if EPA funds the research and retains the intellectual property rights to the information. *Id.* at 16, 17.
[192] *Id.* at 16.

"Information" includes any communication of knowledge in any medium.[193] It does not include employee opinions or Internet hyperlinks.

4. Information Quality Standard

"Influential scientific, financial, or statistical information" is information that will or does have a clear and substantial impact on important public policies or private sector decisions.[194] This includes information disseminated in support of top Agency actions, information in support of economically significant actions[195] per Executive Order 12866,[196] major agency work products subject to peer review as outlined in the *Science Policy Council Peer Review Handbook*, and other information on a case-by-case basis.[197] The information must be used in support of a major agency action, to include rulemakings, policy documents, guidance, and substantive notices.[198] An example of "influential information" could include IRIS documentation or the EPA's review of the NAAQS.

5. How Does The EPA Ensure And Maximize The Quality Of "Influential" Information?

"Influential scientific, financial, or statistical information" is subject to a higher degree of quality. This includes an increased level of transparency and reproducibility in accordance with acceptable scientific, financial, or statistical standards.[199] It is crucial that third parties be able to reproduce the EPA's findings to an acceptable degree of imprecision.[200] "Transparency" of data and methods must exist at a level that would permit a qualified member of the public to conduct an independent analysis.[201] This increased transparency applies to the source data, assumptions employed, specific quantitative methods, analytic methods applied, and the statistical procedures used.[202] However, agencies must continue to protect privacy interests, intellectual property rights, and trade secrets.[203] If other scientists cannot replicate a

[193] *Id.* at 15.
[194] *Id.* at 19.
[195] An economically significant action could include the final rule on the disposal of polychlorinated biphenals.
[196] Exec. Order No. 12,866, *supra* note 13.
[197] EPA Guidelines, *supra* note 29, at 20.
[198] *EPA Guidelines for Information Quality Include Procedures for Influential Data*, 33 ENV'T. REP. (BNA) 2,215 (2002).
[199] EPA Guidelines, *supra* note 29, at 21.
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

study used by the EPA, the study lacks "transparency" and can be challenged under the IQA.[204] The replication of experiments, including peer review of scientific research, is most typically an issue in areas of heightened public interest where the science will have extensive economic impact or is of great social importance.[205]

6. How Does The EPA Ensure And Maximize The Quality Of "Influential" Scientific Risk Assessment Information?

OMB urged federal agencies that assess health, safety, and environmental risks to adapt or adopt the quality principles in the SDWA amendments of 1996.[206] The EPA adapted[207] the SDWA quality principles for human health, ecological and safety risk assessments.[208] This adaptation focuses information "objectivity" on two components: information substance and information presentation.[209] The substance of the information must be accurate, reliable and unbiased; requiring risk assessments to be conducted using the best available science and data collected by accepted methods or the best available methods.[210] The information presented must be done in a comprehensive, informative, and understandable manner.[211] The EPA's guidelines further clarified the SDWA standard by requiring use of the "best available science" at the time the study was completed.[212]

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[204] Adams, *supra* note 53, at 2183.
[205] Greer and Steinzor, *supra* note 91, at 33.
[206] Safe Drinking Water Act Amendments, *supra* note 30.
[207] EPA did not "adopt" the SDWA principles outright, but rather provided for the "adaptation" of the principles. EPA clarified that adaptation as follows:

> (1) by adding the phrase "consistent with Agency statutes and existing legislative regulations, the objectivity of such information disseminated by the Agency;" (2) ensuring increased flexibility by applying the phrase "to the extent practicable" to both subsections (A) and (B) of the SDWA adaptation; (3) creating an emergency exemption whereby a decision must be made based on current information vice conducting additional research; (4) by indicating that all relevant information, including peer reviewed studies, non-peer reviewed studies, and incident information will be considered in the development of the influential scientific risk assessment; and (5) the intent to use terms most suited for influential environmental risk assessments.

EPA Guidelines, *supra* note 29, at 23-27.
[208] Several agencies elected to "adapt" the SDWA principles, including the Department of Labor, the Department of the Interior, the National Oceanographic and Atmospheric Administration, the Department of Transportation, and the Consumer Product Safety Commission. Noe, *supra* note 2.
[209] OMB Guidelines, *supra* note 103.
[210] EPA Guidelines, *supra* note 29.
[211] EPA Guidelines, *supra* note 29.
[212] Adams, *supra* note 53, at 2, 184.

7. Administrative Process For Petition And Appeals To Correct Information

"Affected" parties may submit Requests for Correction (RFC) to the EPA's Office of Environmental Information (OEI).[213] OEI will distribute the complaints to the cognizant information owner within the agency for a decision.[214] The panel at the EPA will consist of assistant administrators from OEI, the Office of Research and Development, and the Office of Policy, Economics, and Innovation.[215] A third party may not appeal or challenge the decision made on a RFC. A three-judge panel will decide IQA petition appeals.

B. Is the Information Quality Act Subject To Judicial Review?

There is extensive debate as to whether an "affected person" can seek judicial review of an agency decision under the IQA. The EPA's final guidelines clearly state they are non-binding, procedural guidance which do not impose legally binding requirements or obligations on the EPA or the public.[216] The OMB guidelines are silent on this issue, but the agency has been very pro-active in warning federal agencies that blanket statements barring judicial review may not be dispositive.[217] Dr. Graham commented at a National Academy of Sciences workshop on March 21, 2002, that "[l]awsuits against agencies are certainly another possibility, and quite frankly, there are as many legal theories about how these issues can be litigated as there are lawyers. My personal hope is that the courts will stay out of the picture except in cases of egregious agency mismanagement."[218]

If the information disseminated fails to meet the information quality standards, as defined by OMB, the agencies are susceptible to suit.[219] Under

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[213] RFCs may be submitted to the EPA, OEI, via the U.S. postal service, Internet, FAX, courier, or by walk-in to the docket center. EPA Guidelines, *supra* note 29, at 30.
[214] *Id.*
[215] *Id.* at 35. *See also* Noe, *supra* note 2, at 10,225.
[216] Inside EPA, *supra* note 35.
[217] James W. Conrad, Jr., *Information Disclosures by Government: Data Quality and Security Concerns Symposium: The Information Quality Act – Antiregulatory Costs of Mythic Proportions*, 12 KAN. PUB. POL'Y 539 (2003), *citing* General Electric Co. v. Envtl. Prot. Agency, F.3d 377, 382 (D.C. Cir. 2002) (the "most important" test is binding effect of agency action) and *Portland Cement Alliance v. Envtl. Prot. Agency*, 101 F.3d 772, 776 (D.C. Cir. 1996) (agency characterization is "not dispositive").
[218] National Academy of Sciences, Transcript of Workshop #1, *Ensuring the Quality of Data Disseminated by the Federal Government*, March 21, 2002, at 22.
[219] Phibbs, *supra* note 18, at 147.

the APA standard of arbitrary and capricious,[220] a proponent often faced an insurmountable burden when attempting to challenge agency rulemakings. The IQA guidelines could now redefine the arbitrary and capricious standard when an issue involves the quality of information disseminated by an agency.[221] If the courts provide standing under the IQA, the new, lower criterion will require a mere showing that the information did not meet the standard of "integrity, utility, quality, and objectivity."[222] A precedent setting case on the issue of judicial review has yet to be decided[223] and only the courts can ultimately resolve this issue. Judicial review may not matter if agencies, fearful of litigation, elect not to take regulatory action as mandated by a particular environmental statute.[224]

C. Improved Use Of Science At The EPA

As a result of the IQA, a new focus on the use of science at the EPA developed. The EPA Inspector General found, during a pilot study conducted from August 2001 to June 2002, "that the role of science in the EPA's regulatory decision-making is not always clear and (that) the agency should begin consistently submitting science-based rulemakings for independent peer reviews."[225] Science at the EPA is used to support regulatory decision-making through in-house scientists analyzing outside studies and by peer review conducted by panels of outside experts convened under the auspices of the EPA's Science Advisory Board.[226] Much of the science used by the EPA has not been peer reviewed and is often based on confidential information or analysis.[227] The EPA's information quality system, which now co-exists with the IQA guidelines, ensures that the EPA's organizations maximize the quality of environmental information.[228] Its multi-faceted approach includes peer

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[220] Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*. (2004).
[221] Phibbs, *supra* note 18, at 146.
[222] *Industry Hires Science Advisor to Scrutinize Federal Data Rules*, Inside EPA, Aug. 7, 2002 at p. 38.
[223] For a discussion of the issue of judicial review under the IQA consult Conrad, *supra* note 216 and Lacko, *supra* note 145, at 322-30.
[224] Steinzor, *supra* note 98, at 11449.
[225] Eryn Gable, *Role of Science In Rulemaking Unclear, IG Says*, Greenwire, Dec. 11, 2002. http://www.eenews.net/Greenwire/searcharchive/test_search-display.cgi?q=Role+of+Science&file=%2FGreenwire%2Fsearcharchive%2FNewsline%2F2002%2FDec11%2F12110206.htm (last visited November 20, 2004).
[226] Greer and Steinzor, *supra* note 91.
[227] *Id*. at 34.
[228] EPA's agency wide quality system is implemented by assigning a quality assurance manager to conduct independent oversight of the organization's quality system. This includes ensuring development of a Quality Management Plan, conducting an annual assessment of the organization's quality system, using a systematic planning process to develop performance criteria, development of a Quality Assurance Project Plan, assessing existing data, and providing adequate staff training.

review for major scientifically and technically based work products,[229] use of Action Development Processes[230] for top agency and economically significant actions under Executive Order 12866,[231] an integrated error correction process,[232] implementation of the Information Resources Management Manual,[233] and the Risk Characterization Handbook.[234] Science Advisory Boards and the Science Advisory Panel are consulted when appropriate.[235] The EPA also disseminated the "Assessment Factors for Evaluating the Quality of Information from External Sources," which outlined the EPA's quality controls on information submitted to the agency or obtained by the EPA from non-agency sources[236] for use in policy or regulatory decision-making.[237] The five assessment factors include "soundness," "applicability and utility," "clarity and completeness," "uncertainty and variability," and "evaluation and review."[238] These five factors were developed to complement

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EPA Order 5360.1 A2, "Policy and Program Requirements for the Mandatory Agency-wide Quality System" and EPA Quality Manual for Environmental Programs 5360 A1 (May 2000).

[229] *See Peer Review and Peer Involvement at the U.S. Environmental Protection Agency*, U.S. EPA, Jun. 7, 1994 and Peer Review Handbook, 2nd Edition, U.S. EPA, Science Policy Council, December 2000, EPA 100-B-00-001.

[230] The Action Development Process requires early involvement of senior management officials who are to consider regulatory and non-regulatory options and analytic approaches to be used. The focus is to determine needed analyses and research. EPA Guidelines, *supra* note 29, at 12.

[231] Exec. Order No. 12,866, *supra* note 13.

[232] The Integrated Error Correction Process for environmental data allows members of the public to notify EPA of potential data errors contained in 8 agency-wide data systems. *See* http://www.epa.gov/OEI/quality.htm (last visited November 20, 2004).

[233] The Information Resources Management Manual outlines information policies regarding EPA's collection of information, security, and data standards. It describes how the agency ensures information integrity. EPA Directive 2100, Information Resources Management Policy Manual.

[234] Ensures that critical information from a risk assessment is considered in forming the conclusions about risk. Risk Characterization Handbook, U.S. EPA, Science Policy Council, December 2000. *See also* http://www.epa.gov/osp/spc/2riskchr.htm (last visited November 20, 2004).

[235] EPA Guidelines, *supra* note 29, at 19.

[236] EPA uses and disseminates information from a variety of sources including information obtained through "contracts, grants and cooperative and interagency agreements or in response to a requirement under a statute, regulation, permit, order or other mandate." Information is also voluntarily submitted or collected from external, non-agency sources that could include "federal, state, tribal, local and international agencies; national laboratories; academic and research institutions; business and industry; and public interest organizations." The information is derived from "scientific studies published in journal articles, testing or survey data, such as environmental monitoring or laboratory test results, and analytic studies, such as those that model environmental conditions or that assess risks to public health." *U.S. EPA*, *A Summary of General Assessment Factors for Evaluating the Quality of Scientific and Technical Information*, EPA 100/B-03/001, p. 3, June 2003.

[237] *Id. See also Workshop on EPA's Assessment Factors*, OMB Watch, Jan. 27, 2003.

[238] EPA determines the required level of quality based upon the context and intended use of the information. "Soundness" is defined as the extent to which the scientific and technical procedures used are consistent with the intended application. Is the study based on sound science and

the Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the EPA.[239]

V. INFORMATION QUALITY ACT PETITIONS FILED AT THE ENVIRONMENTAL PROTECTION AGENCY

There has yet to be the predicted onslaught of IQA petitions filed at the EPA,[240] with only thirteen IQA requests for correction (RFC) and two requests for reconsideration (RFR) submitted between October 2002 and September 2003.[241] Five additional IQA RFC, which are currently at various stages of completion, were filed with the EPA subsequent to the filing of the Information Quality FY03 Annual Report.[242] Although a majority of the petitions were filed by industry,[243] private citizens, interest groups, and even members of Congress[244] petitioned the EPA under the Act. The CRE filed two

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econometrics? "Applicability and utility" apply to the "extent to which the information is relevant for the Agency's intended use." How useful is the economic or scientific theory applied in the study to EPA's intended use of the analysis? "Clarity and completeness" of the information is examined to determine if the "data, assumptions, methods, quality assurance, sponsoring organizations and analyses employed to generate the information are documented." Does the documentation describe the scientific and economic theories applied? The "uncertainty and variability" of the information must be evaluated and characterized. The information will also be examined to determine the extent to which the "procedures, measures, or methods" have been subjected to independent "evaluation and review." Assessment Factors, *supra* note 236, at 4.

[239] Developing Assessment Factors for Evaluating the Quality of Information From External Sources; Notice of Public Meeting, 67 Fed. Reg. 174 (Sep. 9, 2002). *See also* EPA Guidelines, *supra* note 29.

[240] The American Bar Association Administrative Law and Legislative Practice Law Conference Panel in October 2001 predicted that a majority of petitions filed would challenge the reproducibility of influential scientific information. Noe, *supra* note 2, at 10224–36.

[241] *Information Quality FY03 Annual Report*, *supra* note 32, at 3. The IQA petitions filed to date at the EPA may be reviewed at http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004). OMB reported a total of 35 agency-wide requests for correction of information under the IQA, while OMB Watch believes there were as many as 24,618. OMB discounts 24,433 requests submitted to the Federal Emergency Management Agency (FEMA) and 87 filed with the Federal Motor Carrier Safety Administration (FMCSA), as requests that would typically be filed prior to enactment of the IQA. Even discounting the petitions filed at FEMA and FMCSA, there are still 98 unaccounted for petitions. *The Reality of Data Quality Act's First Year: A Correction of OMB's Report to Congress*, OMB Watch, Jul. 2004 at 7-8. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[242] http://www.epa.gov/quality/informationguidelines/iqg-list.html (last visited November 20, 2004).

[243] Industry submitted 72% of all IQA petitions filed agency-wide. A majority of the petitions addressed environmental, health, and safety issues, as well as, toxicology reports and global warming. Industry sought correction of information that directly affected their business interests. OMB's Report to Congress, *supra* note 242, at 3, 8, 9. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[244] Senators Jeffords, Sarbanes, Boxer, and Feinstein challenged EPA's 2003 proposal to impose storm water pollution control standards on construction sites and small cities, because it exempted

requests -- one on behalf of the Kansas Corn Growers Association and the Triazine Network[245] and the second on behalf of the American Chemistry Council Phthalate Esters Panel.[246] The U.S. Chamber of Commerce submitted petitions challenging the numerical properties of chemicals contained in the EPA's databases.[247] The Chamber of Commerce alleged the values vary

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oil and gas well construction sites. Letter from Senators Jeffords, Sarbanes, Boxer, and Feinstein to the Honorable Christine Todd Whitman, Administrator, EPA (Mar. 6, 2003). http://www.epa.gov/quality/informationguidelines/documents/8600_epa2003_0478.pdf (last visited November 20, 2004). The senators questioned the objectivity, accuracy and utility of the Department of Energy's figures relied upon by EPA when determining the number of one to five acre oil and gas construction sites that would fall within the purview of the Phase II storm water regulations. *Senators Use Data Quality Challenge*, OMB Watch, May 21, 2003. http://www.ombwatch.org/article/articleprint/1404/-1/83/ (last visited November 20, 2004). The IQA petition was denied, because it was submitted two days after the final rule was published. Letter from the Honorable Christine Todd Whitman, Administrator, EPA to Senator James M. Jeffords (May 7, 2003)(on file with author)(not the official agency response) and G. Tracy Mehan, III, Assistant Administrator, EPA to Senator James M. Jeffords (Jun. 13, 2003). http://www.epa.gov/quality/informationguidelines/documents/8600response_jeffords.pdf (last visited November 20, 2004) (official agency response).

[245] CRE challenged the preliminary Environmental Risk Assessment for Atrazine, alleging the document erroneously stated that atrazine caused endocrine effects in frogs. Letter from Jim J. Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Nov. 25, 2002). http://www.epa.gov/quality/informationguidelines/documents/2807.pdf (last visited November 20, 2004). EPA treated the RFC as a public comment on the April 2002, Preliminary Environmental Risk Assessment for Atrazine and later denied the document stated that atrazine caused endocrine effects. EPA made editorial changes to the report to clarify any ambiguities. *See also Information Quality FY03 Annual Report*, *supra* note 32, at 6.

[246] The CRE alleged the Diisononyl Phthalate (DINP) Technical Review of August 2000, and the subsequent September 5, 2000, rulemaking proposal to add the DINP category to the TRI did not meet the IQA standards. "The review contains substantial omissions of data and analysis, including significant new data and pertinent consensus scientific views which have been published since August 2000, biased conclusions which are not consistent with the TRI listing requirements, inaccuracies, and reliance on TRI listing guidance which itself cannot meet Data Quality standards." Citing OMB's proposed peer review supplement to the IQA, CRE requested the updated review be made available for public comment and subjected to external peer review. Letter from Jim J. Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Oct. 16, 2003). http://www.epa.gov/quality/informationguidelines/documents/13166rfc.pdf (last visited November 20, 2004). EPA, pursuant to the IQA, treated the RFC as a late public comment on the proposed rule and placed the RFC in the rulemaking docket to be addressed as part of the final agency action. EPA is revising the hazard assessments based upon a recently conducted internal peer review. Letter from Kimberly T. Nelson, Assistant Administrator and Chief Information Officer, EPA to Marian K. Stanley, American Chemistry Council Phthalate Esters Panel (Mar. 15, 2004). http://www.epa.gov/quality/informationguidelines/documents/13166Response.pdf (last visited November 20, 2004).

[247] For example, EPA's CHEM9 database contains a numerical value for the vapor pressure of bis ether, but the chemical is listed in the same database under a different name (dichloroethyl ether) with a different vapor pressure listed. Letter from William L. Kovacs, Vice President, Environment, Technology, and Regulatory Affairs, U.S. Chamber of Commerce to EPA Information Quality Guidelines Staff (May 26, 2004).

between the EPA's own databases and even sometimes within the same database. The numerical values are crucial in preparing health risk assessments.[248]

The types of petitions filed were diverse with no set pattern as to type or IQA category of challenge.[249] Six program offices within the EPA were targeted[250] and a majority of the petitions were denied.[251] The EPA categorized one RFC as "influential"[252] and the congressional storm water petition was the only petition that targeted a major rule.[253]

OMB's congressionally mandated IQA annual report indicated it is premature to "make broad statements about both the impact of the correction request process and the overall responsiveness of the agencies."[254] Due to the shortage of petitions filed, OMB made no substantive recommendations regarding potential legislative changes.[255] OMB surmised the IQA did not

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http://www.ombwatch.org/info/dataquality/EPA_chamber_chemrating.pdf (last visited November 20, 2004).

[248] Letter from William L. Kovacs, Vice President, Environment, Technology, and Regulatory Affairs, U.S. Chamber of Commerce to EPA Information Quality Guidelines Staff, (May 26, 2004). http://www.ombwatch.org/info/dataquality/EPA_chamber_chemrating.pdf (last visited November 20, 2004).

[249] Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 18.

[250] The EPA program offices petitioned include the Offices of Water; Research and Development; Air and Radiation; Prevention, Pesticides, and Toxic Substances; Environmental Information; and Enforcement and Compliance Assurance. OMB, *Information Quality FY03 Annual Report, supra* note 32, at 4-15. *See also* Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 16.

[251] EPA did clarify that the pesticide atrazine does not adversely affect hormone levels in frogs once challenged by CRE in an IQA petition. Letter from Jim Tozzi, Member, CRE Board of Advisors to EPA, Information Quality Guidelines Staff (Nov. 25, 2002). http://www.epa.gov/quality/informationguidelines/documents/2807.pdf (last visited November 20, 2004). *See also* Office of Management and Budget, *Information Quality - A Report To Congress Fiscal Year 2003*, Apr. 30, 2004, at 16.

[252] The Chemical Products Corporation challenged the oral reference dose for barium derived in the Barium and Compounds Substance File in EPA's IRIS and the presentation and analysis of the supporting data, alleging that it did not comply with the OMB requirements for objectivity and reproducibility. This RFC was deemed "influential." OMB *Information Quality Report*, *Fiscal Year 2003*, *supra* note 250, at 94-95. *See also Information Quality FY03 Annual Report*, *supra* note 32, at 4-15. "Influential" information is held to a higher standard with greater transparency regarding "the data and methods used to calculate the data, including the sources of the data, assumptions used, and analytic and statistical procedures used." General Policy EPA Guidelines For Information Quality Include Procedures For Influential Data, BNA, Oct. 4, 2002, at A-1.

[253] Marty Coyne, *EPA Reports, Policies Frequent Target of Data Quality Act Challenges*, Greenwire, May 11, 2004. http://www.eenews.net/Greenwire/Backissues/051104/05110401.htm (last visited November 20, 2004).

[254] OMB, *Information Quality Report Fiscal Year 2003*, *supra* note 249, at 5.

[255] *Id.* at 18.

thwart or slow regulatory rulemaking or the dissemination of information.[256] The report did highlight several misconceptions: (1) agencies were not inundated with requests for correction; (2) the IQA process was not used solely by industry; (3) the Act did not delay the regulatory process; (4) the guidelines have not "chilled" agency dissemination of information; (5) the appeals process did add value; (6) the IQA is not aimed primarily at Federal rulemaking information; (7) the IQA applies to more than just numerical data; and (8) universities and colleges do not fall within the purview of the IQA.[257]

OMB noted several agencies, including the EPA, had difficulty responding to petitions in a timely fashion. They recommended that agencies modify their guidelines to increase the allotted response time and examine staffing levels to ensure proper manning.[258] Ironically, OMB received no petitions for correction of information.

VI. ADDITIONAL OFFICE OF MANAGEMENT AND BUDGET OVERSIGHT OF SCIENCE

The Draft Peer Review Standards for Regulatory Science issued by OMB, are yet another initiative meant to control and curtail regulatory rulemaking through the application of science. Legally anchored in the IQA, the Bush Administration recently announced an OMB centralized scientific peer review program that would require OMB to evaluate science before new regulations are issued by an agency.[259] OMB is proposing the centralized peer review approach, because:

> External experts often can be more open, frank, and challenging to the status quo than internal reviewers, who may feel constrained by organizational concerns. Evaluation by external peer reviewers thus can enhance the credibility of the peer review process by avoiding both the reality and the appearance of conflict of interest.[260]

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[256] *Id.* at 8–11. OMB Watch believes this statement is without merit, since OMB did not rely on any data to draw the conclusion. *The Reality of Data Quality Act's First Year: A Correction of OMB's Report to Congress*, OMB Watch, Jul. 2004 at 3-4. *See also* http://www.ombwatch.org/info/dataqualityreport.pdf (last visited November 20, 2004).

[257] OMB, *Information Quality Report Fiscal Year 2003*, *supra* note 249, at 8 – 11.

[258] *Id.* at 18–19.

[259] Rick Weiss, *Peer Review Plan Draws Criticism*, *Under Bush Proposal, OMB Would Evaluate Science Before New Rules Take Effect*, WASH. POST, Jan. 15, 2004, at 11.

[260] OMB's Proposed Information Quality Bulletin for Peer Review, issued under Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) and the Supplemental Information Quality Guidelines, p. 3, *citing Peer Review in Environmental Technology Development Programs: The Department of Energy's Office of Science and Technology*, 3 NRC Report, 1998.

A significant step towards increased Presidential control over the regulatory process, the OMB bulletin[261] calls into question an agencies' ability to address science as it carries out its statutory and congressionally mandated functions. A number of scientific organizations believe centralized peer review will "inject White House politics into the world of science" and will "use the uncertainty that inevitably surrounds science as an excuse to delay new rules that could cost regulated industries millions of dollars."[262] OIRA currently possesses review authority over agency cost-benefit analysis, while the PRA provides review authority over information collection requests, both of which involve economic considerations and analysis.[263] Centralized control of the peer review process will add yet another level of oversight, thwarting the authority of independent regulatory agencies. Agencies possess the requisite scientific expertise, maintain ties with affected portions of the public sector, and have administrative processes in place to adequately address the science at issue.[264]

VII. CONCLUSION

Congressional interest in the IQA is ongoing and has not waned, as evidenced by recent House conference report language which questions implementation of the IQA by federal agencies. Congress mandated that OMB submit a report to the House and Senate Committees on Appropriation by June 1, 2004, outlining whether federal agencies have properly responded to public requests for correction of information under the Act.[265] OMB is proactively

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[261] An OMB "bulletin" is a term for legally binding language used to guide the actions of federal agencies. Weiss, *supra* note 259.

[262] *Id.*

[263] Letter from Reece Rushing, Policy Analyst, OMB Watch to John Morrall, III, Office of Management and Budget, Office of Information and Regulatory Affairs (May 28, 2002) (on file with author).

[264] *Id.*

[265] The conference report language specifically states:

> Implementation of the Federal Data Quality Act. The conferees are concerned that agencies are not complying fully with the requirements of the Federal Data Quality Act (FDQA). The conferees agree that data endorsed by the Federal Government should be of the highest quality, and that the public should have the opportunity to review the data disseminated by the Federal Government for its accuracy and have available to it a streamlined procedure for correcting inaccuracies. The Administrator of the Office of Information and Regulatory Affairs (OIRA) is directed to submit a report to the House and Senate Committees on Appropriations on whether agencies have been properly responsive to public requests for correction of information pursuant to the FDQA, and suggest changes that should be made

overseeing implementation of the IQA and is using it as a catalyst for further executive branch control of the regulatory state through science. Pending Congressional legislation on Capitol Hill also reflects a renewed interest in regulating through science.[266] The courts have yet to enter the fray to determine whether IQA petitions constitute a final agency action subject to judicial review. If judicial review results, a sharp increase in the number of petitions filed by industry is sure to follow.

Many IQA questions will remain unanswered awaiting further agency implementation and perhaps judicial review. Will enactment of the IQA have the intended consequences of its industrial backers and prove to be rulemaking paralysis through data over-analysis?[267] Is the Act just another openness in government law[268] of minor import or will it enhance both the competence and accountability of government? Can one federal agency force compliance of the IQA against another federal agency? Are the IQA guidelines retroactive or do they apply only to new agency actions? What impact will the guidelines have on information generated by the states? Will agency decisions under the IQA constitute final agency action and become subject to judicial review? What does the future hold for the IQA? It could only be a matter of time before the IQA replaces the Freedom of Information Act[269] as the "Taj Mahal of the doctrine of unanticipated consequences."[270]

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to the FDQA or OMB guidelines to improve the accuracy and transparency of agency science.

H.R. CONF. REP., *supra* note 58.

[266] On April 8, 2003, Representative Greg Walden of Oregon, introduced a bill referred to as the Sound Science for Endangered Species Act Planning Act of 2003, that would require the "Secretary of the Interior to *give greater weight to scientific or commercial data that is empirical or has been field-tested or peer-reviewed*, and for other purposes." Sound Science for Endangered Species Act Planning Act of 2003, H.R. 1662, 108th Cong. (2003) (emphasis added). Senator Gordon Smith of Oregon introduced a similar amendment in the Senate on January 20, 2004. Sound Science for Endangered Species Act Planning Act of 2004, S. 2009, 108th Cong. (2004).

[267] Letter from Thomas McGarity, President, Center for Progressive Regulation to Docket Clerk, EPA (May 31, 2002) (on file with author).

[268] Openness in government laws include the Sunshine Act, 5 U.S.C. § 552b (2003); the Freedom of Information Act, *supra* note 35; Administrative Procedures Act, *supra* note 12; and the Federal Advisory Committee Act, 5 U.S.C. app. § 1 (2003).

[269] Freedom of Information Act, *supra* note 34.

[270] For example, the lack of specificity and use of broad definitions, such as "quality," "objectivity," "utility," "information," and "dissemination," could subject processes under environmental statutes, like the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C.A. §§ 4321 to 4370f (1969), to more public review than that already mandated by the statute itself. It is unclear whether NEPA mandated environmental impact statements (EIS) or environmental assessments (EA) are considered publicly disseminated documents that must undergo scientific peer review or additional quality assurance measures. Under the current process, the public has an extensive right to provide comments on all federally proposed actions through the EIS and EA

processes. What remains unclear is whether the IQA requirement attaches to the EIS and the EA or just to the studies and analysis that underpin those assessments.

DEFINING THE PARAMETERS OF CYBERWAR OPERATIONS: LOOKING FOR LAW IN ALL THE WRONG PLACES?

CDR Vida M. Antolin-Jenkins, JAGC, USN*

I. INTRODUCTION

The information age, touted for progress made in providing rapid access to information and data exchange, creates new issues in the military context. The information age society is hugely dependent on computers and internet connections to accomplish tasks both mundane and critical. Data indicate that over 30 percent of the American population use home computers.[1] Interconnections are even more impressive. An estimated 90 percent of large companies and 75 percent of small companies utilize local area networks for business.[2] Military organizations, particularly in the United States, have been in the vanguard of the information age, particularly vis-à-vis connectivity. The internet originated with the communication system developed by the Department of Defense, specifically the ARPANET.[3] The United States military uses over 2.0 million computers and has in excess of 10,000 local area networks.[4] Furthermore, it is clear that military and civilian information

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[1] Frank J Cilluffo, Pattak, Paul Byron & George Charles Salmoiraghi, *Bad Guys and Good Stuff: When and Where Will the Cyber Threats Converge?*, 12 DEPAUL BUS. L. J. 131, 137 (2000).

[2] *Id*. at 139.

[3] American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996). This case provides a compact history of the internet and the mechanics of its functioning. From its inception, the network was designed to be a decentralized, self-maintaining series of redundant links between computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control, and with the automatic ability to re-route communications if one or more individual links were damaged or otherwise unavailable. Among other goals, this redundant system of linked computers was designed to allow vital research and communications to continue even if portions of the network were damaged, say, in a war. For additional reading on the development of the internet, *see, e.g.,* Bruce Sterling, *Short History of the Internet,* MAGAZINE OF FANTASY AND SCIENCE FICTION, Feb. 1993, *also available at* http://www.forthnet.gr/forthnet/isoc/short.history.of.internet (last visited May 12, 2003).

[4] Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM J. TRANSNAT'L L. 885, 887 (1999).

networks are greatly interdependent. One estimate is that 95% of military information traffic utilizes civilian networks at some stage of the communication.[5] The strategic and economic power of the increased information awareness and connectivity are coupled with a hugely increased vulnerability to destruction and attack. This information network has created a new battleground.

The battle for the information network has already been joined, even as theorists struggle with defining the strategic parameters of the effort. The creation of a new battleground requires not only the development of new strategies and weapons, but also a careful analysis of how the international and national legal frameworks on law of war impact military operations planning in this arena.

Acquisition and control of information has long been a vital consideration for battlefield planners.[6] Denial of accurate information has

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[5] Ronald Knecht & Ronald A. Grove, *The Information Warfare Challenges of a National Information Infrastructure*, *available at* http://web.archive.og/web/20011107174401/http://infowar.com/mil_c4i //iwchall.hyml-ssi, (last visited May 12, 2003). *See also* Information Assurance Technology Analysis Center website, which notes:

> The United States is vulnerable to Information Warfare attacks because our economic, social, military, and commercial infrastructures demand timely and accurate as well as reliable information services. This vulnerability is complicated by the dependence of our DoD information systems on commercial or proprietary networks which are readily accessed by both users and adversaries. The identification of the critical paths and key vulnerabilities within the information infrastructure is an enormous task. Recent advances in information technology have made information systems easier to use, less expensive, and more available to a wide spectrum of potential adversaries.

Available at http://iac.dtic.mil/iatac/about/about.htm (last visited May 12, 2003).

[6] As one commentator noted:

> In the realm of warfare it is the equivalent of the Holy Grail: lifting the "fog of war" that has shrouded every battlefield throughout history. Yet many believe the U.S. military may indeed be on the verge of such a breakthrough, calling it a "Revolution in Military Affairs." In the years to come, they say, U.S. combat commanders may be able to "see" almost everything that happens in a vast battlefield area 200 miles square. Sophisticated communication nets may link data from satellites, reconnaissance aircraft, unmanned aerial vehicles and individual soldiers.

Peter Grier, *Electronics and Communications; Preparing for 21st Century Information War,* NATIONAL JOURNAL GOVERNMENT EXECUTIVE, Aug. 1995.

been a key military strategy from the dawn of time. Information warfare has been a part of military operations in the form of espionage, disinformation operations, and military feints. Modern technology has provided a new dimension to information warfare. Command, control, communications and intelligence (C3I), [7] a cornerstone of military strategy doctrine, has metamorphosized into C4I[8] -- command, control, communications, computers, and intelligence, recognizing the huge role of computer operations in current and future military operations. The changes have provided a new lexicon of terms to describe the operations, the threats, and the means of attack and defense.[9] The growth in terminology alone portends the growth both in the importance of the topic as well as the evolution of the tactics and strategy.

Before commencing operations, even in self-defense, it is important to examine the parameters that apply to those operations. The international legal regimes which have developed, particularly in the last century, limit a state's ability to use force, even in self-defense. It is a generally recognized legal proposition that a state is permitted to exercise self-defense in response to armed attack. However, while self-defense is permitted, the acts taken in self-defense are limited by the doctrines of military necessity and proportionality. Translating each essential term of these legal propositions into application in cyberspace is in its embryonic state. What constitutes an armed attack in cyberspace? What acts can be taken in self-defense? And what constitutes a proportional response?

The use of terms of war in cyberspace operations obscures the reality that cyberwar does not fit well into the legal frameworks on war and use of force. The differences pose doctrinal difficulties in future justifications of state action in response to cyber attacks. Cyberspace operations for the most part do not meet the criteria for "use of force" as currently defined in international law. Defining the parameters of proportional response through analogy is possible, but creates clear dangers of definitional creep into other areas of international relations that have been the subject of long and contentious debate. One of the gravest dangers in cyberwar is destruction of or interference with information infrastructure in such a manner as to cause devastating economic

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[7] DOD Dictionary of Military and Associated Terms, Joint Publication 1-02 09 Jan 2003, *available at* http://www.dtic.mil/doctrine/jel/doddict/acronym_index.html, accessed Mar 12, 2003.
[8] *Id*.
[9] *See, e.g.,* Joint Chiefs of Staff, Joint Pub. No. 3-13, Joint Doctrine for Information Operations, Terminology, I-9 (Oct. 9, 1998), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_13.pdf (last visited March 10, 2003). *See also* William Gravell, *Some Observations Along the Road to "National Information Power"*, 9 DUKE J. COMP. & INT'L L. 401 (1999), for a succinct summary of the development of information warfare in the U.S. Department of Defense.

harm to a State. The choice is to revaluate inclusion of "economic aggression" in the accepted international legal definition of "use of force" under customary and conventional international law or to create a completely new analytic framework to regulate cyberwar. Defining attacks on economic centers of gravity as "use of force" under the current international regimes has grave potential for unintended and undesirable legal consequences. Incorporating cyber attacks on critical economic infrastructures into the definition of "use of force" cannot be done with sufficient precision to exclude other state economic policies which have long been defended as necessary tools of foreign policy, and deliberately excluded from the international definition of "use of force," particularly by market-based democracies. Therefore, theorists need to look elsewhere in adopting an analytic framework for cyberwar. The doctrine of non-intervention is a more flexible framework which could provide the analytic guidelines without prejudice to well developed limitations on the definitions of "use of force" vis-à-vis economic coercion.

This paper will first develop an examination of the new battlefield of cyberspace. This includes both a description of the weapons used in cyberspace and the targets of a cyberwar. Secondly, it will examine current international law on use of force and self-defense, with a discussion of how the factual predicates in the description of the operations are impacted. Third, it will discuss the two premier writings on cyberwar and the use of force. Finally, it will consider other legal frameworks for defining the parameters of permissible operations in cyberspace.

II. CYBERSPACE -- DEFINING THE BATTLEFIELD

The internet, the primary means for information transmission today, is made up of a collection of independent networks which are interconnected. It began in 1969 as the ARPANET, a military program created to provide redundant communication between the Department of Defense, its contractors and defense-related universities.[10] Beginning with four host computer systems, today it consists of tens of millions. Initially designed to survive nuclear attack and the resultant electromagnetic impulse which was posited to disrupt atmospheric communications (such as radio communications), ARPANET began communications through special dedicated telephone lines.[11] Today, internet communications travel through all available links in telecommunications: ordinary telephone lines, microwave relays, satellite

[10] George K. Walker, *Information Warfare and Neutrality*, 33 VAND. J. TRANSNAT'L L. 1079, 1094-95 (2000).
[11] *Id.* at 1095.

uplinks and downlinks. Development of fiber optic cables and their utilization in telecommunications, as well as the development of transistors and microchips resulted in an exponential growth in the ability to communicate.[12]

The internet is organized into a hierarchy of networks.[13] Even the individual home computer is part of a network -- to gain access to the internet the individual computer must connect to an internet service provider (ISP). By connecting to the ISP, the computer becomes part of the network, and it may be utilized in the process of sending messages. Large communications companies often have their own dedicated backbones (fiber optic or cable lines permitting the transmission of large amounts of data simultaneously) connecting various regions. Within each region, the company provides a Point of Presence (POP), an access for local users to utilize the company's network. The large backbones are then connected through Network Access Points (NAPs). This process is reproduced world-wide -- each individual entity, whether a government entity, a communications company or a corporation with a large intranet, agrees to intercommunicate with one another through the NAPs.

The communication is via the Internet Protocol, an agreed upon computer language.[14] The internet protocol language assigns a unique

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[12] *Id.*

[13] The description in this paragraph is derived from information contained in Jeff Tyson, *How Internet Infrastructure Works, available at* http://www.howstuffworks.com/internetinfrastructure.htm/printable. This website provides excellent explanations of myriad technical processes.

[14] ACLU v. Reno, *supra* note 3, at 831.

> No single entity -- academic, corporate, governmental, or non-profit -- administers the Internet. It exists and functions as a result of the fact that hundreds of thousands of separate operators of computers and computer networks independently decided to use common data transfer protocols to exchange communications and information with other computers (which in turn exchange communications and information with still other computers). There is no centralized storage location, control point, or communications channel for the Internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the Internet.

Id. *See also* Walker, *supra* note 10, at 1094-1100.

identifier to each computer on the internet.[15] Emails and information sent from one computer to the assigned address of another provide near real-time transmission of information between the two machines. Unlike voice telephone transmission, the email message does not necessarily travel a single route to its destination address. Because of the loose structure of the internet and the operating protocols, which work to optimize rapid transmission, a message is broken up into "packets," each of which travels independently to its destination. If one computer network is overloaded or not functioning for some reason, the information packets are rerouted to other computers.[16]

The key consideration in the cyberspace battlefield is the nearly universal interconnectivity of computer network systems, regardless of their

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[15] Known as the "IP Address" or internet protocol address, each machine on the internet has a unique four number address assigned to it. The numbers are expressed in binary form; the maximum value which can be assigned to each "number" is 256 (or 2^8). There are almost 4.3 billion possible unique values which can be assigned. In the early years of the internet, connections were possible only if you provided the numerical IP address. This became particularly cumbersome as more systems came online. The initial solution was the creation of a text file which mapped names to IP addresses, but that file soon became too unwieldy to manage. In 1983, the University of Wisconsin created the Domain Name System (DNS), permitting automatic mapping of text names to IP addresses. The DNS system is organized first by top domain name, e.g., .com, .org, .net, .edu, .gov, and .mil. The next level consists of second level domains, the large communications entities or organizations which usually provide the servers and the large trunk connectivity, e.g., AOL, Yahoo, Microsoft, etc. Tyson, *supra* note 13.

[16] Walker, *supra* note 10, at 1095-96.

> A message can travel many routes to a destination over this redundant system of linked computers. A message might begin in Country A and be sent to a computer in Country B, and then be forwarded to and through computers in Countries C. D, and E before reaching its addressee in Country F. If a message cannot travel the A-B-C-D-E-F path because of attack on or destruction of the route or system overload, for example, the Internet allows transmission by alternate routes through other nations, for instance A-G-H-I-F. Transmission and rerouting occur in seconds. Messages between computers on the Internet do not necessarily travel entirely along the same path. "Packet switching" protocols allow individual messages to be subdivided into smaller "packets" -- chunks of the message -- sent independently to its destination. While all packets of a message often travel the same path to the destination, if computers along the way are overloaded or cannot transmit for other reasons, packets, like entire messages, can be rerouted to other computers. Thus the A-F message, if long enough, might be broken into three packets, one of which travels through computers in Countries A-B-C-D-E-F, the second through computers in Countries A-G-H-B-C-F, and the third through computers n Countries A-B-X-Y-Z-F. The destination computer in Country F reassembles the message from the packets.

Id.

use. As noted above, even military communication networks utilize public interfaces for much of the traffic conveyed.

> The proliferation of global electronic communications systems and the increased interoperability of computer equipment and operating systems have greatly improved the utility of all kinds of information systems. At the same time, these developments have made information systems that are connected to any kind of network, whether the Internet or some other radio or hard-wired communications system, vulnerable to computer network attacks.[17]

The degree to which the information society is interconnected has been illustrated all too often in the past few years by the impact of various attacks on the internet. These attacks have affected millions of computers resulting in delay of airlines, inability to access money at Automatic Teller Machines, interference with emergency response number networks, inability to conduct business over the internet. Viruses have spread indiscriminately around the globe with remarkable speed. In a recent attack, the Slammer virus infected computers worldwide in three hours.[18]

III. THE WEAPONS OF CYBERWAR[19]

"Many traditional military activities are included in current concepts of 'information operations' and 'information warfare,' including physical attacks on information systems by traditional military means, psychological operations, military deception, and 'electronic warfare' operations such as jamming radar and radio signals."[20] While kinetic weapons are certainly part of the cyberwar arsenal, they are not the focus of this discussion.[21] The major

[17]Department of Defense, Office of General Counsel, *An Assessment of International Legal Issues in Information Operations,* 5 (May, 1999) [hereinafter *DODGC Assessment*] *available at* http://www.terrorism.com/documents/dod-io-legal.pdf (last accessed on March 10, 2003).

[18] Brian Krebs, *A Short History of Computer Viruses and Attacks,* WASHINGTON POST.COM (Feb. 14, 2003) *at* http://www.washingtonpost.com/wp-dyn/articles/A50636-2002Jun26.html (last visited Mar. 17, 2003).

[19] This discussion of the types of attacks is very superficial and does not come close to capturing the intricacy or complexity of the means and methods of information warfare operations and attacks. For a comprehensive treatment of the types and methods of conducting operations in cyberspace, *see* DOROTHY E. DENNING, INFORMATION WARFARE AND SECURITY (1999).

[20] *DODGC Assessment, supra*, note 17, at 5.

[21] A missile destroying telecommunications towers would certainly affect communications and cyberspace connectivity.

weapons of cyberwar are syntactic attacks, semantic attacks and mixed attacks.[22]

Syntactic attacks, aimed at the computer's operating systems, can be malicious code, denial of service attacks or hacking. The syntactic attack consists of "modifying the logic of the system in order to introduce delays or to make the system unpredictable."[23] Malicious code is computer language designed to damage or impede the computer files and programs of the target computer. Examples are worms, viruses, Trojan horses and denial of service attacks. Worms are programs which replicate in the system without infecting the host computer -- they usually capture the addresses of the infected computer and resend the messages throughout the system. These are capable of causing huge economic damage.[24] At a certain point, there is so much duplication of messages, the system as a whole suffers at the least, a slow-down, and at worse, a crash of host systems overwhelmed by the traffic, thereby denying legitimate traffic a means of transmission. A Trojan horse, as the name implies, is a computer program which disguises what it is upon entry into a computer system. It is an executable code, that is, once the code enters a computer, it activates and performs certain functions, for example, sending passwords to another file, erasing or altering files so as to make them non-functioning, or providing the sender of the code remote access to the target computer. Viruses are codes that are activated only when the computer user interacts with them, i.e. opens a file. They corrupt and destroy files in the infected computer, making the computer inoperative.[25] Today, syntactic attacks frequently combine the various types of malicious code, in part to overcome the security features which have been developed, making them more difficult to detect and eliminate. Hacking is the breaking into a computer

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[22] Susan W. Brenner & Marc D. Goodman, *In Defense of Cyberterrorism: An Argument for Anticipating Cyberattacks*, 2002 U. ILL. J. L. TECH. & POL'Y 1, 27-42 (2002).

[23] *Id.* at 27.

[24] As an example, the Love Bug virus affected forty-five million users in more than twenty countries, causing between $2 billion and $10 billion in damage. Brenner, *supra* note 19 at 28.

[25] Examples of types of viruses include cavity viruses, which overwrite part of the host file, without increasing the length of the file, making them difficult to detect. Cluster viruses modify the directory table of a computer's operating system, so the virus starts before any other program. Overwriting viruses copy code over the host file's data, destroying the original program (and rendering it non-functional). The creation of viruses, which once required significant technical knowledge, has now become much easier, as there are now "tool kits" available on-line. These are computer programs with a basic point and click software technology complete with a menu of options to create a specific virus. Examples of viruses created by such toolkits include the AnnaKournikova (2001) and Shakira (2001) viruses. Jonathan J. Rusch, Lecture, The Biology of Malicious Code, Global Cybercrime Law, Georgetown University Law Center (Sep. 30, 2002). For a listing and definition of hacker's trade tools, *see* William B. Scott, *Goal for "Cyber Warrior" Training: Sharper Hacker Tactic Knowledge,* 157 AVIATION WK. SPACE TECH. 60 (Sept. 2, 2002).

system and altering its operation.[26] Many disaster and cyber attack scenarios begin with the premise that hackers successfully overcome the security functions of major infrastructure computer systems, causing havoc with trains, with telephone switching systems and with traffic light systems.[27]

Semantic attacks target not the computer's operating system but the accuracy of the information to which the computer user has access. "A system under semantic attack operates and will be perceived as operating correctly (otherwise the semantic attack is a failure), but it will generate answers at variance with reality."[28] Computer users generally implicitly accept the information they receive as accurate; the semantic attack targets the information, substituting inaccurate or misleading information. Particularly when the semantic attack occurs on an official government or corporate website, there is a high likelihood that the misinformation will be accepted by a substantial number of users before the information can be corrected. Furthermore, semantic attacks can utilize the automation of information systems to cause serious problems to dependent computer systems.[29] Examples include feeding false data to the seismic activity sensing arrays of nuclear plants, causing a shutdown of the plants and a shutoff of significant sources of electrical power, or providing false data to an air traffic control system, simulating non-existent planes and flight paths, causing confusion and disruption. On a sufficiently wide scale, the use of misinformation to disrupt normal patterns of service could cause panic and unrest. The result would be

[26] Brenner & Goodman, *supra,* note 22 at 31. An example of hacking occurred in Maroochy Shire Queensland, where an Australian man hacked into a computerized waste management system by using a laptop equipped with an antenna, causing spillage of 264,000 gallons of raw sewage onto the local tourist resort. *See also* National Infrastructure Protection Center, HIGHLIGHTS, Issue 3-02, 6 (June 15, 2002)

[27] *See, e.g.*, Brenner & Goodman, *supra*, note 22 at 23-25; Peter Piazza, *Who's Winning the Cyberwars?,* 46 SEC. MGMT. 71 (Dec. 1, 2002); Douglas Waller, *Onward Cyber Soldiers,* TIME, 38 (Aug. 21, 1995).

[28] Brenner & Goodman, *supra* note 22 at 31-32.

[29] In one semantic attack, in August, 2000, involving the Emulex Corporation, a former employee of Internet Wire, a business reporting service, sent a notice purporting to be from Emulex announcing the resignation of the corporation's Chief Executive Officer and restating the corporate earnings. Internet Wire distributed the information, and the value of the stock dropped 61 percent before the hoax was exposed. $2.54 billion in market capitalization disappeared temporarily. The people who lost the most money in the transactions were those who had pre-set sell orders, so that computer programs automatically transacted a sale, without human intervention. Brenner & Goodman, *supra* note 22 at 36-37.

"The War of the Worlds" radio broadcast.[30] This would be particularly true if a semantic attack on dependent computer system were coupled with a coordinated attack on official internet information sources. In an information dependent society, the inability to access accurate information is likely to result in significant civil unrest.[31]

Mixed attacks combine syntactic and semantic attacks, attacking both the operating programs of the computers and introducing false data to the system. By combining a disabling of critical operational systems with a feeding of disinformation, any number of scenarios destructive to the extant political system can be posed.[32]

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[30] On October 30, 1938, the Mercury Radio Theater broadcast an adaptation of H. G. Wells' science fiction novel, War of Worlds. The dramatization was written as though it was a contemporary news broadcast of an invasion of Martians. Listeners who were unaware they were listening to a fictional work panicked. Of an estimated six million listeners, it is believed that one million thought they were listening to a real broadcast. A significant number of people packed into their cars and tried to escape the invasion. Subsequent broadcasts of the play in Chile in 1944 and in Ecuador in 1949 resulted in civil unrest as well. MuseumofHoaxes.com, *The War of the Worlds,* http://www.museumofhoaxes.com/war_worlds.html (last visited May 7, 2003).

[31] Brenner & Goodman, *supra* note 22, at 31-39.

[32] By way of example, Brenner and Goodman provide the following scenario:

> Or imagine that it is a heavy travel day, a few days before Christmas. At a selected hub airport -- LaGuardia, O'Hare, Atlanta, Los Angeles, Dulles, Denver and Dallas -- non-lethal explosions occur in checked baggage, each exploding before the planes take off. An immediate syntactic attack on airport communication systems follows, freezing security and check-in controls. Next comes the release of a flash worm designed to destroy data. The flash worm erases all files in the airport computer systems, thereby immobilizing the recovery of travel information and aborting all travel activity involving these airports. The terrorists then launch a semantic attack, taking credit for the attack and blaming their actions on "the treachery and hypocrisy of American authorities even as to their own people." The terrorists can say they used non-lethal bombs to demonstrate vulnerabilities that still exist in the air security system; vulnerabilities they attribute to the authorities' persistent, callous disregard of citizen safety. They accuse U.S. authorities of concealing prior, successful acts of airline terrorism -- including the destruction of TWA flight 800. The American public is outraged by the disruption of their holiday travel and the destruction of their confidence in the air travel system. They are also infuriated by the notion that their leaders had been deceiving them. The media -- furious and embarrassed about the possibility that they have been government dupes -- joins in, attacking political officials and career bureaucrats. All this produces a political firestorm and extreme volatility in the stock market; the government is besieged and the economy is reeling.
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> Brenner & Goodman, *supra* note 22, at 40-41.

IV. EXAMINING THE THREAT

In the last decade, the United States has recognized the vulnerability of military and economic systems to attack via cyberspace. The first recognitions of vulnerability were as the result of the Y2K problem.[33] In the course of monitoring the remediation effort, the U.S. government, including both the Executive Branch and Congress, expended huge resources to identify systems vulnerable to the problem. At the same time, vulnerabilities due to data flow were also uncovered.[34] By way of illustration, in a congressional hearing on Y2K and oil imports, Chairman Bennett noted the extent of dependence on computer data in continuing the flow of oil, with computers being part of the delivery chain from pumping the oil out of the ground, to pipelines to ports, to the ocean vessels transporting the oil, the pumping stations at ports to onload and offload the oil.[35]

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[33] The Y2K problem, also termed the Millennium Bug, was a problem identified in computer programming which potentially could have affected the operation of many computer-based system. In the early days of computer programming, when brevity was critical due to the limited amount of memory which computer devices had available, programmers entered time parameters utilizing only two digits to denominate the year. At the turn of the millennium, the inability of computer programs to recognize the new year had potential to paralyze certain functions dependent on computer automated process. A massive remediation effort was undertaken to identify which devices were affected by the programming issue and to either provide new devices or provide reprogramming solutions to correct the issue.

[34] *See, e.g.*, THE U.S. SENATE, SPECIAL COMMITTEE ON THE YEAR 2000 TECHNOLOGY PROBLEM, *INVESTIGATING THE IMPACT OF THE YEAR 2000 PROBLEM,* S. Prt. 106-10, Feb. 24, 1999, *available at* http://www.access.gpo.gov/congress/senate/y2k/sp106-10.pdf (last visited May 11, 2003). This report provides a detailed description of many of the critical infrastructures in the U.S., including utilities, healthcare, telecommunications, transportation, financial services, some manufacturing industries and government.

[35] Hearing before the Special Committee on the Year 2000 Technology Problem, United States Senate, 106th Congress. First Session on Oil and its Availability, S.Hrg. 106-161, Apr. 22, 1999, p.14-15.

> The vulnerable nature of pipeline systems to peripheral communication and control systems was recently highlighted in Iraq. In February 1999, a missile hit a repeater station on the Kirkuk to Ceyhan oil pipeline. Although the pipeline itself was not damaged, the loss of the communication center cut the flow of oil between Iraq and Turkey. The pipeline's control centers at Kirkuk and Ceyhan terminals rely on data from repeater stations to operate valves, pressure and temperature controls along various stages of the pipeline. Without data, these control centers were effectively blind, losing operational control and ordering system shutdown. An attempt was made to operate the line manually but was aborted as operationally unfeasible, thus highlighting the vulnerability of modern pipeline systems to computerized data and communication links. Repairs took nearly 1 week to complete.

Id.

In 1998, President William Clinton issued Presidential Decision Directive 63(PDD 63) [36] addressing critical national infrastructures, both governmental and private.

> Critical infrastructures are those physical and cyber-based systems essential to the minimum operations of the economy and government. They include, but are not limited to, telecommunications, energy, banking and finance, transportation, water systems and emergency services, both governmental and private.[37]

President George W. Bush has followed that directive with new guidance in Executive Order 13231 of Oct. 16, 2001. [38] He added

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[36] Presidential Decision Directive 63 (PPD 63), *Critical Infrastructure Protection*, May 22, 1998, *available at* http://www.fas.org/irp/offdocs/pdd/pdd-63.htm (last visited March 11, 2003).

[37] *Id.* PPD 63 identified 12 areas critical to the functioning of the country: information and communications; banking and finance; water supply; transportation; emergency law enforcement; emergency fire service; emergency medicine; electric power, oil and gas supply and distribution; law enforcement and internal security; intelligence; foreign affairs; and national defense. John D. Moteff, *Critical Infrastructures: Background and Early Implementation of PDD-63*, Congressional Research Service, June 19, 2001.

[38] Executive Order 13231 of October 16, 2001, CRITICAL INFRASTRUCTURE PROTECTION IN THE INFORMATION AGE, 66 Fed. Reg. 53,063 (Oct. 18, 2001) *available at* http://www.ciao.gov/resource/eo13231.html (last visited May 10, 2003). In addition to articulating the following policy statement on protection of information systems, the Executive Order creates the President's Critical Infrastructure Protection Board, drawn from various Executive Branch agencies, tasked to ensure proper steps are taken to protect information technology infrastructures.

> Section 1. Policy.
> (a) The information technology revolution has changed the way business is transacted, government operates, and national defense is conducted. Those three functions now depend on an interdependent network of critical information infrastructures. The protection program authorized by this order shall consist of continuous efforts to secure information systems for critical infrastructure, including emergency preparedness communications, and the physical assets that support such systems. Protection of these systems is essential to the telecommunications, energy, financial services, manufacturing, water, transportation, health care, and emergency services sectors.
> (b) It is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential human and government services, and national security of the United States, and to ensure that any disruptions that occur are infrequent, of minimal duration, and manageable, and cause the least damage possible. The implementation of this policy shall include a voluntary public-private partnership, involving corporate and nongovernmental organizations.

Id.

manufacturing and health care to the list of critical infrastructures. Most recently, in February 2003, the White House issued a National Strategy to Secure Cyberspace.[39] Responsibility for cyberspace security is placed under the purview of the Department of Homeland Security.[40] The list of critical infrastructures has again expanded: "agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance, chemicals and hazardous materials, and postal and shipping."[41] A huge focus of the strategy is the economy. The strategy also recognizes that most critical infrastructures exist in the private sector, rather than being part of the government.[42]

Discussions and scenarios on cyberspace operations and cyber attack focus on a parade of horribles visited on the target state, as hackers and cyber warriors take over control of systems which manage trains, planes, dams, electricity and communications.[43] They posit death and destruction as the result of such a takeover. A closer look at the vulnerabilities appears to indicate that the scenarios fail to take into account the amount of human intervention in any of the activities attacked.[44] Trains still retain drivers and engineers, planes have pilots on board. Additionally, particularly in the United States, there is not centralized vulnerability. Most infrastructures in the United States are owned and operated as commercial enterprises, and the markets are highly fragmented.[45] Attacks would only be effective if sufficient computing power was expended to attack a significant proportion of the

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[39] THE NATIONAL STRATEGY TO SECURE CYBERSPACE, (Feb. 2003) *available at* http://www.whitehouse.gov/pcipb/cyberspace_strategy.pdf (last visited March 31, 2003).

[40] *Id.* at ix. "DHS will become a federal center of excellence for cyber-security and provide a focal point for federal outreach to state, local, and nongovernmental organizations including the private sector, academia, and the public." *Id.*

[41] *Id.* at 1.

[42] *Id.* at 2.

[43] Schmitt, *supra* note 4, at 892.

[44] James A. Lewis, *ASSESSING THE RISKS OF CYBER TERRORISM, CYBER WAR AND OTHER CYBER THREATS,* Center for Strategic & International Studies Monograph, 5-6 (Dec. 2002), *available at* http://www.csis.org/tech/0211_lewis.pdf (last visited March 30, 2003).

[45] *Id.* at 4-7. Lewis reviews many of the scenarios created by various analysts and concludes that these are largely unrealistic. He points to the systems redundancies available for many of the communications modes, the human interface for operation of many of the presumably "vulnerable" systems, as well as the fragmentation of infrastructure markets such as electricity (over 3,000 providers in the U.S.), water systems (54,064 separate water systems, although eighty-one percent of the population is served by 3,769 systems), air traffic control (90 major computer systems and nine different communications networks -- he notes that modernization of FAA systems could actually introduce greater vulnerability). *See also,* Mark M. Pollitt *CYBERTERRORISM - Fact or Fancy? at* http://www.cs.georgetown.edu/~denning/infosec/pollitt.html (last visited May 10, 2003).

particular market. Even then, very few attacks could realistically result in physical manifestations. They would result in inconvenience and inefficiency, but, by themselves, would be unlikely to cause death or destruction of the kind comparable to physical attack.[46]

An illustration of both the vulnerability and the resilience of information technology and communications infrastructures came as the result of the attacks of September 11th. The World Trade Towers were the center for a huge amount of IT and communications activities. The destruction of the Towers resulted in an estimated loss to the financial community of $3.2 billion in IT resources.[47] Nonetheless, in the immediate aftermath of the attack, the communications networks handled flows of information and communication traffic well in excess of normal demands.[48]

Of greater concern is the economic impact of cyber attacks.[49] Economic transactions, particularly for all types of financial markets, are hugely dependent on reliable information. The impact of information on the economy was well illustrated by the boom and bust cycle we are still experiencing.[50] Cyber attacks can potentially cause huge economic damage with relatively few resources. "The financial costs to economies from cyber attack include the loss of intellectual property, financial fraud, damage to reputation, lower productivity, and third party liability."[51] A direct attack on financial markets, particularly a mixed attack, which would both change economic data and target financial programs created to respond to that data, has huge long term destructive potential. Given the international economic

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[46] Lewis, *supra* note 44, at 47.

[47] CELLULAR COMMUNICATIONS & INTERNET ASSOCIATION, ET. AL., INFORMATION AND TECHNOLOGY SECTOR: NATIONAL STRATEGY FOR CRITICAL INFRASTRUCTURE AND CYBERSPACE SECURITY [hereinafter I&T NATIONAL STRATEGY], 15 (May, 2002) *available at* http://www.wow-com.com/pdf/may2002_national_strategy.pdf (last visited May 10, 2003). The area around the World Trade Center was described as "the most telecom-intensive square mile in the world. Equipment lost as the result of the attack included 10 cellular sites for Verizon Wireless, four cells for Sprint PCS's wireless network, six Manhattan cell sites for Cingular Wireless and 200 high-speed circuits for WorldCom.

[48] I&T NATIONAL STRATEGY, *supra* note 47 at 15-16. AOL Instant Messenger logged 1.2 billion messages, approximately 100 times normal traffic. Telephone traffic was twice normal levels for both AT&T and MCI, Cingular Wireless experienced a 400 percent rise in usage.

[49] Bruce Berkowitz**,** *Warfare in the Information Age,* ISSUES IN SCIENCE AND TECHNOLOGY, 59-66 (1995) *reprinted in* THE INFORMATION AGE: AN ANTHOLOGY ON ITS IMPACT AND CONSEQUENCES**,** (David S. Alberts & Daniel S. Papp, eds.), *available at* http://www.dodccrp.org /antch19.html (last visited May 10, 2003).

[50] One might view the scandals surrounding the feeding of information to potential buyers by brokers whose companies also had a financial interest in the market as an illustration of semantic attack.

[51] Lewis, *supra* note 44, at 9.

interdependency, such an act by a state actor is highly risky. An attack on a state's financial markets is likely to have a cascade effect on other world markets, including the market of the attacker.

V. USING FORCE IN INTERNATIONAL RELATIONS

The right of a nation to use force, once an accepted tool of national policy in international relations, has become very circumscribed since the adoption of the United Nations Charter.[52] Article 2(4) of the UN Charter articulates the current international law rule on the use of force: "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."[53] Article 51 provides the sole exception to use of force by individual Members without express Security Council sanction: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[54] These simple declarations mask the complexity of the questions that the Charter leaves unanswered. To fully appreciate the workings of these two Articles, it is necessary to review the historical developments leading to the adoption of the UN Charter.

The move to prohibit use of force as an instrument of national policy began before World War I. Prior to that time, particularly in the 19th Century, Von Clausewitz's declaration, "War is regarded as nothing but the continuation of state policy with other means,"[55] was a generally accepted premise. The Napoleonic Wars brought a huge change in the nature of war.[56]

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[52] Charter of the United Nations, signed 26 June 1946, entry into force 24 Oct. 1946 *available at* http://www.un.org/aboutun/charter/ (visited Mar. 13, 2003) [hereinafter UN CHARTER].

[53] *Id*.

[54] *Id*. The Article goes on to state: "Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." *Id*.

[55] KARL VON CLAUSEWITZ, *in* ON WAR, author's note (1833), trans. by O.J. Matthijs Jolles (1943) from The Columbia World of Quotations, 1996 *available at* http://www.bartleby.com /66/5/12605.html (last visited March 12, 2003).

[56] Or, in current analytic terminology, caused a RMA – revolution in military affairs. For a discussion of revolutions in military affairs and their effect on the law of war, *see* Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare,* 2 YALE H.R. & DEV. L. J. 143 (1999), especially footnotes 1 and 2. Furthermore, the development of information warfare is largely viewed as the latest RMA. *See, e.g.*, Grier, *supra*, note 6.

Napoleon introduced the concept of compulsory national conscription to the waging of war. Armies no longer were composed of professional soldiers but of ordinary citizens required to don uniforms and take up arms. The larger armies also resulted in a greater number of casualties, both military and civilian. The nature of the conflicts moved from being discrete battles across limited territory to national mobilizations, requiring industrial support to supply arms and equipment. The increased lethality of the endeavor resulted in an effort to limit the means of war.

By the second half of the 19th Century, there was an international movement to codify the law of war. The Lieber Code is generally recognized as the first codification of the laws of war.[57] President Abraham Lincoln adopted it and issued it as General Order No. 100 to the Union Army during the American Civil War.[58] A subsequent effort, this time international in scope, was the Oxford Manual published by the Institute of International Law in 1880.[59] The rules of the Oxford Manual were subsequently largely adopted into international conventions on the law of war, illustrating the wide acceptance of the rules articulated therein.[60] The first major international

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[57] Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity,* 92 A.J.I.L. 213, 214 (Apr. 1998).

[58] Instructions for the Government of Armies of the United States in the Field as prepared by Francis Lieber, and promulgated as General Orders No. 100, by President Lincoln, 24 April 1863, contained in The Laws of Armed Conflicts, Schindler, Dietrich and Jiri Toman, ed., 2nd ed. Henry Dunant Institute, Geneva, 1981, 3-24 [hereinafter, Schindler & Toman]. *See also*, LESLIE C. GREEN, *What Is – Why is There – The Law of War* 19, *in* ESSAYS ON THE MODERN LAW OF WAR, (2nd ed., 1999)[hereinafter GREEN, ESSAYS]. The Lieber Code exerted tremendous influence on other countries which were also interested in formal codifications of the law of war. Army law of war manuals of Prussia and Great Britain followed the template provided by Lieber. Carnahan, *supra* note 57, at 215.

[59] Schindler & Toman, *supra* note 58, at 35. The Preface to the Manual states:

> War holds a great place in history, and it is not to be supposed that men will soon give it up -- in spite of the protests which it arouses and the horror which it inspires -- because it appears to be the only possible issue of disputes which threaten the existence of states, their liberty, their vital interests. . . . The Institute . . . does not propose an international treaty...but, being bound by its by-laws to work, among other things, for the observation of the laws of war, it believes it is fulfilling a duty in offering to the governments a Manual suitable as the basis for national legislation in each State and in accord with both the progress of juridical science and the needs of civilized armies. . . . the Institute . . . has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable.

Manual Published by the Institute of International Law (Oxford Manual) Adopted by the Institute of International Law at Oxford, 9 Sept. 1880, *in* Schindler & Toman, 35-48, 36.

[60] GREEN, ESSAYS, *supra*, note 58, 23.

agreement regarding the law of war (*jus in bello*) is the Declaration of St. Petersburg of 1868, which prohibited the use of particular bullets.[61] This effort was followed by the Hague Peace Conference of 1899 which resulted in additional Conventions and Declarations, limiting use of certain weaponry and setting out obligations to protect wounded, sick and shipwrecked. The Second Hague Conference resulted in the adoption of thirteen conventions and one declaration.[62] The most important of these for the law of war is Hague Convention IV of 1907 and its annexed regulations.[63] Article 22 of the annexed regulations sets out the premise: "The right of belligerents to adopt means of injuring the enemy is not unlimited."[64] Article 23 contains specific prohibitions on means and methods of warfare. Particularly notable for purposes of this discussion is Paragraph (e) prohibiting employment of "arms, projectiles, or material calculated to cause unnecessary suffering."[65]

The vast human suffering visited on much of Europe during World War I resulted in the effort to prohibit use of force as a means of dispute resolution. The Covenant of the League of Nations provided some limitation on the use of force, but overall, was an unsatisfactory effort, largely due to the political realities of its implementation.[66] War was still a permitted means of conflict resolution, albeit only after a signatory submitted to certain procedures seeking peaceful settlement.[67] Resort to war was not in and of itself illegal; the

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[61] 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, signed 11 Dec. 1868, entry into force 11 Dec. 1868, *in* DOCUMENTS ON THE LAWS OF WAR, 3rd ed., (Adam Roberts and Richard Guelff, ed., Oxford University Press 2000), 53-54. The Declaration also contains the much quoted articulation "That the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable . . . ." This appears to be the first articulation of a doctrine of proportionality in a binding multinational document. [hereinafter Roberts & Guelff, Documents]

[62] Roberts & Guelff, Documents, *supra* note 61, at 67.

[63] Hague Convention IV Respecting the Laws and Customs of War on Land, *signed* 18 Oct 1907, entry into force 26 Jan 1910, *in* Roberts & Guelff, Documents, *supra* note 61, at 69-84.

[64] *Id*. at 77.

[65] *Id*.

[66] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 56-59 (1963). The Covenant, adopted as part of the treaties of peace ending World War I, suffered from a flaw which continues in the definitional nature of current treaties – the framers were unable to provide a definition of aggression which would provide some definitive limitations on state action. The definition of aggression remains an outstanding problem even today, the debate being periodically resurrected in international treaty negotiations. The most recent debates have been those in the negotiation of the Treaty for the International Criminal Court; the definition of "aggression" continues to be a tabled issue, as international agreement on the question remains contentious. *Id*.

[67] *Id*. at 68.

failure to utilize the settlement procedures was the violation of the treaty.[68] In 1928, the Kellogg-Briand Pact[69] explicitly outlawed war. Articles I and II describe the undertakings of the States party to the Treaty:

> Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.
>
> Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[70]

The Pact resulted from an exchange of notes between M. Briand, the French Foreign Minister to Mr. Kellogg, the U.S. Secretary of State, proposing an agreement to outlaw war. The U.S. response was to propose the creation of a multinational agreement "renouncing war as an instrument of national policy."[71] However, the French acceptance of the proposal changed the language "renunciation of war as an instrument of national policy" substituting "war of aggression." The exchange between the parties continued, with the French insisting on the inclusion of some recognition of the "rights of legitimate self-defence[sic]." The recognition of a right of self-defense was contained in diplomatic exchanges prior to the signature of the treaty.[72] The British Government also accepted the treaty with a reservation recognizing a right of self-defense, not only of Great Britain itself, but also in respect of "certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety."[73] The Kellogg-Briand Pact remains in force, and constitutes the legal underpinning of current prohibition against States' use of force.[74]

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[68] *Id*.
[69] The General Treaty for the Renunciation of War, 27 August 1928, 94 L.N.T.S. 796. Known variously as the Kellog Pact, Kellogg-Briand Pact, and the Pact of Paris. BROWNLIE, *supra* note 66 at 74-75.
[70] Kellog-Briand Pact, *quoted in* BROWNLIE, *supra* note 66 at 75.
[71] M. Briand proposal of 6 April 1927, *quoted in*, BROWNLIE, *supra* note 66 at 80.
[72] BROWNLIE, *supra* note 66 at 81, footnotes omitted.
[73] Cited in LESLIE C. GREEN, *Armed Conflict, War and Self-Defense, in* GREEN, ESSAYS, *supra* note 58 at 101.
[74] BROWNLIE, *supra* note 66 at 91, 112-13.

The international response to World War II, which found the scourge of war visited on cities and civilians, resulted in a renewed effort to provide an effective framework for international cooperation and resolution of international disputes without the use of force. The creation of the United Nations included a prohibition against use of force as a means of conducting international relations. Under Article 2(4) of the UN Charter, Member states are required to refrain from both use of force as well as threat of use of force.[75] The previous peace treaties contained prohibitions against "war;" the response of state actors was to refrain from formal declarations of war while pursuing their policies through use of armed force.[76] The language of Article 2(4) is therefore deliberately broader to encompass more situations, and was expanded to include threat of force. This broad prohibition has two exceptions. The first is the use of force with the authorization of the Security Council, under the determinations and procedures of Chapter VII. The second, articulated in Article 51,[77] recognizes the customary international law right of self-defense, both individual and collective. Currently, 191 nations are parties to the UN Charter;[78] the virtual universality of the acceptance of the UN Charter makes it clear the use of force in the conduct of a Party's international relations is prohibited by international law other than in self-defense.

VI. DEFINING USE OF FORCE

The UN Charter uses the terms "aggression," "armed attack" and "use of force" in its various provisions without defining any of the terms. This has resulted in over 50 years of debate on meanings of those terms. An examination of the debates surrounding the adoption of the UN Charter,

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[75] UN CHARTER, *supra* note 52. "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 manner inconsistent with the Purposes of the United Nations."

[76] Oscar Schacter, *International Law: The Right Of States To Use Armed Force,* 82 MICH. L. REV. 1620, 1623 (1984)

[77] UN CHARTER, Art. 51 *supra* note 52:

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

[78] UN Press Release ORG/1317 (26 September 2000) Updated 27 September 2002 *at* http://www.un.org/media/utilities/stateslist_banner.gif (last visited March 13, 2003).

subsequent legal writings and international practice is needed to inform those definitions, although there is still no complete international consensus.[79] There is, however, agreement that the terms are not synonymous.[80] During the drafting of the Charter, the United States and other major powers opposed the Soviet Union's proposed inclusion of a definition of aggression on the basis that no definition could adequately encompass all the circumstances to be considered in determining whether a state action constituted aggression in a particular case.[81]

There were persistent efforts over the years to arrive at a definition of aggression,[82] but it was not until 1974 that international consensus on the definition of aggression was reached in the United Nations General Assembly Resolution 3314.[83] Article 1 of the Resolution defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[84] Article 2 provides that the first use of armed force by a State is *prima facie* evidence of aggression, unless the Security Council determines, after an examination of the surrounding circumstances, that an act of aggression is not justified.[85] Article 3 lists seven actions which qualify as aggression. All involve the use

[79] Albrecht Randelzhofer, *Article 2(4),* MN 15, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2d ed., 2002).
[80] *Id.* at Article 2(4), MN 15
[81] Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?,* 22 HOUS. J. INT'L L. 223, 236-37 (2000).
[82] INGRID DETTER, THE LAW OF WAR, 67-68 (2d ed. 2000). Various draft resolutions defining aggression were proffered by member States, including the Soviet Union in 1950 (USSR, A/C.6/l.208), and Boliva (A/C.6./L.211). A series of Special Committees was set up to draft a definition by various General Assembly resolutions in 1952, 1954, 1957 and 1967. The debate on the utility of the definition and its limitation continues, particularly in view of the growth of asymmetric warfare by non-state actors.
[83] Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Suppl. No. 31 at 142, U.N. Doc A/9631 (1974), *reprinted as* Document G *in* WALTER GARY SHARP SR., CYBERSPACE AND THE USE OF FORCE 211-17, (1999). For an extensive discussion on the legal effect of a General Assembly Resolution, *see* GAETANO ARANGIO-RUIZ, THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW, 73-88 (1979).
[84] SHARP, *supra* note 83 at 214.
[85] *Id.* at 214. Included in the circumstances is "the fact that the acts concerned or their consequences are not of sufficient gravity."

of physical force against another country.[86] However, Article 5 of the Resolution notes the list of acts is not all inclusive, leaving open the door for additional debate.[87]

Use of force also remains undefined in international treaties. The prevailing view among international legal scholars seems to be that the term

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[86] Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockage of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Definition of Aggression, *supra* note 83.

[87] *Id.* at 215-16. In an interesting debate on aggression, in 1960, the Soviet Union presented a draft resolution to the Security Council condemning the United States' U-2 flights over the Soviet Union as aggressive acts. Their representative, Andrei Gromyko, argued the overflights were aggressive acts "creating a threat to universal peace." The Security Council disagreed, finding the incursion to be a violation of Soviet sovereignty but not an act of aggression. The Argentine representative, in particular, referred back to the Soviet Union's proposed draft on aggression and concluded the act complained of did not fit into any of the fourteen categories listed in the draft. UN SCOR, 15th Sess., 858 mtg, at 27, U.N. Doc. S/PV.857 (1960)

"use of force" in the UN Charter encompasses only use of military force.[88] Again, the debates surrounding the adoption of the UN Charter make clear that economic coercion is not included in the definition of use of force.[89] Article 41 of the UN Charter, which sets out measures "not involving the use of armed force" which the Security Council may employ to enforce its decisions, lists "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication."[90] A significant number of States apparently would support a proposition that in circumstances where coercive economic pressures are so severe as to threaten the territorial integrity of a state or its independence, those pressures may constitute "use of

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[88] HANS KELSON, U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES: COLLECTIVE SECURITY UNDER INTERNATIONAL LAW, 57-58 (1954); Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?,* 22 HOUS. J. INT'L L. 223, 238 (2000). *See also*, NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS, 13 (1950):

> Where the League Covenant forbade "resort to war", the Charter prohibits "the threat or use of force". The different terminology is justified by the experience of the inter-war period. The use of force without an actual declaration of war has developed to a fine art. By prohibiting what is of the essence of war (i.e. the use of force), the Charter intends to cut short the unending squabble which attends a decision as to the existence of a state of war. Unfortunately, "force" itself is a flexible term. Under modern conditions the threat or use of economic retaliation may be as effective against a weaker State as the threat or use of armed force. But it appears that the prohibition of Article 2(4) is directed exclusively at force in the sense of "armed force."

See also, Randelzhofer, *Article 2(4), supra*, note 79, MN 16, who states: "The term does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force."

[89] In the Dumbarton Oaks Proposals, Brazil proposed the term force include "economic measures", however, the proposal was rejected. The Western states in particular rejected the concept that economic coercion fit within the scope of Article 2(4); the communist bloc and Third World nations would include it. Richard W. Aldrich, *How Do You Know You Are At War in the Information Age?,* 22 HOUS. J. INT'L L. 223, 241 (2000). *See also*, BELATCHEW ASRAT, PROHIBITION OF FORCE UNDER THE UN CHARTER: A STUDY OF ART. 2(4), 40 (1991). BROWNLIE, *supra* note 66 at 361-62. Randelzhofer, Article 2(4), *supra* note 79 at MN 17-18; Michael N. Schmitt, *supra* note 4 at 905. Asrat notes:

> Brazil took up the question of its amendment during the discussion of the draft Article in Committee I/1, but again the amendment was not accepted. The record states merely that the Belgian delegate "recalled that the subcommittee had given the point about 'economic measures' careful consideration ." And we are left with no further clarification as to what those reasons were.

[90] UN CHARTER, art. 41, in Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, *supra* note 52.

force" under Article 2(4).[91] The debate surrounding the drafting of the Vienna Convention on the Law of Treaties, particularly with reference to Article 52, focused on the term "use of force" in Article 2(4). The conclusion of that

[91] SHARP, *supra* note 83 at 88-91. Sharp catalogues various legal commentator's views on whether economic coercion fits within the scope of "use of force" in Article 2(4). He concludes:

> Accordingly, a complete contextual analysis reveals that Article 2(4) is a prohibition on a spectrum of force that does not include coercive political and economic sanctions that are intended to influence another state's policy or actions, but ranges from state activities that begin with coercive political and economic sanctions that threaten the territorial integrity or political independence of another state to that of armed force. Boycotts, the severance of diplomatic relations, the interruption of communications, and economic competition or sanctions between states are lawful and not considered a threat or use of force. In contrast, political or economic aggression is a use of force within the meaning of Article 2(4).

Sharp goes on to posit a scenario where, in incremental steps, Country B takes measures initially to curtail some of the communications of neighboring Country A by initially prohibiting transmission of economic data into the neighboring country, then jamming all CNN broadcasts, followed by the creation of a false database and permitting it to be compromised in a disinformation campaign, to finally taking measures which curtail all electronic transmissions to and from Country A, resulting in the A's economic downfall, and acquiescence to Country B's demands. In the spectrum of activity, Sharp considers only the final cutoff of communications as a use of force under Article 2(4), terming it "the electronic equivalent of an armed attack." *Id*. at 92-93.

debate concurred with limiting the definition of "use of force" in the UN Charter.[92]

This limited definition of the use of force causes particular problems in analyzing cyber attacks. As noted above, one of the greatest threats with cyber attack is the economic impact on the target nation. Particularly where the attack is on economic infrastructures, such as financial markets and banks, destruction of national wealth can paralyze the state with a devastating effect on the state's ability to maintain independence. The issue which arises is whether the use of a cyber attack on the economic operations within the target nation fits more clearly into the definition of economic coercion or whether it can fit into armed attack. Arguing that it constitutes economic coercion ignores the destructive result possible through cyber attacks. With both syntactic attacks, which destroy the computer operating system or the underlying data, and semantic attacks, which are more comparable to an interruption or disruption of communications, but without the destructive effect, an attacker can destroy both functions of critical economic infrastructure and accumulations of wealth that are key to fueling a thriving economy. While the short term result is unlikely to be death of individuals, the longer term result is

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[92] I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 15-17 (2d ed., 1984), *quoted in* BARRY E. CARTER AND PHILLIP R. TRIMBLE, INTERNATIONAL LAW, 122-23 (3d ed., 1999).

> Article 52 of the Convention deals with coercion of the State itself and again lays down a rule of absolute nullity. The Commission, after reviewing the history of the matter and taking into account the clear-cut prohibition of the threat or use of force in Article 2(4) of the United Nations Charter, considered that these developments "justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today." Discussion at the Conference on this article tended to concentrate on two issues:
> (a) whether the expression "threat or use of force" could, or should, be interpreted as covering economic and political pressure.
> (b) The temporal application of the rule - that is to day, the date from which the rule invalidating a treaty procured by the threat or use of force in violation of the principles of international law embodied in the Charter may be said to operate. The records of the Conference reveal strongly conflicting views on both these points. That the rule now embodied in Article 52 of the Convention represents the modern law on this topic is beyond serious dispute; but there are clearly uncertainties about the scope of the rule and its temporal application, and these uncertainties are not removed by the lapidary formulation of the article . . . . From this, it may be concluded that Article 52 may savour more of codification than of progressive development, at least insofar as the expression "threat or use of force" is confined to physical or armed force and no question arises as to the temporal application of the rule.

Id.

no less devastating than a physical blow which destroys means of production. However, from a legal analyst's point of view, the fact that semantic attacks can also be categorized as propaganda efforts makes a determination that such attacks constitute use of force almost impossible.

UN General Assembly Resolution 2625, the Declaration on Friendly Relations[93] provides:

> [e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[94]

While this is a somewhat circular proposition and does not truly define use of force, it is at least illustrative of activities which may be considered use of force.

The International Court of Justice (ICJ) opinion in *Nicaragua v. United States*[95] provides extensive discussion of the term "use of force." Nicaragua had charged the United States with unlawful use of force by various means including mining of harbors, training of the contra rebel groups, and providing money, equipment and logistical support to the contras. The Court considered what constitutes use of force under customary international law,

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[93] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Suppl. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter UN Resolution 2625, Declaration on Friendly Relations].

[94] UN Resolution 2625, Declaration on Friendly Relations. A General Assembly Resolution is generally not held to be a legally binding document, except in those circumstances where it is meant to be declaratory of customary international law, is supported by all members and is observed in the practice of states. U.S. representatives have publicly expressed that the Declaration on Friendly Relations is one of few General Assembly Resolutions the U.S. views as "an authoritative restatement of customary international law." DEPARTMENT OF DEFENSE OFFICE OF GENERAL COUNSEL, *AN ASSESSMENT OF INTERNATIONAL LEGAL ISSUES IN INFORMATION OPERATIONS,* p. 17, May, 1999 *available at* http://www.terrorism.com/documents/dod-io-legal.pdf (last visited March 10, 2003).

[95] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14 (June 27) (Merits). Although the ICJ opinion has been criticized by some international law scholars, it is nonetheless generally accepted as a definitive articulation of international law, particularly in defining what acts constitute use of force in customary international law.

being precluded from considering the definitions under the UN Charter.[96] The Court began by cataloguing what acts constituted use of force giving rise to individual self-defense:

> [i]n the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defense of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein. . . . But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[97]

In examining the U.S. support to the contra rebels attacking the Sandanista government, the Court observed:

> while the arming and training of the contras can certainly be said to involve the threat or use of force against Nicaragua,

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[96] The United States had maintained that their reservation to the Statute of the International Court of Justice (the Vandenberg Reservation) precluded ICJ's jurisdiction over matters arising under multilateral treaties unless all the parties to the treaty affected by the decision are also parties to the case before the court. The United States argued other Central American states would be affected by the Court's decision on the merits. While the Court agreed that the reservation precluded them from examining Nicaragua's claims under both the UN Charter and the Organization of American States Charter, they also concluded that the norms regarding prohibition against use of force and self-defense expressed in Articles 2(4) and 51 respectively of the UN Charter also existed in customary international law. The ICJ determined they continued to have jurisdiction over the questions. *See* Nicaragua v. United States, 1986 I.C.J. 14, 92-99, paras. 172-88. *See also,* Monroe Leigh, *Decision International Court of Justice – Multilateral Treaty Reservation – Use of Force – Nonintervention – Collective Self-Defense – Justiciability,* 81 A.J.I.L. 206, 207 (1987).

[97] Nicaragua v. United States, 1986 I.C.J. 14, 103, Para. 195.

> this is not necessarily so in respect of all the assistance given by the United States Government. In particular, the Court considers that the mere supply of funds to the contras, while undoubtedly an act of intervention in the internal affairs of Nicaragua . . . does not in itself amount to a use of force.[98]

Although it has been argued that trespass by one state on the sovereign territory of a state, without other action, should not be considered a use of force unless it is "accompanied by an intent to violate territorial integrity or political independence,"[99] reference to the *travaux preparatoires* shows that the additional language in Article 2(4) is not meant to be restrictive in this manner. Not every incidence of trespass onto the sovereign territory of a state constitutes use of force. By way of illustration, in 1960, following the incursion of the United States U-2 flight into Soviet territory, the Soviet Union brought the issue to the Security Council. The Soviet Union proposed a Security Council resolution condemning the United States for its aggressive acts.[100] The Security Council debated the incursions. The Council accepted

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[98] *Id*. at 118, para. 228.

[99] BROWNLIE, *supra* note 66, at 265-66. The United Kingdom argued in the Corfu Channel Case because the British actions in respect of Albania "threatened neither the territorial integrity nor the political independence of Albania." The I.C.J. rejected the argument. *See also* DETTER, *supra* note 82, at 20-21; Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello,* 84 INT'L REV. OF THE RED CROSS, 365, 372 (2002). Both authors maintain that isolated border incursions or small scale raids do not reach the level of armed conflict.

[100] Cable Dated 18 May 1960 from the Minister for Foreign affairs of the Union of the Soviet Socialist Republics Addressed to the President of the Security Council, with a Copy to the Secretary General of the United Nations, S/4314 18 May 1960.

> The Government of the Union of the Soviet Socialist Republics requests that the Security Council should be convened urgently to examine the question of aggressive acts by the Air Force of the United States of America against the Soviet Union, creating a threat to universal peace. The need for immediate examination of this question arises from the fact that military aircraft of the United States of America have repeatedly encroached upon the airspace of the USSR and that the Government of the Untied States of America has declared these actions on its part which violate the frontiers of other sovereign States to be its State policy.

Id.

that the U-2 flight constituted intelligence activities,[101] but did not concur that the trespass constituted an act of aggression. The concept that intelligence activities are not illegal under international law is a significant one for cyberspace operations.[102]

If, however, the trespass is accompanied by other acts that appear preparatory to the use of armed force, the conclusion that trespass is not an act of aggression or a use of force can change. A single aircraft, intruding into the sovereign airspace of country, armed with a nuclear weapon or other weapon of mass destruction, has the potential to deliver a substantial military blow. The current consensus today is that notwithstanding nations' complete and exclusive sovereignty over their airspace, response to both military and

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[101] *See, e.g.*, statement of Mr. Berard, France's representative:

> In truth, the incident of 1 May and the overflights which the Government of the USSR is denouncing come under the category of intelligence activities. These activities, beyond all question, are regrettable and it may be admitted that they imply interference in a country's internal affairs. My Government would wish that the States could abstain from such activities, but in the present world situation, with the opposition that places two groups of countries face to face, or at the very least, considering the distrust with which they watch one another, these activities are, alas, a current practice. What country does not find itself implicated, and which would have the right to cast the first stone? Is the Soviet Union, which today expresses indignation, sure of being, more than any other, above reproach on this score? If the rule which the Soviet Union is advocating today had been applied to it, would it not have risked, since 1945, being summoned frequently before the Security Council for the numerous incidents, proved by patent facts, in which it has found itself involved in the United States, Canada and almost all the other NATO powers? If this was not the case, it is because in practice -- something which is perhaps open to criticism but which is generally accepted -- such activity does not result in recourse to international bodies. . . . Under these conditions, the French delegation cannot admit that the acts which have been charged represent acts of aggression according to Article 39 of the Charter, or according to the applicable rules of international law.

U.N. SCOR, S/PV. 858 , 4-5, May 19, 1960.

[102] The interaction between cyberspace operations and intelligence activities was seen in the debates during Kosovo operations. In addition to the issue debated by U.S. operations planners and their advising attorneys on how to retaliate against the computer attacks by Serbia, there was a debate between the information warfare community and the intelligence community. The information warfare community favored counterattacks on Serbia. The intelligence community saw the counterattacks as destructive of their capability to effectively gather intelligence. Furthermore, the issue of third party nations or "neutrals" and use of their cyber facilities an information systems further clouded the discussions. ANTHONY H. CORDESMAN, CRITICAL INFRASTRUCTURE PROTECTION AND INFORMATION WARFARE, Final Review Draft for Comment, Vii (Dec. 8, 2000), *available at* http://www.csis.org/homeland/reports/dacriticalipiw.pdf (last visited May 9, 2003).

civilian aircraft incursion in their airspace requires a reasonable response proportionate to the danger posed by the trespassing aircraft.[103] This does not interfere with a nation's inherent right of self-defense; if the perception of the nation suffering trespass is that there is a danger of attack, then that nation is justified in exercising that right. Furthermore, the nature of the aircraft is likely to change the perception of danger posed.[104]

By contrast, under customary international law, as well as the United Nations Convention on the Law of the Sea,[105] ships can pass through the territorial waters of a nation without violating the sovereignty of the nation, under the right of innocent passage. Innocent passage is the right of a vessel to continuous and expeditious transit through the territorial seas of a coastal nation for the purpose of traversing the seas, without entering the state's internal waters.[106] Certain activities are precluded within the territorial waters, particularly for military vessels, including, for example, exercise or practice with weapons, flying of military aircraft, collection of information to the prejudice of the security of the coastal state, fishing activities, and carrying out research or survey activities.[107] While a nation may suspend innocent passage temporarily when such action is required for the protection of the security of the nation, it may do so only with advance publication or notice to mariners.[108] Any such suspension must be non-discriminatory, temporary, and applied to a specific geographic area.[109] A ship's movement through territorial waters therefore is not a use of force, unless accompanied by prohibited activities.[110] It has been suggested by one commentator that the nature of cyberspace makes

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[103] BROWNLIE, *supra* note 66, at 99.

[104] Aircraft have known profiles and in addition, military aircraft have IFF (identify friends or foes) electronic identification equipment which provides observers, with a "squawk" i.e., an electronic signature, particular to the type of craft being flown. John T. Phelps II, *Contemporary International Legal Issues – Aerial Intrusions by Civil and Military Aircraft in Time of Peace,* 107 MIL. L. REV. 255, 261 (1985).

[105] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[106] U.S. NAVAL WAR COLLEGE, OCEANS LAW AND POLICY DEPARTMENT, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS [hereinafter COMMANDER'S HANDBOOK], 2-7 – 2-9, (1997); Operational Law Handbook, 30-3

[107] *Id.* at 2-8.

[108] *Id.* at 2-10.

[109] *Id.*

[110] For a discussion by the International Court of Justice on rights of innocent passage, see The Corfu Channel Case, (Albania v. U.K.) 1949 I.C.J. 4, particularly at 29-30. The other issue in the case, the United Kingdom's minesweeping of the Corfu Channel over the protest of the Albanian Government, also touches the question of when an incursion into sovereign territory of a state constitutes an act of aggression.

the law of the sea regime of innocent passage the most useful framework to utilize in creating an international scheme for cyberspace.[111]

Whether cyberspace operations violate the territorial integrity of the state is a complex question. Given that the operations consist of transmission of electronic data over varied media, it is significantly more complex than the comparable operation in the physical reality. It is relatively simple to discern the location of a state border and then to determine whether there has been a violation of that border. In cyberspace, the issue of locale is one of great debate, currently focused in the arena of cybercrime. There is little agreement between sovereigns regarding who has proper jurisdiction over a particular criminal act. Since cyberspace and the information contained therein (and, usually, the target of an attack) cannot be accurately defined by physical dimension, when and how there is violation of a particular sovereign's territory will require some international agreement on situs of the acts.[112]

Nor is there agreement on how much of an entry must there be to constitute a territorial violation. A prime usage of cyberspace operations is collection of intelligence and data. As seen above, in the U-2 incident, there appears to be some international consensus that espionage itself is not an illegal act in international relations.[113] (It is, however, a criminal act in each state's domestic law.) It is therefore posited that entry into computer systems to observe and obtain information, without causing a destructive or modifying effect, while it may constitute a violation of territorial integrity, does not constitute either an armed attack or use of force.

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[111] Steven M. Barney, *Innocent Packets? Applying Navigational Regimes from the Law of the Sea Convention by Analogy to the Realm of Cyberspace,* 48 NAVAL L. REV. 56 (2001). While such an adoption would make many official state transactions via cyberspace clearly legal, it would not solve the issue of using cyberspace in a response which is considered a use of force. A primary tenet of the concept of innocent passage is that transit is permitted in a peaceful mode, i.e., in a normal operational mode for warships but with weapons systems secured. However, the limitation against using weapons systems or showing other indicators of using force would also apply in cyberspace. Therefore, during a time of conflict, use of cyberspace and the cyberspace nodes and systems in a neutral country would still not be permissible, unless one argues that mere passage of an information packet containing the means to damage the systems of the target nation is comparable to the passage of a warship enroute to the Arabian Gulf for operations against Iraq when transiting through national waters, as opposed to a warship armed and prepared for imminent attack.

[112] For a more extensive discussion of this issue, *see* Sean P. Kanuck, *Recent Development: Information Warfare: New Challenges for Public International Law*, 37 HARV. INT'L L.J. 272, 286-88 (1996).

[113] *Id.* at 276.

VII. THE RIGHT OF SELF-DEFENSE

The scope of the right of self-defense has generated great debate since the adoption of the UN Charter.[114] There are two identifiable schools of thought on the matter.[115] The language of the UN Charter's Article 51, referring to the "inherent right of self-defence [sic]" has opened the floodgates of discussion on the derivation of this inherent right and the extent of the right. The issues include analyses of what constitutes armed attack justifying self-defense as well as whether or not there is any right to anticipatory self-defense. As seen above, the concept that a state has a right to self-defense despite a general abrogation of the right to use force is well-embedded in the development of the overarching restriction. This debate becomes even sharper when translated into the sphere of cyberspace. What constitutes an act attacking information systems or computer network attack (CNA) triggering the right of self-defense? Does the nature of the threat in information warfare create a different threshold for the right (if any) of anticipatory self-defense to ensure the continued functioning of critical infrastructure nodes?

There is not a bright line identifying when the right of self-defense arises. The language of the text of Article 51 is couched in conditional clauses: "if an armed attack occurs against a Member" and "until the Security Council has taken measures necessary." The practice which has arisen since the UN Charter's entry into force also does not provide much clarity, since state actors using force since 1949 invariably have justified their military actions by invoking self-defense. Furthermore, it continues to be unclear what constitutes "an armed attack" sufficient to give rise to the "inherent right." Some commentators have charted a spectrum of action, where a minor incursion into the sovereign territory of a state with a minimum use of force does not give rise to right to act in self-defense, whereas a more robust action, either causing significant destruction or targeting, does. Secondly, the act of self-defense must generally be within a very short temporal span after the offending action. A long delay in response, without further aggressive action

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[114] *See, e.g.*, footnote 1 in George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said,* 31 CORNELL INT'L L. J. 321 (1998), listing 38 sources discussing just anticipatory self-defense which is a sub-category of this discussion.

[115] ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE : BEYOND THE UN CHARTER PARADIGM, 72-73 (1993). The authors divide scholars into two schools, labeled the restrictionist and the counter-restrictionist. Restrictionists take the view that under the UN Charter, states have can use self-defense only once an actual armed attack has occurred. Article 51 is seen as restricting the pre-existing right of self-defense under customary international law, arguing that Article 51 is the only contemporary source of law on self-defense. Counter-restrictionists reject this interpretation, largely pointing to the effect of the word "inherent" in the language of Article 51, arguing this preserves the customary international law with regard to self-defense which existed at the time of the Charter's adoption.

on the part of the initial violator, creates the appearance the response is not self-defense, but rather an act of retaliation. Once accepted as a mode of response in international relations, retaliation is now prohibited under the UN Charter.

Two United Nations General Assembly resolutions provide some clarification of the terms in Article 2 of the UN Charter. UN General Assembly Resolution 2625, the Declaration on Friendly Relations[116] and UN General Assembly Resolution 3314, Definition of Aggression [117] both enumerate certain state actions which could constitute a violation of Article 2(4). UN General Assembly Resolution 2625 provides:

> [e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[118]

[116] UN Resolution 2625, Declaration on Friendly Relations, *supra* note 93.
[117] Definition of Aggression, *supra* note 83.
[118] UN Resolution 2625, Declaration on Friendly Relations, *supra* note 93. A General Assembly Resolution is generally not held to be a legally binding document, except in those circumstances where it is meant to be declaratory of customary international law, is supported by all members and is observed in the practice of states. U.S. government representatives have publicly expressed that the Declaration on Friendly Relations is one of the few General Assembly Resolutions the U.S. views as "an authoritative restatement of customary international law." *DODGC Assessment, supra* note 17, at 17.

Article 3 of UN Assembly Resolution lists seven actions which may qualify as aggression. All involve the use of physical force against another country.[119]

The classic articulation of the standard permitting anticipatory self-defense is contained in Daniel Webster's response to the British Ambassador's justification of British capture and burning of *The Caroline*, a U.S. flagged vessel, as action in self-defense and self-preservation. Secretary of State Webster required the British Government to show:

> necessity of self-defence[sic], instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the

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[119] Article 3. Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) The blockage of the ports or coasts of a State by the armed forces of another State;
(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

> necessity of self-defence [sic], must be limited by that necessity, and kept clearly within it.[120]

While international law scholars debate whether the right of anticipatory self-defense exists under international law norms today, it is clear that military and political leaders generally assert a nation's right to anticipatory self defense. The United States, in particular, has apparently expanded the scope of its doctrine of anticipatory self-defense in the most recent articulation of the national strategy.[121] The expansion is particular to anticipatory self-defense in response to a perceived threat of terrorism and use of weapons of mass destruction. The rationale is that the immediacy of the risk for both terrorist attack and weapons of mass destruction makes waiting for the first blow an even more unacceptable risk. The doctrine of anticipatory self-defense is premised on the theory that a nation need not wait to accept the first military blow before acting to preserve its own interests.[122]

It is questionable whether a similar declaration regarding cyberspace and critical infrastructure in the articulated national strategy would be a workable solution to establishing a "right" to self-defense in this arena. Such an approach echoes the historical precedents of German and Japanese

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[120] BROWNLIE, *supra* note 66, at 43, citing Webster's letter of 24 April 1841 to British Ambassador Fox, (footnotes omitted.). *See also*, *DODGC Assessment*, *supra* note 17:

> In December 1837, Canada,, which was still a British colony, was fighting an insurrection. More than 1,000 insurgents were encamped on both the Canadian and U.S. dies of the Niagara River. A small steamer, the Caroline, was used by the insurgents to travel across and along the river. On the night of December 19, 1837, a party of British troops crossed the Niagara and attacked the Caroline in the port of Schlosser, New York, setting the vessel on fire and casting it adrift over the Niagara Falls. One U.S. citizen was killed on the dock, another was missing, and several others were wounded. The United States demanded reparations. The British Government responded that it had acted in self-defense.

Id. at 20.

[121] The National Security Strategy of the United States, 15 (Sept. 2002) *available at* http://www.whitehouse.gov/nsc/nss.html (last visited March 17, 2003).

[122] For a concise discussion of U.S. pre-emptive actions, *see* Richard F. Grimmett, *U.S. Use of Preemptive Military Force: The Historical Record,* 7 U.S. FOR. POL. AGENDA 4, 41-43, (Dec. 2002) *available at* http://usinfo.state.gov/journals/itps/1202/ijpe/ijpe1202.htm (last visited March 18, 2003).

declarations justifying their actions at the beginning of World War II.[123] Furthermore, without an international consensus identifying particular electronic infrastructures as so critical they should be sacrosanct, coupled with international agreement that any disabling attack on those systems constitutes a "use of force" under the UN Charter, states might use a definitional means to broadly rationalize a large number of actions. The United States and other countries have already begun to articulate national policies on critical infrastructure.[124]

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[123] NORMAN BENTWICH & ANDREW MARTIN, A COMMENTARY ON THE CHARTER OF THE UNITED NATIONS, 106 (1950). "To give individual States discretionary authority to resort to arms is dangerous because it is open to abuse. Modern history is crowded with instances where aggression was committed under the cloak of self-defense. (Note 1: The German aggression against Luxembourg and Belgium in 1914; the Japanese aggression in Manchuria in 1931-2; The German aggression against Poland in September 1939)."

[124] A discussion of non-U.S. views and activities can be found in Steven A. Hildreth, *Cyberwarfare,* 13-14*,* CRS Report for Congress, RL30735 (June 19, 2001) *available at* http://policy.house.gov/assets/def-cyberwarfare.pdf. (Last visited May 9, 2003).

> In general, some hold views comparable to the United States, including the UK, Germany and NATO. France, however, may be an exception, because many observers have concluded that the French may see a legitimate role for economic cyberwarfare in the pursuit of national objectives. Russian rhetoric portrays cyberwarfare as an act of war for which any response, convention or with weapons of mass destruction, is deemed justified. China sees cyberwarfare as a legitimate form of asymmetrical warfare and is preparing cadres of computer professionals for this task.

Id. at 13. Of particular interest on the debate of whether or not cyber attacks constitute use of force is the following quote excerpted from the speech of a senior Russian military officer:

> [F]rom a military point of view, the use of Information Warfare against Russia or its armed forces will categorically not be considered a non-military phase of a conflict whether there were casualties or not . . . considering the possible catastrophic use of strategic information warfare means by an enemy, whether on economic or state command and control systems, or on the combat potential of the armed forces. . . . Russia retains the right to use nuclear weapons first against the means and forces of information warfare, and then against the aggressor state itself.

V. I. Tsymbal, K*onseptsiya "Informatsionnoy voyny", (Concept of Information Warfare),* speech given at the Russian-U.S. conference on "Evolving post Cold War National Security Issues, " Moscow 12-14 Sept., 1995, p. 7. Cited in Col. Timothy Thomas, *Russian Views on Information-Based Warfare,* [http://call.army.mil/call/fmso/fmsopubs/issues/rusvuiw.htm]. Paper published in a special issue of *Airpower Journal*, July 1996. Hildreth, *supra*, note 124, at Footnote 22. (Note: Underlying Thomas article is currently accessible at http://web.archive.org/web/20010206123223/ http://call.army.mil/call/fmso/fmsopubs/issues/rusvuiw.htm (last visited May 9, 2003).

The right of self-defense is complicated by the need to accurately identify the source of the armed attack. This becomes a serious problem for identification of appropriate targets. *Jus in bello* requires that belligerent nations limit, to the extent possible, their targeting to military targets. Since the structure of the internet utilizes random paths to transmit information, by mathematical algorithms designed to maximize the optimal use of the system as a whole while providing redundant pathways, a frequent problem in any cyberspace attack is identifying the origin of the attack. So, for example, hackers have had considerable success in sending messages by alternate paths, giving a totally false initial source identification.[125] Again, computer technology has served to make such disguise easier; spammers today often use computer software to randomize the apparent source address.[126]

VIII. WHAT IS AN ARMED ATTACK IN CYBERSPACE? TWO THEORETICAL FRAMEWORKS

It is clear is that under both conventional and customary international law, use of force is only justified as a response in self-defense to armed attack. It is not clear, however, whether a cyberspace attack, except in extraordinary circumstances, constitutes an armed attack. Two prominent legal scholars in the area have examined the issue of assessing attacks in cyberspace. Walter

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[125] Whether there are circumstances which might meet the criteria defining perfidy under the law of war is another related subject ripe for discussion.

[126] John Arquilla and David Ronfeldt discuss the difficulty the issue of accurate identification of the attacker poses for development of strategy for netwar:

> In netwar, the attacker may often be difficult to identify. To deal with this ambiguity, defenders may find it useful to use an approach that provides alternative images of the attacker. This analytic framework enables the defender to construct and assess well-hedged defensive strategies, even when uncertainty about he attacker's identify persists. If, or example, it is unclear whether the attacker is a disgruntled individual (a Unabomber), a small group of malcontents (most likely the case with Sheikh Rahman and his adherents), or a full-blown terrorist organization, perhaps with state sponsorship, then considering the possibility of any of the three being the attacker will usefully inform the search for countermeasures. This hedged approach, which relies upon alternate imaging of the adversary, may help to prevent overreaction against minor miscreants. However, this approach may also make it much harder to arrive at decisions to retaliate massively against more serious attackers and/or putative sponsors whose identities have not been established beyond doubt. Indeed, this problem of ultimate identification may be a central security dilemma posed by the advent of netwar.

JOHN ARQUILLA & DAVID RONFELDT, THE ADVENT OF NETWAR, 96 (1996).

Gary Sharp, Sr.,[127] provides thoughtful insights on methods of analyzing cyberspace operations, and describes a sliding scale of acts which should be considered by the practitioners. However, he ultimately concludes that:

> What constitutes a prohibited "threat or use of force," in CyberSpace and elsewhere, is a question of fact that must be *subjectively* analyzed in each and every case in the context of all relevant law and circumstances. The terms "use of force," "armed attack," and "self-defense" will never be clearly defined by objective rules of law. The international community has struggled for decades to define these terms, but there are simply too many factual variables involved to capture them in a few simple rules.[128]

However, he also proffers the rule that "*Any* computer network attack that intentionally causes *any* destructive effect within the sovereign territory of another state is an unlawful use of force within the meaning of Article 2(4) that may produce the effects of an armed attack prompting the right of self-defense."[129] Sharp provides a spectrum of interstate relations, outlining in a linear chart where the lines should be drawn between peaceful operations, through threats to the peace, threat of force and use of force. He places interruption of communications and economic competition or sanctions into peaceful operations; proffers no cyberspace illustrations of threats to peace,[130] includes interference with early warning or C^2 systems in threat of force and concludes with destruction of EW (electronic warfare) or C^2 systems in armed attack or use of force.[131] Ultimately, while Sharp provides a good framework for the uninitiated to become informed on principles by which to analyze cyber attack under the use of force paradigm, he leaves open the question of when cyber attack constitutes use of force other than when the attack results in destruction.

Michael N. Schmitt[132] also examines the issue of how "use of force" is defined. After considering the negotiation history of the Charter, as well as the histories of both the Declaration on Friendly Relations [133] and the

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[127] SHARP, *supra* note 83.
[128] *Id.* at 137-38.
[129] *Id.* at 140.
[130] Although he includes extreme intrastate violence or human rights violations; failure of state to surrender terrorists; illegal racist regimes; large refugee movements; diversion of a river and serious violations of international law that may provoke armed response. *Id.* at 120, Figure 4.
[131] *Id.* at 120-21.
[132] Schmitt, *supra* note 4.
[133] UN Resolution 2625, Declaration on Friendly Relations, *supra* note 93.

Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,[134] he concludes "that although economic and political coercion may constitute threats to international stability and therefore are precluded by the principle of non-intervention . . . the concept of the use of force is generally understood to mean armed force."[135] He then goes on to note the difficulty with defining use of force in light of present technological advances.

> The foregoing analysis shows that the prohibition of the threat or use of force includes armed, but not economic or political coercion. However, it does not demonstrate that the borders of "force" precisely coincide with armed force, i.e. physical or kinetic force applied by conventional weaponry. This reality has only recently proven of applicative import. Until the advent of information operations, most coercion could be handily categorized into one of several boxes, for few coercive options existed that could not be typed as political, economic, or armed in nature. Because there was little need to look beyond these genera, discourse about the lawfulness of State coercion, as illustrated *supra*, tended to revolve around them. If the act in question fell within the armed force box, it violated the prescription banning the use of force; if not, questions of legality had to be resolved by looking elsewhere.[136]

Schmitt goes on to note that determination of whether the use of force proscription has been breached has been dependent on the type of instrument used to achieve the national objective. Diplomatic and economic instruments might reach the threshold of intervention, but do not constitute "use of force." After examining the underlying rationale for the limitation on use of force, he concludes the proscriptions derive from a community objective to preserve the state-based international structure, in the interest of providing the normative architecture to promote the values of physical survival and security for individuals, as well as human dignity, social progress and quality of life and

[134] G.A. Res. 42/22, U.N. GAOR, 42d Sess., 73d plen. Mtg., Agenda Item 131, *reprinted in* KEY RESOLUTIONS OF THE UNITED NATIONS GENERAL ASSEMBLY, 1946-1996, 7 (Dietrick Rauschning, et al. eds, 1997).
[135] *Id.* at 908.
[136] *Id.* at 908 (citations omitted).

"the right of peoples to shape their own political community."[137] He further concludes that the international community is interested not so much in the coercive means by which States attempt to reach their national objectives which may be damaging to the aspirations above, but rather in the consequences of the use of a particular instrumentality.[138] In order to retain the "use of force" framework, he proposes analysis of the consequences of actions in CNA to assess when a particular act would qualify. Schmitt suggests looking at six criteria in evaluating the consequences of a particular act: severity, immediacy, directness, invasiveness, measurability and

[137] *Id.* at 910-11. Schmitt goes on to note:

> The primary constraint, the determinative reality, is that these aspirations must be pursued within a state-based international structure. This structure contains many obstacles, not the least of which is interstate rivalry rift with zero-sum thinking. The UN charter reflects this understanding by including in its purposes the maintenance of international space and security, development of friendly relations among nations, achievement of international cooperation in solving international problems, and harmonization of the actions of nations. While these appear to be goals in and of themselves, they are actually intermediate goals in the attainment of the ultimate ends just articulated. They are community value enablers.

Id.

[138] *Id.* at 911.

presumptive legitimacy.[139] By proposing an alternative to instrument-based analysis, Schmitt hopes to retain the current framework for use of force in the area of cyber attack, rather than creating a new standard altogether for a means of coercion which does not fit into the old modality. In this manner, he "allows the force box to expand to fill lacunae (that become apparent upon the emergence of coercive possibilities enabled by technological advances) without altering the balance of the current framework -- the growth is cast in terms of the underlying factors driving the existing classification."[140] Schmitt points to the analysis used both in defining proportionality and in inter-state coercion short of force as models of consequence based definitional modalities which

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[139] *Id.* at 914 -15.

> Economic and political coercion can be delimited from the use of armed force by reference to various criteria. The following number among the most determinative:
> 1) Severity: Armed attacks threaten physical injury or destruction of property to a much greater degree than other forms of coercion. Physical well-being usually occupies the apex of the human hierarchy of need.
> 2) Immediacy: The negative consequences of armed coercion, or threat thereof, usually occur with great immediacy, while those of other forms of coercion develop more slowly. Thus, the opportunity for the target state or the international community to seek peaceful accommodation is hampered in the former case.
> 3) Directness: The consequences of armed coercion are more directly tied to the actus reus than in other forms of coercion, which often depend on numerous contributory factors to operate. Thus, the prohibition on force precludes negative consequences with greater certainty.
> 4) Invasiveness: In armed coercion, the act causing the harm usually crosses into the target state, whereas in economic warfare the acts generally occur beyond the target's borders. As a result, even though armed and economic acts may have roughly similar consequences, the former represents a greater intrusion on the rights of the target state and, therefore, is more likely to disrupt international stability.
> 5) Measurability: While the consequences of armed coercion are usually easy to ascertain (e.g., a certain level of destruction), the actual negative consequences of other forms of coercion are harder to measure. This fact renders the appropriateness of community condemnation, and the degree of vehemence contained therein, less suspect in the case of armed force.
> 6) Presumptive Legitimacy: In most cases, whether under domestic or international law, the application of violence is deemed illegitimate absent some specific exception such as self-defense. The cognitive approach is prohibitory. By contrast, most other forms of coercion -- again in the domestic and international sphere - are presumptively lawful, absent a prohibition to the contrary. The cognitive approach is permissive. Thus, the consequences of armed coercion are presumptively impermissible, whereas those of other coercive acts are not (as a very generalized rule).

Id.

[140] *Id.* at 915.

international legal scholars will find familiar.[141] However, he recognizes that more gray areas will occur in utilizing such analysis; consequence-based examination does not create the same bright lines that instrument-based analysis provides.[142]

Both of these authors leave us essentially with a Justice Potter Stewart "we know it when we see it"[143] standard for ascertaining when cyber attacks constitute use of force sufficient to justify a response in self-defense. However, it is clear that except for the extreme attacks or those which accompany the threat of a physical armed attack, most cyber operations will not rise to the level of "use of force." Many more of the operations will fit into the category of intervention in the internal affairs of another sovereign nation. The more critical question is whether it is reasonable to require adherence to old concepts of what constitutes "use of force" when it is clear that the destructive power of cyberspace operations can threaten the economic integrity of a state? The value being protected by the framework of the UN Charter and customary international law is the integrity of the sovereign state. Operations would have to target economic interests in a manner to do more than interfere with efficient conduct of economic interactions to truly constitute use of force. Operations which only cause interference and inefficiency, such as denial of service attacks,[144] would have an economic cost but should not be characterized as a "use of force."

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[141] *Id.* at 917-18.

[142] *Id.* at 920.

[143] In a concurring opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964), Justice Potter Stewart articulated his much quoted test.

> I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

Id. at 197.

[144] For example, Denial of Service attacks, which constitute concentrated efforts to overwhelm a system with so many messages that the system, unable to deal with the volume, freezes, may impede operations but are rarely so destructive as to do more than cause delays.

IX. CONCLUSION

What becomes clear in the consideration of these issues is that cyber operations do not readily fit the use of force framework. Because so few of the potential operations could constitute "use of force" or "armed attack" under the current formulation, the victim state appears to be in the position of either responding outside the framework while constructing a strained justification in the language of self-defense or of punctiliously adhering to the intellectual framework without response. Expanding the term "use of force" to encompass cyber attacks which constitute economic aggression is likely to have the effect of opening the door widely to other acts which the United States has long held constitute permissible acts of influence through economic forces.[145]

Taking cyber attacks, other than those that manifest in a physical result, and placing them into the framework of non-intervention would provide a more productive means to analyze the threat. Furthermore, it would open up certain responsive options not available under the "use of force" paradigm. Under the "use of force" framework, self-defensive actions can only be taken where there is an armed attack or, under some schools of thought, imminent threat of armed attack. In the realm of the non-intervention doctrines, a state can apply countermeasures to intervention by another state, bounded by proportionality. Non-intervention is clearly an accepted international norm.[146] (Its converse, intervention, is being widely explored vis-à-vis humanitarian intervention to protect the rights of individuals subjected to human rights

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[145] For example, embargos, limitations on imports, export controls, tariffs, and product quality requirements are all means by which the United States has wielded economic coercion, often for political goals. Nicaragua asserted that the United States economic actions, specifically the cessation of economic aid, reduction in sugar quota for U.S. imports, and trade embargo, constituted a "systematic violation of the principle of non-intervention." The ICJ rejected contention under customary international law, noting "the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention." Nicaragua v. United States, 1986 I.C.J. 14, 126, para. 244.

[146] D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW, 44-50 (1958); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs,* 83 A.J.I.L. 1, 6-10 (1989); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), 20th Sess. Agenda Item 107, 14 Jan 1966, *reprinted in* Rauschning, *supra* note 134, at 26-27; Nicaragua v. United States, 1986 I.C.J. 14*,* 106, para. 202: "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."

violations.[147]) The parameters of non-intervention have varied even more over time than have the definitions of use of force. However, that very flexibility provides a basis to develop norms specific to cyberspace, without unnecessary encroachment in other areas. There are already some treaties in place which frame some of the parameters of non-intervention in cyberspace.[148] The non-intervention norm is a more adaptable framework than an overarching treaty would be. The rapid changes in technological applications make regulation of this aspect of warfare particularly ill-suited to treaty negotiations. By the time a treaty defining parameters could be negotiated, it is highly likely that the means of accomplishing tasks defined as cyberwar would have changed. Providing limitations through treaty by proscribing certain end results is also not promising. Again, the rapid growth in technology, which shows no abatement, is likely to make the negotiated limitations meaningless. Non-intervention doctrine can benefit from treaty negotiation in one area. As noted, the United States and many other countries have undertaken efforts to identify critical infrastructure. Achieving agreement that attacks on certain sectors of critical infrastructure necessary for defined humanitarian needs, such as health care, are prohibited could provide some clarity and protection in this arena. A complete discussion of the norm of non-intervention is reserved for future study, but it appears to be an ideal framework to inform operators and theorists on the parameters of cyberspace operations.

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[147] *See, e.g.*, ENFORCING RESTRAINT, (Lori Fisler Damrosch, ed., 1993); Michael J. Glennon, LIMITS OF LAW, PREROGATIVES OF POWER (2001);Charles W. Kegley, Jr, et. al., *Issues and Policy: The Rise and Fall of the Nonintervention Norm: Some Correlates and Potential Consequences,* 22 FLETCHER F. WORLD AFF. 81 (1998); and Ravi Mahalingam, *Comment: The Compatibility of the Principle of Nonintervention with the Right of Humanitarian Intervention*, 1 UCLA J. INT'L L. & FOR. AFF. 221 (1996).

[148] For a discussion of some of these treaties, *see* Roger D. Scott, *Legal Aspects of Information Warfare: Military Disruption of Telecommunications*, 45 NAVAL L. REV. 57 (1998).

NAVIGATING THE CONFRONTATION CLAUSE WATERS AFTER *CRAWFORD V. WASHINGTON*; WHERE HAVE WE GONE AND WHERE ARE WE HEADED?

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I. INTRODUCTION

On March 8, 2004, the Supreme Court in *Crawford v. Washington*[1] changed the landscape of Sixth Amendment's Confrontation Clause jurisprudence and the law of hearsay.[2] Trial lawyers and jurists all over the country read initial abstracts of the landmark decision and immediately questioned themselves on its scope and applicability. Was it simply not a straightforward statement against interest hearsay exception case? Has that exception been ruled unconstitutional? Are other hearsay exceptions affected or, worse yet, are all hearsay exceptions, traditional and modern, now unconstitutional as well? Is the holding limited to criminal cases, or are we facing a complete overhaul of hearsay law?[3] The Court's reliance on the distinction between testimonial and non-testimonial statements as the determinative factor in applying the correct admissibility standard has fundamentally altered the practitioner's approach to analyzing the admissibility of all out-of-court statements. Frankly stated, by injecting a new and outcome-determinative term into Sixth Amendment Confrontation Clause and hearsay analysis and then failing to define that term, our Supreme Court has cast criminal jurisprudence off its pier without a chart, curiously and unexplainably confident that it will find its way back into a calm and predictable sea.[4] One year removed from the date of this landmark decision, federal and state

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[1] 541 U.S. 36 (2004).

[2] Horton v. Allen, 370 F.3d 75, 83 (1st Cir. 2004).

[3] *See* United States v. Cromer, 389 F.3d 662, 671 (6th Cir. 2004) ("The Supreme Court, in *Crawford*, introduced a fundamental re-conception of the Confrontation Clause.").

[4] *Crawford*, 541 U.S. at 68.

practitioners, prosecutors and defense counsel, face a fundamental query in this new arena: where have we been, and where are we headed?[5]

Part II of this paper will discuss and critique the *Crawford* opinion, the categories of out-of-court statements it creates, and the likely pitfalls created for criminal practitioners. Part III will discuss the developing definition of the term "testimonial" as it is used in *Crawford* and subsequently in the federal courts. Brief attention will be given to the development of that term in state courts. Parts IV and V will examine how the application of the term "testimonial" has affected selected traditional hearsay exceptions in federal courts and selected states. Finally, Part VI is a brief conclusion offering a comprehensive reflection of where we have been with *Crawford* to date, and where we are likely headed.

II. *CRAWFORD V. WASHINGTON* -- An Overview and Critique

Crawford overruled the Court's previous decision in *Ohio v. Roberts*,[6] at least with regard to "testimonial" statements, taking issue with the *Roberts* rationale as it applied to such statements.[7] Reversing twenty-four years of precedent, the Court expressed its dislike for the direction hearsay and Confrontation Clause law was heading, and abruptly halted it in favor of a new one. Some suggest the Court completely separated the Confrontation Clause from the law of hearsay,[8] as the Court articulated a detailed historical rendition of the clause to establish the premise that "the principal evil at which the clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."[9] Using the text of the Clause as authority, the Court concluded that it applies to witnesses who "bear testimony."[10] Citing Webster's,[11] the Court stated

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[5] This paper is intended as a forward look at how federal and state courts have interpreted *Crawford* in the hopes of providing practical guidelines and references for criminal law practitioners. Little attention is paid to the historical aspect of the Confrontation Clause, except as necessary to put post-*Crawford* cases into proper context. It is the author's intention to provide practitioners with a fundamental understanding of how *Crawford* has been applied in the year since it was decided, offer comprehensive references to all relevant federal case law and significant state case law, and offer reconciliatory analysis to assist in properly addressing and arguing post-*Crawford* Confrontation Clause and hearsay issues. While the primary focus is on federal law, selected state cases are discussed when instructive on the developing law regarding certain traditional hearsay exceptions.

[6] 448 U.S. 56 (1980).

[7] *Crawford*, 541 U.S. at 68 ("*Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability.").

[8] Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185 (2004).

[9] *Crawford*, 541 U.S. at 50.

[10] *Id.* at 51.

[11] N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

testimony was typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[12] By way of contrast, the court offered that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."[13] Resisting the obvious and inevitable urge to define the term, the Court instead offered three exemplar definitions: (1) "*Ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; (2) "extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony or confessions"; and (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[14] By way of specific examples, the Court stated that statements taken by police officers in the course of interrogations,[15] and prior testimony at a preliminary hearing, before a grand jury, or at a former trial are testimonial statements.[16] While acknowledging the failure to articulate a comprehensive definition would lead to uncertainty, the Court excused its failure by offering such uncertainty could not be worse than the status quo under the *Roberts* standard.[17] The Court held specifically that where testimonial statements are at issue, admissibility is contingent upon unavailability and a prior opportunity to cross examine.[18]

That said, throughout the opinion the Court articulated categories of statements outside the scope of its holding. Relying on historical precedent, the Court suggested that dying declarations represent a historical common law exception to the Confrontation Clause, without regard to whether they are testimonial.[19] Similarly, the Court accepted and adopted the equitable rule of forfeiture by wrongdoing as an exception to its new rule.[20] Business records and statements of co-conspirators are summarily deemed not testimonial, and

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[12] *Crawford,* 541 U.S. at 51.
[13] *Id.*
[14] *Crawford*, 541 U.S. at 51-52 (internal citations omitted).
[15] *Id.* at 52.
[16] *Id.* at 68.
[17] *Id.* at 68 n.10.
[18] *Id.* at 68.
[19] *Id.* at 56 n.6 ("The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal law hearsay cannot be disputed . . . . We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*." (citations omitted)).
[20] *Crawford*, 541 U.S. at 62.

hence to that extent are excluded from the Court's holding.[21] Clarifying surviving Confrontation Clause precedent, the Court reiterated that when the declarant appears for cross examination at trial, the Confrontation Clause does not bar the use of the declarant's prior testimonial statements,[22] and that the clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.[23]

In reviewing a litany of its recent hearsay and confrontation clause decisions, the Court attempted to demonstrate its holding is not a departure from its past jurisprudence, at least with regard to its past decisions. In near unanimous agreement with these past decisions, the Court takes issue with its past rationales,[24] effectively stating the Court has been making the correct decisions all along, but for the wrong reasons.[25] But its inexplicable refusal to define testimonial, the term that benchmarks the point at which the Confrontation Clause controls and traditional hearsay law is relieved,[26] injects a level of uncertainly and instability into the analysis of out-of-court statement admissibility that leads learned jurists into inconsistent, and at times, nonsensical decisions.[27] Ironically, though the Court expressly chided the Chief Justice for suggesting in his concurrence that a general bar on unsworn hearsay made application of the Confrontation Clause to unsworn testimonial statements moot,[28] the Court's holding leaves us with that very premise; that sworn testimony given to law enforcement officials will be excluded under the new rule while many forms of unsworn statements made to friends and family members will still be admissible. This result supports the Chief Justice's point that whether a statement is testimonial does nothing to undermine the wisdom of a traditional hearsay exception.[29] Indeed, as post-*Crawford* analysis of excited utterances will show, specifically with 911 emergency service calls,[30] the testimonial distinction without precise definition has forced the state of the law into practically unworkable conclusions. Such uncertainty is compounded by the Court's decision to summarily parse out exceptions that admittedly cover both testimonial and non-testimonial statements, altogether creating a

[21] *Id*. at 56 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial -- for example business records or statements in furtherance of a conspiracy.").
[22] *Id*. at 59 n.9.
[23] *Id*.
[24] *Id*.
[25] *Id*. ("If nothing else, the test we announce is an empirically accurate explanation of the results our cases have reached.").
[26] *Id*. at 68.
[27] *See infra* Part V(a), Excited Utterances.
[28] *Crawford*, 541 U.S. at 52 n.3.
[29] *Id*. at 71 n.4 (Rehnquist, C.J., concurring).
[30] *See infra* Part V(a)(2).

new set of "vague standards" that are "manipulable," mirroring those the Court was seeking to eliminate.[31]

So, to begin one's post-*Crawford* analysis of a pretrial statement, simply ask yourself the following question: Is the statement in question testimonial? If it is not, you are safe analyzing the admissibility of the statement under the existing federal or state law of hearsay without regard to *Crawford*.[32] If the statement is testimonial, then determine if one of the articulated exceptions applies. If none apply, the rule is clear; the only reliability standard sufficient for testimonial statements is unavailability and prior cross examination.[33]

To digest and fully comprehend what Confrontation Clause ills the Court was really after, one must start with an analysis of where our lower courts have gone with the term "testimonial."

III. TESTIMONIAL – A Definitional Analysis

A. Common Principles in Federal Courts.[34]

The post-*Crawford* analysis of whether any out-of-court statement is admissible begins with determining if it is a testimonial statement. Though the Court expressed some skepticism whether the *Roberts* standard would continue to apply to non-testimonial statements,[35] such statements have continued to be evaluated under pre-*Crawford* jurisprudence.[36]

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[31] *Crawford*, 541 U.S. at 67-68.

[32] *Id.* at 68 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law -- as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

[33] The right to confrontation under the Sixth Amendment is a right of the accused; it does not apply to evidence offered against the Government. United States v. Hite, 364 F.3d 874, 883, n. 12 (7th Cir. 2005); *See also* State v. Perry, 2005 Ohio 27, ¶113 (Ct. App. 2005) (Gallagher, J., concurring) ("Nevertheless, the State cannot claim the constitutional protections of the Sixth Amendment in the same manner as Perry. Constitutional rights are individual rights, not rights of the government.").

[34] State court citations are included in footnotes with federal case law when not specifically addressing state statutory or common law hearsay exceptions.

[35] *Crawford*, 541 U.S. at 58 n.8.

[36] *Id.* at 68. *See also*, U.S. v. Manfre, 368 F.3d 832, 838 (8th Cir. 2004) ("[T]he residual body of our Confrontation Clause jurisprudence . . . remains in effect." (citations omitted)); United States v. Reyes, 362 F.3d 536, 541, n.4 (8th Cir. 2004) ("*Crawford* did not provide additional protection for non-testimonial statements, and indeed, questioned whether the Confrontation Clause protects non-testimonial statements at all."); United States v. Saget, 377 F.3d 223, 227 (2d Cir. 2004) ("Accordingly, while the continued viability of *Roberts* with respect to non-testimonial

At the outset, some situations can be eliminated from discussion. Consistent with the language of the *Crawford* opinion itself, courts have unanimously held that statements not offered for the truth of the matter asserted are not testimonial,[37] that *Crawford* does not apply to the defendant's own statements,[38] or at civil trials,[39] and that when the declarant of the out-of-court statement appears and testifies at trial, there is no Sixth Amendment Confrontation Clause issue.[40] Conversely, plea allocutions are testimonial under the most restrictive definition of the term.[41] Courts, and thus practitioners, must initially grapple with the term testimonial before addressing a Confrontation Clause claim.

In the absence of a comprehensive definition, courts have strictly adhered to the plain language examples offered in *Crawford*.[42] Statements made to police during an interrogation are the simplest example of testimonial statements, and have been ruled as such, relying simply on *Crawford's* most restrictive use of that term without any expansion of or attempt to define the term.[43]

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statements is somewhat in doubt, we will assume for purposes of this opinion that its reliability analysis continues to apply to control non-testimonial hearsay . . . .").

[37] *Crawford*, 541 U.S. at 59, citing Tennessee v. Street, 471 U.S. 409, 414 (1985); *accord* U.S. v. Eberhart, 388 F.3d 1043, 1050-51 (7th Cir. 2004); People v. Reynoso, 814 N.E.2d 456, 456 (N.Y. 2004); People v. McPhearson, 687 N.W. 2d 370, 376-77 (Mich. Ct. App. 2004); Dednam v. State, No. CR 04-573, 2005 Ark. LEXIS 8, *14-15 (Ark. Jan. 6, 2005).

[38] U.S. v. Lopez, 380 F.3d 538, 546 (1st Cir. 2004).

[39] SEC v. Sekhri, 333 F. Supp. 2d 222, 228 (S.D.N.Y. 2004).

[40] *Crawford*, 541 U.S. at 59; State v. Gorman, 854 A.2d 1164, 1177-78 (Me. 2004); Comm. v. Ruiz, 817 N.E.2d 771 (Mass. 2004); Cooley v. State, 849 A.2d 1026 (Md. Ct. Spec. App. 2004); Crawford v. State, No. 05-03-01489-CR, 2004 Tex. App. LEXIS 6472 (Ct. App. Jul. 21, 2004); State v. Marbury, 2004 Ohio 1817 (Ct. App. 2004); People v. Martinez, 810 N.E.2d 199 (Ill. App. Ct. 2004); State v. Plantin, 682 N.W.2d 653 (Minn. Ct. App. 2004); People v. Martinez, 23 Cal. Rptr. 3d 508 (Ct. App. 2005); People v. Argomaniz-Ramirez, 91 P.3d 1162 (Colo. 2004); State v. Carter, 91 P.3d 1162 (Kan. 2004); Summerville v. State, 883 So. 2d 836 (Fla. Dist. Ct. App. 2004); Starr v. State, 604 S.E.2d 297 (Ga. Ct. App. 2004); In re I.A., 66 Pa. D. & C.4th 449 (Ct. Comm. Pl. 2004).

[41] United States. v. Grinage, 390 F.3d 746 (2d Cir. 2004); United States v. Bruno, 383 F.3d 65 (2d Cir. 2004); United States. v. Mclain, 377 F.3d 2129 (2d Cir. 2004); People v. Shephard, 689 N.W.2d 721 (Mich. Ct. App. 2004). *Cf.* U.S. v. Sharif, 343 F. Supp. 2d 610, 620 (E.D. Mich. 2005) (depositions of deported material witnesses allowed when defendants had opportunity to cross-examine).

[42] *See* United States v. Saget, 377 F.3d 223, 228, (2d Cir. 2004), adopting a combined version of the *Crawford* examples as its definition. ("[A]ll involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.").

[43] United States v. Gilbert, 391 F.3d 882, 884 (7th Cir. 2004); United States v. Merrill, 371 F.3d 574, 581 (9th Cir. 2004).

A more involved definitional analysis arises when courts address the admission of less traditional pre-trial statements. In *United States. v. Morgan*,[44] the Second Circuit addressed whether admission of a letter against defendant Morgan, written by an accomplice (Hester) to her boyfriend, violated Morgan's confrontation rights. The letter was admitted at trial under Federal Rule of Evidence (hereinafter F.R.E.) 807, the catch-all exception. Finding the letter was not testimonial, the court reasoned the letter was not in response to police questioning or written to law enforcement authorities, but was written to an intimate acquaintance in the privacy of her hotel room.[45] Additionally, the court stated Hester has no reason to expect the letter would ever find its way into the hands of the police.[46] Even when applying this version of *Crawford's* "reasonably foreseeable" formulation of a testimonial statement, the case illustrates the developing trend where the absence of law enforcement involvement with the statement likely renders it non-testimonial. Of note is the court's conclusion that the same factors that prevent the letter from being testimonial also render the letter trustworthy,[47] an analytical approach specifically condemned in *Crawford*.[48] The evils which *Crawford* attempted to eradicate remain, exacerbating the error of hinging its decision on judicial interpretation of a term previously untested in this context.

In *Parle v. Runnels*,[49] the Ninth Circuit addressed whether diary entries made by a murder victim prior to her death were testimonial statements. Defendant Parle was convicted of first degree murder of his wife, Mary Parle. At trial in state court, the prosecution admitted several entries from Mary Parle's diary to document a history of physical and emotional abuse. The statements were admitted under a state statutory, non-traditional hearsay exception that authorized the admissibility of hearsay statements made by a declarant regarding the infliction or threat of physical injury on them that were made at or near the time of the infliction or threat and that describe or explain the infliction or threat.[50] The court found that even under the most expansive definition of testimonial offered by the new *Crawford* rule, the diary was not testimonial, as it had not been created "under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial."[51] Hence, despite the significant incriminating nature of the diary entries, the court found the diary entries contained sufficient indicia of

[44] 385 F.3d 196 (2d Cir. 2004).
[45] *Morgan*, 385 F.3d at 209.
[46] *Id.*
[47] *Id.*
[48] *Crawford*, 541 U.S. at 65.
[49] 387 F.3d 1030 (9th Cir. 2004).
[50] CAL. EVID. CODE §1370.
[51] *Parle v. Runnels*, 387 F.3d at 1037 (citations omitted).

reliability under existing state law to be properly admissible. As in *Morgan* above, analyzing and demarcating the testimonial line in this fashion suggests that individuals are more truthful in their private affairs than they are when speaking with law enforcement authorities. To be fair, that is the direction *Crawford* pointed us in when it removed all lines and set us adrift, and it begs the question: what true ill in our constitutional jurisprudence did the Court seek to remedy?

Broadening this demarcation, which will be further discussed *infra*, courts are frequently drawing the distinction between statements made to law enforcement authorities and those made to family members or acquaintances in order to identify testimonial and non-testimonial statements. Courts have seized upon the word "acquaintance" as it is used in *Crawford*,[52] to deem the contested statement non-testimonial, even when the subject matter and timing of the statements are substantially the same as statements made to police.

Illustrating this point is *U.S. v. Mikos*.[53] In *Mikos*, the defendant, a podiatrist, was charged with murder as well as numerous counts of Medicare fraud as a result of an investigation that began in August of 2000. The murder victim, Joyce Brannon, was interviewed by Department of Health and Human Services (HHS) agents in September 2001 concerning some eighty-seven surgeries the defendant had allegedly performed on her feet and for which he had subsequently billed Medicare. Brannon recalled defendant Mikos performing surgery on both her big toes, but denied having any additional surgeries. Brannon later received a grand jury subpoena on January 9, 2002, to testify on January 31, 2002. The defendant allegedly called Brannon on the evening of January 24 to talk her out of testifying. Later that evening after speaking with the defendant, Brannon spoke with her sister and two friends about the call. The next day, Brannon discussed the phone call with her home health care nurse. On the afternoon of January 27th, Brannon spoke about the defendant's January 24th phone call and her upcoming testimony with a volunteer at Brannon's church. Later that evening, Brannon was shot six times in the back, neck and head at close range while sitting in her apartment. The Government sought to admit Brannon's statements to HHS agents as well as her statements to her sister, home health care nurse, church volunteer, and two friends.[54] In addressing *Crawford's* applicability to all of the statements, the

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[52] *Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an *acquaintance* does not." (emphasis added)); *accord* Ramirez v. Dretke, 398 F.3d 691 (5th Cir. 2005).

[53] No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650 (N.D. Ill. Jul. 15, 2004).

[54] *Mikos*, 2004 U.S. Dist. LEXIS 13650, at *3. (Brannon's friends are identified in the opinion only as Individuals B and E, respectively. Her home health care nurse is identified as Individual C. The church volunteer is identified as Individual D.).

Court noted the *Crawford* court did not define "testimonial," but stated the opinion made it clear that formal statements to government officers are considered testimonial, whereas casual remarks to acquaintances are not.[55] Thus, the court held the statements Brannon made to HHS agents were testimonial and hence inadmissible because Mikos did not have the opportunity for cross examination.[56] As to all of the remaining statements, the Court held that since they were from Brannon's conversations with her sister and friends, with no government involvement, they were not testimonial, and hence *Crawford* did not apply.[57] Again, *Crawford's* testimonial distinction has the practical effect of making statements to police inherently untrustworthy as a matter of law, while accepting pre-trial statements to friends akin to gossip as more reliable and hence admissible.

The acquaintance analysis also provides courts additional authority for summarily deeming statements admitted under F.R.E. 801(d)(2)(E) non-testimonial. Coupled with *Crawford*'s patent exception for such statements, federal courts have unanimously held such statements are non-testimonial and hence outside the holding of *Crawford*.[58] States have followed suit, at least those with an evidentiary rule of law similar to the federal version of F.R.E. 801(d)(2)(E).[59] However, one state court has determined that *Crawford* applies to all testimonial statements, even those made during and in furtherance of a conspiracy.[60]

Some difficulty has arisen when determining the admissibility of co-conspirator statements in the context of conversations with a government informant. The Third Circuit provided excellent guidance on this issue as well as a thorough overview of the *Crawford* opinion in *United States v.*

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[55] *Id*. at *17. (The court, citing *Crawford*, states that the term testimonial "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (citations omitted)).

[56] *Id*. at *17-18.

[57] *Mikos*, 2004 U.S. Dist. LEXIS 13650, at *18. The Court went on to analyze the admissibility of the statements under F.R.E. 804(b)(6), forfeiture by wrongdoing, and F.R.E. 807, the residual hearsay exception, using the *Roberts* standard.

[58] United States v. Hendricks, 395 F.3d 173, 183 (3d Cir. 2005); United States v. Delgado, 401 F.3d 290 (5th Cir. 2005); United States v. Reyes, 362 F.3d 536, 541, n.4 (8th Cir. 2004); Diaz v. Herbert, 317 F. Supp. 2d 462 (S.D.N.Y. 2004); United States v. Cozzo, No. 02 CR 400, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. Apr. 16, 2004).

[59] State v. Jones, No. 9911016309, 2004 Del. Super. LEXIS 407 (Super. Ct. Dec. 14, 2004); Wiggins v. State, 152 S.W.3d 656 (Tex. Ct. App. 2004); People v. Cook, 815 N.E.2d 879 (Ill. App. Ct. 2004).

[60] State v. Cox, 876 So. 2d 932, 938 (La. Ct. App. 2004) (*Crawford* applies to all testimonial statements, including those otherwise admissible under Louisiana equivalent of F.R.E. 801(d)(2)(E), co-conspirator statements).

Hendricks.[61] In *Hendricks*, the court addressed the admissibility of various defendants' statements that were recorded pursuant to Title III wiretaps,[62] as well as statements made to a confidential informant (CI) during face-to-face, non-recorded encounters. Consistent with other courts addressing *Crawford* issues for the first time, the court in *Hendricks* chose not to adopt its own working definition of testimonial, relying instead on the exemplar definitions and examples set forth in the *Crawford* opinion.[63] As to the Title III recordings, the court, using the most broad definition of testimonial, found the statements not testimonial as the declarants did not make the statements thinking that they "would be available for use at a later trial."[64] Regarding the non-recorded conversations with the CI, the court noted that *Crawford* cited *Bourjaily v. United States*[65] with approval as an example of a case in which non-testimonial statements were correctly admitted against a defendant despite the lack of a prior opportunity for cross-examination. Based on this approval, the court held that the party admission and co-conspirator portions of the conversations with the CI are non-testimonial and thus not barred by *Crawford*.[66] The court went on to find that the portions of the CI's statements that were reasonably required to place the admission or coconspirator statement in context were also admissible.[67]

In partial contrast to *Hendricks* is *United States v. Cromer*[68] regarding the CIs portion of the surreptitiously recorded statement. In light of *Crawford*, the *Cromer* court held that the statements of a CI are testimonial and thus inadmissible unless the defendant has an opportunity to cross-examine the informant.[69] Significant is the Sixth Circuit's adoption of the broad definition of testimonial, to wit, any statement "made in circumstances in which a

[61] 395 F.3d 173 (3d Cir. 2005).
[62] 18 U.S.C. §2510 *et. seq*.
[63] *Hendricks*, 395 F.3d at 178-80.
[64] *Id*. at 181, citing *Crawford*, 541 U.S. at 52 (quoting brief of National Association of Criminal Defense Lawyers).
[65] 483 U.S. 171 (1987).
[66] *Hendricks*, 395 F.3d at 184. *See also* United States v. Saget, 377 F.3d 223, 229 (2d Cir. 2004) ("[W]e conclude that a declarant's statements to a confidential informant, whose true status in unknown to the declarant, do not constitute testimony within the meaning of *Crawford*.").
[67] *Hendricks*, 395 F.3d at 184 ("We thus hold that if a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's non-testimonial statements into context.").
[68] 2004 FED App. 0412P, 389 F.3d 662 (6th Cir. 2004).
[69] *Cromer*, 2004 FED App. 0412P at p. 9, 389 F.3d at 670-71.

reasonable person would realize that it likely would be used in investigation or prosecution of a crime."[70]

B. State Cases

State courts have generally held to the fundamental demarcation that if the statement was made to a law enforcement authority, it is testimonial,[71] while statements made to friends or acquaintances are not.[72] Though some state court decisions are addressed in depth below when discussing specific hearsay exceptions, a few cases offering fundamental interpretations of the term "testimonial" are worth noting.[73]

In *Florida v. Hernandez*,[74] the court addressed whether a co-defendant's statements made during a pretext call to the defendant were admissible as adoptive admissions. Before addressing whether the statements met the state requirements for adoptive admissions, the court determined that

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[70] *Cromer*, 2004 FED App. 0412P at p.11, 389 F.3d at 673-74, citing Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1240-41 (2002). The Sixth Circuit is the only federal court to date that extensively researched various proposed definitions of the term "testimonial" outside of the confines of the *Crawford* opinion. The court went to great lengths to justify its adoption of a broad definition, and arguably provided a more sensible rationale for the *Crawford* decision than the *Crawford* opinion did. In essence, they adopt Professor Friedman's pre-*Crawford* concern that such a broad definition "is necessary to ensure that the adjudicative system does not effectively invite witnesses to testify in informal ways that avoid confrontation." Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1043 (1998). This concept of government sponsored procedures designed to preserve unconfronted testimony for use at subsequent criminal trials is the evil *Crawford* sought to eradicate. However, by failing to properly define what it meant by "testimonial," the *Crawford* Court has failed it is intended purpose.

[71] People v. Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (statements made to police investigator deemed testimonial); People v. Lee, 21 Cal. Rptr. 3d 309App. 4th 483 (Ct. App. 2004); *See also* People v. Pirwani, 14 Cal. Rptr. 3d 673 (Ct. App. 2004) (state statutory hearsay exception for statements made by elderly or dependent adults, CAL. EVID. CODE §1380, are testimonial when statements made to law enforcement authorities).

[72] State v. Blackstock, 598 S.E.2d 412 (N.C. Ct. App. 2004); People v. Rolandis G., 817 N.E.2d 183 (Ill. App. Ct. 2004) (statements made to mother about sexual abuse not testimonial); *See also* State v. Dedman, 102 P.3d 628 (N.M. 2004) (blood alcohol content (BAC) report not testimonial).

[73] The most innovative attempt to classify a pretrial statement as testimonial is reflected in Ohio v. Lloyd, 2004 Ohio 5813 (Ct. App. 2004). Defendant Lloyd confirmed his birth date at the beginning of an interview with a police officer regarding an allegation of Lloyd having unlawful sexual intercourse with a minor. At trial, Lloyd argued that since his statement was made to police during an interrogation, it was testimonial, and that he was precluded from cross examining himself about his statement regarding his birthday, hence making the statement inadmissible under the new rule announced in *Crawford*. Preserving the admissibility of party-opponent admissions, the court found, based on is careful reading of *Crawford*, that the Confrontation Clause is "simply inapplicable when the 'witness' is the accused himself." Ohio v. Lloyd, 2004 Ohio 5813, ¶16 (Ct. App. 2004).

[74] 875 So. 2d 1271 (Fla. Dist. Ct. App. 2004).

the statements of the co-defendant, while under police control and during a phone conversation with Hernandez, were testimonial under *Crawford* and hence not admissible unless Hernandez was afforded an opportunity to cross-examine the co-defendant.[75] This ruling effectively removed the use of pretext calls as a law enforcement tactic in Florida. The distinction of the caller being a co-defendant is of no consequence; the holding is based on law enforcement setting up a controlled situation in the hopes that the suspect will incriminate himself.[76] Thus, the common use of pretext calls in other situations, specifically where intra-familial sexual assaults are alleged by a minor victim who often is used as the caller, will yield inadmissible evidence in the absence of the caller, normally the assault victim, testifying at trial.[77]

In *State v. Lewis*,[78] defendant Lewis was convicted of an aggravated assault offense, robbery with a deadly weapon, and breaking and entering. The victim, Nellie Carlson, was interviewed by police at her apartment shortly after the assault. Subsequently, while Ms. Carlson was at the hospital receiving medical treatment for injuries suffered during the attack, she identified the defendant in a photo line-up presented to her by the police. Ms. Carlson died prior to trial of causes unrelated to the attack. At trial, over Lewis' objection, the court admitted the pretrial identification from the photo line-up into evidence. Reversing, the court held that the identification fell within the minimum definition of testimonial given by *Crawford*, and was thus inadmissible since Lewis had not had the opportunity to cross examine Ms. Carlson.[79] Law enforcement involvement, at times without regard to whether the involvement was designed to secure pre-trial, unconfronted testimony, is becoming the litmus test for post-*Crawford* admissibility of pre-trial statements.

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[75] *Id.* at 1273 (The trial court granted Hernandez's motion to suppress the entire tape recorded phone conversation, a ruling not disturbed by the appellate court); *But cf.* People v. Combs, 101 P.3d 1007 (Cal. 2004) (adoptive admissions are not testimonial).

[76] *Hernandez*, 875 So. 2d at 1273.

[77] The caller's statements are arguably not offered for their truth, but to simply put the defendant's responses into context, to couple a question with its respective answer. This was not discussed in *Hernandez*.

[78] 603 S.E.2d 559 (N.C. Ct. App 2004).

[79] As F.R.E. 801(d)(1)(C) has the prerequisites of the declarant testifying at trial and being subject to cross-examination, pretrial identifications admitted under this rule, the new rule of *Crawford* is inapplicable. *See, e.g.,* United States v. Elemy, 656 F.2d 507 (9th Cir. 1981).

IV. SELECTED F.R.E. 804 EXCEPTIONS

A. F.R.E. 804(b)(1) - Former Testimony

Refreshingly, statements qualifying under this exception are the simplest to evaluate under *Crawford*, as by definition these statements already meet the criteria for admissibility of testimonial pre-trial statements. As such statements are patently testimonial, the reviewing court need only determine if the two *Crawford* requirements are met: 1) that the declarant is unavailable, and 2) that the defendant had a prior adequate opportunity to cross-examine the declarant.

As the issues presented with this exception are not novel, few Federal Courts have directly addressed them in the context of *Crawford*. Of note is *United States v. Avants*,[80] the Fifth Circuit held that preliminary hearing testimony originally given in a 1966 state court trial was admissible at a 2003 federal trial under F.R.E. 804(b)(1).[81] The court reasoned that the motive to cross-examine during the earlier preliminary hearing was the same as the motive during the 2003 trial: to discredit a witness whose testimony could, if believed, convict the defendant.[82] Prior depositions have also been admitted as former testimony provided the court finds the motive to cross examine at the deposition was similar to the motive at the subsequent trial.[83] Whether the motive to cross-examine was sufficiently similar during the previous testimony is not a new question, and *Crawford* offers no additional rules or guidance on the issue.

One case has arguably extended *Crawford* further into this area than simply applying the definitional rules of former testimony. In *United States v. Wilmore*,[84] the Ninth Circuit ruled *Crawford* applied to prior grand jury testimony of a witness when used by the Government to impeach the witness. In *Wilmore*, the Government called Ms. John as a trial witness expecting her to

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[80] 367 F.3d 433 (5th Cir. 2004).

[81] *Id.* at 444 (In 1967, the defendant was acquitted of state murder charges in Mississippi. In 1999, the federal government learned the site of the alleged crime was a national forest, supplying a basis for federal jurisdiction and prosecution. The defendant was convicted in 2003 of what the court termed a racially motivated murder).

[82] *Id.*

[83] *See* United States v. Sharif, 343 F. Supp. 2d 610 (E.D. Mich. 2004) (deposition of a material witness and subsequent deportation prior to trial by government in a prosecution under 18 U.S.C. §1324 does not violate the defendant's right to confront witnesses under *Crawford*); Liggins v. Graves, No.: 4:01-cv-40166, 2004 U.S. Dist. LEXIS 4889 (S.D. Iowa Mar. 24, 2004) (admission of deposition under state equivalent of F.R.E. 804(b)(1) comports with the new rule announced in *Crawford*).

[84] 381 F.3d 868 (9th Cir. 2004).

testify that the defendant had a gun on the day in question. Ms. John testified she did not see the defendant with a gun on that day. The prosecutor impeached her with her grand jury testimony, in which she testified that the defendant had come into her and her mother's apartment, picked up his gun off of a table, and ran out the door. When the prosecutor asked Ms. John if she had been truthful during her grand jury testimony, the trial court excused the jury and appointed Ms. John counsel. Thereafter, Ms. John invoked her Fifth Amendment right against self-incrimination on any questions concerning her inconsistent testimony, and the trial court advised defense counsel that it would limit cross-examination to prevent the witness from being forced to repeatedly invoke her privilege against self incrimination.[85]

The court, finding *Crawford* was applicable, held that since Ms. John asserted her right against self-incrimination regarding her inconsistent testimony, she was unavailable regarding her grand jury testimony, and the court's restriction on her trial cross-examination and the lack of cross-examination during her grand jury testimony deprived the defendant an opportunity to confront Ms. John about her inconsistent testimony,[86] and thus ruled the grand jury testimony inadmissible for any purpose.[87]

State courts have generally held that pre-trial statements otherwise qualifying as former testimony comply with *Crawford*.[88]

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[85] *Id.* at 870-71.

[86] *Wilmore*, 381 F.3d at 872-73.

[87] The Court conceded there was no issue regarding the admissibility of the grand jury testimony at the time it was admitted, as it was not hearsay under F.R.E. 801(d)(1)(A). Recognizing that Ms. John became available after the evidence was already admitted, rendering *Crawford* directly inapplicable, the court found this distinction unpersuasive, reasoning that regardless of when a declarant becomes unavailable, "the core principle of *Crawford* is that the defendant must have the opportunity for cross examination with regard to 'testimonial evidence' such as grand jury testimony. *Id.* at 872 (citations omitted). This is a significant extension of *Crawford* to statements admitted under F.R.E. 801(d)(1)(A).

[88] Comm. v. Sena, 809 N.E. 2d 505 (Mass. 2004) (state former testimony rule complies with *Crawford*); State v. Ross, 849 A.2d 648 (Conn. 2004) (state statutory former testimony exception complies with *Crawford*); State v. Murray, 204 Ohio 4966 (Ct. App. 2004) (preliminary hearing testimony complies with *Crawford* and admissible as former testimony); State v. Summers, 159 S.W.3d 586 (Tenn. Crim. App. 2004) (prior testimony from a juvenile court proceeding admissible as former testimony); Howard v. State, 816 N.E.2d 948 (Ind. Ct. App. 2004) (prior deposition of a child witness admissible as former testimony); ***But see*** People v. Fry, 92 P.3d 970 (Colo. 2004) (preliminary hearing testimony under Colorado criminal procedure is per se inadequate prior opportunity to cross-examine).

B. F.R.E. 804(b)(3) - Statements Against Interest

This exception is most closely related to the facts of *Crawford*, as the statement in issue in *Crawford* had been admitted at trial under the Washington state statutory equivalent of a statement against interest.[89] Federal courts have maintained a steady course in applying *Crawford* to statements against interest, determining if the statement was made to law enforcement officials in a manner and setting sufficient to trigger the Confrontation Clause. When the statement was made to law enforcement officials and was later admitted at trial against another defendant as an F.R.E. 804(b)(2) equivalent, courts find the statement testimonial.[90] Recognizing the "colloquial" form of interrogation directed in *Crawford*, the statement need not be made to a police officer to be deemed testimonial. When a prosecutor conducts an interview as part of an ongoing criminal investigation, the statement of the witness will likely be deemed testimonial.[91] A prosecutor who actively participates in an ongoing criminal investigation acts in a manner akin to the magistrates of 18th century England when the magistrates conducted interrogations in furtherance of police investigations. Their procurement of *ex parte* statements from witnesses with the intent to use them at a subsequent trial is the specific ill that *Crawford* militates against.[92] This is wholly consistent with preventing governments from systemically securing admissible, unconfronted pretrial testimony.

As one would expect, the acquaintance distinction is evident when addressing statements that otherwise fit the statement against interest exception. When the statement is not made to law enforcement authorities, but to an individual classified by the reviewing court as an "acquaintance" to the declarant, the statement is not testimonial, and thus eligible for admission as statements against interest. Statements to a significant other,[93] a confidential informant,[94] or one's spouse or mother,[95] have all been held to be not testimonial, as they all lack the formality and substance of a police interrogation and were not made to anyone acting in or having any connection to a law enforcement capacity.[96]

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[89] *Crawford*, 541 U.S. at 40.
[90] United States v. Rodriguez-Marrero, 390 F.3d 1 (1st Cir. 2004); United States v. Jones, 393 F.3d 107 (2d Cir. 2004); Marten v. United States, 856 A.2d 595 (D.C. Cir. 2004).
[91] United States v. Saner, 313 F. Supp. 2d 896 (S.D. Ind. 2004).
[92] *Id.* at 901.
[93] United States v. Savoca, 335 F. Supp. 2d 385 (S.D.N.Y. 2004).
[94] United States v. Saget, 377 F.3d 223 (2d Cir. 2004).
[95] United States v. Lee, 374 F.3d 637 (8th Cir. 2004).
[96] *See also* Williams v. United States, 858 A.2d 978 (D.C. Cir. 2004) (diary entries of an un-indicted co-conspirator are not testimonial, and were properly admitted against defendant as statements against interest).

State courts that have addressed this issue have conformed to the same distinction; statements otherwise qualifying as statements against interest have been deemed testimonial when they are made to someone acting in a law enforcement capacity,[97] but when made to an "acquaintance," or someone not having any connection to law enforcement, they are deemed not testimonial.[98]

This basic distinction is logical and expected. It accurately differentiates between the types of statements that *Crawford* sought to prevent; i.e., unconfronted testimony, statements obtained from witnesses through the use of *ex parte* examinations designed to secure pre-trial, and those that lack any governmental involvement and thus involve no such systemic processes to secure such testimony. While the wisdom of this distinction may be debated, the line is instructively clear and accurate in the arena of statements against interest.

C. F.R.E. 804(b)(6) - Forfeiture by Wrongdoing

Crawford recognizes an exception to the Confrontation Clause for the doctrine of forfeiture by wrongdoing.[99] Distinguishing it from exceptions created or analyzed under *Roberts*, the Court stated the doctrine was not an alternate means of assessing reliability, but was accepted on equitable grounds as a Confrontation Clause waiver.[100] The doctrine has been interpreted as a per se exception, applicable regardless whether the statement in issue would be considered "testimonial," provided the foundational criteria are met.[101] State courts have also generally adopted it as an exception under the plain language of *Crawford*.[102]

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[97] State v. Williams, 889 So. 2d 1093 (La. Ct. App. 2004); People v. Bell, 689 N.W.2d 732 (Mich. Ct. App. 2004); State v. Allen, 2004 Ohio 3111 (Ct. App. 2004); State v. Page, 104 P.3d 616 (Ore. Ct. App. 2005); State v. Alvarez-Lopez, 98 P.3d 699 (N.M. 2004); Vigil v. State, 98 P.3d 172 (Wyo. 2004)

[98] State v. Rivera, 844 A.2d 191 (Conn. 2004); Woods v. State, 152 S.W.3d 105 (Tex. Crim. App. 2004); People v. Deshazo, 679 N.W.2d 69 (Mich. 2004).

[99] *Crawford*, 541 U.S. at 62.

[100] *Id*.

[101] United States v. Johnson, 354 F. Supp. 2d 939 (N.D. Iowa 2005); U.S. v. Jordan, No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289 (D. Colo. Mar. 3, 2005); Francis v. Duncan, No. 03 Civ. 4959 (DC), 2004 U.S. Dist. LEXIS 16670 (S.D.N.Y. Aug. 23, 2004); United States v. Mikos, No. 02 CR 137-1, 2004 U.S. Dist. LEXIS 13650 (N.D. Ill. Jul. 15, 2004).

[102] State v. Scacchetti, 690 N.W.2d 393 (Minn. Ct. App. 2005) (when forfeiture by wrongdoing is applicable, defendant deemed to have waived confrontation rights under *Crawford*); Gonzalez v. State, 155 S.W.3d 603 (Tex. Ct. App. 2004) (confrontation rights waived under doctrine of wrongdoing); People v. Moore, No. 01CA1760, 2004 Colo. App. LEXIS 1354 (Ct. App. Jul. 29, 2004) (forfeiture by wrongdoing survives *Crawford*); State v Meeks, 88 P.3d 789 (Kan. 2004) (Kansas statutory equivalent of forfeiture by wrongdoing exception survives *Crawford*).

D. F.R.E. 804(b)(2) - Dying Declarations

While both the plain language of *Crawford*[103] and the lack of any Federal Circuit case on point would suggest that this exception survived, without regard to whether the statement is deemed testimonial, one court recently held to the contrary. The court's rationale and justification warrant discussion. In *United States v. Jordan*,[104] the court, despite recognizing the *Crawford* court acknowledged there was ample historical authority for admitting testimonial dying declarations, held there was no rationale in *Crawford* that justified treating dying declarations differently from any other testimonial statement.[105] Defendant Jordan was charged with second degree murder of a fellow inmate. The victim was stabbed in the main recreation yard of the U.S. Penitentiary at Florence, Colorado. While at the emergency room, the victim begged the trauma doctors to save his life, and he repeatedly asked if he was going to die. The victim died approximately seven hours after he was stabbed. Between the time of the stabbing and the time of his death, the victim was questioned by a Bureau of Prisons (BOP) agent. The court, finding the victim's statements to the BOP agent that identified the perpetrator of the attack and its motive were testimonial, held that *Crawford* did not intend to create an exception for dying declarations and thus the statements were not admissible as such.[106] The court went to great lengths to demonstrate the inherent unreliability of dying declarations,[107] ultimately footing its ruling on the aforementioned litmus test of whether the statement was made to law enforcement.[108] As the court did not articulate the circumstances surrounding the BOP agent's questioning of the victim, the educated reader cannot apply any analytical model to the statements in issue.[109] Though the Tenth Circuit

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[103] *Crawford*, 541 U.S at 62 n.6.
[104] No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289 (D. Colo. Mar. 3, 2005).
[105] *Id*. at *7.
[106] *Jordan*, 2005 U.S. Dist. LEXIS 3289, at *10-11.
[107] *Id*. at *9-10.
[108] *Id*. at *6. To classify the reasoning in this fashion is being kind to the court. The court actually wrote that the statements were testimonial because "he identified the perpetrator of the attack and its motive." *Id*.
[109] The court in *Jordan* also held, for the same reasons, that the victim's statements were not admissible as excited utterances under F.R.E. 803(2). Given the court's determination that the statements were testimonial, this ruling was correct in context. The court distinguishes its holding from three cases that it claims read *Crawford* as inapplicable to "firmly rooted" hearsay exceptions such as excited utterances and statements against penal interest. As I have cited to a case that expressly held just that (*see* State v. Banks, 2004 Ohio 6522 (Ct. App. 2004), n.139, *infra*), the court's inaccurate reference of these cases for that premise warrants correction. In United States v. Brown, 322 F. Supp. 2d 101, 105 (D. Mass. 2004), the court stated that it was unlikely that *Crawford* would apply to excited utterances and statements against penal interest when dealing with non-testimonial hearsay. In People v. Moore, No. 01CA1760, 2004 Colo. App. LEXIS 1354 (Ct. App. Jul. 29, 2004), the court cited *Crawford* solely for the position, endorsed by the court in

has not spoken on the issue of whether a statement made to or heard by a police officer is inherently testimonial, this case will likely provide the opportunity for that court to expand its *Crawford* analysis to all types of pretrial statements.[110] It is expected, less the law encourage would-be attackers to ensure their victim's death to prevent the use of anything they say at a subsequent trial, that courts will create a limited exception for the admission of testimonial dying declarations.[111]

V. SELECTED F.R.E. 803 EXCEPTIONS

A. F.R.E 803(2) - Excited Utterances

In addressing the admissibility of pretrial statements under this traditional hearsay exception, the error of failing to properly define the parameters of "testimonial" is well illustrated. However, at least one court seems to have clearly understood the fundamental point of *Crawford* despite the Court's failure to clearly make it; that the Court's concern was "the principle evil at which the Confrontation Clause was directed[:] . . . . the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." [112] Once this point is understood, traditional excited utterances fall out of *Crawford's* purview, for by definition, such statements do not involve any mode of criminal procedure.[113]

Jordan, that the doctrine of forfeiture by wrongdoing extinguishes an otherwise viable confrontation claim. Finally, in State v. Manuel, 685 N.W. 2d 525, 532 (Wisc. 2004), the court addressed firmly rooted hearsay exceptions only in the context of applying the *Roberts* test to statements deemed not testimonial under *Crawford*, noting that in the case before it, the declarant of the statements in issue testified at trial and was subject to cross-examination, mooting the *Crawford* issue.

[110] *See* McKinney v. Bruce, 125 F.App'x 947 (10th Cir. 2005) (statements admitted under state of mind hearsay exception not testimonial).

[111] *See, e.g.*, State v. Nix, 2004 Ohio 5502 (Ct. App. 2004) (dying declaration made to police officer not testimonial); People v. Monterroso, 101 P. 3d 956 (Cal. 2004) (dying declarations pass Sixth Amendment muster without regard to whether they are testimonial).

[112] Leavitt v. Arave, 371 F. 3d 663, 683 (9th Cir. 2004) (citations omitted).

[113] *Crawford*, 541 U.S. at 58 n.8 (to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made "immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage" (citations omitted)). The issue the Court had with excited utterances was with those utterances that trial courts have admitted when substantial periods of time have passed between the occurrence of the incident and the making of the utterance. These statements, though often admitted as excited utterances based on the rationale that the declarant remains under the stress of the even, are not truly excited utterances. Once the declarant has meaningful time to reflect prior to making a statement, the statement ceases to be an excited utterance, regardless what some courts may call it. Admitting such statements, in the context of police interviews, days, weeks and even months after the startling event, is the core evil *Crawford* is after.

1. Fundamentals.

> In brief, to qualify a statement as an excited utterance the party offering the statement must show that the declarant was under the stress of excitement caused by an external event sufficient to still the declarant's reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful.[114]

From its historical roots to its use in modern criminal jurisprudence, the admissibility of excited utterances has been, and remains, dependent on the very fact that such statements are detached from any criminal process and are made under circumstances completely divorced from any *ex parte* examination, policy, or procedure designed to preserve unconfronted testimony for trial. However, courts have misunderstood this fundamental principle in light of *Crawford*, and have applied the aforesaid law enforcement involvement factor as determinative to the admissibility of a traditional excited utterance. This flawed distinction is fairly illustrated in *Mungo v. Duncan*.[115] Defendant Mungo was convicted of murder in New York state court. In a petition for writ of habeas corpus, Mungo contended that the admission at trial over his objection of pretrial statements made by the murder victim just prior to the victim's death violated his rights under the Sixth Amendment Confrontation Clause. The trial court admitted the statements as excited utterances under the New York state F.R.E. 803(2) equivalent.[116] Two plain clothes police officers in a police cruiser disguised as a taxicab heard gunshots fired. Driving toward the sound of the shots, the murder victim, Brent Arthur, flagged them down. The police officers saw two African-American men in light-colored shirts run across the street away from them as they approached Arthur. One officer asked Arthur, "Who shot you, those guys running?" Arthur answered, "Yeah those guys." The police officers put Arthur in their cruiser and drove off in pursuit of the two men. While in pursuit, one officer asked Arthur, "Do you know where they are going?" Arthur answered, "Go to the projects, go to the projects." When the officers arrived at the nearby Sutter Avenue housing projects, they recognized the two men they had seen earlier crossing the street and identified by Arthur. One officer asked Arthur if these where his assailants, to which Arthur answered, "Those are them."

The two police officers pursued the men into the Sutter Avenue housing projects and found them hiding. One of the men was defendant

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[114] People v. Moscat, 777 N.Y.S.2d 875, 879 (N.Y.C. Crim. Ct. 2004).
[115] 393 F.3d 327 (2d Cir. 2004).
[116] *Id.* at 329.

Mungo. When the police brought the two men back to their police cruiser, Arthur was lying on the ground writhing in pain. One of the officers told Arthur an ambulance was on its way, and then began a colloquy with Arthur that produced more statements from Arthur identifying Mungo and the other man as Arthur's assailants.[117]

While the court did not address a *Crawford* issue as part of its holding,[118] it offered, in dictum, guidance as to "how the distinction drawn by *Crawford* might apply to Arthur's several statements to police."[119] Regarding Arthur's statements before Mungo was apprehended by the two police officers, the court stated such statements, delivered in emergency circumstances to help police "nab Arthur's assailants," were not the type of declarations the *Crawford* Court would regard as testimonial.[120] However, regarding Arthur's identification of Mungo after he was apprehended, the court felt this statement "seems to have been made in greater formality with a view to creating a record and proving charges," thus suggesting it to be testimonial.[121]

The testimonial distinction must run deeper than simply determining if the statement was made to law enforcement authorities. Failure to do so equates the officers' on-scene, show-up identification actions to a type of criminal process designed to preserve trial testimony without confrontation. The evils that *Crawford* sought to eradicate were processes specifically designed to subvert the protections of the Confrontation Clause; every setting that has a police officer in it does not become such a process. But without clear parameters for what is and is not testimonial, the Court has forced

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[117] The following summarized dialogue occurred: Sergeant Delaney the driver of the cruiser, said to Arthur, "Listen I'm going to bring over two people, bring two people over to you one at a time. You have to tell me are these the guys who shot you." Officer Cavallo (the other police officer) then brought each man over and asked Arthur if it was the man who shot him. Both times Arthur stated "Yes." Officer Cavallo then asked Arthur, "I need to know exactly who shot you." Arthur responded, "The guy in gray," identifying defendant Mungo. Sergeant Delaney asked Arthur why they had shot him, and Arthur stated, "They tried to rob me." *Mungo*, 393 F.3d at 328.

[118] The court determined that the rule in *Crawford* was not a "watershed rule of criminal procedure" to be applied retroactively under AEDPA and Teague v. Lane, 498 U.S. 288 (1989), and thus affirmed the trial court's denial of Mungo's writ petition. *Mungo*, 393 F.3d at 336.

[119] *Mungo*, 393 F.3d at 336.

[120] *Id*.

[121] *Id*. The court is silent as to whether Arthur's identification of Mungo at the Sutter Avenue projects, while on the ground in obvious pain, would qualify as a dying declaration. It appears quite likely the identification would so qualify, making all of Arthur's statements admissible. Though courts should take instruction from such a result to clearly define the limits of a startling event supporting a true excited utterance, the distinction between the two is significant, for *Crawford* seemingly endorsed an exception to its rule for dying declarations without regard to whether they are testimonial. *Crawford*, 541 U.S. at 56 n.6. *Contra*, U.S. v. Jordan, No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289 (D. Colo. Mar. 3, 2005).

developing uncertainty into our criminal jurisprudence.[122] We thus face a lengthy period of judicial definitional development before courts can even begin to consider whether current social, cultural, or public policy standards of fairness warrant exceptions in specified circumstances.[123]

Federal courts and most state courts that have specifically addressed this issue have held the circumstances surrounding pre-trial statements, which are otherwise admissible as excited utterances, render them not testimonial.[124] This remains true even if the statement was made to or recorded by a law enforcement officer.[125] These courts adhere to and understand the intended purpose of the new *Crawford* rule. However, there are noted exceptions where statements otherwise falling squarely within the parameters of a traditional excited utterance were held inadmissible simply because the person to whom it was made, or by whom it is being conveyed, is a member of law enforcement organization.

A case illustrating this erroneous understanding is *Lopez v. State*.[126] The court addressed the simple question of whether a statement otherwise admissible as a traditional excited utterance was testimonial because it was made in response to on scene police questioning. In *Lopez*, police officers

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[122] *Cf. Mungo*, 393 F.3d at 336 (stating that the *Crawford* Court declined to define "testimonial," wisely sensing the issue was complex and should gradually develop in light of cumulative judicial experience). The inconsistent holdings in 911 call cases illustrate that the court's decision was unwise. To be sure, it is unlikely the Court intended that in a situation such as in *Mungo*, the victim's statements would be inadmissible if the victim lived but was unable to testify due to his injuries, but admissible if the victim dies. Such a rule would quickly turn prosecutors into personal injuries lawyers; the worse the injuries, the better the case.

[123] *See infra* Part V(a)(3), Child Hearsay and state "tender years" statutes.

[124] United States v. Griggs, 04 Cr. 428 (DWA), 2004 U.S. Dist. LEXIS 23695 (S.D.N.Y. Nov. 22, 2004) (statement heard by responding police officer "Gun! Gun! He's got a gun!" not testimonial in nature as declarant did not expect it would be used in future judicial proceedings); Ricketts v. Dretke, No. 4:04-CV-0397-Y, 2004 U.S. Dist. LEXIS 24986 (N.D. Tex. Aug. 12, 2004); Brooks v. State, No. 2001-KA-01826-COA, 2004 Miss. App. LEXIS 616 (Ct.Miss. App. Jun. 29, 2004), *rev'd on other grounds,* Brooks v. State, 903 So. 2d 691 (Miss. 2005); People v. Compan, 100 P.3d 533 (Colo. Ct. App. 2004); Demons v. State, 595 S.E.2d 76 (Ga. 2004); State v. Ferguson, 607 S.E.2d 526 (W.V. 2004); State v. Manuel, 685 N.W.2d 525 (Wis. Ct. App. 2004); State v. Harr, 821 N.E.2d 1058 (Ohio App. Ct. 2004); Doe v. Doe, 103 P.3d 967 (Idaho Ct. App. 2005); State v. Cunningham, 99 P.3d 271 (Ore. 2004); People v. Garrison, 109 P.3d 1009 (Colo. Ct. App. 2004).

[125] State v. Barnes, 854 A.2d 208 (Me. 2004); People v. Rivera, 778 N.Y.S. 2d 28 (N.Y. App. Div. 2004); State v. Forrest, 596 S.E.2d 22 (N.C. 2004); Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004); Hammon v. State, 809 N.E.2d 945 (Ind. Ct. App. 2004); Wilson v. State, 151 S.W. 3d 694 (Tex. Ct. App. 2004); People v. Cage, 15 Cal. Rptr. 3d 846 (Ct. App. 2004); State v. Orndorff, 95 P.3d 406 (Wash. Ct. App. 2004); Commonwealth v. Eichele, 66 Pa. D. & C. 4th 460 (Ct. Comm. Pl. 2004).

[126] 888 So. 2d 693 (Fl. Dist. Ct. App. 2004).

responded to a report of kidnapping and assault at an apartment complex. They found the declarant, Hector Ruiz, in the parking lot, visibly nervous and upset. The officers asked Ruiz what had happened, and Ruiz told them a man had abducted him in his own car at gunpoint. Ruiz then pointed at defendant Lopez who was standing in the same parking lot some distance away. Ruiz also told the officers that the gun Lopez used to abduct him was still in Ruiz's car. Ruiz's statements to the police officers in the parking lot were admitted at trial, over Lopez's objection, as excited utterances.

The court began its analysis by addressing how the facts before it fit into the three sample definitions of "testimonial" offered by *Crawford*, focusing primarily on the third one, to wit: "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[127] The court noted that most state courts addressing this issue had held excited utterances under similar circumstances to be not testimonial.[128] However, the court drew its own distinction between statements volunteered to a law enforcement or government official and those that are in response to questioning. The court used 911 emergency calls as an example where many courts have concluded that statements made during 911 calls are not testimonial because the purpose of the call is to obtain assistance, not to make a record against someone.[129] The court then cites three state cases that prove the point; each case supporting the position that excited utterances declared to someone other than a person in authority are not testimonial.[130] Contrasting the case before it, the court summarily concluded that a *startled person* who identifies a suspect in a statement made to a police officer at the scene of a crime surely knows that the statement is a form of accusation that will be used against the suspect.[131]

This statement begs the following questions: when the assault victim is asked by a good Samaritan who their assailant was, when they answer, do they similarly then "surely know that the statement . . . will be used against the suspect?" If so, does it matter whether the declarant knows the identity of the individual to whom they speak? If the declarant later dies, does the character and reliability of the statement change? Would the *Lopez* panel of judges be compelled to reach a different result based on the literal language of *Crawford's sui generis* exception for dying declarations? The point is, none of these variations change the character of the statement nor the circumstances

[127] *Lopez*, 888 So. 2d at 698.
[128] *Id*. at 699.
[129] *Id*.
[130] *Id*.
[131] *Id*. (emphasis added).

under which it was made. To rule it admissible in one case and inadmissible in another is placing form over substance. The *Lopez* court makes a fundamental error in justifying its decision by saying "the statement does not lose its character as a testimonial statement merely because the declarant was excited at the time it was made."[132] Statements otherwise qualifying as excited utterances are inherently not testimonial. Even using the malleable exemplar definition of "reasonably foreseeable" that the statement may be used at a later trial, the entire historical premise of an excited utterance is that there is no reflection by the declarant when making the statement; she is relaying what she saw, heard, smelled or did in relation to the startling event while still under the stress of that event. Stated another way, she reasonably foresees or expects *nothing* about the statement when she makes it. Properly founded excited utterances have no element of reflection, preventing any realization by the declarant at the time the statement is being made that it will be used at a later trial. This is the classic situation where the witness is not bearing testimony; courts are creating it.

Some courts have recognized that statements made after a passage of time from the startling event or after an intervening event, previously held to be admissible under an expanded version of excited utterances, are the type of testimonial statements that *Crawford* sought to preclude. In *People v. Victors*,[133] the Illinois Appellate Court held that statements by a domestic violence victim made to a police officer at the location of the complaint did not qualify as excited utterances because they followed previous questioning by an unidentified backup officer and thus gave the declarant an opportunity to reflect on her statements, "moving them outside the realm of excited utterances."[134] The court went on to determine the statements were the result of police questioning as part of an investigation into the possible commission of a crime, and thus testimonial.[135] Similarly, in *Wall v. State*,[136] the court ruled that statements of an assault victim made in response to police questioning after the victim was taken to a hospital, admitted at trial as excited utterances over the defendant's objection, qualified as the result of "structured police questioning" and thus were testimonial and subject to *Crawford*.[137]

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[132] *Lopez*, 888 So. 2d at 700.

[133] 819 N.E.2d 311 (Ill. App. Ct. 2004).

[134] *Victors*, 819 N.E. 2d at 319.

[135] *Id*.

[136] 143 S.W. 3d 846 (Tex. Ct. App. 2004).

[137] *Wall*, 143 S.W. 3d at 851. *See also*, Sammaron v. State, 150 S.W. 3d 701 (Tex. Ct. App. 2004) (statements by assault victim made in response to police questioning at the police station one hour after that assault were testimonial, as the victim did not *spontaneously* tell the interviewing officer what had happened at the scene) (emphasis added)); *But see* Cassidy v. State, 149 S.W. 3d

These holdings follow the intent of *Crawford* by restricting the use of colloquial police interrogations as methods of securing unconfronted trial testimony. Victims and witnesses of crimes undoubtedly remain under some stress long after the predicate event. But this stress was never the sole determinative factor for excited utterances; it is the stress coupled with the lack of reflection that qualifies the statement for admission under this traditional exception. Limiting excited utterances in this fashion upholds the spirit of *Crawford*, and demonstrates a thorough understanding of the issue.[138]

2. 911 Calls

The difficulty in applying *Crawford* in a manner that generates logical and consistent results is best evidenced in this arena. Statements made during 911 calls pose the most challenging real world application of *Crawford*.[139] Often used by prosecutors as an alternative to testimony from a victim or complainant, the relevant portions of 911 calls are normally admitted at trial as excited utterances or present sense impressions.[140] In light of *Crawford*, courts have been forced to determine, what portion, if any, of the caller's statements are testimonial, effectively barring the admissibility of such statements. Though there is significant disagreement in this area among courts, a modicum of clarity has emerged offering a potential framework within which *Crawford* can be applied to all 911 calls.

a. *Moscat* and *Cortes*

It is instructive to begin this discussion with two frequently cited New York Supreme Court[141] cases that reach opposite results regarding whether a

712 (Tex. Ct. App. 2004) (police questioning of assault victim at hospital is not testimonial and victim's responses properly admitted as excited utterances).

[138] Left open is the question whether statements like those in *Victors* and *Wall* would still be admissible as excited utterances if they had been made to an "acquaintance" of the declarant. This further illustrates the ills of using law enforcement involvement as the determinative *Crawford* factor.

[139] At least one court was not up to the challenge. In State v. Banks, 2004 Ohio 6522 (Ct. App. 2004), the court ruled that *Crawford* was inapplicable to 911 calls, stating, "the holding in *Crawford* only applies to statements that are, in fact, hearsay, and that are not subject to common-law exceptions to the hearsay rule, such as excited utterance or present sense impression." *Banks*, 2004 Ohio 6522 at ¶18. With due respect to the court, statements that qualify as excited utterances and present sense impressions are by definition hearsay statements, else we would not need an exception for their admission. *Crawford* applies to any testimonial pretrial statement, without regard to any otherwise applicable hearsay exception.

[140] Though present sense impressions have not been addressed in many post-*Crawford* cases, most jurisdictions treat them the same as excited utterances due to their nearly identical foundational requirements. *See, e.g.*, People v. Nieves, 492 N.E.2d 109, 115 n.4 (N.Y. 1986).

[141] The Supreme Court level of New York State Courts is the trial court level.

911 caller's statements are testimonial. In *People v. Moscat*,[142] Judge Greenberg wrote that a 911 call for help is essentially different in nature than the "testimonial" statements *Crawford* sought to exclude because a 911 call is, (1) "typically initiated not by the police, but by the victim of a crime," and (2) "generated not by the prosecution or the police to seek evidence against a particular suspect; [but] rather . . . the urgent desire of a citizen to be rescued from immediate peril."[143] Finding that a 911 call can usually be seen as part of the criminal incident itself, rather than any resulting prosecution, the court found the statements made during the call were not testimonial.[144] The court did not articulate or summarize the statements in question from the relevant 911 call.

In apparent conflict with *Moscat* is *People v. Cortes,*[145] in which Judge Bamberger wrote that statements during a 911 call to report a crime and supply information about the circumstances of the crime are made for the purpose of "invoking police action and the prosecutorial process," and thus are testimonial.[146] Providing a historical analysis of the Confrontation Clause that rivals, if not exceeds, that in *Crawford*, presented in an arguably adversarial manner,[147] the court held an "objective reasonable person knows that when he or she reports a crime the statement will be used in an investigation and a proceedings relating to prosecution."[148] Additionally, the court points out that the procedures employed by most cities in the taking and preserving of 911 calls "meet the definition of formal" as the term is used in *Crawford*.[149]

These two cases have become the starting point for other jurisdictions facing this issue. In an attempt to reconcile the two cases, it could be fairly argued that though they are seemingly opposite in their holdings, they are consistent in their rationales in that they simply distinguish between testimonial 911 calls that report a crime and non-testimonial 911 calls for help.[150] While

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[142] 777 N.Y.S.2d 875 (N.Y.C. Crim. Ct. 2004).
[143] *Moscat*, 777 N.Y.S.2d at 879.
[144] *Id*. at 880.
[145] 781 N.Y.S. 2d 401 (N.Y. Sup. Ct. 2004).
[146] *Cortes*, 781 N.Y.S. 2d at 415-16.
[147] For an interesting perspective on Judge Bamberger, *see* David Feige, *Bumble in the Bronx*, LEGAL AFFAIRS, July/August 2002.
[148] *Cortes*, 781 N.Y.S.2d at 415.
[149] *Id*. at 406.
[150] It is doubtful that the respective Judges in *Moscat* and *Cortes* would agree with such a reconciliation. In *Moscat*, Judge Greenberg wrote, "A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call, it is the citizen who summons the government to her aid." *Moscat*, 777 N.Y.S.2d at 879. In *Cortes*, Judge Bamberger compared the questions asked by a 911 operator to depositions and interrogations by magistrates and justices of the peace in 19th century England. *Cortes*, 781 N.Y.S.2d at 415. In spite of the rationale that

the distinction is tempting, and at least one court has adopted this "dichotomy" as a framework for whether statements made during 911 calls are testimonial,[151] it is an artificial one that presumes all 911 calls can be so divided. Practically speaking, most calls are both. The danger in adopting such a distinction is that the reviewing court will attempt to characterize the entire call as either a request for help or a call to report a crime. The better approach is to simply evaluate whether each statement made during the call otherwise qualifies as a spontaneous declaration.[152] Even those who advocate an expansive definition of "testimonial" make their point using the foundational criteria of this exception.[153] This approach provides a familiar, workable framework that can be used to analyze each statement in a 911 call as to whether it is testimonial or not without imposing a "purpose statement made" test that forces an artificial distinction.[154] Whether the caller is seeking help or reporting a crime, if they are under the stress of an event and are conveying what they are observing or recently observed regarding that event, they have not reflected on their statements, regardless if they are responding to questioning, and thus cannot be said under any reasonable person standard to realize that their statements would likely be used prosecutorially or be available for use at a later trial.[155]

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one who calls to report a crime knows their statements will be used in a later prosecution, Judge Bamberger states, "When a 911 call is made to report a crime and supply information about the circumstances and the people involved, the purpose of the information is for investigation, prosecution, and potential use at a judicial proceeding; *it makes no difference what the caller believes*." *Id*. (emphasis added). Both courts essentially lumped all 911 calls together in reaching their post-*Crawford* decisions and, frankly, failed to recognize that 911 calls need to be characteristically distinguished not only from each other, but more importantly the statements within the same 911 call must be characteristically distinguished as well in order to logically and properly subject such statements to a testimonial analysis. Nonetheless, these two cases have provided the foundation for courts to objectively engage the issue with the goal of developing an analytical framework applicable to all 911 calls.

[151] State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004).

[152] I use this term to cover both excited utterances and present sense impressions.

[153] *See, e.g.,* Richard Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1243 (2002) ("Thus if any significant time has passed since the events it describes, the statement is probably testimonial.").

[154] *See* People v. Isaac, No. 23398/02, 2004 N.Y. slip op. 50582U, 4 Misc. 3d 1001A (N.Y. Dist. Ct. 2004) (agreeing with *Moscat* in that excited utterances fall outside *Crawford* because the characteristics that qualify them as excited utterances negate the characteristics which would be required to make them "testimonial").

[155] People v. Conyers, 777 N.Y.S.2d 274, 277 (N.Y. Sup. Ct. 2004) (stating that the callers intention in placing the 911 call was "to stop the assault in progress and not to consider the legal ramifications of herself as a witness in a future proceeding."). The court went on to hold that the statements made during the call clearly fell within the parameters of an excited utterance, and thus the call was not testimonial in nature.

b. The Emerging Dichotomy

Parsing the 911 call to determine which statements are testimonial and which are not is illustrated in *People v. West*.[156] The case involved a prosecution for aggravated sexual assault, vehicular hijacking, armed robbery, and kidnapping. The victim, identified as M.M., was a cab driver. Two male passengers entered her cab and robbed her at gunpoint. They then forced her to drive to an abandoned garage where the two men had nonconsensual vaginal sex with her. One of the men then drove his accomplice and M.M. to another abandoned garage where the two men, along with a third accomplice who had been picked up along the way, again had nonconsensual vaginal sex with her. M.M. was eventually able to escape and run to a nearby house and seek help from the occupant, Dorothy Jackson. In an effort to assist M.M., Ms. Jackson called 911 and relayed the information M.M. provided to her about the robbery and sexual assaults.

At trial, the State introduced a tape of Ms. Jackson's 911 call over the defendant's objection as a spontaneous declaration. The court noted that during the call, the 911 dispatcher posed numerous questions to Ms. Jackson, including what was wrong, whether M.M. needed medical assistance, where she was located, where M.M.'s vehicle was and the direction her assailants went "in order to get the police over there to help."[157]

The court rejected a bright line rule that would hold a 911 call either entirely testimonial or non-testimonial in nature.[158] Instead, they stated a court should determine on a case by case basis whether a statement during a 911 call was: (1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence or use in a criminal prosecution. In either instance, the court stated the statement would be testimonial.[159] Conversely, if the statements are made "to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous, situation," then the statement would not be testimonial.[160]

Applying this framework, the court held the statements made during the 911 call concerning the nature of the alleged attack, M.M.'s medical needs,

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[156] 823 N.E.2d 82 (Ill. App. Ct. 2005).
[157] *West*, 823 N.E.2d at 85.
[158] *Id.* at 91.
[159] *Id.*
[160] *Id.*, citing Richard Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1242 (2002).

her age and her location were not testimonial, as they were given immediately after M.M. was brutally assaulted and in a *state of shock* for the purpose of requesting medical and *police assistance*.[161] However, as to the statements by M.M. describing her vehicle, the direction in which her assailants fled and her items of personal property that they took, the court found these statements were testimonial, as they were made in response to the dispatchers questioning for the stated purpose of involving the police.[162] The court compared these statements to those obtained through official questioning for the purpose of producing evidence in anticipation of a potential criminal proceeding.[163]

While *West* provides some guidance on evaluating a 911 call to ensure that the dispatcher does not extend the questioning to the point where it becomes a *de facto* police interview, the court's reliance on the caller's purpose causes it to trip over its own framework. The court's first test to determine whether statements are testimonial is whether the statements were "volunteered for the purpose of initiating police action or criminal prosecution."[164] When Ms. Jackson called 911 after a woman had frantically banged on her front door stating she had just been raped, surely everyone would agree that the *objectively reasonable* person in Ms. Jackson's position would have been seeking immediate police and medical assistance. Certainly, seeking police involvement in order to get help does not exclude the simultaneous desire, or intention, of the caller to have the police apprehend the offender in order to not only end the traumatic event but also preclude further criminal action against either the initial victim or subsequent ones. Simply put, a call is often for both contemporaneous purposes; to seek immediate assistance and to initiate police action so they can catch the perpetrator of the crime. The latter is often the crux of the former. The *West* court says as much when they stated the initial statements in the 911 call were "for the purpose of requesting medical and police assistance."[165] These statements were deemed not testimonial even though many were in response to the dispatcher's questions.[166] The real Confrontation Clause concern arises when the dispatcher begins to act as an interrogator; once that occurs, they become a

[161] *West*, 823 N.E.2d at 91 (emphasis added). The court in essence held these statements were not testimonial because they fit the criteria for an excited utterance, while at the same time triggering the first factor in its "testimonial" test, to wit: volunteered for the purpose of initiating police action.
[162] *Id.* at 91.
[163] *West*, 823 N.E.2d at 91-92.
[164] *Id*. at 91.
[165] *Id*.
[166] *Id*. at 86 ("Further, the dispatcher's questions concerning what was wrong, whether M.M. was in need of an ambulance, what her age was, and where she was located were posed in order to gather information about the situation and to secure medical attention for her, not to produce evidence in anticipation of a potential criminal prosecution.").

facilitator of an *ex parte* pretrial examination in anticipation of using it against a suspect; before that time, they are simply facilitating statements that would otherwise be admissible as excited utterances, imposing order into what would otherwise be a emotional, often frantic, and clearly "excited" one-sided phone call.

c. The Federal View

The only federal court to date to specifically address this issue fundamentally agrees with this principle. In *Leavitt v. Arave*,[167] the Ninth Circuit, among many other issues, addressed the applicability of *Crawford* to statements made during a 911 call made by a women who suspected a prowler had attempted to enter her home. The court held that the women's statements during the call were not testimonial, reasoning that she had initiated the call, not the police, and that she was not being interrogated by the dispatcher during the call but instead was seeking help in ending a frightening intrusion into her home.[168] The court closed its brief and to the point analysis by stating that "we do not believe the admission of her hearsay statements against [defendant] implicate 'the principle evil at which the Confrontation Clause was directed[:] . . . the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.'"[169] Other courts would be wise to follow this lead.

d. A Proposed Workable Analytical Framework for All 911 Calls

Consider the following hypothetical. A 911 call is made by an individual who is witnessing an event as they are speaking to the dispatcher. The caller describes a chase in which one individual is chasing the other with a gun, firing shots, until the individual being chased collapses, suffering an apparent gun shot wound. The caller states, "Oh my God, he just shot him. You gotta' get the cops here right now or he is going to get away." The caller then describes the shooter standing over the wounded individual firing two additional gunshots, after which the caller states, "He just shot the guy again. There is blood everywhere. The guy just ran away down Thornton St. He still has the gun. We need an ambulance right away."

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[167] 371 F.3d 663 (9th Cir. 2004).
[168] *Leavitt*, 371 F. 3d at 683.
[169] *Id*.

Under the dichotomy advanced in *West*,[170] the initial statements by the caller would be testimonial, as they were patently made with the intended purpose to involve the police to apprehend the man with the gun. These statements would otherwise be admissible as a traditional excited utterance or present sense impression. The caller's statements after observing the shooting, that medical attention is needed, would be non-testimonial, as he is seeking assistance to end the dangerous situation. However, his subsequent statement regarding where the shooter fled is intended to assist the police in finding the shooter so that they could arrest and prosecute him, and could arguably be considered testimonial.[171]

This hypothetical illustrates that the focus should not be on the caller but on the dispatcher. As stated above, the characteristics that place a statement within the parameters of an excited utterance or present sense impression are the same characteristics that render the statements non-testimonial. Since statements in 911 calls began being admitted as such hearsay exceptions in criminal prosecutions, law enforcement agencies have adapted to take advantage of them. Structured and systemic interview questions posed by dispatchers are an attempt to gain as much information as possible to assist law enforcement with the resulting criminal investigation have undoubtedly evolved with the understand that since the contents of the call will be admissible, get as much information as you can during the call. Once a dispatcher begins to conduct a *de facto* police interview with the caller, the resulting statements venture into that principle evil at which the Confrontation Clause was directed: *ex parte* examinations of witnesses. In order to protect against such a systemic procedure by law enforcement or governmental entities to circumvent trial testimony in favor of police controlled *ex parte* pretrial testimony, the analytical framework for determining whether statements in a 911 call are testimonial should be as follows: at what point, if any, does the dispatcher cease seeking information in order to provide immediate assistance to the caller to alleviate the situation reported and begin to gather information that would normally be obtained by a

[170] *See also* State v. Powers, 99 P.3d 1262 (Wash. Ct. App. 2004).

[171] It is conceded that under the framework for non-testimonial statements adopted by the *West* court from Professor Friedman's and Professor McCormack article, the statement about where the shooter fled could also arguably be deemed made while the caller was still seeking assistance to end the exigency at hand (i.e. statements made "to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous situation." Richard Friedman and Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. at 1242). To reconcile this potential dispute, once the dispatcher begins to interject questions into the call, the focus should shift off of the caller and onto the dispatcher solely to determine at what point the dispatcher crosses into the arena of colloquial interrogation. The only focus on the caller should be whether the statements qualify as excited utterances or present sense impressions.

responding police officer conducting an investigation with an eye toward a possible criminal prosecution? More succinctly put; at what point does the dispatcher become an interrogator, colloquially speaking. Statements made before such point are not testimonial; those made after are.

There is ample support for this approach. In *State v. Wright*,[172] the Minnesota Court of Appeals ruled that statements made during a 911 call, "moments after the criminal offense and under the stress of that event" are not testimonial as they do not fit within any of the definitions or examples set forth in *Crawford*.[173] In *People v. Corella*,[174] the 2nd District of the Court of Appeal of California ruled that statements made during a 911 call by a victim of a domestic violence incident were not testimonial because they were not given in response to structured police questioning and they bore "no indicia common to the official and formal quality of the various statements deemed testimonial by *Crawford*."[175] The court went on to state that it found it difficult to identify any circumstances under which a statement that qualified as an excited utterance or present sense impression would be "testimonial."[176] The court stated the rationale behind those exceptions is that the "utterance must be made without reflection or deliberation due to the stress of the excitement," and that such statements are "not made in contemplation of their 'testimonial' use in a future trial."[177] In *People v. Caudillo*,[178] the Sixth District of the Court of Appeal of California held that statements made during a 911 call reporting an on-going crime, made by an anonymous female caller, specifically that there were "men with guns" at a local 7-Eleven, and a license plate and description of a car in which the defendant was a passenger, were not testimonial under any interpretation of *Crawford*.[179] First, the court stated that the call was not an "*ex parte* in-court testimony or its functional equivalent," noting that the dispatcher was "seeking to obtain information to assist the police in responding appropriately by providing assistance to any victims and *apprehending the gunman to prevent any further violence*."[180] Secondly, the court held that the call was not a formalized testimonial statement, but rather an informal report of a recent shooting made in order to advise the police so "they could take

[172] 686 N.W.2d 295 (Minn. Ct. App. 2004).
[173] *Wright*, 686 N.W. 2d at 302.
[174] 18 Cal. Rptr. 3d 770 (Ct. App. 2004).
[175] *Corella*, 18 Cal. Rptr. 3d at 776.
[176] *Id*. at 469
[177] *Id*.
[178] 19 Cal. Rptr. 3d 574 (Ct. App. 2004).
[179] *Caudillo*, 19 Cal. Rptr. 3d at 589-90.
[180] *Id*. at 590 (emphasis added). This illustrates that at times, the "help" the caller is seeking is protection of others against further violence.

appropriate action to protect the community."[181] Finally, the court held the call was not made under circumstances which would lead an "objective witness reasonably to believe that the statement would be available for use at a later trial," reasoning that the caller was simply "requesting help from the police by describing what she saw without thinking about whether her statements would be used later at trial." [182]

Focusing on the purpose of the dispatcher's questions, while accepting that excited utterances and present sense impressions are inherently not testimonial, is the appropriate analytical framework to use when applying *Crawford* to statements made during 911 calls.

3. Child Hearsay and State "Tender Years" Statutes

This area of law has seen the most significant impact as a result of *Crawford*. At least forty states have some version of a tender years statute.[183] Varied in structure but common in purpose, such statutes create a hearsay exception for pretrial statements made by minors who are victims of certain enumerated crimes. Even before such statutes became common, law enforcement agencies adapted to the sensitivities necessary for the successful handling of child victims by fostering non-intimidating settings in which they conducted forensic interviews of child victims. The concept is that when children feel comfortable in their surroundings, and not threatened by their interviewers, they are more likely to be candid and complete in their responses and descriptions.

Though created in good faith to protect child victims from suffering further emotional distress and potential harm as a result of the adversarial criminal process, in light of *Crawford*, these government processes will ultimately yield testimonial statements from the child, as this is their intended purpose. The intent to shield the child from the trauma of testifying at trial is thwarted by the realization that the lack of live testimony will be fatal to the relevant prosecution. It is in this arena that the protections afforded by the Confrontation Clause collide with the society's public policy demands.[184]

The cases in this area, much like in the area of excited utterances, provide illustrative instruction on the inconsistent results that are caused by the

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[181] *Id*.
[182] *Id*. (citations omitted).
[183] Snowden v. State, 846 A.2d 36, 41 n.7 (Md. Ct. Spec. App. 2004).
[184] *See* Thomas J. Reed, *Crawford v. Washington and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 226 (2004)

Crawford's failure to clearly define the consequential term. While it appears obvious to courts, under any formulation of testimonial offered by *Crawford*, that such forensic interviews are testimonial,[185] it appears equally obvious that statements made to family members are not testimonial.[186] This distinction is significant, for non-testimonial statements of child victims that do not otherwise qualify as excited utterances may still be admissible under a cognizant tender years statute analyzed under criteria at a minimum equivalent to the *Roberts* standard.[187]

When courts are faced with the question of whether statements made to a physician conducting an examination of the child victim are testimonial, the courts' reasonings begin to show the *Crawford* confusion much like that illustrated in the 911 call cases. Statements made for the purpose of medical diagnosis and treatment that would be otherwise admissible under F.R.E. 803(4), like excited utterances, are inherently not testimonial.[188] This point was superbly articulated by the First District of the Illinois Court of Appeals court in *In re T.T.,*[189] which stated:

> [A] victim's statements to medical personnel regarding descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external

[185] *See* People v. Sisvath, 13 Cal. Rptr. 3d 753, 758 (Ct. App. 2004) (statements made by four year-old victim of sexual abuse during an interview at a county Multidisciplinary Interview Center (MDIC) by a forensic interview specialist, with the prosecutor and his investigator present, are testimonial.); People v. Vigil, 104 P. 3d 258, 262-63 (Colo. Ct. App. 2004) (statements made by seven year-old victim of sexual abuse during a videotaped interview with police are testimonial); T.P. v. State, No. CR-03-0574, 2004 Ala. Crim. App. LEXIS 236 (Crim. App. Oct. 29, 2004) (statements made by eight year-old victim of sexual abuse during interview with Sheriff's Department investigator and social worker are testimonial); Blanton v. State, 880 So. 2d 798, 801 (Fla. Dist. Ct. App. 2004) (videotaped interview of eleven year-old victim of sexual abuse by police investigator yielded testimonial statements); *But c.f.* United States v. Thunder Horse, 370 F.3d 745 (8th Cir. 2004) (decided after *Crawford* but without any reference to *Crawford* in the opinion, statements made by a ten year-old female victim of sexual abuse to an interviewer at a Child Advocacy Center ruled admissible as reliable hearsay under F.R.E. 807 because they contained sufficient guarantees of trustworthiness).

[186] *See* State v. Bobadilla, 690 N.W. 2d 345, 349-50 (Minn. Ct. App. 2004) (statements made by three year-old child victim of sexual abuse during videotaped interview with child protection worker and police detective are testimonial, but statements made to victim's mother not testimonial); *In re* Rolandis G, 817 N.E.2d 183, 188 (Ill. App. Ct. 2004) (statements made by seven year-old victim of sexual abuse during questioning by police officer who responded to victim's home, and during interview by child advocacy worker under observation by police were testimonial, but statements to victim's mother were not).

[187] *Bobadilla*, 690 N.W. 2d at 351; *In re Rolandis G*, 817 N.E. 2d at 190.

[188] *See, e.g.,* State v. Vaught, 682 N.W.2d 284 (Neb. 2004); State v. Castilla, 87 P.3d 1211 (Wash. Ct. App. 2005).

[189] 815 N.E. 2d 789 (Ill. App. Ct. 2004).

> source thereof . . . are not testimonial in nature where such statements do not accuse or identify the perpetrator of the assault . . . . [Such statements are] not accusatory against [defendant] at the time made and, thus, do not trigger enhanced protection under the confrontation clause. Respondent's primary focus on G.F.'s entire statement to Dr. Lonard as testimonial, because an objective witness would reasonably believe the statement would be available for use at a later trial, misses the mark. Such an analysis overlooks the crucial *witnesses against* phrase of the confrontation clause and casts too wide a net in categorizing nonaccusatory statements by sexual assault victims to medical personnel as implicating the confrontation clause's core concerns regarding *government production of ex parte evidence against a criminal defendant*.[190]

The court perfectly articulated that statements properly falling under the medical diagnosis and treatment exception are inherently not testimonial. As to statements by the child victim that concern fault or identity, such statements rarely if ever are relevant to diagnosis and treatment, and the court properly characterized them as testimonial, admissible only if the victim testified at trial subject to cross examination.[191] This is fundamentally sound rationale, and it represents a comprehensive understanding of the intended scope of *Crawford*[192]

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[190] *In re* T.T., 815 N.E.2d at 804 (citations, internal quotations omitted) (emphasis added).

[191] *Id*. at 993

[192] One court reached the same result for the wrong reasons. In People v. Vigil, 104 P.3d 258 (Colo. Ct. App. 2004), the court reached the same result as *In re T.T.*, but reasoned that the child victim's statements to the doctor identifying his assaulter were made under "circumstances that would lead an objective witness reasonably to believe that they would be used prosecutorially." *Vigil*, 104 P.3d at 265. The court wrongly interprets the term "witness" in this definition of testimonial to mean someone who hears the statements in question, in this case the doctor. The flaw is obvious. To bolster its position, the court pointed out that the doctor was a member of a child protection team that provided consultations at hospitals in cases of suspected child abuse, that he had previously provided expert testimony in child abuse cases and that he spoke with the police before conducting what the court termed a forensic sexual abuse examination. *Id*. This reasoning equally applies to all of the victim's statements during the examination; the doctor knew nothing of *Crawford*, and thus likely believed, given his experience articulated by the court, that everything the victim said during the interview would be used in a subsequent prosecution. Thus, the court, by its own argument, should have struck the entire interview as testimonial. Alternatively, had the examining doctor not had any experience in conducting a forensic sexual abuse examination on a child victim, would the court's holding have changed? The court actually based its conclusion on its finding that the victim's statements identifying his assaulter did not pertain to his diagnosis and treatment. In an effort to show its understanding of *Crawford*, they demonstrated a lack thereof. This interpretation of "witness" is simply wrong.

Statements made to social workers have also produced inconsistent results, and will likely be an area of unrest for some time.[193]

In such an emotional arena, societal preservation and public outrage demand that governments do everything possible to eradicate crimes of violence against children. It is conceivable that public policy concerns will mandate some form of accommodation be made to keep prosecutions viable while protecting a child victim from suffering irreparable emotional harm as a direct result of their trial testimony. However, under even the most restrictive reading of *Crawford*, it is evident that the forensic child interview, performed by or at the behest of law enforcement, is an exemplar, though perhaps unintended, of the type of process used to secure unconfronted testimonial statements that the Court believed well within the scope of the Confrontation Clause. To what extent this analysis must be modified to balance the need to protect child witnesses against the defendants right to confrontation, is a matter left for another day.

B. F.R.E. 803(3) - Then Existing State of Mind

To date, three circuits have specifically addressed whether statements admitted at trial either directly under F.R.E. 803(3), or under the state equivalent, are testimonial.

In *Horton v. Allen*,[194] the First Circuit determined that statements made by an accomplice to a third party were not testimonial, and hence *Crawford* did not apply.[195] In *Horton*, the defendant and accomplice Frederick Christian acted in concert to murder three acquaintances with whom they engaged in periodic drug transactions. The government offered testimony from a Henry Garcia that on the day of the murders, Christian told Garcia that he needed money and that Desir (one of the murder victims) had refused to give Christian drugs on credit in order for him to obtain money. This testimony was admitted over Horton's objection as a state equivalent of an

[193] *See* Snowden v. Maryland, 846 A.2d 36 (Md. Ct. Spec. App. 2004) (statements by child sexual abuse victims to social worker were testimonial as questioning was done for express purpose of obtaining statements admissible under Maryland's statutory hearsay exception for child statements in sexual abuse cases); State v. Mack, 101 P.3d 349 (Ore. 2004) (social worker questioning of three year-old witness at direction of police yielded testimonial statements); *But see* People v. Geno, 683 N.W.2d 624 (Mich. Ct. App. 2004) (statements made by two year-old victim of sexual abuse to civilian director of Children's Assessment Center, while police observed, were not testimonial).

[194] 370 F.3d 75 (1st Cir. 2004).

[195] *Horton*, 370 F.3d at 83-84.

803(3) state of mind exception.[196] The court, in determining *Crawford* was not applicable, acknowledged the three formulations of testimonial statements set forth in the opinion.[197] The court distinguished Christian's statements to Garcia as having been made in a private conversation, and using the most expansive definition of testimonial offered by *Crawford*, held that Christian's statements were not testimonial.[198] In the overall testimonial analysis, *Horton* is significant in that it adopted the most expansive definition of testimonial,[199] while also endorsing the distinction between statements made to those in a law enforcement capacity vice those made to acquaintances.[200] This simplifies the testimonial analysis, reducing the potential realm of testimonial statements to those made to government officers with some colloquial degree of formality.[201]

More restrictive in its application of *Crawford* to F.R.E. 803(3) statements is *Evans v. Luebbers*.[202] The court, stating that *Crawford* applies "to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations,"[203] held that various statements

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[196] *Horton*, 370 F.3d at 83.
[197] *Id*. at 84.
[198] *Id*. ("In short Christian did not make the statements under circumstances in which an objective person would 'reasonably believe that the statement would be available for use at a later trial.'" (citations omitted)).
[199] *Id*. It remains somewhat unsettled whether the term "objective person" in the definitional formulation from *Crawford* adopted in *Horton* refers to the declarant or to an individual to whom the statement is made or hears and later conveys the statement. The majority of courts have treated the "objective person" as the declarant, as it is the declarant's statements that courts must determine are the functional equivalent of "a witness who bears testimony" or not. A minority of courts have interpreted the term "objective person" to mean a person whom hears the statement. (n.193, *supra*); *See also* People v. Sisvath, 13 Cal. Rptr. 3d 753, 758 n.3 (Ct. App. 2004) (statements made by eight year-old female sex abuse victim during forensic interview at county Multidisciplinary Interview Center (MDIC) are testimonial). Given that such an interpretation would collide with itself in the situation where two people heard the statement, one who might qualify as someone who would expect the statement to be used in a subsequent prosecution and one who would not, the declarant's statement would be deemed testimonial if conveyed by one witness, and not testimonial if conveyed by the other. Given that the circumstances under which the statement are the same regardless of who may have heard it, it is quite clear that the Court intended this definitional formulation to refer to the declarant, as the ultimate question is whether the statement is the functional equivalent of a witness *bearing* testimony, not whether others may have *heard* testimony. In *Sisvath*, the court could have simply ruled that the forensic interview of the child victim was tantamount to an interrogation by government officials, thus avoiding needless confusion on this issue. The setting described in the case is the very form of colloquial interrogation and systemic government process to secure unconfronted testimony that *Crawford* sought to eliminate. Expanding the boundaries of the definitional formulation was unnecessary.
[200] *Horton*, 370 F.3d at 84. It is significant to distinguish between using the distinction as a bright-line test for determining if a statement is testimonial, and using the distinction to limit the category of statements that require further *Crawford* analysis.
[201] *Id.*
[202] 371 F.3d 438 (8th Cir. 2004).
[203] *Evans*, 371 F.3d at 445 (citations omitted).

offered by the government to show that the murder victim was afraid of the defendant were not testimonial and were properly admitted under the Missouri equivalent of F.R.E. 803(3).[204] The court provided no analysis of the statements, stating only that the hearsay statements of the victim to friends and family did not fit the restrictive definition of testimonial it adopted.[205]

Finally, in *McKinney v. Bruce*,[206] the Tenth Circuit held that statements admitted under the Kansas equivalent of F.R.E. 803(3) state of mind exceptions were not testimonial. At the defendant's murder trial, the government offered testimony from the victim's uncle that the victim was visiting him on the day of the murder, that the uncle heard gunshots fired, and that a few minutes before he heard the shots, his nephew told him he had to go to "Les" because "Les" wanted to talk to him. The uncle believed, and the government contended, that "Les" was the defendant, Celester McKinney. The court recognized that testimonial statements include "formal statements to government officials, affidavits, testimony at a preliminary hearing, and statements taken by police officers during criminal investigations."[207] Citing to *Horton*, *supra*, the court held that the victim's statements were not testimonial, as they were made "immediately before his death in his uncle's home."[208]

All three of these cases inversely adopt the law enforcement involvement test as determinative of whether a statement is testimonial. Inversely, such a test yields proper results, as without law enforcement involvement, there is no danger of any arm of a sovereign securing unconfronted testimony.[209] That said, it is unclear what if any statements otherwise admissible under F.R.E. 803(3) will survive *Crawford* if they are made to or otherwise reported by a law enforcement or other government official. As has been the trend, that factor alone has rendered many statements testimonial when the inherent characteristics of the statement are to the contrary. Thus, though it remains to be seen how courts will fully address *Crawford* in the context of the state of mind exception, we know so far they have correctly and concisely drawn the distinction between the true Confrontation Clause "abuses" that *Crawford* sought to remedy, and the remaining hearsay statements whose admissibility should continue to be analyzed under *Roberts* and the applicable law of evidence.[210]

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[204] *Id*.
[205] *Id*.
[206] 125 F.App'x 947 (10th Cir. 2005).
[207] *Id*. at 950.
[208] *Id*.
[209] *Crawford*, 541 U.S. at 52.
[210] Though it has been infrequently addressed in federal courts to date, the same rationale for determining that statements otherwise admissible under F.R.E. 803(3) (statements pertaining to

C. F.R.E. 803(6) - Business Records

In their effort to outline the historical origin of the right of confrontation, the *Crawford* court conceivably defined an exception for business records by stating most of the common law hearsay exceptions covered "statements that by their nature were not testimonial—for example, business records."[211] As a likely result of this language, not surprisingly, few circuits have had occasion to specifically address the issue,[212] but three cases are worthy of discussion for both their value as precedents and the questions they leave unanswered.

In *United States v. Rueda-Rivera*,[213] the defendant was charged with being found in the United States following deportation and removal, without having obtained the consent of the Attorney General or the Secretary of Homeland Security, in violation of 8 U.S.C. § 1326. Identifying the *Crawford* court's endorsement of business records as non-testimonial statements, the court, adopting the reasoning of one of its previous unpublished opinions,[214] held that a Certificate of Nonexistence of Record (CNR), offered to show the Government had not consented to the defendants presence in the United States, was not testimonial and hence was properly admitted under F.R.E. 803(10) as an absence of public record or entry.[215] Significant is that the CNR contained only statements describing what type of records searches were conducted and their corresponding results. The CNR did not memorialize any statements from any other persons, or "witnesses," other than those of the individual conducting the searches and the result of the searches.

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medical diagnosis or treatment) are not testimonial is also used for statements otherwise admissible under F.R.E. 803(4). *See Evans*, 317 F.3d at 445. *See also* State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (statements made to treating physician by child sexual assault victim are not testimonial and admissible as a statement for medical diagnosis and treatment); State v. Castilla, 87 P.3d 1211 (Wash. Ct. App. 2004) (statements made to a medical provider for the purpose of diagnosis and treatment are not testimonial).

[211] *Crawford*, 541 U.S. at 56.

[212] The following state court cases are of note: Burchfield v. State, 892 So. 2d 191 (Miss. 2004) (Documents qualifying for admission under state equivalent of F.R.E. 803(17) are not testimonial); People v. Shreck, 107 P.3d 1048 (Colo. Ct. App. 2004) (Documentary evidence of a criminal conviction are not testimonial); State v. Dedman, 102 P. 3d 628 (N.M. 2004) (Report of blood alcohol level is not testimonial); Perkins v. State, No. CR-02-1779, 2004 Ala. Crim. App. LEXIS 87 (Crim. App. Apr. 30, 2004) and Smith v. State, No. CR-02-1218, 2004 Ala. Crim. App. LEXIS 93 (Crim. App. Jul. 30, 2004) (Both holding autopsy reports are not testimonial, but reaching different results as to whether the report qualifies as a business record).

[213] 396 F.3d 678 (5th Cir. 2005).

[214] United States v. Gutierrez-Gonzales, 111 F.App'x. 732 (5th Cir. 2004) (unpublished).

[215] *Rueda-Rivera*, 396 F.3d at 680.

In *United States v. Robinson*,[216] the defendant, charged with bank robbery and carrying a gun in connection with the robberies, objected to a certificate offered by the government that established the bank robbed by the defendant was insured by the Federal Deposit Insurance Corporation (FDIC). The certificate described the relationship between the parent bank and the branch in question, that the parent bank was FDIC insured, and that no official bank record could be found terminating the bank's status as FDIC insured.[217] Faced with an opportunity to define and potentially limit the parameters of a document otherwise qualifying under F.R.E. 803(10), the court determined any error in the certificate's admission was harmless beyond a reasonable doubt, expressly avoiding the question whether, and if so to what extent, a statement otherwise admissible under F.R.E. 803(10) is testimonial.[218]

The danger in accepting a blanket exception for business records without further analysis occurs when the records contain statements that are beyond the intended parameters of the record, or even if within such parameters, are testimonial under even the most restrictive interpretation of *Crawford*. An illustration of this danger is present in *Johnson v. Renico*.[219] Though the court determined that *Crawford* was not applicable to Johnson's petition for a writ of habeas corpus, it offered in dicta its view on *Crawford's* applicability to police booking records.[220] Johnson was arrested and charged as a result of a search of a motel room he was occupying that yielded illegal drugs and various items of drug paraphernalia. During the search, police found a pair of fatigue pants containing identification belonging to a Cory Colbert. At Johnson's Michigan state court trial, the government offered the booking record of Colbert to establish that he was in jail at the time of the search to support the theory that Johnson was in possession of all items found in the motel room at the time of the search. The court opined that since *Crawford* noted business records were inherently not testimonial and the booking record was properly admitted as a business record under Michigan law, the record was not testimonial under the plain language of *Crawford*.[221]

This case provides a framework to illustrate the pitfalls of a blanket exception to *Crawford* for business records. The court flips the analysis around, stating that since the booking records were admitted pursuant to the business record exception, by their nature they are not testimonial. While

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[216] 2004 FED App. 0391P, 389 F. 3d 582 (6th Cir. 2004).
[217] *Robinson*, 2004 FED App. 0391P at p.8, 389 F. 3d at 592.
[218] *Id*. *But see* City of Las Vegas v. Walsh, 91 P.3d 591 (Nev. 2004) (affidavit of registered health professional is testimonial).
[219] 314 F. Supp. 2d 700 (E.D. Mich. 2004).
[220] *Johnson*, 314 F. Supp. 2d at 707.
[221] *Id.*

often such a flip has no effect, the proper analysis is to first determine whether the statement in question is testimonial before determining if it qualifies as a hearsay exception.[222] Second, business records, and particularly police booking records, often contain multiple statements, most of which reflect information that falls within the scope, or competency, of the record. But such records often memorialize statements of other persons, which are not germane to the information reported in the record, that are frequently smuggled into evidence by the admission of the record. It is highly likely the *Crawford* Court referred only to those statements that are inherently part of the information the record regularly records when it classified business record as inherently not testimonial. Surely, few would argue that a medical record containing statements made by the patient to a police officer pursuant to an interview conducted at a hospital would be exempt from the testimonial analysis simply because the statements are offered as part of the greater record.[223]

The *Johnson* court's acceptance of booking records as inherently not testimonial opens the door for statements that are clearly testimonial to be smuggled into evidence. It is conceivable that a booking record may contain statements made by the arrestee that are in response to police questioning; indeed, that is the nature of the booking process -- information gathering. Allowing someone's booking record to be admitted against another person, the purpose of which includes the government's substantive use of the arrestee's statements as evidence against the defendant, demonstrates a unique end around the Confrontation Clause that *Crawford* sought to prevent.[224]

Any time statements of other persons are included in a record, in addition to the factual information the record normally contains, the testimonial analysis must extend to each statement to ensure the entire record is not

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[222] As suggested in Part V(a), *supra*, the testimonial analysis often establishes the foundational requirements of the exception, but to ensure that such exceptions do supersede Confrontation Clause protections, the testimonial analysis should come first.

[223] This analysis is fundamentally the same as ensuring the record properly meets the foundational requirements of the exception. Once the foundational requirements are met, the record essentially takes the stand as a witness and testifies as to what it knows. If the record tries to testify as to what someone else said, that out-of-court statement is subject to the same analysis as if a live witness was offering it. Such statements fall outside the scope of the record, hence outside the scope of the hearsay exception, and must be evaluated separately.

[224] A thorough, factual analysis of the questions asked during the booking process must be done to ensure the process was not a "colloquial interrogation" within the meaning of *Crawford*. While normally such questioning pertains only to biographical information, *Crawford* expressly stated its use of the term "interrogation" was not used in its technical legal sense. The focus in this arena is the right to confrontation of the defendant, not the Fifth Amendment rights of the arrestee-declarant.

testimonial before it is summarily admitted pursuant to the language of *Crawford*.

VI. CONCLUSION – Where Are We headed?

How far adrift have we been set and can we figure out how to get control of the ship again? The answer lies in the underlying simplicity of what *Crawford* thrust upon us. The comprehensive reconciliation of *Crawford* cases has demonstrated many things, but taken as a whole, we realize one clear point: the waters are not that rough.

The acquaintance distinction is real. Whatever testimonial means, it does not include statements we make to friends, family members, casual acquaintances, or anyone else lacking ties to law enforcement or other governmental entity. Though the zealous practitioner will undoubtedly continue to assert that such statements can be testimonial, the law of hearsay, not the Confrontation Clause, will steady and guide the ship in this arena.

This distinction does not decide the issue; it merely shrinks the set of statements that must be further scrutinized. The law enforcement factor alone is not determinative. The spirit of *Crawford* seeks to rid criminal jurisprudence of proxy trial testimony. Not every statement made to a law enforcement officer qualifies. Somewhere there is a line where governmental involvement ceases to provide societal expected assistance. Once the line is crossed, we see a fact gathering process intended on presenting all available evidence for review and possible prosecution. Every *Crawford* analysis must seek this fact-based line. As such, the line will move; it will not always be bright. But it will stand at the point where governmental involvement has begun to build its case and is no longer providing civil assistance. The term "colloquial interrogation" was an in-artful way of saying governmental action or process that preserves pretrial testimony. The motive for the action or process is immaterial; at that point the defendant's right of confrontation kicks in. When the government presents testimony, the defendant has a right to confront it. To read anything more into *Crawford* loses the forest through the trees. The Court never intended the fundamental reformulation of the entire gamut of hearsay law many courts have perceived.

What *Crawford* did not intend was to provide a platform for courts, silently hostile to the law of hearsay, to justify and advance their own agendas. It is fair to conclude that persons being interviewed by police reasonably believe the information they provide will be used to locate, apprehend and prosecute the perpetrator, particularly when the person knows of or assists in

the preservation of their statements. It is not fair or logical to impute such a belief in any other setting, for to do so creates a legal fiction necessary only to justify the result. The use of pretrial testimony by proxy violates the Confrontation Clause. The unaffected law of hearsay remains legally sound and in tact.

Perhaps the *Crawford* Court did not intend to be as restrictive as I suggest; perhaps they intended to be even more so. The Court could have prevented the squalling sea that has followed its decision by doing more than giving passing reference to advocated definitions of testimonial, definitions the Court never expressly adopted or attempted to place in context. But whatever else *Crawford* may have done, it has forced the criminal justice system to reexamine the post-*Roberts* extensions of hearsay law that had gradually exceeded their common law and constitutional roots. Since *Crawford* was decided, courts have showed renewed interest and commitment to ensuring the fundamental foundations of hearsay exceptions, both traditional common law and modern statutory, are properly and competently fulfilled. While a comprehensive understanding of what testimonial means may still elude us, we are in an era of a renewed constitutional preference for live trial testimony in criminal prosecutions.

Perhaps we are closer to the day when the entire scope of hearsay law will fall under the Confrontation Clause than I realize. But we are not there today. *Crawford* is a reminder that we cannot drift too far from the Constitutional guarantees we long ago thoughtfully and reflectively provided to criminal defendants. A reminder -- a limited reminder -- not a complete abrogation of historically founded hearsay law. A reminder -- to adhere to the fundamentals. That is the heading -- stay that course -- and the horizon of Confrontation Clause jurisprudence will once again be clear.

NAVY CHAPLAINS AT THE CROSSROADS: NAVIGATING THE INTERSECTION OF FREE SPEECH, FREE EXERCISE, ESTABLISHMENT, AND EQUAL PROTECTION

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* © Copyright 2005 by CDR William A. Wildhack III, CHC, USNR. The views expressed in this Article are those of the author and do not necessarily reflect the views of the Department of the Defense, the Department of the Navy, or the Navy Chaplain Corps. Commander Wildhack (B.A., University of Delaware, 1982; M.Div., Princeton Theological Seminary, 1985; Th.M., Princeton Theological Seminary, 1986; J.D., Stetson University College of Law, expected 2005) is a Minister of Word and Sacrament in the Presbyterian Church (U.S.A.), a Navy Reserve Chaplain, and a student at Stetson University College of Law, Gulfport, FL. Prior to entering law school, Chaplain Wildhack was mobilized to the staff of Commander, U.S. Naval Forces Central Command in support of Operation ENDURING FREEDOM, and he is currently assigned to NR USCG RELSUP 106, Adelphi, MD, and USCG District 7, Miami, FL. He has pastored churches in Virginia and Florida, and served active duty tours as a chaplain assigned to U.S. Naval Station Panama Canal and USS ABRAHAM LINCOLN (CVN 72). During law school, Chaplain Wildhack has interned with the Florida Supreme Court, the U.S. District Court for the Middle District of Florida (Tampa Division), and the Civil Rights Division of the U.S. Department of Justice, and served as both Assistant Editor and Articles & Symposia Editor of the *Stetson Law Review*. Chaplain Wildhack would particularly like to thank Lieutenant H. Brendan Burke, JAGC, USN, former *Stetson Law Review* Editor in Chief, Carrie Ann Wozniak, former *Stetson Law Review* Notes & Comments Editor, and Stetson University College of Law faculty members Associate Dean Theresa Pulley Radwan, Professor Thomas C. Marks, and Professor Brooke J. Bowman for their professional encouragement, advice, and support as he developed this Article, and he is especially indebted to Professor Kristen David Adams for her help and counsel throughout his time at Stetson. Chaplain Wildhack dedicates this article to his wife and children, who have been so patient and understanding through overseas moves, Reserve duty, mobilization, and law school, and especially to all who have served well and faithfully in seeking to provide for the free exercise of religion by all persons in the armed forces of the United States.

I. INTRODUCTION: MINISTERING TOGETHER IN THE WORST OF TIMES

A Jewish rabbi, a Catholic priest, a Methodist minister, and a Dutch Reformed minister once went on an ocean cruise together. Rather than the start of a bad joke, it is instead the beginning of one of history's most moving stories of cooperative ministry in the religiously pluralistic environment of the armed services. The rabbi, priest, and two ministers were Army chaplains who sailed with nearly 900 other service members and crew aboard the U. S. Army Transport *Dorchester* as it traveled across the North Atlantic toward Europe and World War II in early 1943.[1] Just before 1:00 a.m. on February 3, German torpedoes struck the ship, and by 1:30 a.m. the *Dorchester* was gone.[2] Eyewitness accounts speak of the four chaplains "calm[ing] the frightened, tend[ing] the wounded and guid[ing] the disoriented toward safety" as the ship was sinking.[3] Having given their own lifejackets to others, the four stood on the deck of the sinking ship, linked arms, and prayed together.[4] One account notes that as they gave away their lifejackets, "Rabbi Goode did not call out for a Jew; Father Washington did not call out for a Catholic; nor did the Reverends Fox and Poling call out for a Protestant," but they gave the jackets to whomever was next.[5]

Forty years later, on October 23, 1983, a terrorist bomb killed 241 Marines, Sailors, and Soldiers in Beirut, Lebanon.[6] In the aftermath of that tragedy, two Navy chaplains -- a Jewish rabbi and a Catholic priest -- worked

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[1] The story of the four chaplains continues to be widely reported, as a Westlaw search in early 2005 found 37 stories or announcements of services commemorating their actions. Search of Westlaw, ALLNEWS database (Apr. 16, 2005) (search for records including "four chaplains" and "Dorchester" within the last 90 days). This account is adapted from the history found on the website of The Chapel of Four Chaplains, an organization formed in their honor. The Chapel of Four Chaplains, *The Story*, *available at* http://www.fourchaplains.org. The Chapel labels itself a "non-profit organization established to encourage cooperation and selfless service among all people," says it "exists to further the cause of 'Unity Without Uniformity,' and does not purport a particular theology or doctrine. Rather, it is a symbol of strength found in unity with one another and with God." *Id.*

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] As with the story of the four chaplains, this story was also widely reported. *See, e.g.,* Larry Bonko, *Rabbi's Camouflage Yarmulke Woven with Tragedy, Heroism*, NORFOLK LEDGER-STAR A1 (Jan. 13, 1984), *at* http://www.resnicoff .net/kippa_story_84.html); 133 CONG. REC. E1846-02 (daily ed. May 11, 1987) (extension of remarks by Rep. Steven J. Solarz regarding religious apparel and military uniforms). The account here is adapted from a retelling of one chaplain's first-hand account by President Ronald Reagan in a speech to Baptist Fundamentalists. Ronald W. Reagan, *Remarks at the Baptist Fundamentalism Annual Convention*, *at* http://www.reagan.utexas.edu/archives/speeches/1984/41384h.htm (April 13, 1984).

tirelessly with the wounded, offering comfort, passing on information, and helping move others to safety.[7] A third chaplain, a Protestant minister, was among the seriously wounded.[8] As they worked together that day, the priest noticed that the rabbi had lost his *kippa*, the small cap worn by rabbis.[9] As the rabbi reported:

> [T]he Catholic chaplain, cut a circle out of his cap - a piece of camouflaged cloth which would become my temporary headcovering. Somehow he wanted those [M]arines to know not just that we were chaplains, but that he was a Christian and that I was Jewish. Somehow we both wanted to shout the message in a land where people were killing each other - at least partially based on the differences in religion among them - that we, we Americans still believed that we could be proud of our particular religions and yet work side by side when the time came to help others, to comfort, and to ease pain.
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> [We] worked that day as brothers. The words from the prophet Malachi kept recurring to me—words he'd uttered some 2,500 years ago as he had looked around at fighting and cruelty and pain. "Have we not all one Father?" he had asked. "Has not one God created us all?" It was painfully obvious, tragically obvious, that our world still could not show that we had learned to answer, yes. Still, I thought, perhaps some of us can keep the question alive. Some of us can cry out, as the [M]arines did that day, that we believe the answer is yes.[10]

In their ministry, the chaplains on the *Dorchester* and in Beirut sought and found the "highest common denominator without compromise of

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[7] The rabbi was Lieutenant Commander Arnold Resnicoff; the Roman Catholic priest was Lieutenant Commander George Pucciarelli. *Id.*

[8] The third chaplain was Lieutenant Danny Wheeler. *Id.* Although Chaplain Resnicoff uses the general term "Protestant" for him in this account, published Chaplain Corps' records list Chaplain Wheeler as a minister in the Evangelical Lutheran Church in America. CHAPLAIN RESOURCE BOARD, UNITED STATES NAVY CHAPLAINS 1982-1991 at 295 (Michael D. Halley, ed., Chaplain Resource Board 1993).

[9] *Id.*

[10] Reagan, *supra* n.6 (quoting from the rabbi's report; the referenced Bible passage is Malachi 2:10).

conscience"[11] and ministered to all without any preferential treatment for one faith over another. Their stories have been told in the popular media[12] and used as lessons in instructing new chaplains for years.[13]

More than twenty years have passed since that horrible morning in Beirut, and more than sixty since that frigid night in the North Atlantic. Perhaps it was easier to minister well with chaplains of other faith groups in an earlier time, but a growing number of legal actions brought in federal court by chaplains (and potential chaplains) against the Navy suggest that it is increasingly difficult to do so today.[14] Just as the historical acts described above may have been noteworthy for remarkable cooperation shown in difficult circumstances, so may be the current allegations of cooperation lacking or compromise directed.[15]

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[11] The National Conference for Community and Justice (NCCJ), *When You Are Asked to Give Public Prayer in a Diverse Society*, (NCCJ, date unknown) (*available at* http://65.214.34.18/PublicPrayerBrochure.pdf).

[12] *See supra* nn.1, 6 (describing media accounts of these actions).

[13] The author first learned of these events while a student at the Naval Chaplains School, Newport, RI, in the summer of 1984. These powerful lessons made a deep impression on him as a young officer.

[14] The primary cases are Adair v. England, No. CIV.A.00-0566 (D.D.C.) and Chaplaincy of Full Gospel Churches (CFGC) v. England, No. CIV.A.99-2945 (D.D.C.). The district court consolidated *Adair* and *CFGC* for the purposes of all pretrial motions. *Adair*, 217 F. Supp. 2d 8 (2004). At the time of writing this article, both cases are still pending in the U.S. District Court for the District of Columbia. A motion to compel testimony of chaplain selection-board personnel in the cases, granted by the district court, was overturned by the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court denied certiorari on the appeal. Chaplaincy of Full Gospel Churches v. England, 217 F.R.D. 250 (D.D.C. 2003), *rev'd in part and vacated in part sub nom; In re* England, 375 F.3d 1169 (D.C. Cir. 2004), *cert. denied sub nom.* Chaplaincy of Full Gospel Churches v. England, 125 S.Ct. 1343 (2005). Although fascinating, the examination of the issues raised in that action are beyond the scope of this article. Other recent actions involving Navy chaplains include Sturm v. Dept. of the Navy, 76 Fed. App. 833 (9th Cir. 2003) (unpublished), Wilkins v. United States, 279 F.3d 782 (9th Cir. 2002), Veitch v. Danzig, 135 F. Supp. 2d 32 (D.D.C. 2001) (denying plaintiff's motion for preliminary injunction and return to duty), and Veitch v. England, No. CIV.A.00-2982, 2005 U.S. Dist LEXIS, 6257 (D.D.C. April 4, 2005) (granting the Navy's motion for summary judgment because plaintiff did not adequately rebut the presumption that he resigned voluntarily from the Navy, nor did he show any material dispute with regard to his claim of constructive discharge). Another pending case involving four ministers who wanted to become chaplains but allege the Navy unlawfully discriminated against them in denying their applications is Larsen v. England, No. CIV.A.02-2005 (D.D.C.). The district court granted in part and denied in part the Navy's motion to dismiss Larsen's case in late 2004. Larsen v. England, 346 F. Supp. 2d 122, 124 (D.D.C. 2004).

[15] One article refers to the litigation as a "barrage of civil lawsuits brought against the Navy by current and former chaplains" and describes them as alleging "that the system of religious accommodation intended by the implementation of a military chaplaincy has now been replaced by a system that perpetuates a denominational hierarchy dominated by Roman Catholic and [l]iturgical chaplains." After summarizing the allegations, the author of that article asserts that "[i]f

A. Cooperation Under Fire: Litigating the Line between Cooperation and Compromise[16]

As alleged in one of the cases, a senior chaplain of one Christian group declared that a junior chaplain's style of worship, which followed the traditions of a different Christian group, was "hogwash," and took over the service and recast it in a form more acceptable to the senior chaplain.[17] In another allegation in the same case, one can hear an echo from the mid-nineteenth century,[18] as an Episcopalian chaplain allegedly instructed a Southern Baptist chaplain to make changes in a weekly service for which the Baptist chaplain was responsible.[19] Allegedly, making the changes would have transformed one chaplain's service from one conducted "according to the manner and forms of the church of which he is a member"[20] into one following the manner and forms of another chaplain's church.[21] Other allegations focus on a senior chaplain's alleged criticism of the content of a chaplain's prayers and direction that future prayers be altered,[22] another senior chaplain's alleged direction of changes in the content of a junior chaplain's sermons in worship,[23] various other alleged violations of the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment,[24] and alleged violations of the Equal Protection Clause of the Fifth Amendment.[25]

Related actions involve similar allegations filed by one Christian faith group on behalf of several of its chaplains,[26] a claim of constructive discharge resulting from a hostile environment after a chaplain refused to change the

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ultimately proven, these claims threaten to impact the careers of hundreds of active duty and retired Navy chaplains who were commissioned since 1977, award millions of dollars in compensation to litigants and force a massive restructuring of the Navy Chaplain Corps." Steven H. Aden, *The Navy's Perfect Storm: Has a Military Chaplaincy Forfeited Its Constitutional Legitimacy by Establishing Denominational Preferences?* 31 W. ST. U. L. REV. 185, 187 (2004).

[16] "Cooperation Without Compromise" is an oft-repeated motto of the Chaplain Corps. *See infra* nn.125-26 (discussing the history of this motto).

[17] Adair v. England, 183 F. Supp. 2d 31, 37 (D.D.C. 2002) (describing actions alleged by Lieutenant Michael Belt). The terms "senior" and "junior" refer to relative military rank.

[18] *See infra*, nn.54-56 and accompanying text (relating questions sent from Congress to the Navy in 1859 regarding allegations that "non-Episcopal ministers are required . . . to use the Episcopal liturgy").

[19] *Adair*, Pl.'s 3d Amend. Comp. ¶3.q.

[20] 10 U.S.C. § 6031a. The full text reads, "An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member." *Id.*

[21] *Adair*, Pl.'s 3d Amend. Comp. ¶ 3.q.

[22] *Adair*, 183 F. Supp. 2d at 37 (listing allegations of Dr. Gregory M. DeMarco).

[23] *Id.* (continuing allegations of Lieutenant Belt).

[24] *Id.* at 44 (referring to the plaintiff's complaint).

[25] *Id.*

[26] *Adair*, 183 F. Supp. 2d at 39 (describing *CFGC v. England, supra*). The court consolidated *CFGC* with *Adair* for the limited purpose of ruling on several motions. *Id.* at 34-35.

content of his sermons and other speech,[27] and alleged religious discrimination in decisions regarding potential chaplains' applications to join the Navy.[28] In all of the cases, a central theme is the allegation that the Navy's categorization of various faith groups has led to favoring some groups over others, and that some groups of Christians have allegedly treated other groups of Christians particularly unfairly.[29]

In 2002, one of the cases became a class action with a potential class size asserted to be over 1,000 current and former chaplains.[30] Late in 2003, the District Court for the District of Columbia asked for memoranda from the parties regarding consolidation of all the pending cases because of the court's view that the underlying issues in all of them are so similar.[31]

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[27] Veitch v. England, *supra*, 135 F. Supp. 2d at 32. *But see* n.14, *supra* (listing the full history of the case, including a recent ruling granting the Navy's motion to dismiss the action).

[28] Larsen v. England, No. CIV.A.02-2005 (D.D.C.) (alleging that the Navy wrongfully denied entry to four fully qualified candidates for the chaplaincy from one faith group, while it accepted for active duty others of another faith group who were not fully qualified). At least one Canadian minister has complained to the Canadian Human Rights Commission alleging similar discrimination after the Interfaith Committee on Canadian Military Chaplaincy denied his application in favor of applicants from other faith groups. *Canadian Military is Accused of Anti-evangelical Bias,* THE CANADIAN PRESS (March 18, 2003) (*available at* 2003 WL 16140599).

[29] The district court has observed that an overriding theme running through all the free exercise claims is that Navy policies and practices effectively silence one group of chaplains. *Adair* at 65. This argument asserts that the Navy favors Catholics and so-called "liturgical Protestants" over the groups labeled "non-liturgical Protestants." These categories will be described and further developed in Part III, *infra*.

[30] Adair v. England, 209 F.R.D. 5, 8-9 (D.D.C. 2002) (ruling that the litigation could proceed as a class action and citing the plaintiffs' assertion that the Navy's own statistics suggested a class between 700 and 1000 in size). A later action extended the time back to 1977, thus expanding the potential class size beyond 1000. Adair v. Johnson, 216 F.R.D. 183 (D.D.C. 2003) (granting plaintiffs' motion for leave to amend their complaint in light of new evidence that the alleged discrimination began earlier than originally argued). *But see* Letter from Louis V. Iasiello, Chief of Chaplains, U.S. Navy, in *Letters to the Editor for Thursday, December 18, 2003*, STARS AND STRIPES (Dec. 18, 2003) (*available at* http://www.stripesonline.com/article.asp?section=125&article=19125&archive=true) (arguing that any discussion of the size of the class is "mere speculation" and pointing out that the only certain number is *Adair*'s 17 named plaintiffs).

[31] Telephone interview with Arthur A. Schulcz, Sr., Plaintiff's Counsel in *Adair*, *CFGC*, *Larsen*, *Veitch*, and *Wilkins*. (October 16, 2003) (asserting that the plaintiffs favor consolidation but the government opposes it).

B. A Fascinating Intersection, Or an Accident Waiting to Happen?

While a full treatment of all the issues raised in these cases is clearly beyond the scope of a single article, an examination of just one is not.[32] In ruling on several motions in the two cases already combined for pretrial motions,[33] Judge Ricardo Urbina observed that "[t]he issue of what restrictions the Navy may place on the content of its chaplains' speech is a fascinating one, standing at the intersection of four major jurisprudential roads—free speech, free exercise, establishment, and equal protection."[34] Successful navigation of such an intersection presents several challenges to the chaplain who seeks to serve both his or her faith and the Navy, to the faith group he or she represents, to the Navy itself, and to any who would seek to offer guidance to the parties. Just as drivers accept traffic signals and lane markers to guide free movement through an intersection, some argue Navy chaplains may have to accept some restriction on the content of their speech[35] so that the free exercise rights of all service members can be protected fully.[36] At the same time, one court has suggested the Navy must recognize that some restrictions on speech are impermissible, and that whatever permissible restrictions it seeks to apply must be applied evenly to all or not at all.[37]

In preparing to enter this fascinating intersection, Part II of this article examines the evolving role of chaplains in American military history, highlighting a shift in official responsibility from providing primarily direct ministry to a priority of protecting free exercise. Moving closer to the

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[32] For another treatment of the cases that further develops the plaintiffs' equal protection claims, *see* Aden, *supra* n.15.

[33] *Adair*, 183 F. Supp. 2d at 34-35.

[34] *Id.* at 66.

[35] Such limitations would join other provisions in the Bill of Rights either expressly inapplicable to the military or interpreted differently in a military setting. *See, e.g.,* John A. Carr, *Free Speech in the Military Community: Striking a Balance between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 312 (1998) (listing as examples the grand jury provision of the Fifth Amendment and a qualification of the search and seizure protection of the Fourth Amendment in suggesting that free speech protections may also not be as broad for service members as for civilians).

[36] The full scope of religious free exercise rights, and the challenges in defining them, are beyond the scope of this discussion. The challenges in defining religious belief, along with the accompanying challenge of recognizing either exercise or establishment, are many. *See* John C. Knechtle, *If We Don't Know What It Is, How Do We Know If It's Established?*, 41 BRANDEIS L.J. 521 (2003).

[37] In first describing the four-way jurisprudential intersection, Judge Urbina noted in *Adair* that the Constitution does not permit the Navy to regulate religious speech of one group of Christian chaplains but not that of other groups of Christian chaplains. 183 F. Supp. 2d at 66. *See infra* n.100 for a discussion of the terms "liturgical" and "non-liturgical."

intersection, Part III examines modern recognition of the "Protestant Problem"[38] and the challenges it presents. Part IV enters the intersection, and seeks to offer some traffic signals or lane markers that fully protect a chaplain's rights to free speech in worship while also protecting other service members' rights to free exercise, avoid further establishment problems, and treat all chaplains equally.

II. HITTING THE ROAD: HISTORICAL NOTES ON MILITARY CHAPLAINCY IN THE UNITED STATES

Chaplains have been a part of our history on this continent since before the Revolutionary War. A chaplain, Francis Fletcher, accompanied Sir Francis Drake on his famous trip around the world in the late sixteenth century, and led the first English-language Church of England worship service in the New World when the expedition landed in what is now California in the late 1570s.[39] Other chaplains accompanied Sir Walter Raleigh and Captain John Smith on the earliest explorations of Virginia.[40] George Washington began asking Virginia's governor and state legislature at least as early as 1756 to appoint a chaplain for his troops, though it took some time before he received one.[41] In 1775, one year before the signing of the Declaration of Independence, the Continental Congress authorized pay for chaplains serving the Army.[42] In the second article of the Navy Regulations approved later that year, that same Congress also recognized the need for worship opportunities for sailors.[43] Although the first U.S. Navy chaplain known by name in Navy archives did not report aboard his first ship until 1778,[44] records of the Continental

[38] The "Protestant Problem" refers to the wide variety of faith groups labeled "Protestant" by the Navy, and is described more fully in Part III, *infra*.

[39] CLIFFORD M. DRURY, 1 THE HISTORY OF THE CHAPLAIN CORPS OF THE UNITED STATES NAVY: 1778-1939, 2 (Bureau of Naval Personnel 1983) [hereinafter DRURY]; FRANK S. MEAD AND SAMUEL S. HILL, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 130 (Craig D. Atwood, rev. 11th ed., Abingdon 1990)[hereinafter MEAD & HILL].

[40] MEAD & HILL, *supra* n.39, at 130.

[41] Charles W. Hedrick, *The Emergence of the Chaplaincy As a Professional Army Branch: A Survey and Summary of Selected Issues*, MIL. CHAPLAINS' REVIEW 20-21 (Winter 1990). At the time, Washington was a colonel responsible for protecting Virginia's western frontier. *Id.*

[42] Interestingly, the pay for Army chaplains was set at the same rate as that of judge advocates. Hedrick, *supra* n.41 at 21 (citing CHAUNCEY FORD, JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 (GPO 1905)).

[43] DRURY, *supra* n.39, at 3. The regulation stated: "The Commanders of the ships of the thirteen United Colonies, are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other extraordinary accidents prevent." *Id.*

[44] The record apparently begins with Benjamin Balch reporting aboard the *Boston* in October, 1778. DRURY, *supra* n.39, at 4-5. One of his sons, William, also became a chaplain, and has the distinction of being the first chaplain to receive a commission in the United States Navy. *Id.*

Congress in 1776 seem to assume chaplains were already present in the Continental Navy from its earliest days.[45]

Interestingly, a former Army chaplain was a signer of the Constitution and member of the First Congress.[46] It is also important to note that the First Congress approved employing chaplains "to offer daily prayers in the Congress" the same week it approved the Religion Clauses of the First Amendment[47] for submission to the states.[48] Those who approved the Establishment Clause apparently saw no conflict between the two actions.[49] Nor did they suggest any conflict the day after voting on the Religion Clauses when they passed a resolution calling on President Washington to declare a day of Thanksgiving "to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God."[50] Finally, just two years later, when Congress voted in 1794 to formally establish a "United States Navy" in response to raids by Algerian pirates,[51] it included a chaplain in the crew of each ship above a certain size.[52]

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[45] Drury reports that the *Journals of the Continental Congress* contain two references to chaplains in 1776. *Id.* at 3. The first includes chaplains in the list of those who share in any prizes seized; the second sets pay for Navy chaplains at the same rate enjoyed by Army chaplains and judge advocates at the time (and already $5 less than that paid to surgeons). *Id.*

[46] Abraham Baldwin was a Georgia delegate to the Constitutional Convention, then represented that state in Congress from 1789 through 1799. William J. Hourihan, *Abraham Baldwin: Army Chaplain and Signer of the Constitution*, MIL. CHAPLAINS' REV. 55, 61 (Nov. 1987). Along with serving as an Army chaplain, Mr. Baldwin was also a professor of divinity at Yale. *Id.* at 56.

[47] The Religion Clauses form the first part of the First Amendment, and state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[48] Lynch v. Donnelly, 465 U.S. 668, 674 (noting the First Congress included 17 veterans of the Constitutional Convention "where freedom of speech, press, and religion . . . were subjects of frequent discussion," and suggesting "[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers" than in the practice of employing chaplains to offer prayers in Congress each day, and pointing out that the practice has continued ever since).

[49] While James Madison's later writings are often referenced by opponents of a federally-funded military chaplaincy, he voted in favor of it in 1792 and nothing in the record suggests he had any reservations about doing so or said anything opposing the action. Paul J. Weber, *The First Amendment and the Military Chaplaincy: The Process of Reform*, 22 J. CHURCH & ST. 459, 460 (1980). With the First Amendment just two months old, and Madison as "a scrupulously careful legislator and president in church-state matters, his vote can only be interpreted as an endorsement." *Id.* (citing several of his votes in Congress on religious matters).

[50] *Lynch*, 465 U.S. at 675 n.2 (1984) (referring to various sources for the text of both the resolution and President Washington's following proclamation).

[51] DRURY, *supra* n.39, at 6.

[52] *Id.* at 8.

A. Early Questions about Worship

As in our day, questions about the manner and forms of worship have also long been a part of the history of the Chaplain Corps. Early regulations specified that the duties of chaplains included having to "read" prayers.[53] In 1859, the Speaker of the House of Representatives asked the Secretary of the Navy whether chaplains were required to "read" prayers or follow any particular forms or ceremony in leading worship, and if the Navy had any evidence of a requirement that non-Episcopal chaplains had to follow the Episcopal liturgy.[54] In replying, the Secretary explained that he was not aware that the instruction to "read" had ever been construed to require a literal reading from a particular prayer book, but rather as a requirement that prayers be offered aloud without specifying they be read from a book, written down by the chaplain beforehand to be read later, or offered extemporaneously.[55]

To further reassure the Speaker and his colleagues in Congress, the Secretary announced a new order officially interpreting the requirement that prayers be "read" to mean that prayers be "offered," thus leaving the chaplain free to follow the dictates of his own religious tradition.[56] Perhaps in response to such communication with Congress, new Navy Regulations adopted in 1860 included this addition: "Every chaplain shall be permitted to conduct public worship according to the manner and forms of the church of which he may be a member."[57] No longer merely a regulation, that language is now in force as part of the United States Code.[58]

B. Free Exercise Then and Now: The Need for Chaplains

While conducting worship has always been one of a military chaplain's duties, protecting the rights of others to freely exercise their faith

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[53] President Jefferson issued a new set of Navy Regulations in early 1802. *Id.* at 17. In reference to chaplains, the first duty listed was "to read prayers at stated periods" and the only requirement in those regulations regarding worship says that the chaplain shall "perform all funeral ceremonies over such persons as may die in the service . . . ." *Id.* In addition to praying and funerals, these early chaplains were also onboard schoolmasters. *Id.*

[54] *Id.* at 68-69 (quoting from a letter sent by the Secretary of the Navy to the Speaker of the House of Representatives in response to the inquiries).

[55] *Id.* at 69.

[56] *Id.* Note also that "his" in this sentence reflects the fact that all chaplains of the time were male.

[57] *Id.* (quoting from wording included in a later edition of the Navy Regulations).

[58] The current law changes only the language identifying the chaplain, saying, "An officer in the Chaplain Corps may conduct public worship according to the manner and forms of the church of which he is a member." 10 U.S.C. § 6031(a) (2000). The exclusively male language in the statute will have to be revised to reflect the presence of women in the modern chaplaincy.

also predates the Constitution and Bill of Rights.[59] The earliest chaplains, like their modern-day counterparts, served a military population representing a variety of faith groups or no faith at all.[60] One author asserts that the "pattern for chaplain ministry to soldiers of different religious backgrounds was set in the seventeenth century, from the time the first militia units drilled at Jamestown, Plymouth, Boston and New York."[61]

In the modern day, the responsibility for protecting free exercise rights in the broadest sense for all personnel became the chaplains' explicit duty after the U.S. Court of Appeals for the Second Circuit announced its decision in *Katcoff v. Marsh*[62] in 1985. The court observed that the Army chaplaincy of the time, if viewed in isolation, would likely be found to violate the Establishment Clause.[63] The court also noted, however, that neither the Establishment Clause nor the chaplaincy existed in a vacuum.[64] A history including more than 200 years of military chaplaincy, congressional action authorizing a chaplaincy before, during, and after its debate on the Religion Clauses, and Congress' continuing support all suggest that neither the Framers nor their successors intended the Establishment Clause to preclude a government-funded military chaplaincy.[65]

Perhaps most importantly for the current debate, the court suggested that the Army "could be accused of violating the Establishment Clause *unless* it provided [soldiers] with a chaplaincy since its conduct would amount to inhibiting religion" if the Army prevented soldiers from worshiping by deploying troops to places where religious leaders and facilities were not available.[66] Echoing the second prong of the Supreme Court's test in *Lemon v.*

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[59] *See* John W. Brinsfield, *Our Roots for Ministry: The Continental Army, General Washington, and the Free Exercise of Religion*, MIL. CHAPLAINS' REV. 23 (Nov. 1987).
[60] *Id.* at 25.
[61] *Id.* at 23.
[62] 755 F.2d 223, 234 (2nd Cir. 1985).
[63] *Katcoff*, 755 F.2d at 232.
[64] *Id.*
[65] *Id.*
[66] *Id.* (citing Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (emphasis in original). The court also commented on the use of government facilities for worship in School District of Abington Township v. Schempp, 374 U.S. 203 (1963):

> We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

Kurtzman[67] for Establishment Clause questions,[68] the Second Circuit observed that if the Army did not provide chaplains, the Army would "deprive the soldier of his right under the Establishment Clause not to have religion inhibited and of his right under the Free Exercise Clause to practice his freely chosen religion."[69] Noting that Congress had in 1850 recognized that not providing a chaplaincy would violate soldiers' free exercise rights,[70] that the Supreme Court, at least in dicta, seemed to assume the chaplaincy's continuation "in order to avoid infringing free exercise guarantees,"[71] and that Congress had "from time to time . . . rejected proposals for abolition of the military chaplaincy,"[72] the Second Circuit also upheld continuation of a federally-funded military chaplaincy.[73] Finding relevance to national defense and reasonable necessity as more appropriate standards for reviewing chaplaincy activities than *Lemon*'s prongs,[74] the court went so far as to say that

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Id. at 226, n.10.

[67] 403 U.S. 602 (1971).

[68] *Lemon*, 403 U.S. at 612 (listing the three prongs as secular legislative purpose, primary effect neither advancing nor inhibiting religion, and absence of excessive entanglement with religion on the part of the government).

[69] *Katcoff*, 755 F.2d at 234. The court seems to transpose part of the Free Exercise Clause into the Establishment Clause here, because inhibiting religion seems more a danger of the government acting to prohibit free exercise than of the government acting to establish religion. U.S. CONST. amend I.

[70] *Id.* at 235 (citing H.R. REP. No. 171, 31st Cong., 1st Sess. (1850)).

[71] *Id.* at 235 n.4. The court cited comments in Justice Brennan's concurrence and Justice Stewart's dissent in *Schempp*. Justice Brennan suggested that provisions for chaplains could be an example of a practice arguably in violation of the Establishment Clause that, if struck down, could seriously interfere with other liberties covered by the First Amendment. *Schempp*, 374 U.S. at 296 (Brennan, J., concurring). Justice Stewart was more declarative:

> [T]he fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.
>
> A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.

Id. at 309 (Stewart, J., dissenting).

[72] *Katcoff*, 755 F.2d at 237

[73] *Id.*

[74] Following Supreme Court reasoning that the test arising from *Lemon* was not the only appropriate test for evaluating Establishment Clause challenges, and recognizing that any interpretation of the Clause must accommodate other parts of the Constitution (citing Marbury v. Madison, 55 U.S. 137 (1803)), the Second Circuit noted that *Katcoff*'s challenge on establishment

not only did the majority of the chaplaincy's activities meet those standards, but that "[a]s a result, the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for the national defense rests in substantial part on the military chaplaincy, which is vital to our Army's functioning."[75] While *Katcoff* limited its examination to the Army chaplaincy, it is reasonable to extend its result to the Navy Chaplain Corps and the Air Force Chaplain Service as well.[76]

C. Free Exercise Today: Modern Regulations

Since *Katcoff*, Department of Defense (DoD) policy has emphasized protection of free exercise rights for all service members -- and others -- as a chaplain's duty.[77] The Secretary of the Navy, in implementing the DoD policy

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grounds had to be resolved in tension with what it called "the War Power Clause" (citing U.S. CONST. art. I, § 8 and including several parts of that section in its description) and the Free Exercise Clause (U.S. CONST. amend. I). *Katcoff*, 755 F.2d at 232-33. The court concluded that *Lemon*'s test was inappropriate here, holding instead that "the test of permissibility in this context is whether, after considering practical alternatives, the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense." *Id.* at 235.

[75] *Katcoff*, 755 F.2d at 237.

[76] In fact, one author (who was both an attorney and Army Reserve chaplain) involved in preparing the Army's defense in *Katcoff* later wrote:

> Katcoff and Weider [a second plaintiff] set themselves the task of ridding this nation of its military chaplaincy, for had they succeeded in their challenge against the Army, similar suits would soon have doomed an organized chaplaincy in the Navy and Air Force, in federal prisons, and at hospitals run by the Veterans Administration.

ISRAEL DRAZIN & CECIL B. CURREY, For God and Country: The History of a Constitutional Challenge to the Army Chaplaincy 3 (KTAV Publg. House 1995)[hereinafter DRAZIN & CURREY].

[77] The DoD directive on appointing chaplains states:

> It is DoD policy that the Chaplaincies of the Military Departments:
>
> 4.1. Are established to advise and assist commanders in the discharge of their responsibilities *to provide for the free exercise of religion in the context of military service as guaranteed by the Constitution*, to assist commanders in managing Religious Affairs (DoD Directive 5100.73 (reference (e)), and to serve as the principal advisors to commanders for all issues regarding the impact of religion on military operations.
>
> 4.2. *Shall serve a religiously diverse population*. Within the military, commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility. *Religious Organizations that choose to participate in the Chaplaincies recognize this command imperative and express willingness for their Religious Ministry*

and assigning responsibilities for religious ministry support, defines "chaplains" first as "professionally qualified clergy of a certifying faith group *who provide for the free exercise of religion for all* military members of the Department of the Navy, their family members, and other authorized persons, in accordance with [DoD Directive (DODD) 1304.19]."[78] Accordingly, the Chief of Naval Operations implements the Secretary's policy "by *providing for the free exercise of religion* for all naval service members, their families, and all other authorized personnel,"[79] and declares, "Religious Ministry is the entire spectrum of professional duties performed by Navy chaplains and Religious Program Specialists[80] *to provide for or facilitate the free exercise of religion and accommodates* [sic] *the religious practices of military personnel*, their families, and other authorized personnel."[81] Doctrine for military operations involving forces from more than one service states plainly that "[r]eligious support includes the entire spectrum of professional duties that a chaplain provides and performs in the *dual role* of religious leader and staff

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> *Professionals (RMPs) to perform their professional duties as chaplains in cooperation with RMPs from other religious traditions*.

Department of Defense Directive (DOD Dir.) 1304.19, *Appointment of Chaplains for the Military Departments*, ¶ 4 (June 11, 2004) (emphasis added).

[78] Secretary of the Navy Instruction (SECNAVINST) 1730.7B, *Religious Ministry Support within the Department of the Navy*, ¶ 4.a. (Oct. 12, 2000) (emphasis added). Although this Article focuses on the role of chaplains, it is important to note that Navy policy makes commanding officers responsible for providing Command Religious Programs supporting the religious needs and preferences of all eligible personnel. *Id.* at ¶ 5.

[79] Chief of Naval Operations Instruction (OPNAVINST) 1730.1D, *Religious Ministry in the Navy*, ¶ 1 (May 6, 2003) (emphasis added).

[80] "Religious Program Specialists" are enlisted sailors who are much more than merely chaplain's assistants. The Navy describes their duties as follows:

> Religious Program Specialists (RP) support chaplains in implementing Command Religious Programs (CRPs) to accommodate the religious needs and rights of sea service personnel and their families; facilitate the delivery of ministry by chaplains by conducting rehearsals, making referrals, and rigging and unrigging for religious services and CRP events; recruit, train, and supervise CRP volunteers who assist in worship, religious education, and other programs; publicize CRP programs and events; organize, coordinate, and support religious education programs; serve as bookkeepers and custodians of Religious Offering Funds; provide library services onboard ships; manage and administratively support CRP program elements; determine, requisition, and manage logistic support for CRPs; manage, maintain, and assist in designing and determining requirements for Religious Ministry Facilities afloat and ashore; provide physical security for chaplains in combat.

CHIEF OF NAVAL PERSONNEL, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS (NAVPERS 18068F), RP-1 (October 2003).

[81] OPNAVINST 1730.1D, ¶ 4.a. (emphasis added).

officer . . . . Religious support in joint operations is *dedicated to* . . . *[m]eeting the personal free exercise of religion needs of military and other authorized members*."[82] Finally, a duty of the Navy's Chief of Chaplains is to "[a]dvise the Secretary of the Navy, the Chief of Naval Operations, the Commandant of the Marine Corps and the Commandant of the Coast Guard on *all matters pertaining to the free exercise of religion*."[83]

While chaplains have always had responsibility for protecting free exercise for all personnel, prior to *Katcoff* their focus was mostly on providing ministry according to the "manner and forms of the church of which he [or she] is a member."[84] Post-*Katcoff*, the directives and instructions appear to focus first on providing for free exercise by all personnel.[85] This shift began at a time when our nation was experiencing profound changes in the practice and understanding of religion due to an explosion of new religious movements along with increasing fragmentation of traditional denominations as "individual autonomy, greater mobility, increased self-expression and experimentalism" affected both society and religion.[86] At the same time, religion-based bias was emerging as a growing issue in the workplace.[87] With such shifts occurring in military policy and society at large, it should not be surprising that chaplains themselves are struggling with their evolving roles. Chaplains must balance the growing incongruity between those roles and their own faith beliefs,[88] along with what the Navy thinks it needs from its chaplains.[89] This seems especially true as commands more and more expect chaplains to learn about -- and be able to explain -- the growing multitude of religious traditions, even as

[82] Joint Chiefs of Staff Publication (Joint Pub) 1-05, *Religious Support in Joint Operations* I-1 (Jun. 9, 2004) (emphasis added).
[83] OPNAVINST 1730.1D, ¶ 6.a.(1) (emphasis added). Flowing from this duty, the Navy Chaplain Corps also provides chaplains for service in the Marine Corps and the Coast Guard.
[84] *See supra* nn.53-58 (quoting earlier regulations and the current statute).
[85] *See supra* nn.77-83 (citing various official policies).
[86] Rebecca French, *Shopping for Religion: The Change in Everyday Religious Practice and Its Importance to the Law*, 51 BUFF. L. REV. 127, 127-28, 138 (Winter 2003). Professor French examined over 1000 religion cases decided between 1963 and 2001, comparing their content and results with religious trends in society at large. One finding of note is that the politically-oriented cases she examined have shifted over the years from "a religious concern about minority and disadvantaged members of the society to a concern about the power of conservative Christianity's influence on the general population." *Id.* at 154.
[87] Georgette F. Bennett, *Religious Diversity in the Workplace . . . An Emerging Issue*, 9 THE DIVERSITY FACTOR 15 (Winter 2001).
[88] Olenda E. Johnson, *Diverse Views of Religious Pluralism: Implications for the Military Chaplaincy* 6 (Defense Equal Opportunity Management Institute 2001).
[89] "The needs of the Navy" is a catchall phrase frequently used by sailors in recognition of the secondary place of many of their personal needs in relation to the Navy's.

commands continue to expect chaplains to remain faithful to their own beliefs.[90]

III. APPROACHING THE INTERSECTION: THE "PROTESTANT" PROBLEM [91] OF SPLIT "P" SOUP [92]

This struggle among expectations, roles, and needs is most obvious not only between those chaplains the Navy labels as "Protestant" and chaplains of other faith groups represented in the Chaplain Corps, but also within the group of chaplains called "Protestant."[93] During World War II, the Navy classified religious preference with just three categories and marked "dog tags" with a one-letter code accordingly: "C" for Catholic, "J" for Jewish, and "P" for Protestant.[94] As convenient as that was, it was overly simplistic:

> If one was not a J or a C, one was automatically a P. Chaplains were also classified in this way. Even a Russian Orthodox priest was categorized as a P. The histories of the chaplaincies of each branch of the service include in the Protestant category all faith groups other than Roman Catholic, Jewish, and Orthodox.[95]

Although the groupings within the modern Navy Chaplain Corps have expanded to include Buddhist, Hindu, Islamic, and "other faiths,"[96] the groupings may still be overly broad. No differentiation is made, for example,

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[90] Johnson, *supra* n.88.

[91] An endorsing agent from one of the Protestant groups discussed this "problem" in a 1983 speech he gave to a meeting of the National Conference on Ministry to the Armed Forces (NCMAF), an interfaith body of organizations that endorse chaplains from their respective faith groups. S. David Chambers, *The Protestant Problem*, MIL. CHAPLAINS' REV. 81, 82 (Nov. 1987).

[92] The author first heard this term applied to the various Presbyterian churches in a conversation otherwise forgotten long ago. It seems even more applicable to all the various "Protestant" groups than to just one family of them.

[93] The term "Protestant" first arose in 1529 in reference to the minority at the Diet of Speyer in Germany, who sought to follow the reformation teachings of Martin Luther and others against the wishes of the Roman Catholic majority. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1135 (F. L. Cross and E. A. Livingston, eds., 2d ed., Oxford 1983).

[94] Chambers, *supra* n.91, at 82. Today, religious preference is spelled out in full on the tags if possible. NAVY MILITARY PERSONNEL MANUAL (MILPERSMAN) 1000-070, ¶ 7.c-7.d. (Aug. 22, 2002) (including a list of suggested abbreviations for faith groups whose names are too long to fit on the tags).

[95] Chambers, *supra* n.91, at 82. "Orthodox" apparently became a separate category from "Protestant" at some point, but Chambers does not comment on the change.

[96] Chaplain Resource Branch, *United States Navy Chaplain Corps* (visited Apr. 16, 2005), *at* http://www.chaplain.navy.mil; *select* Faith Groups. The pull-down menu lists: Buddhism, Catholic, Hinduism, Islam, Judaism, Orthodox, Protestant, and Other Faiths. The category "Other Faiths" includes Baha'i, Confucianism, Taoism, and Wicca. *Id.*

between the Sunni and Shia branches of Islam,[97] nor does the category "Jewish" take into account the differences between Orthodox, Reformed, Conservative, Reconstructionist, or other Jewish groups.[98] Of particular interest are all the groups included under the label "Protestant," representing perhaps 70% of all chaplains and military personnel.[99] In common usage today, the Navy Chaplain Corps appears to distinguish between "liturgical" and "nonliturgical" groups within the category "Protestant."[100] Though allegations regarding that apparent division are at the heart of the current litigation,[101] even that distinction fails to go far enough.

Of 116 groups currently eligible to endorse chaplains for service, the Navy considers at least 105 of them "Protestant."[102] It is also important to note that several of the groups listed endorse chaplains from more than one faith group, so the actual number of faith groups is higher than the number of endorsing agencies.[103]

An earlier analysis of groups the Navy deemed "Protestant" noted four distinctions:

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[97] *See* ABINGDON DICTIONARY of LIVING RELIGIONS 351 (Keith Crim, gen. ed., Abingdon 1981) (describing Islam's development and its various sects).

[98] *Id.* at 392 (delineating the modern branches of Judaism).

[99] RICHARD G. HUTCHESON, JR., THE CHURCHES AND THE CHAPLAINCY 88 (rev. ed., GPO 1997).

[100] "Liturgical" refers generally to churches that have a set order of worship or formal structure for worship; "nonliturgical" refers generally to churches that do not follow a formal order. *See Adair*, 183 F. Supp. 2d at 36 n.4 and accompanying text (following the plaintiffs' definitions in distinguishing the two groups, and noting that the defendants use the same terminology in their documents). Also, the two groups are often distinguished by their differing baptismal practices: so-called liturgical groups generally baptize infants; the nonliturgical groups limit baptism to adults or children who have attained an "age of reason." *Id*.

[101] *Adair*, 183 F. Supp. 2d at 36–37, 40 (identifying the plaintiffs as "seventeen current and former nonliturgical Christian chaplains" and alleging the Navy favored liturgical over nonliturgical chaplains in accession, retention, and promotion).

[102] CHIEF OF NAVAL PERSONNEL, 1 MANUAL OF NAVY OFFICER MANPOWER AND PERSONNEL CLASSIFICATIONS, NAVPERS 15839I, Major Code Structures (October 2003) (*available at* https://buperscd.technology.navy.mil/bup_updt/508/Officer Classification/i/officerClassOneMenu.htm) (listing 99 groups); an expanded listing at http://www.chaplain.navy.mil/Attachments/aqd.pdf adds 17 more groups that do not yet have a separate classification number assigned by DoD. Removing groups other than "Protestant," as listed *supra* n.96, leaves at least 105 groups. Faith groups endorse chaplains subject to a DoD instruction listing requirements that a group must meet for DoD to recognize as a "Religious Organization" as well as requirements that a group's "Religious Ministry Professional" must meet for the services to consider them for accession as chaplains. Department of Defense Instruction (DODI) 1304.28, *Guidance for the Appointment of Chaplains for the Military Departments* (June 11, 2004).

[103] For example, the Chaplaincy of Full Gospel Churches describes itself as representing members of 120,000 independent/non-denominational churches from 245 Fellowships or Associations. Chaplaincy of Full Gospel Churches, *About the CFGC! at* http://www.chaplaincyfullgospel.org (visited April 16, 2005).

- groups that recognize themselves and are recognized by others as "Protestant" (e.g., Presbyterian, Lutheran, Methodist),
- groups that do not recognize themselves as "Protestant" but are called that by others (e.g., Baptist, Episcopalian),
- some groups who accept the term "Protestant" but are not considered such by many others (e.g., Unitarian, Christian Scientist), and
- some groups called "Protestant" by the Navy but who do not consider themselves, nor do others consider them, to be such (e.g., Latter Day Saints (Mormons)).[104]

To further exacerbate the Protestant problem, not all of these groups recognize each other as even being "Christian." While some groups share a common set of core beliefs but differ on certain other beliefs or practices,[105] some of them also consider at least some of the other groups to be cults.[106]

With such a wide diversity of beliefs, this challenge of identity leads, not surprisingly, to a challenge in worship. While Catholic, Jewish, or Islamic worship may be easy to identify, the plethora of "Protestant" possibilities is the crux of the current conflict.[107] While it may once have been possible to have a single "General Protestant"[108] service that arguably met the religious

[104] Chambers, *supra* n.91, at 83. The Episcopal Church, USA was known as the Protestant Episcopal Church from 1789 until 1967; it adopted the term "Protestant" in the United States to distinguish it from Roman Catholic churches. MEAD & HILL, *supra* n.39, at 131. The church is not properly a descendant of the Protestant Reformation in continental Europe but of a distinctly English movement. THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH, *supra* n.93, at 1166 (describing the English Reformation as an insular process separate from others).

[105] Two such groups may be the Presbyterian Church (U.S.A.) and the Presbyterian Church in America. The two share a common history until 1973 when a conservative group formed the Presbyterian Church in America after a long period of growing disagreement with decisions of the annual national assembly of church leaders. MEAD & HILL, *supra* n.39, at 302. The two groups share a common form of church governance, but differ, for example, on qualifications and eligibility for church office. *Id.* at 303.

[106] WALTER MARTIN, THE KINGDOM OF THE CULTS (Hank Hanegraaff ed., rev. ed., Bethany House, 1997). The table of contents lists at least three of the Navy's "Protestant" groups as cults: Church of Jesus Christ of Latter Day Saints (Mormons), Christian Scientist, and Unitarian Universalism. *Id.*

[107] *See supra* nn.17-29 and accompanying text (outlining the allegations regarding limitations on preaching and styles of worship).

[108] One author suggests that the term "General Protestant Service" may be confusing, but that it is used more for convenience than to suggest any requirement for enforced conformity. He argues

needs of the perceived majority with little objection -- and sometimes willing acquiescence -- from smaller groups, that day may be disappearing into the past.[109] Chaplains today "represent all degrees of liturgy, non-liturgy, and a-liturgy,"[110] and "[a]ll extremes of ordered and free worship are present" in today's Navy chaplaincy.[111] Yet the alleged insistence of senior chaplains that "Protestant" chaplains cooperate in leading such a service,[112] and an alleged resistance to permitting (and sometimes flat out prohibiting) chaplains to lead faith-group specific worship apart from a general service, fuels the current litigation.[113] While some faith groups or chaplains consider leadership and

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the phrase is nothing more than a "more convenient term for use in the plan of the day or on the bulletin board than 'Service Conducted by a Methodist Chaplain Open to Protestants of All Denominations.'" Hutcheson, *supra* n.99, at 86.

[109] Chambers, *supra* n.91, at 85 (asserting that there was a fair degree of uniformity in the past when 90% of "Protestant" chaplains came from just six major faith groups, but that today's diversity greatly reduces the possibility for uniformity); *See also* CLIFFORD M. DRURY, 2 THE HISTORY OF THE CHAPLAIN CORPS OF THE UNITED STATES NAVY: 1939-1949, 58-59 (Bureau of Naval Personnel 1992) [hereinafter DRURY 2] (describing cooperation among "Protestant" chaplains at the end of World War II).

[110] Chambers, *supra* n.91, at 85. The three terms describe a continuum from an externally imposed order of worship to an avoidance of any predictable order.

[111] *Id.* at 85, 86. Mr. Chambers goes on to state:

> [I]t has long been accepted that a chaplain of the Episcopal church has the prerogative not to celebrate communion with chaplains of other faith groups; that Missouri Synod Lutheran chaplains may hold closed communion; that Baptist chaplains shall not baptize infants; that those who choose not to wear ecclesiastical garb are justified in conducting worship in civilian or military attire if they should desire.

Id.

[112] Chambers asks two provocative questions beyond the scope of this article regarding continuation of a "General Protestant" worship service:

> Chaplains exist in the military first, last, and always to provide opportunity for the military community to exercise its right for worship. The focus must be on the worshippers and their spiritual needs and enrichment; not upon chaplains with their likes and dislikes. The first question is therefore: How can chaplains of diverse traditions provide meaningful worship to the greatest number of parishioners without compromising the essential tenets of their own tradition? . . .
>
> [A] second question is: If a chaplain or a faith group cannot accommodate ministry to the needs of the pluralistic religious community, does the faith group or its clergy belong in the military environment?

Id. at 86–87.

[113] *See supra* nn.17–29 (describing the allegations).

form of worship as incidental and open to great cooperation, others consider such matters crucial and open to very little compromise.[114]

IV. ENTERING THE INTERSECTION: REGULATING RELIGIOUS SPEECH

Navigating Judge Urbina's "intersection of . . . free speech, free exercise, establishment, and equal protection"[115] is difficult while both the chaplains bringing suit and the Navy continue to insist that each has the right of way and the other must yield.[116] Although the pending cases involve allegations of discriminatory practices in recruiting, retention, and promotion, the roads that form this particular intersection come together on the "fascinating" issue of what restrictions the Navy may place -- if any -- on the content of a chaplain's speech.[117]

Several of the allegations focus on the conduct of worship and the content of chaplains' sermons and prayers: one nonliturgical chaplain alleges that a liturgical chaplain reprimanded him for preaching that those "who call themselves Christians should live as Christians;"[118] another alleges that his supervising chaplain criticized him for ending his prayers with the phrase, "in Jesus [sic] name;"[119] and a third alleges his supervising chaplain removed him from worship leadership when he refused to conform his nonliturgical service to his supervisor's liturgical preferences.[120] In each case, the chaplains allege they received poor fitness reports[121] because they refused to compromise their

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[114] Chambers, *supra* n.91, at 85. The author once served with two senior chaplains who alternated leadership of the "General Protestant" service; one was from a fairly liturgical tradition, while the other was from a fairly non-liturgical tradition. While always complimentary of each other and the faithfulness with which each led worship according to his respective tradition, both expressed a lack of understanding of the other's preferences. When asked to substitute in worship for one or the other, the author received clear guidance from each on how that chaplain preferred "his" service to be conducted on a particular day.

[115] *Adair*, 183 F. Supp. 2d at 66.

[116] Judge Urbina has commented on his frustration at delays in getting the already-consolidated cases through his court, much less getting through the intersection, saying, "[o]ver the past two years, the court has issued memorandum opinions on at least seven dispositive motions filed by the parties. Yet more motions are waiting in the wings. The court's patience is beginning to wear thin." *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp. 2d 79, 81 (D.D.C. 2003) (internal citations omitted).

[117] *Adair*, 183 F. Supp. 2d at 66.

[118] *Id.* at 37 (citing plaintiff's complaint).

[119] *Id.*

[120] *See supra* nn.18–21 and accompanying text (discussing an alleged disagreement over worship styles).

[121] All officers receive a "fitness report" at least once each year which includes both numerical grades on performance in various areas and comments from their reporting seniors, and selection for promotion is based almost entirely on the grades and comments on these official records.

religious beliefs or change their speech, leading to reduced opportunities for advancement in the Navy.[122] In general, the plaintiffs allege "that senior officials in the Chaplain Corps have criticized and berated non-liturgical chaplains 'for preaching and teaching on truths of the Christian faith and their specific religious tradition.'"[123] Noting the overlap between the plaintiffs' claims, the court has observed that "[t]he overriding theme that runs through all the claims relating to the plaintiffs' free exercise of their religion is that the Navy has adopted and implemented policies and practices that effectively silence non-liturgical Christian chaplains."[124]

"Cooperation without compromise" has long been a motto of the Navy Chaplain Corps.[125] These allegations suggest that chaplains today view the boundary between the two terms quite differently from many of their predecessors,[126] and while cooperation may be a worthy goal, it cannot come at the sacrifice of religious liberty.[127]

Bureau of Naval Personnel Instruction (BUPERSINST) 1610.10, *Navy Performance Evaluation and Counseling System* (Aug. 2, 1995).

[122] *See Adair*, 183 F. Supp. 2d at 59-61 (discussing allegations concerning promotion practices).

[123] *Adair*, 183 F. Supp. 2d at 66 (citing plaintiff's complaint).

[124] *Id.* at 65.

[125] Chaplain Thomas Knox suggested this slogan while serving on temporary duty to assist in starting the first Naval Chaplains School in 1943. DRURY 2, *supra* n.109, at 59.

[126] Drury is careful to note that '[a]ny categorical statement to the effect that Navy chaplains of all faiths always worked together in peace and harmony would be unhistorical." *Id.* at 214. But, even if that was not always true, he later notes that by the end of World War II:

> Chaplains of all religious groups lived and worked together in a more intimate manner than was ever possible in civilian life. The motto of the Chaplains School—Cooperation Without Compromise—was found to be possible. Protestants learned more about the Catholics, Christians more about the Jews, and vice versa. Rarely were denominational lines drawn among the Protestants. The experiences of the chaplaincy did much to promote the spirit of ecumenicity among the Protestants. Chaplains who had learned to minister to men and women in the service without denominational labels were less tolerant of some of the minor differences of doctrine and polity which keep some of the Protestant denominations apart.

Id. at 307.

[127] Indeed, as the court intends to apply a strict-scrutiny standard to the plaintiffs' free exercise, establishment, free speech, and equal protection claims in the current litigation, *Adair*, 183 F. Supp. 2d at 50–53, 63–67, it seems quite unlikely that it would consider "cooperation" alone to be a compelling state interest.

A. Religious Speech in Faith-Group Worship

Although the question of restrictions on speech in military chapels has not yet reached the Supreme Court,[128] it did reach the United States District Court for the District of Columbia in *Rigdon v. Perry*.[129] In that case, a Roman Catholic priest, a Jewish rabbi, and other service members[130] sued the DoD and the armed forces over restrictions on the chaplains' speech in worship, falling under the Anti-Lobbying Act[131] and various regulations.[132] The court held that chaplains act in a religious capacity when they preach, and it is appropriate for them to teach their religious beliefs in that setting.[133] Applying the Religious Freedom Restoration Act (RFRA),[134] the court observed that the suspect speech appeared to be "no less important . . . than other religiously-motivated activity courts have held to be important enough to a religion such that its prohibition amounts to a substantial burden."[135] RFRA imposes strict-scrutiny analysis on questions of governmental burden on free exercise, allowing substantial burden of one's exercise of religion only if the government can show a compelling governmental interest and that such burden "is the least restrictive means of furthering that compelling governmental interest."[136]

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[128] Given the issues in these cases and the determination of both the plaintiffs and the Navy, the author believes that this question may reach the Court as a result of these actions.

[129] *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997).

[130] For an examination of *Rigdon* describing the other plaintiffs and developing the idea of chaplains serving as officers with rank but not with command, *see* Aden, *supra* n.15, at 198–203.

[131] 18 U.S.C. § 1913 (2000). The defendants conceded before trial that the Anti-Lobbying Act was not relevant to the facts in this case because it only applies if the activity in question involves spending government funds; because this case involved active duty service members but no government funds, the defendants relied instead on DOD Directive 1344.10, *Political Activities of Members of the Armed Forces on Active Duty* (Jun. 15, 1990). *Rigdon*, 962 F. Supp. at 157.

[132] *Rigdon*, 962 F. Supp. at 152, 154 (citing several DOD and Air Force regulations or directives, and describing correspondence directed to chaplains by each service's headquarters regarding the restrictions).

[133] *Id.* at 161.

[134] 42 U.S.C. § 2000bb-1 (2000). While at first blush the Supreme Court's holding in City of Boerne v. Flores, 521 U.S. 507, 536 (1997), regarding RFRA's constitutionality may appear all-encompassing, later opinions clarify that *Boerne*'s ruling abrogated RFRA only with regard to *state* government action. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 638 (1999); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 167 (D.C. Cir. 2003) (indicating that the court hearing the current cases has held "without doubt" that RFRA "survived the Supreme Court's decision striking down the statute as applied to the States" and is still constitutional as applied to the federal government, citing Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.D.C. 2001)).

[135] *Rigdon*, 962 F. Supp. at 161. The judge hearing the current cases has ruled, following First Amendment rather than RFRA analysis, that strict-scrutiny applies to the cases pending before it. *Adair*, 183 F. Supp. 2d at 50-53.

[136] 42 U.S.C. §§ 2000bb-1(a), (b) (2000).

Having found a substantial burden in *Rigdon*,[137] the court examined whether the burden fit the exception and held that "the compelling interests advanced by the military are outweighed by the military chaplains' right to autonomy in determining the religious content of their sermons . . . ."[138] The government's asserted interests in *Rigdon* were potential political conflicts that might arise in the military ranks should different chaplains encourage their respective congregations to undertake competing lobbying activities.[139] In fact, the court observed, the defendants failed to show how the burden furthered those interests at all, much less in the least restrictive manner.[140] *Stare decisis* suggests the district court's decision in *Rigdon* is strongly indicative of how it will rule in the current litigation, and it would seem that an interest in cooperation between individual chaplains is even less compelling than an interest in preventing potential political conflicts in the ranks.[141]

In a particularly interesting parallel to the differences between various so-called "Protestant" groups in the current litigation, the court also examined a difference of opinion between two Roman Catholic chaplains.[142] The military considered one chaplain's religious speech to violate the restriction, while the other chaplain's speech on the same subject did not.[143] The court reasoned that the military was thus sanctioning one Catholic view over another on a matter of faith, a form of viewpoint discrimination that is presumed impermissible in such a forum.[144] Finally, at least with regard to speech in worship, *Rigdon* uses very strong language in concluding that:

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[137] *Supra* n.135.
[138] *Rigdon*, 962 F. Supp. at 162.
[139] *Id.* at 161–62.
[140] *Id.* at 162.
[141] The district court's recent ruling on the Navy's motion to dismiss in *Larsen* suggests that RFRA itself will apply to few, if any, of the various claims, because the chaplains' claims attack intentionally discriminatory policies rather than laws or regulations of neutral or general applicability. *Larsen*, 346 F. Supp. 2d at 137–38. While claims under RFRA may be precluded by this latest ruling, the underlying allegations of violations of First Amendment rights are not. *See supra* n.135 (describing an earlier ruling by the district court that First Amendment strict scrutiny analysis would apply to the claims).
[142] *Id.* at 163–64. One, Father Rigdon, believed his faith compelled him to urge members of the congregation to engage in a certain activity. *Id*. The other priest, a Navy chaplain who was not a party to the suit, did not feel so compelled. *Id*.
[143] *Id.* at 164.
[144] *Id.* (citing Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995), involving a university's refusal to pay a religious student group's printing costs because of the religious content of the publication while paying other nonreligious student groups' printing costs). Having noted that expressive, religious activity was the underlying purpose for having chapels, the court held that the speech at issue in *Rigdon* was within the limitations of the proper forum and protected from such viewpoint discrimination *Id.* at 163, 164.

> [W]hat we have here is the government's attempt to override the Constitution and the laws of the land by a directive that clearly interferes with military chaplains' free exercise and free speech rights, as well as those of their congregants. On its face, this is a drastic act and can be sanctioned only by compelling circumstances. The government clearly has not met its burden. The "speech" that the plaintiffs intend to employ to inform their congregants of their religious obligations has nothing to do with their role in the military. They are neither being disrespectful to the Armed Forces nor in any way urging their congregants to defy military orders. The chaplains in this case seek to preach only what they would tell their non-military congregants. There is no need for heavy-handed censorship, and any attempt to impinge on the plaintiffs' constitutional and legal rights is not acceptable.[145]

The directive referred to here came from headquarters-level officers, not front-line supervisors.[146] If similar reasoning under the First Amendment is followed in the pending cases, *Rigdon* suggests that the Navy -- or any chaplain, no matter how senior in grade -- cannot tell a chaplain what he or she may or may not say while preaching or praying when leading faith-group worship.

B. Religious Speech Beyond Faith-Group Worship

But what of chaplains' activities and speech outside of worship, having more to do "with their role in the military"[147] than with their role as worship leaders? The mission of the Chaplain Corps extends beyond formal acts of worship to include responsibilities to: "advise commanders to ensure the free exercise of religion; provide religious ministry support to authorized personnel; advocate for and promote the well-being of all personnel; and serve as command liaison to civilian religious leaders, communities, organizations and agencies."[148] In carrying out this mission, chaplains find themselves speaking in forums far removed from faith-group worship.[149] Navy chaplains

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[145] *Id.* at 165.
[146] *Supra* n.132.
[147] *Supra* n.145 and accompanying text.
[148] U.S. Navy, *U.S. Navy Chaplain Corps Strategic Plan 2001 to 2007*, 3 (undated) (*available at* http://www.chaplain.navy.mil/CoC/StrategicPlan.asp).
[149] The court in *Rigdon* took note of "the government's clear intent that certain facilities on military property (e.g., chapels) and personnel (e.g., chaplains) be dedicated exclusively to the free exercise rights of its service people." *Rigdon*, 962 F. Supp. at 163. If certain facilities are

engage in counseling sessions one-on-one with Sailors, Marines, other service members, and family members; attend and participate in staff meetings with other officers; visit workspaces and dining facilities; travel to far-flung lands; lead workshops on healthy relationships, planning for deployment, and return and reunion issues; offer invocations and benedictions at assemblies ranging in size from a handful to hundreds of attendees; spend weeks or months at sea, interacting daily with the rest of the crew; accompany forces encountering hostile fire; broadcast an evening prayer over a ship's public address system just before "Taps" at the end of each day; visit patients in sickbays or hospitals; and myriad other activities.[150] While any or all of these may involve religious speech, many are certainly not strictly religious activities.[151]

Both courts and military regulations expressly recognize a distinction between a chaplain's conduct as an officer and a chaplain's conduct as a religious leader.[152] While current Navy instructions seem to attempt to include "the entire spectrum of professional duties performed by Navy chaplains" under the term "religious ministry,"[153] and to subsume nearly anything a chaplain might do under the heading of "Religious Ministry Tasks,"[154] earlier documents offer clearly separate instructions regarding "The Chaplain as a Professional Representative of His Church" and "The Chaplain as a Naval Officer."[155] Training materials and conferences have focused separately on

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included in this intent, others presumably are not. *See Rigdon*, 962 F. Supp. at 162-63 (describing the Supreme Court's forum analysis developed in Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985)).

[150] The list is by no means all-inclusive, but reflects the author's personal experiences as a chaplain or those of others known to him over more than twenty years of reserve and active duty.

[151] While reluctant to assert that a chaplain uttering religious speech might make any activity religious, this author is also concerned about courts drawing too fine a distinction. In ruling against a defendant's claim of clergy-penitent privilege for statements made in a counseling setting, one court has drawn just such a line between secular marriage counseling performed by a minister and religious counseling performed by that same minister. United States v. Shelton, 59 M.J. 727 (A. Ct. Crim. App. 2004). The author is encouraged by an appellate court decision to grant review on the question of "whether the United States Army Court of Criminal Appeals erred in upholding the ruling of the military judge that denied the defense motion to suppress any evidence obtained as a result of communications between appellant and his pastor." United States v. Shelton, 60 M.J. 314 (Armed Forces App. 2004). No final decision has been reported as of this writing.

[152] *Rigdon*, 962 F. Supp. at 158-61 (reviewing distinctions regarding the roles of chaplains as found in various provisions of the Manual for Courts-Martial, Army and Navy instructions, and the Military Rules of Evidence, along with interpretations of those distinctions in several court cases).

[153] OPNAVINST 1730.1D, *Religious Ministry in the Navy*, ¶ 4.a.

[154] *Id.* at ¶ 5.b.

[155] OPNAVINST 1730.1, *Chaplains Manual*, art. 1202, 1203 (1973) (as amended through *Change Transmittal 5*, (1980)) (*available at* http://www.chaplain.navy.mil/CoC/History.asp, *select* 1973 Chaplain Corps Manual).

spiritual development issues[156] and the need for chaplains to understand their leadership role as commissioned officers in "the command structure, as staff officers, and as supervisors . . . ." [157] Rules concerning privileged communications between chaplains and service members extend the privilege to communication "made either as a formal act of religion or as a matter of conscience" to a chaplain in his or her "capacity as a spiritual advisor" but not in any other capacity.[158]

Beyond worship, regulations limit a chaplain's duties solely to religious service "while assigned to a combat area during a period of armed conflict." [159] Outside of combat, prohibited duties include any that would violate "the religious practices of the chaplain's religious organization, undermine privileged communication . . . or involve the management of funds other than the [Religious Offering Fund]." [160] Although at least one author asserts that "anything that a chaplain touches must be related to religion and religious activities," [161] nothing in the regulations currently precludes assignment when not in a combat area as: Division Officer supervising enlisted Religious Program Specialists running a shipboard library and computer lab; Voting Rights Officer; member of an Awards Board; Command Liaison to a local chapter of the U.S. Navy League; member of a Community Relations Board; Project Officer for a Predeployment/Change of Homeport Workshop; member of a Special Cases Board reviewing requests to delay or defer mobilization; Zone Inspector of berthing and workspaces aboard ship; Ombudsman Liaison assisting key family-member volunteers in helping other family members; member of an Examination Board proctoring enlisted advancement exams; Enlisting Officer administering an Oath of Enlistment to a new Sailor; or even Project Officer responsible for directional signs throughout an aircraft carrier for a "Family Day" cruise.[162] Construing all these activities

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[156] *Chaplain Corps Professional Development Training Course Fiscal Year 89: Spiritual Development and Pastoral Care* (Dept. of the Navy 1988).

[157] *Chaplain Corps Professional Development Training Course Fiscal Year 94: Chaplain Leadership* (Dept. of the Navy 1993).

[158] Note that while the military rule extends the privilege beyond the "clergyman" to include communications with a "clergyman's assistant," and is thus broader than that offered in many civilian courts, it is also limited by the "formal act of religion" and "capacity as a spiritual advisor" requirements. Mil. R. Evid. 503(a), (b). *See also supra* n.151 (discussing a pending case reexamining this privilege).

[159] *Navy Regulations*, art. 1063 (1990). The regulation further explains that this restriction in combat areas flows from the requirements of the Geneva Conventions to protect the noncombatant status of medical, dental, and religious personnel. *Id.*

[160] OPNAVINST 1730.1D ¶ 5.e.(11).

[161] Aden, *supra* n.15, at 209.

[162] This list reflects many, but not all, of the collateral duties held by the author of this article over the years. One of these assignments, serving as member of a Special Cases Board reviewing requests to delay or defer mobilization, is in fact suggested by a regulation recommending that

as religious ministry would strain credulity, yet chaplains have done all these and more in their role as Naval officers.

Does the broad protection of religious speech enjoyed by chaplains leading worship extend to these other activities? Does the mere presence of a chaplain make something a "religious" activity? If so, then the protection may well extend to those other activities. One district court has observed that the government cannot restrict some forms of speech merely because a person has other opportunities to speak, and held that the government cannot restrict some religious exercise just because other religious practices might be available.[163] The court suggested that "[i]t would be curious to find that RFRA barred challenges to governmental restrictions on religion as long as the plaintiff could practice, say, two-thirds of his religion."[164]

C. Is Religious Speech Absolutely Protected in Any Military Forum?

Following that reasoning, a growing number of chaplains have asserted that their religious speech is protected in all forums, and that their faith and conscience require them to use every opportunity to promote the teaching of their respective faith groups.[165] But, while a right to individual interpretation of the Bible is a closely held tenet of faith for some groups,[166] that right does not extend to constitutional or statutory construction.[167] Also, military commanders and authorities enjoy substantial deference from courts

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"board membership include a chaplain, a line officer, and a JAG Corps officer when available." Commander, Naval Reserve Forces, Instruction (COMNAVRESFORINST) 3060.5A, *Commander, Naval Reserve Force Manpower Mobilization Support Plan*, Appendix B, para. 2. (April 3, 2000).

[163] Muslim v. Frame, 897 F. Supp. 215, 217 (E.D.Pa. 1995).

[164] *Id.*

[165] This observation comes generally from the author's experience in conversations with other chaplains over the last twenty years, and particularly since the start of the present litigation.

[166] *See generally* ABINGDON DICTIONARY OF LIVING RELIGIONS, *supra* n.97, at 90 (describing beliefs of Baptist churches in general). Some traditions, though, expressly limit private interpretation to matters of faith or worship. *See, e.g.,* GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE CONSTITUTION OF THE Presbyterian CHURCH (U.S.A.), PART II: THE BOOK OF ORDER 2003-2004, sec. G-1.0301(1)(a) (listing as one of that church's "Historic Principles of Church Order" that "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to his Word, or beside it, *in matters of faith or worship*" (quoting from the Westminster Confession of Faith) (emphasis added)).

[167] That such a right does not so extend has been clear from the Supreme Court's earliest days: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." Marbury v. Madison, 5 U.S. 137, 177 (1803).

regarding certain types of speech and the threat that speech might pose to various military interests.[168] Judges have recently shown a willingness to show less deference to military authorities in cases of perceived "outright abuse,"[169] and showing any deference at all has its critics in some cases.[170] However, courts continue to appear willing to treat the military as a separate community,[171] in which First Amendment principles are applied differently through necessity, and individual challenges to First Amendment restrictions rarely succeed.[172]

The case of *Veitch v. Danzig,*[173] brought by a former Navy chaplain, presents a recent challenge to such restrictions. The case focuses on allegations concerning events that occurred while the plaintiff was on active duty and stationed in Naples, Italy, and involves perhaps the most publicized[174] allegations of limitations on a chaplain's rights to free speech, free exercise, and equal protection, along with other claims.[175] In ruling on the plaintiff's

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[168] Carr, *supra* n.35, at 307 (commenting on an examination of case law involving articles of the Uniform Code of Military Justice (UCMJ), DOD and service regulations, and lawful orders of lower echelon commanders).

[169] *Id.* at 309 (citing *Rigdon*).

[170] *Id.* at 308 n.19 (citing as one example C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other Special "Contexts"*, 56 U. CIN. L. REV. 779, 799 (1988)).

[171] *See generally* James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984) (describing development of "separate community" standard for reviewing constitutional claims brought by military members).

[172] Carr, *supra* n.35, at 313. *Rigdon* appears to be one of those rare exceptions. An earlier review of Free Exercise challenges prior to 1987 found that most focused on appearance (beards) or dress (religious head coverings), and none on speech by chaplains. Michael F. Noone, Jr., *Rendering Unto Caesar: Legal Responses to Religious Noncomformity in the Armed Forces*, 18 ST. MARY'S L.J. 1233, 1252–62 (1987).

[173] Veitch v. Danzig, 135 F. Supp. 2d 32 (D.D.C. 2001). *But see supra* n.14.

[174] *See generally* Ward Sanderson, *War in the Chaplain Corps*, STARS AND STRIPES/STRIPES SUNDAY MAGAZINE (Nov. 23, 2003) (*at* http://www.stripesonline.com/article.asp?section=126&article=18884) (introducing a three-part series on the current litigation and describing testimony in *Veitch*); Letter from Louis V. Iasiello, Chief of Chaplains, U.S. Navy, in *Letters to the Editor for Thursday, December 18, 2003*, STARS AND STRIPES (Dec. 18, 2003) (*at* http://www.stripesonline.com/article.asp?section=125&article=19125&archive=true) (responding to Sanderson series); *Chaplain's Case Against Navy Can Continue, Judge Rules*, SAN JOSE MERCURY NEWS 3F (September 8, 2001) (available at 2001 WL 27027719); Dale Eisman, *Navy Chaplain Bucks "Vanilla Gospel," Fights To Keep Job*, THE VIRGINIAN PILOT & THE LEDGER STAR A5 (September 26, 1999) (available at 1999 WL 21869096); Rowan Scarborough, *Chaplain Charges Navy Forced Him Out Over Views: Evangelical Complains Of Discrimination*, THE WASHINGTON TIMES A1 (August 23, 1999) (available at 1999 WL 3092688).

[175] As reported by the court:

> Plaintiff's complaint charges: (1) violation of the First Amendment's Free Exercise and Establishment Clauses (based on [the supervisor's] actions toward plaintiff); (2) violation of plaintiff's First Amendment free speech rights and right to seek redress (the Navy's insistence that he preach

request to enjoin the enforcement of certain regulations concerning the First Amendment, the court focused on the chaplain's behavior as a Naval officer, even as it recognized that his First Amendment claims would be substantial if the case focused instead on heresy or doctrine.[176] The chaplain asserted that the dispute centered on religious issues,[177] but two equal opportunity complaint investigations and an Inspector General's (IG) investigation concluded otherwise.[178] In denying the plaintiff's motion for a preliminary injunction, the court observed that "the dispute appear[ed] more to be centered upon [plaintiff's] military deportment than upon his religious convictions." The district court also noted that the IG concluded that "the disciplinary proceedings against [the plaintiff] were the product of his own military -- not theological -- misconduct."[179] In the most recent development in this case, the district court granted the Navy's motion to dismiss the case without reaching the constitutional issues, because the plaintiff failed to show the Navy's liability for the alleged claims.[180] Judge Barzilay seemed quite willing to separate a chaplain's protected religious speech from other forms of expression in forums beyond worship.[181]

Beyond worship, commanders call upon chaplains to engage in religious speech in situations that are otherwise wholly secular, asking them to pray at the start and end of change of command ceremonies, retirements, graduations, formal dinners and celebrations, and other events.[182] While the

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> "pluralism among religions," and the Navy's retaliation for his complaining about religious discrimination); (3) violation of the Equal Protection Clause under the Fifth Amendment (inconsistent application of the Uniform Code of Military Justice); (4) illegal or constructive discharge (hostile working conditions); (5) violation of the Religious Freedom Restoration Act ("RFRA") (censoring what plaintiff could preach); (6) irreparable harm (his precipitous separation from the Navy); (7) violation of plaintiff's civil rights (withholding back pay); and (8) conspiracy to violate plaintiff's civil rights.

Veitch, 135 F. Supp. 2d at 34.

[176] *Id.* at 35.

[177] *Id.* at 33-36.

[178] *Id.* at 34.

[179] *Id.* at 36.

[180] *Veitch*, 2005 WL 762099 at *9.

[181] *Veitch*, 2005 WL 762099 at *12 (discussing, as one example, the charge of "disrespect toward a superior commissioned officer" the plaintiff faced before he resigned from the Navy). Similarly, Judge Urbina has indicated he agrees with the District Court for the Southern District of California's conclusion in *Sturm*'s underlying action that the judiciary's traditional deference to the military "does not extend to practices that may subvert one's inalienable constitutional rights." *Adair*, 183 F. Supp. 2d at 52 (citing Sturm v. U.S. Navy, No. 99-2272 at 7 (S.D.Cal. 2000)).

[182] The author has prayed at innumerable such events during his career. Although occasionally asked to pray for good weather as the chaplain in the movie *Patton* was asked to do, to date he has successfully demurred.

practice has not yet faced a formal challenge before the Supreme Court, as have prayers offered at high school graduations,[183] it may yet.[184] Although the Navy audience is older than that in the high school cases,[185] attendance at many Navy events is quite often mandatory[186] or arguably coerced.[187] Restrictions on speech that some might perceive as prejudicial "to good order and discipline in the armed forces"[188] have not yet extended formally[189] to the content of chaplains' prayers in such settings. The growing religious diversity in the military,[190] however, may someday require it.[191]

D. Lane Markers in the Intersection: Some Dashed Lines

The chaplain's dual role as a religious ministry professional and a Naval officer may necessitate tailoring of religious speech in settings beyond faith-group worship in recognition of the religious diversity in command assemblies. Generally, commanders ask "the chaplain" to pray, not "the Presbyterian chaplain," or "the Catholic chaplain," or "the Baptist

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[183] Lee v. Weisman, 505 U.S. 577 (1992).

[184] Some media reports suggest the ACLU may file suit to end the practice of student-led prayer at mealtime at the United States Naval Academy. *See generally* Amy Fagan, *Bill Would Permit Military Academy Prayers; Move Aimed at Thwarting ACLU*, THE WASHINGTON TIMES A1 (Oct. 4, 2003) (describing successful litigation brought by the ACLU ending mealtime prayers at Virginia Military Institute, a following ACLU letter to the Naval Academy asking that it also end the practice, and a bill introduced in Congress designed to protect the practice).

[185] Though the Supreme Court declined to extend its holding in *Lee* to "mature adults," *Lee*, 505 U.S. at 593, much of the audience at many military functions is not much older than those graduating high school. In 1997, 36.6% of the Navy was under 25 years old, and 58.3% of the Navy was under 30. Defense Manpower Data Center, *Active Duty Workforce Profile: March 31, 1997* (visited Feb. 28, 2004), *at* http://www.dmdc .osd.mil/ids/archive/act_prof2.htm.

[186] Change of command ceremonies ordinarily involve all unit members not on watch standing in formation. *See, e.g.,* WILLIAM P. MACK, THE NAVAL OFFICER'S GUIDE 139-40 (9th ed., Naval Inst. Press 1983).

[187] Formal dinners or informal receptions, for example, may not officially be mandatory, but the author's experience is that attendance at many so-called "optional" events is generally considered not genuinely optional.

[188] Article 134, Uniform Code of Military Justice.

[189] Allegations of attempts by senior chaplains to extend the restriction to the content of public prayers are at issue in the current litigation. *See supra* nn.17-29 (outlining the allegations).

[190] One example of the diversity is the growth in the number of personnel who identify themselves as Islamic, growing five-fold from 2,000 to 10,000 in a recent six-year period. Hutcheson, *supra* n.99, at 81.

[191] While perhaps 98.9% of service members claiming a religious preference call themselves Christian, leaving only 1.1% identifying with non-Christian groups, "the religious rights of Americans have never depended on numbers." *Id.* at 81. Also, the author's personal experience of reviewing religious preference data in several commands suggests that many members' records lack not only an indication of preference but also fail to show that many members were ever aware of the opportunity to record a preference.

chaplain."[192] Such settings are very different from faith-group worship and, absent a demonstrable faith group requirement for a particular formulaic ending to prayer, would seem to require a cooperative accommodation.

An interfaith resource often distributed and recommended to chaplains over the years offers guidelines for prayer given publicly in a diverse society.[193] Such a document offers lane markers to guide one through the fascinating four-way intersection. It suggests that "public prayer in a pluralistic society must be sensitive to a diversity of faiths."[194] Public prayer that becomes divisive by using "forms or language [that] exclude persons from faith traditions different from that of the speaker"[195] might run afoul of the deference usually given to the military on matters prejudicial to good order and discipline.[196] Prayer that is "nonsectarian, general and carefully planned" can be "authentic prayer that also enables people to recognize the pluralism of American society."[197] Recognizing such diversity, coupled with the idea that "prayer in such secular settings can and should bind a group together in a common concern,"[198] would reinforce, rather than offend, good order and discipline. This would also support the military necessity of unit cohesion[199] over a chaplain's own interest in furthering a particular religious viewpoint.[200]

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[192] In commands having more than one chaplain, particularly for retirements, individual retirees or commanding officers sometimes ask for chaplains of their particular faith group to pray. But those attending seldom know about the particular request, understand the relationship between the honoree and the chaplain, or even care, especially if compelled to stand in formation for a long ceremony!

[193] NCCJ, *supra* n.11. Interestingly, this is an updated version of the brochure handed out to clergy invited to pray at the graduations in *Lee* and used as evidence to show an impermissible establishment violation when used to guide school prayer. *Lee*, 505 U.S. at 581, 588. Formerly known as The National Conference of Christians and Jews, NCCJ "changed its name in the 1990's to better reflect its mission to build whole and inclusive communities." NCCJ, *The National Conference for Community and Justice (NCCJ)*, (visited Mar. 1, 2004), *at* http://www.nccj.org. The author received his first copy of the brochure while a student at the Naval Chaplains School in 1984.

[194] *Id.*

[195] *Id.*

[196] *See supra* n.168 (discussing the usual deference).

[197] NCCJ, *supra* n.11.

[198] *Id.*

[199] General Colin Powell, while Chairman of the Joint Chiefs of Staff, and General H. Norman Schwarzkopf have reportedly commented on the singular importance of unit cohesion for success in battle. *See* Carr, *supra* n.35, at 347 (citing Congressional testimony of the two generals).

[200] Such conduct would also be consistent with guidelines President Clinton issued on religious exercise and expression in the Federal civilian workplace, which state:

> As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the

Following such guidelines would also recognize that a chaplain's right to free exercise might end at the appearance of establishment, much like the right to free speech ends at falsely shouting "fire" in a crowded theater.[201] A chaplain praying in faith-group worship -- a purely religious forum -- seems to stand in a very different place from one praying on a platform in close proximity to military officials and the trappings of governmental authority.[202] While the one is permitted great freedom even where the Establishment Clause might ordinarily prohibit such activity,[203] the other presents an Establishment problem of another magnitude. Just as the Establishment Clause may be limited in some settings by the Free Exercise Clause,[204] so the Free Exercise Clause may be limited in this setting by the Establishment Clause.[205]

> legitimate rights of other employees or creates the appearance, to a reasonable observer, of an official endorsement of religion.

The White House, Office of the Press Secretary, *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, *at* http://clinton6.nara.gov/1997/08/1997-08-14-guidelines-on-religious-expression-in-the-workplace.html (August 14, 1997).

[201] Justice Holmes first used this illustration in a case involving charges of "causing and attempting to cause insubordination . . . in the military and naval forces of the United States." Schenck v. United States, 249 U.S. 47, 48-49 (1919). In words that might well be used to test the acts at issue in the present cases in tension with the Establishment Clause, he wrote:

> But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id. at 52 (internal citations omitted).

[202] A reasonable observer might easily see a chaplain in the latter setting as speaking and acting on behalf of the government, rather than merely representing a particular faith group, thus presenting facts for a compelling state interest that could lead to the Establishment Clause defeating both Free Exercise and Free Speech claims. Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religions Issues in the Army*, 1998 ARMY LAW. 14 (November 1998) (citing Justice Scalia's statement for the majority in Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 761–62 (1995), that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech").

[203] *Katcoff*, 755 F.2d at 233 (interpreting the Establishment Clause in tension with the Free Exercise and War Powers Clauses).

[204] *Id.*

[205] One might suggest that a closer proximity to the appearance of establishment requires a greater degree of restriction on a chaplain's free exercise.

V. CONCLUSION: REACHING THE OTHER SIDE OF THE INTERSECTION

The Navy and its Chaplain Corps will spend a great deal of time and energy on this intersection and the nearby interchange of related issues currently before the United States District Court for the District of Columbia. This cluster of cases presents overlapping constitutional questions regarding religious ministry in the Navy that go far beyond those examined by the Second Circuit in *Katcoff*'s limited challenge. The plaintiffs in *Katcoff* challenged the constitutionality of the chaplaincy itself on Establishment grounds, and failed at both the district and appellate level.[206] The current litigation goes to broader questions of the constitutionality of how the Navy operates its chaplaincy, and will likely impact religious ministry in the other branches as well.[207]

Unlike the litigants in *Katcoff*, who appeared *pro se*, used their own resources, and had little personal interest at stake,[208] the plaintiffs in the current actions have retained counsel, sought the help of other organizations, and have great personal interests at stake.[209] Like the Army before it, the Navy is likely to be willing to fight for its position to the utmost.[210] Given the great interests of both sides and the constitutional questions at issue, *Adair*,

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[206] The original action was Katcoff v. Marsh, 582 F. Supp. 463 (E.D.N.Y. 1984). The Second Circuit Court of Appeals did remand one question regarding whether a government-funded chaplaincy in certain large urban areas in the United States would meet the test it adopted in evaluating the chaplaincy as a whole, *Katcoff*, 755 F.2d at 238, but the plaintiffs chose not to pursue the action further rather than face the prospects of paying the government's costs on appeal if they lost again. DRAZIN & CURREY, *supra* n.76, at 203.

[207] *Supra* n.76 (describing the possible effects on the various services if a suit against one were to succeed).

[208] Joel Katcoff and Allen Wieder were third-year law students when they first filed suit against the Army, and do not appear to have sought or accepted outside help at any point in the litigation. DRAZIN & CURREY, *supra* n.76, at 1-2. They based standing only on their status as federal taxpayers. *Katcoff*, 755 F.2d at 231.

[209] Arthur A. Schulcz, Sr., Vienna, Va. is listed as counsel for the plaintiffs on *Adair*, *CFGC*, *Veitch*, and *Wilkins*, joined by Bradley L. Bollinger on the most recent *Adair* actions. *Supra* n.14 (listing citations for the various cases). Steven H. Aden, formerly head of litigation for the Rutherford Institute and now Chief Litigation Counsel for the Christian Legal Society, has also assisted. Telephone interview with Steven H. Aden, Christian Legal Society (October 16, 2003). More recently, John W. Whitehead and Douglas R. McKusick, of the Rutherford Institute, assisted with the petition for writ of certiorari in *CFGC*. *CFGC*, 125 S.Ct. at 1343 (listing Whitehead and McKusick as "of counsel" on the petition). The personal interests of the litigants include at least their personal and professional reputations, possible promotions to higher rank, and potential recovery of wages lost either to not being selected for promotion or allegedly forced resignation. *Supra* n.31.

[210] *See generally* DRAZIN & CURREY, *supra* n.76 (recounting the Army's determination to see the litigation through to the very end).

CFGC, *Veitch*, *Larsen*, or a name not yet at the top of any of the cases, may well achieve landmark status in Religion Clause jurisprudence.

The court currently responsible for these cases has stated clearly that "the Constitution prevents the Navy from regulating the religious speech of non-liturgical Christian chaplains but not that of liturgical Christian or Catholic chaplains."[211] If the court reinforces its holding in *Rigdon* supporting fully-protected speech in worship,[212] the "General Protestant" service may become a rarity, subject to the willingness of individual chaplains to conduct such a service without regard to the wishes of chaplains from other faith groups.[213]

But, just as the Navy cannot regulate the religious speech of one group of chaplains and not that of another, query whether it can regulate the speech of *all* chaplains when outside of the protected forum of faith-group worship. This appears a more challenging question, for logically, an unlawful restriction remains unlawful even if applied evenly. Only time will tell if the Supreme Court's holding in *Lee* will extend beyond prayers offered before high school children to those offered before mature adults.[214] In the meantime, prayers in civic occasions that at least acknowledge the religious diversity in the audience and limit efforts to further a chaplain's own religious viewpoint would seem a reasonable reconciliation between free exercise and establishment concerns.

One writer goes so far as to suggest that the decisions in these cases will determine whether a federally-funded military chaplaincy will survive at all.[215] How well the plaintiffs, the Navy, the courts, and the hundreds of chaplains ministering 24/7/365 around the world to the men and women of the Navy, Marine Corps, Coast Guard and Merchant Marine navigate this intersection will, at the very least, change the face of the Navy Chaplain Corps for years to come.[216]

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[211] *Adair*, 183 F. Supp. 2d at 66.
[212] *Supra* n.144 (quoting the conclusion of the opinion in *Rigdon*).
[213] That willingness, of course, would be subject to the "manner and forms of the church of the church of which [the chaplain] is a member." *Supra* n.20 (quoting 10 U.S.C. § 6031a).
[214] *Supra* nn.183–85 (describing *Lee*).
[215] Aden, *supra* n.15, at 237.
[216] One sign of changes to come is an Equal Opportunity Symposium held for five days in May, 2004. The announcement for the symposium said it was "the first of its kind specifically designed for Chaplains." (Announcement *available at* http://www.chaplain.navy.mil/training/pdtw.asp) (copy on file with author). The accompanying "information paper" called this workshop "a pro-active approach to avoid future equal opportunity problems within the Chaplain Service," and observed that "[r]ecent allegations of discrimination within the Chaplain Corps warrants consideration of additional training that may prevent unequal treatment or its perception within the naval chaplaincy." (Dean Bonura, *Information Paper* (Defense Equal Opportunity Management

This article's focus on just some of the challenges facing military chaplaincies may also foreshadow challenges facing society at large in the new century. If religious diversity becomes to the twenty-first century what race relations were to the twentieth century,[217] then there is much more at stake here than the relief sought by plaintiffs and class members in a few court cases. How the Navy Chaplain Corps -- with or without help from the courts -- resolves questions of pluralism, diversity, and cooperative ministry may offer guidance not only to the other branches of the United States military, but also to our nation and the larger community of nations.

Institute - Chaplain, Jan. 27, 2003) (visited Jul. 12, 2005), *available at* http://www.chaplain .navy.mil/Attachments/Training/EO%20 INFORMATION%20PAPER %20 US%20Navy.pdf (copy on file with author).

[217] Knechtle, *supra* n.36, at 522-23 (describing the difficulty in even defining "religion" and asserting that religious diversity may be the greatest challenge we face both locally and globally on this side of September 11, 2001).

AN ASSESSMENT OF THE AUTHORITY FOR AUSTRALIA TO USE FORCE UNDER UNITED NATIONS SECURITY COUNCIL RESOLUTIONS CONCERNING IRAQ

CMDR Rob McLaughlin, RAN*

"War ought not to be undertaken except for the enforcement of rights."[1]

I. INTRODUCTION

Public debate surrounding the efficacy of Australia's involvement in recent military operations in Iraq (2003) has focused, arguably to an unprecedented degree, upon issues of legality concerning international law. In part, this is reflective of Hilary Charlesworth's opinion, ostensibly concerning the Kosovo intervention but of wider general significance, that:

> International lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance.[2]

Indeed, if anything, debate over the specific *legality* of military operations in Iraq was considerably more public than that surrounding Kosovo. Public debate on the rights and wrongs of the Kosovo operation tended to focus upon the humanitarian imperatives, rather than the explicitly legal dimensions of that conflict. This left the international lawyers to argue these legal ramifications in academic journals and before several international tribunals.[3] The Iraq

* The author would like to express his deep appreciation for the significant assistance provided by a number of reviewers and editors. However, all errors are the author's alone. Further, this work is simply a piece of academic analysis. The positions and opinions expressed in this article are solely those of the author and do not represent the views of the Australian Government, Department of Defense, or Australian Defense Force.

[1] HUGO GROTIUS, PROLEGOMENA TO THE LAW OF WAR AND PEACE para. 25 (Francis W. Kelsey trans., New York: Liberal Arts Press 1957) (1625).

[2] Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377 (2002).

[3] *See* the academic debate conducted in the major journals. Ian Brownlie & CJ Apperley, *Kosovo Crisis Inquiry: International Law Aspects*, 49 INT'L & COMP. L.Q. 878 (2002); Christine Chinkin, *The Legality of NATO's Action in the Former Republic of Yugoslavia (FRY) Under International*

situation, however, prompted widespread legally-focused debate in the op-ed pages of the major daily newspapers, in news journals, radio and television interviews, conferences and political speaking engagements, and in the Australian Parliament.[4] For the first time in recent history, public discussion over the precise nature and boundaries of the *legal* issues involved in military conflict reached a level of sophistication, and, in some instances, sophistry. This reaction was an anomaly of sorts, having been relatively absent from previous debates over the lawfulness of action in East Timor, Kosovo, the Former Yugoslavia, Somalia, Rwanda, and Cambodia.

This global debate not only disclosed a range of important legal themes, but also revealed the discrepancies inherent in their interpretations among the many global communities. In the United States, for example, the parameters of debate were significantly wider and more strident than in Australia. On June 1, 2002, U.S. President Bush, addressing the graduating class at the U.S. Military Academy, West Point, articulated his view that:

> We cannot defend America and our friends by hoping for the best. We cannot put our faith in the words of tyrants, who solemnly sign non-proliferation treaties and then systematically break them. If we wait for threats to fully materialize, we will have waited too long.[5]

Indeed, this doctrine of pre-emption was subsequently echoed in the September 2002 *National Security Strategy of the United States*. In what seems a slippery step from anticipatory self-defense to a doctrine of pre-emptive self-defense, U.S. policy declared that:

Law, 49 INT'L & COMP. L.Q. 910 (2000); Christopher Greenwood, *International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L.Q. 926 (2000); Dino Kritsiotis, *The Kosovo Crisis and NATO: Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT'L & COMP. L.Q. 330 (2000); Vaughan Lowe, *International Legal Issues Arising in the Kosovo Crisis*, 49 INT'L & COMP. L.Q. 934 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999), *available at* http://www.ejil.org/journal/Vol10/No1/100001.pdf; Marc Weller, *Enforced Negotiations: The Threat and Use of Force to Obtain an International Settlement for Kosovo*, 5 INT'L PEACEKEEPING 4 (1999). *See also* Legality of Use of Force (Yugo. v. Belg.), 1999 I.C.J. 105 (June 2); Bankovic and Others v. Belgium and 16 other Contracting States, 123 Eur. Ct. H.R. Application No. 52207/99, *available at* http://hudoc.echr.coe.int/Hudoc2doc2/HEDEC/200112/52207_die.doc.

[4] *See for example Law Experts on Legality of Use of Force Against Iraq*, (ABC PM Radio, Mar. 14, 2003) *available at* http://www.abc.net.au/pm/content/s807386.htm.

[5] President George W. Bush, Address to Graduating Class at West Point (June 1, 2002) (transcript available at http://www.newsmax.com/archives/articles/2002/6/2/81354.shtml).

> For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack . . . . The United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security.[6]

In the U.S. debate, pre-emptive self-defense was a consistent justificatory theme, but not the only such theme. The role and authority of the United Nations Security Council (UNSC) was also a central, if paradoxical, point of reference, both as a legitimizer of action through United Nations Security Council Resolutions (UNSCRs) and as an obstacle to such action.[7] The time, effort, and political capital expended by the U.S. in attempting to secure UNSC coverage for military operations in Iraq were significant. Secretary of State Powell's statement to the UNSC on February 6, 2003, was an attempt to cajole the UNSC into positive action, although it was balanced by a latent (but nonetheless clear) prediction of UNSC irrelevance in the event of a failure to act. As Powell emphasized:

> We have an obligation to our citizens -- we have an obligation to this body -- to see that our resolutions are complied with. We wrote 1441 (2002) not in order to go to war. We wrote 1441 to try to preserve the peace. We wrote resolution 1441 to give Iraq one last chance. Iraq is not, so far, taking that one last chance. We must not shrink from whatever is ahead of us. We must not fail in our duty and our responsibility to the citizens of the countries that are represented by this body.[8]

The third panel of the U.S. legal triptych, with respect to Iraq, was the more ephemeral messianic mission of (selectively) bringing the fruits of democracy, liberty, and *laissez-faire* capitalism to a people who had labored under decades

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[6] *National Security Strategy of the United States* 2002, *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[7] *See* President George W. Bush, Address to the U.N. General Assembly (GAOR) (Sept. 12, 2002), *in We have the Power and Will to Take a Stand*, THE WEEKEND AUSTRALIAN, Sept. 14, 2002, at 10. Bush challenged the United Nations Security Council (UNSC) to act in accordance with the wishes of the United States, because the U.S. was determined to act. In essence, Bush's challenge was for the UNSC to endorse action, or face potential irrelevance.

[8] *See* Colin L. Powell, Former U.S. Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003) (transcript available at http://www.cnn.com/2003/US/02/05/sprj.irq.powell.transcript/).

of repression. It is no accident of politics that Powell concluded his remarks to the UNSC by adding:

> There is one more subject that I would like to touch on briefly, and it should be a subject of deep and continuing concern to this Council: Saddam Hussein's violations of human rights.[9]

Neither is it incidental that the operative trigger in President Bush's ultimatum to Iraq on March 17, 2003, was that military action would commence unless Hussein and his sons left Iraq within forty-eight hours.[10] Thus when it came to the business end of setting military operations in motion, it was arguably regime change, not UNSCRs that took center stage in U.S. policy.[11]

In the United Kingdom (U.K.), debate over specific legal authority focused much more particularly on the issue of UNSC powers and the authorizations extant, or otherwise, in the string of UNSCRs spanning 1990 to 2003. However, as was also the case in Australia, the justifications of self-defense and the humanitarian imperative were also inserted into public debate, although without any reference to authority. In the (now largely discredited) U.K. Government publication *Iraq's Weapons of Mass Destruction: The Assessment of the British Government*, U.K. Prime Minister Blair declared that:

> It is unprecedented for the Government to publish this kind of document. But in light of the debate about Iraq and Weapons of Mass Destruction, I wanted to share with the British public the reasons why I believe this issue to be a current and *serious threat to the U.K. national interest*.
>
> In recent months, I have been increasingly alarmed by the Evidence from inside Iraq that despite sanctions, despite the damage done to his capability in the past, despite the U.N. Security Council Resolutions expressly outlawing it, and despite his denials, Saddam Hussein is *continuing to develop weapons of mass destruction*, and with them the ability to

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[9] *Id.*

[10] President George W. Bush, Address to the Nation (Mar. 17, 2003) (transcript available at http://www.cbsnews.com/stories/2003/03/17/iraq/main544377.shtml).

[11] *See* PETER SINGER, INTERNATIONAL PEACE AND AMERICAN PREEMINENCE, *available at* http://www.conferences.unimelb.edu.au/flagship/Abstracts/Singer.pdf., for a strong philosophical critique of the U.S. claim to Hobbesian preeminence.

> inflict real damage upon the region, and the *stability of the world* . . . .
>
> The threat posed to international peace and security, when weapons of mass destruction are in the hands of a brutal and aggressive regime like Saddam's, is real. Unless we face up to the threat, not only do we risk undermining the authority of the U.N., whose resolutions he defies, *but more importantly and in the longer term, we place at risk the lives and prosperity of our own people*.
>
> The case I make is that the U.N. resolutions demanding he stops his weapons of mass destruction program are being flouted; that since the inspectors left four years ago he has continued with this program; that the inspectors must be allowed back in to do their job properly; and that if he refuses, or if he makes it impossible for them to do their job, as he has done in the past, the international community will have to act.[12]

In distinction from the U.S., where a legal *authority* for pre-emptive self-defense was at least hinted at in the *National Security Strategy of the United States*, thus obscuring the question of authority by burdening it with multiple justifications, the U.K. Government clearly nailed their authority colors exclusively to the mast of UNSCRs on Iraq. This is confirmed by Prime Minister Blair's March 2004 statement on the issue of pre-emptive self-defense, calling for "a *change* in international law to legitimize pre-emptive military action against rogue states that develop weapons of mass destruction, cooperate with terrorists, or brutalize their people."[13] For Blair, the legitimacy of pre-emption is therefore a prospective rather than current authority in international law. It is thus clear, albeit unspoken, that although the U.K. government raised pre-emptive self-defense as one of many justifications on the path to military operations, it certainly concluded that there was no legal authority to fireproof this claim.

The U.K. Government's reliance on UNSCRs for authority thus placed this issue more firmly at the core of debate in Britain than was the case

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[12] U.K. Prime Minister Tony Blair, *forward* to *Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (Sept. 2002) (transcript available at http://www.official-documents.co.uk/document/reps/iraq/contents.htm) (emphasis added).

[13] George Jones, *Blair Calls for Rethink on Terror*, SUN-HERALD, Mar. 7, 2004, at 66 (emphasis added).

in the U.S. Indeed, this much more limited, and precise, envelope of debate on authority took on a particularly jurisprudential dimension in the U.K. through *R(CND) v. Prime Minister and Secretaries of State,*[14] and learned discussions within academic and legal circles. In the *CND* case, the non-governmental organization (NGO) CND (Campaign for Nuclear Disarmament) asked the High Court to deliver an advisory opinion on the interpretation of UNSCR 1441, and the U.K. Government's rights and responsibilities under it. In doing so, the CND hoped that the High Court would declare any military action in Iraq without a further explicit UNSC authorization, to be unlawful. The High Court, citing a long standing convention of leaving such matters of high state policy to the executive, declined to offer an opinion. But the nature of political debate, and the publicity accorded to legal proceedings concerning the issue, saw the *legal* parameters of the situation take center stage in public consideration as they never before had.[15]

II. OUTLINE

This article will examine the existence and nature of a continuing UNSCR-based authority for military operations in Iraq in 2003. To achieve this, it will examine two matters. First, the analysis will establish why this issue is important within the context of debate in Australia. It will refer briefly to the understated, perhaps purposefully obscured, line between *justification* and *authority* in the Australian debate, and outline why the issue of a traceable line of continuing UNSCR authority is fundamental to this context. Second, and comprising the bulk of this study, this article will examine the specific issue of a continuing authority inherent to the UNSCRs relating to Iraq, and in particular the claimed thread of authority linking

[14] R (on the application of the Campaign for Nuclear Disarmament) v. Prime Minister and others [2002] EWHC 2777 (Admin), [2002] All ER (D) 245 (Dec.), (Approved Judgment).

[15] *See* RABINDER SINGH & CHARLOTTE KILROY, IN THE MATTER OF THE POTENTIAL USE OF ARMED FORCE BY THE U.K. AGAINST IRAQ AND IN THE MATTER OF RELIANCE FOR THAT USE OF FORCE ON UNITED NATIONS SECURITY COUNCIL RESOLUTION 1441 (Nov. 15, 2002), *available at* http://www.inlap.freeuk.com/caw_chapter_04.pdf; Letter by Peacerights to U.K. Secretary of State for Defense Geoffrey Hoon (June 19, 2002), *available at* http://cndyorks.gn.apc.org/caab/articles/lettertohoon.htm; Lord Alexander of Weedon, Address at the Justice Annual Lecture (Oct. 14, 2003) (transcript available at http://www.justice.org.uk/images/pdfs/iraqpaxam.pdf). Indeed, Lord Weedon, in one of his arguments concerning the legality of operations in Iraq, specifically noted that the debate was a case in point for lifting the tradition of never disclosing the detail of any advice received from the Attorney-General. It must be said, however, a point Weedon concedes, that in this case a brief fourteen-sentence summation of the Attorney General's advice was in fact publicly released, *see* Lord Goldsmith's, QC, Parliamentary Written Answer to Baroness Ramsay of Cartvale in the House of Lords (Mar. 17, 2003) (transcript available at http://www.guardian.co.uk/guardianpolitics/story/0,,1422998,00.html).

UNSCR 678 to the right, in 2003, to use force in Iraq with respect to the twin issues of Weapons of Mass Destruction (WMD) disarmament, and the restoration of international peace and security in the Gulf region.[16] In the course of this examination, the article will also comment upon several issues raised by the Memorandum of Advice provided to the Australian Government and the two counter-advices provided to the then Leader of the Opposition.

III. THE AUSTRALIAN CONTEXT: JUSTIFICATION v. AUTHORIZATION

In Australia, debate evolved from an initially irresolute approach to authorization. This included a tentative and controversial floating of a potential authorization along the lines of pre-emptive self-defense.[17] In the end, Australia opted to focus almost exclusively upon the issue of UNSC authorization. Although some of these attempts at alternative authorizations have re-emerged in subsequent academic discussion,[18] it was the *jus ad bellum* of UNSC authorization that set the parameters of debate in Australia.[19]

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[16] This article does not deal with, in the Australian context at any rate, the non-operative issue of self-defense, either generally or through any linkage between terrorism and Iraq which attempts to harness the UNSC Resolution 678 authority for "all necessary means" to the UNSC's terrorism resolutions - 1368, 1373, 1377, 1438, 1440, 1452, 1455, and 1456. Indeed, although "terrorism" is raised as an issue in UNSC Resolution 687, Section H, even if this basis for authority proved in some way theoretically defensible with respect to operations in Iraq in 2003, it is clear that there was little to no evidence capable of supporting a right to use force in self-defense against Iraq on the basis of combating terrorism.

[17] *See* Senator Robert Hill, Address at the John Bray Memorial Oration (Nov. 28, 2002) (transcript available at http://www.minister.defence.gov.au/HillSpeechtpl.cfm?CurrentId=2121).

[18] *See* Devika Hovell, *A New World Order Beckons When Violation Becomes the Norm*, SYDNEY MORNING HERALD, Nov. 10, 2003, at 13.

[19] *See* Don Anton et al., *Waging War Crimes*, SYDNEY MORNING HERALD, Feb 26, 2003 (text available at http://law.anu.edu.au/cipl/Newsletters/03%20April%20newsletter.pdf). This piece was signed by 42 noted scholars and intellectuals. It asserted that "the UNSC is itself bound by the terms of the U.N. Charter and can only authorize the use of force if there is evidence that there is an *actual* threat to the peace." As an aside, this comment is partially deceptive for two reasons. First, the references to "evidence" and "actual" seem to imply a legal test or measure which the UNSC must apply when determining whether there is a threat to international peace and security, and which is reviewable. However, the UNSC's discretion in determining whether there is a threat to international peace and security is first and fundamentally a political, not a legal decision. *See* VERA GOWLLAND-DEBBAS, COLLECTIVE RESPONSES TO ILLEGAL ACTS IN INTERNATIONAL LAW: UNITED NATIONS ACTION IN THE QUESTION OF SOUTHERN RHODESIA 451-52 (Brill Academic Pub 1990). Certainly, there is some developing jurisprudence on a degree of *procedural* reviewability. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21) [hereinafter 1971 I.C.J. 16 (June 21)]. The International Court of Justice (I.C.J.) discussed the UNSC's procedural practice of not characterizing abstentions as a bar to adopting a resolution. The I.C.J. concluded that a South African argument, to the effect that the

Nowhere is this more evident, as noted above, than in the Australian Government's own words. Both before military operations (in Hansard), and since (in the Defense publication *The War in Iraq*), the full range of public *justifications* wheeled out in support of action included regime change, the humanitarian imperative, self-defense, past use of WMD, and potential future provision of WMD to terrorists. However, the only true *authorization* ever argued was that based on UNSC authority and resolutions.

Ultimately, the Australian Government thus recognized the dangers inherent in relying on the more legally amorphous justifications of pre-emptive self defense, the humanitarian imperative, and regime change, and on March 18, 2003, it made its legal position on authority clear. In moving a motion in the House of Representatives on the decision to commit forces to military operations in Iraq, the Government outlined its Iraq policy. First, it *justified* involvement by reference to a range of factors. These included, as previously mentioned: Iraq's continued possession and pursuit of WMD, which represented "a real and unacceptable threat to international peace and security;" Iraq's "behavior," which was weakening "the global prohibition on the spread of WMD;" Iraq's possession of WMD as linked to the danger that other rogue states and terrorists would acquire WMD; Iraq's "continued support for international terrorism;" and the regime's "institutionalized, widespread, and grave abuse of the human rights of the Iraqi people over many years." The motion also contained vague references to the issue of self-defense, noting that Iraq's behavior with respect to WMD held "the potential

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resolution in question was invalid because of abstentions, was not correct. Indeed, a significant minority of the Court argued that if the UNSC refers such a matter to the I.C.J., then the I.C.J. *must* act as if it can review the resolution for procedural validity. Similarly, as the only member of the bench to address the specific issue, and in a dissenting judgment, Lauterpacht J's well reasoned opinion was that a UNSC resolution should not, as a matter of upholding the international rule of law, knowingly breach a rule of *Jus Cogens*. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. Serb. & Mont.), 1993 I.C.J. No. 91 (Mar. 20). (separate opinion of Judge Lauterpacht). This may herald a possible, nascent, further grounds of judicial review of UNSC "procedure." However, the UNSC's findings as to the existence of a threat to international peace and security are not currently reviewable in the I.C.J. The second problem with the assertion in the article is that it implies that the UNSC can only act where there is an *actual* or manifested threat to international peace and security. Yet one of the earliest UNSC naval interdiction operations concerned a *potential* threat to international peace and security. In the days following the declaration of independence by a minority white regime in Southern Rhodesia, the UNSC declared, in UNSC Resolution 217, that the situation was "extremely grave," that the U.K. government "should put an end to it," and that "it's *continuance in time* constitutes a threat to international peace and security." S.C. Res. 217, U.N.SCOR, 20th Sess., 1257th mtg. ¶ 1 (1965). The UNSC thus acted on the basis of a *potential* threat, and finally, on April 9, 1966, determined that the regime's continuance in time now constituted an *actual* threat to the peace. S.C. Res. 221, U.N.SCOR, 21st Sess., 1276th mtg. ¶ 1 (1966).

to damage Australia's security," and that the acquisition of WMD by terrorists presented "a real and direct threat to the security of Australia and the entire international community."[20] The *authority* for involvement, however, was found in paragraphs four and five of the motion, which referred to UNSCRs providing "clear authority for the use of force against Iraq for the purpose of disarming Iraq of weapons of mass destruction, and restoring international peace and security to the region."[21] Indeed, as Prime Minister Howard made clear in the debate following the motion's tabling:

> Our legal advice, provided by the head of the Office of International Law in the Attorney-General's Department and the senior legal adviser to the Department of Foreign Affairs and Trade, is unequivocal. The existing United Nations Security Council resolutions already provide for the use of force to disarm Iraq and restore international peace and security to the area.[22]

Thus through all of the rhetoric and the blurring between justification and authorization, it is clear that only one legal *authorization* was explicitly and definitively detailed – the UNSCRs. The legitimacy of this thread of authority,

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[20] Australia, *Parliamentary Debates,* House of Representatives, Mar. 18, 2003, 12505 (Prime Minister Howard) (transcript available at http://www.aph.gov.au/hansard/reps/dailys/dr180303.pdf).

[21] *Id.* Indeed, this blurring of the line between justification and authority has continued since. In the Government's official post-conflict publication, THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST IN 2003, the justifications put forward in hindsight include "the removal of the threat to international security posed by weapons of mass destruction and long-range missiles in the hands of a rogue state, the removal of the Saddam Hussein regime, and the promise of a better future for the Iraqi people." AUSTRALIAN DEPARTMENT OF DEFENSE, THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST IN 2003 5 (2003) (text available at http://www.globalsecurity.org/military/library/report/2004/australia-2003iraq-lessons_23feb2004.pdf). One page later, justification is described in terms of Iraq's refusal to comply with the UNSC's Resolutions relating to WMD and long-range missiles, its record of supporting terrorism, and its use of WMD against Iran (in the Iran-Iraq War which predated the first Gulf War in 1990-1991). On page seven, the UNSC's Resolutions take center-stage, culminating at page fifteen with a reference to the UNSC Resolutions as authority to act. Other justifications put forward include a reference to Minister Hill's June 18, 2002 "pre-emptive" statement that "the need to act swiftly and firmly before threats become attacks is perhaps the clearest lesson of 11 September," Minister Hill, Address to the Defense and Strategic Studies Course (June 18, 2002), *in id.*, and a reference to Saddam Hussein's rejection of U.S. President Bush's regime change ultimatum on Mar. 17, 2003 as the final justification for operations. *Id.* at 15.

[22] *Supra,* note 20. For an example of the debate that followed the tabling of the Advice, *see* Cynthia Banham, *Experts at Odds as PM Releases Legal Advice*, SYDNEY MORNING HERALD, Mar. 19, 2003.

clearly linked to, but also limited by, the twin issues of WMD disarmament and the restoration of international peace and security, is therefore the fundamental point at issue in the Australian context. It is, consequently, this narrow, singular issue upon which the remainder of this article will focus.

Before embarking on this examination, however, it will be useful to outline the main contentions within the Australian debate, in order that their validity is consciously assessable over the course of this analysis. This is best achieved by distilling four significant points of tension from the interplay between the Memorandum of Advice and the two Counter-Advices. These tensions are interdependent, but it is useful to identify them discretely at the outset. The first point of tension concerns the scope of the authority to use force. Bill Campbell and Chris Moraitis assert, in *Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq*, that the authorization, at its genesis, was wider than the mere liberation of Kuwait.[23] Conversely, Williams and Hovell argue that the authorization in UNSCR 678 was "clearly tie[d] . . . to the liberation of Kuwait," and that UNSCR 687 ended that authorization and created a new, more limited authorization subject to the conditions set out in UNSCR 687.[24] Grant Niemann proposed a different position, arguing that the authorizations in UNSCRs 678 and 687 relate narrowly to "Iraq's illegal invasion and annexation of Kuwait," and were thus not valid outside of that context.[25] In this article, this will be called the *purpose* tension. The second point of tension – which this article will label the *continuity* tension - is the effect of the UNSCR 687 "ceasefire" upon the continuity of any authority to use force. Campbell and Moraitis argue that:

> Iraq's past and continuing material breaches of SCR 687 have negated the basis for the "formal ceasefire." Iraq, by its conduct subsequent to the adoption of SCR 687, has demonstrated that it did not and does not "accept" the terms of SCR 687. Consequently, the ceasefire is not effective and the authorization for the use of force in SCR 678 is *reactivated*.[26]

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[23] Bill Campbell & Chris Moraitis, *Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq,* 4 MELB. J. INT'L L. 178, 178-81 (2003).

[24] George Williams & Devika Hovell, *Advice to Hon Simon Crean MP on the Use of Force Against Iraq*, 4 MELB. J. INT'L L. 183, at 185 (2003).

[25] Grant Niemann, *Advice to Hon Simon Crean MP on the Use of Force Against Iraq,* 4 MELB. J. INT'L L. 190, at 193, (2003). "No matter how much one might argue that later resolutions such as 687 might keep alive the authority to use military force as contained in Resolution 678, the fact remains that this authority relates only to the conflict between Iraq and Kuwait." *Id.* at 194.

[26] Campbell & Moraitis, *supra* note 23, ¶ 14, at 181 (emphasis added).

Williams and Hovell, however, argue as follows that UNSCR 687 did not tie the ceasefire to Iraq's *implementation* of the obligations set out in UNSCR 687, but rather to their *acceptance*:

> [T]he terms of the Resolution do not make the ceasefire following the Gulf War conditional upon Iraq's disarmament. The Resolution instead states that the formal ceasefire will take effect "upon official notification by Iraq to the Secretary-General and to the Security Council of its *acceptance* of the above provisions."[27]

The third point of tension is the issue of the UNSCR 687 paragraph thirty-four caveat of "further steps" in conjunction with the subject matter of UNSCR 1441. In a breathtakingly brief argument, Campbell and Moraitis conclude that UNSCR 687 paragraph thirty-four "does not remove the authority given to member states in SCR 678,"[28] although the reasoning behind this assertion is not entirely clear. Williams and Hovell assert, to the contrary, that UNSCR 687 paragraph thirty-four means that "[N]o state or coalition of states acting outside the authorization of the Security Council retains the right to use force, even to punish Iraq for breaches of the Resolution or to compel its compliance."[29] Niemann, in a different approach, argues that UNSCR 1441 is based in Article 41 of the U.N. Charter, rather than Chapter VII, and thus does not permit the use of forceful measures, which are the purview, he argues, of Article 42.[30] This will be referred to as the *subject matter* tension. The final point of tension, the *unilateralism* tension, relates to whether any pre-existing authorization to use force remains operative until explicitly negated by the UNSC, or, alternatively, that such authority required a further positive act of endorsement by the UNSC. The former argument is that of Campbell and Moraitis, who posit that the "existing authority for the use of force would only be negated in current circumstances if the Security Council were to pass a resolution that required member states to refrain from the use of force against Iraq."[31] The latter is effectively the argument of Williams and Hovell, who claim that UNSCR 1441 explicitly requires referral back to the UNSC of any intention to use force.[32] Niemann, who shares this contention, asserts that the

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[27] Williams & Hovell, *supra* note 24, at 185 (emphasis added).

[28] Campbell & Moraitis, *supra* note 23, ¶ 18, at 182.

[29] Williams & Hovell, *supra* note 24, at 186.

[30] Niemann, *supra* note 25, at 192.

[31] Campbell & Moraitis, *supra* note 23, at 178-83.

[32] Williams & Hovell, *supra* note 24, at 186-87.

combined effect of UNSCR 1441, U.N. Charter Article 25, and the intention, on behalf of the UNSC, to "remain seized of the matter" dictates that a positive (re)authorization is required before resort to force becomes legal.[33] Each of these four points of tension will be briefly assessed as they arise in the course of analysis.

IV. THE THREAD OF AUTHORITY: INITIATING UNSC RESOLUTIONS ON IRAQ

A. UNSCRs 660 and 678

The significant thirteen year history of UNSCRs concerning Iraq began with UNSCR 660. Resolution 660 was passed August 2, 1990. Acting explicitly under U.N. Charter Articles 39 and 40, the UNSC demanded that Iraq withdraw from Kuwait. It also decided to meet again as necessary to consider further steps to ensure compliance with UNSCR 660.[34] Following a broadening of its assumption of powers to encompass Chapter VII, a reinforced condemnation of Iraq's actions, the establishment of a sanctions regime in UNSCR 661,[35] and further declarations against Iraq,[36] on November 29, 1990, the UNSC took the next step in escalating force via UNSCR 678. The Council commenced by declaring that it was mindful of its "duties and responsibilities under the Charter . . . for the maintenance and preservation of international peace and security," and that it continued to act under Chapter VII. The UNSC then authorized states cooperating with Kuwait "*to use all necessary means to uphold and implement resolution 660 and all subsequent relevant resolutions and to restore international peace and security in the area*."[37] This operative paragraph arguably points to three potential purposes for which the use of "all necessary means" was authorized. The first was to uphold and implement UNSCR 660, that is, the withdrawal of Iraqi forces from Kuwait. The second was to implement all subsequent relevant

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[33] Niemann, *supra* note 25, at 191-92.

[34] S.C. Res. 669, U.N.SCOR, 45th Sess., 2942nd mtg. Supp. for July-Sept. 1990 at 24, U.N. Doc. S/RES/669 (1990).

[35] S.C. Res. 661, U.N.SCOR, 45th Sess., 2932nd mtg. Supp. for July-Sept. 1990 at 19-20, U.N. Doc. S/RES/661 (1990).

[36] *See* S.C. Res. 662, U.N.SCOR, 45th Sess., 2937th mtg. Supp. for July-Sept. 1990 at 20, U.N. Doc. S/RES/662 (1990), calling on all states, international organizations and agencies not to recognize Iraq's annexation of Kuwait; S.C. Res. 677, U.N.SCOR, 45th Sess., 2959th mtg. Supp. for July-Sept. 1990 at 27, U.N. Doc. S/RES/677 (1990), concerning safeguarding a population register for Kuwait, in the face of Iraqi actions against the populace.

[37] S.C. Res. 678, U.N.SCOR, 45th Sess., 2963rd mtg. Supp. for July-Sept 1990 at 27-28, U.N. Doc. S/RES/678 (1990) (emphasis added).

resolutions, and thus presumably encompassed any resolution which specifically recalled UNSCR 660 or UNSCR 678 in the preamble (a narrow interpretation), or more widely, any resolution on Iraq which related to the invasion of Kuwait and its aftermath. The third purpose for which "all necessary means" was authorized was to restore international peace and security in the area. The significance of this triptych will become apparent as the examination progresses, but it is clear at the outset that although the *initiating event* may have been Iraq's invasion of Kuwait, the *context* of UNSCR 678 was always intended to be wider than that single issue, and would encompass a more general suite of measures to reduce Iraq's aggressive capacities as well as progress toward the ultimate goal of restoring peace and security in the region.

V. IMMEDIATE POST-GULF WAR: CONTINUATION OR EXHAUSTION OF THE AUTHORITY TO USE FORCE?

A. UNSCR 686

Any assessment of the continuing authority to use "all necessary means" subsequent to the liberation of Kuwait must begin with UNSCR 686, passed March 2, 1991. In the preamble, the UNSC set the context for its decisions by making four important statements. Firstly, the UNSC noted "the *suspension* of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678." Second, the UNSC emphasized "the importance of Iraq taking the necessary measures which would permit a *definitive end to the hostilities*." Third, the UNSC reiterated the "need to be assured of Iraq's peaceful intentions, and the objective expressed in . . . 678 . . . of *restoring international peace and security in the region*." Finally, the UNSC declared that it was continuing to act under Chapter VII, thus indicating that a threat or potential threat to international peace and security was still extant. Thus the UNSC reaffirmed the power to act in relation to the situation.[38] The combined effect of these statements indicates that the authority to use force, "combat operations", was *suspended*, but not *ended*. This is reinforced, for example, by the reference to a "definitive end to hostilities" as something *yet to be achieved*, and the reference to the restoration of international peace and security as a future condition which was also *yet to be achieved*.

UNSCR 686 operative paragraph one affirms that the twelve UNSCRs referred to in the preamble, including UNSCR 678 (all necessary means),

[38] S.C. Res. 686, U.N.SCOR, 46th Sess., 2978th mtg. at 8, U.N. Doc. S/RES/686 (1991).

continued to have full force and effect. In paragraph four, the UNSC "recognise[d] that during the period required to comply with paragraphs two and three [of 686] the provisions of paragraph two of resolution 678 (1990) remain valid," which is an explicit reference to "all necessary means." Paragraphs two and three required Iraq to implement its acceptance of all twelve UNSCRs noted in the preamble, and in particular to: rescind its purported annexation of Kuwait; accept in principle its liability under international law for loss, damage, or injury arising out of the Kuwait conflict; release all Kuwaiti and third-state nationals/remains; begin the return of all seized Kuwaiti property; cease all hostile or provocative actions; designate military commanders to meet with coalition commanders to arrange the military aspects of the ceasefire; arrange access to and release of all prisoners of war (POWs); and disclose information to assist in identifying Iraqi mines/booby traps and any chemical and biological weapons and material in Kuwait, in Kuwaiti/Iraqi waters, or in areas of Iraq where coalition forces were at that point temporarily present.[39] Paragraph eight again refers to a "definitive end to hostilities" as a contingent and future prospect, as something the UNSC was yet to "secure."[40] Thus while UNSCR 678's first authorized purpose for using "all necessary means," eviction from Kuwait, was nearing completion, there is nothing to imply that the other two purposes in UNSCR 678 (to implement subsequent resolutions, such as those in UNSCR 686 above, and to restore international peace and security) were completed. In fact UNSCR 686 is explicit in that the endorsement of "all necessary means" in UNSCR 678 paragraph two continued to apply to the issues set out in paragraphs two and three. Also, paragraph eight clearly implied that international peace and security had not yet been restored.

B. UNSCR 687

UNSCR 687, passed on April 3, 1991, began by recalling the relevant UNSCRs, including UNSCR 678. The UNSC then reaffirmed the need to be "assured of Iraq's peaceful intentions," expressed its awareness of Iraqi statements regarding using chemical and biological weapons and affirmed that "grave consequences" would follow any further use of such weapons. It also confirmed that the UNSC was still acting under Ch VII. The preamble accentuated the commitment of all member states to the independence, sovereignty and territorial integrity of Iraq.[41] Significantly, the UNSC also

[39] S.C. Res. 686, *supra* note 38, ¶¶ 2, 3.

[40] S.C. Res. 686, *supra* note 38, ¶ 8.

[41] S.C. Res. 687, U.N.SCOR, 46th Sess., 2981st mtg. U.N. Doc. S/RES/687 (1991). This commitment was reiterated in most subsequent UNSC Resolutions on Iraq, although it is equally clear that the invocation of Chapter VII merely confirms that a UNSC authorized use of force

made an explicit note to the effect that UNSCR 686 "marked the lifting of the measures imposed by resolution 661 (1990) [initial sanctions regime] *in so far as they applied to Kuwait*." Clearly, the UNSC cited an early intent to deal with Iraq in contexts beyond those immediately connected with Kuwait. This is an important point to consider in the light of the counter advice provided to Simon Crean, the then Leader of the Federal Opposition, by Williams and Hovell, which declared that "[T]he context of the *Resolution* [678], and the specific language of the authorization, clearly tie the use of force to the liberation of Kuwait," and that UNSCR 687 "brought an end to the forceful measures against Iraq authorized by the Security Council."[42] Clearly, the UNSC did no such thing.

At operative paragraph one of UNSCR 687, the UNSC affirms that UNSCR 678 remains extant, *except as expressly changed* in UNSCR 687. Paragraph eight directs Iraq to "unconditionally accept the destruction, removal, or rendering harmless, under international supervision," of biological and chemical weapons and stocks/agents, ballistic missiles with a range greater that 150km, and related parts and production facilities. Paragraph twelve refers in similar terms to nuclear weapons. As distinct from the tactical reference in UNSCR 686 paragraph three (d), to disclosure of the location of WMD in areas of operations occupied by coalition forces, UNSCR 687 takes the quantitatively and qualitatively larger step of tying *general* disarmament and destruction of WMD, via paragraph one, to UNSCR 678 and its authorization of "all necessary means." Thus in UNSCR 687, the UNSC described further specific purposes. For example, it cited the general disarmament of WMD from Iraq as being within the three general purposes already authorized by UNSCR 678.

This dovetail with UNSCR 678 was complicated, however, by the combined effect of UNSCR 687, paragraphs one and thirty-four. Paragraph one: "*Affirms* all thirteen resolutions noted above [preamble], *except as expressly changed below to achieve the goals of the present resolution*, including a formal ceasefire . . . ."[43]

At paragraph thirty-four, the UNSC decided to "remain seized of the matter *and to take further steps as may be required for the implementation of*

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aimed at restoring international peace and security or securing compliance with UNSC Resolutions, such as the authorization relating to Iraq, is not a breach of UN Charter Article 2(4).

[42] Williams & Hovell, *supra* note 24, at 185 (emphasis added).

[43] S.C. Res. 687, *supra* note 41, ¶ 1 (emphasis added).

the present resolution and to secure peace and security in the region."[44] This indicates that any "further steps" with respect to disarmament of WMD, a matter under the "present resolution," thus required a further act by the UNSC to permit use of the preserved UNSCR 678 authority to use "all necessary means."

Important to ask, however, is: whether the passing reference in paragraph thirty-four to "secur[ing] international peace and security" is *explicit* enough, as required in paragraph one, to place a new caveat on the otherwise still extant UNSCR 678 authorization to use "all necessary means" to restore international peace and security in the region? Does the reference to "tak[ing] such further steps as required" hobble the previously unfettered and continuing UNSCR 678 paragraph two authority to use force to restore international peace and security in the area? Arguably no, because UNSCR 687 paragraph one expressly limits the scope of paragraph thirty-four. UNSCR 687 paragraph one *affirmed* UNSCR 678 except as "expressly changed [in 687] to achieve the goals of [687]." UNSCR 687 dealt with:

a. the international boundary between Iraq and Kuwait (Section A);
b. monitoring the demilitarized zone (Section B);
c. WMD inspections and disarmament (Section C);
d. return of Kuwaiti property (Section D);
e. Iraq's repudiation of foreign debt (Section E);
f. Iraqi trade and U.N. sanctions with respect to import/export of goods (Section F);
g. accounting for still missing Kuwaiti and third-state nationals (Section G); and
h. Iraq's obligation to inform the UNSC that it will have no part in international terrorism (Section H).

The general restoration of international peace and security in the area, however, is a much wider concept than the eight specific issues dealt with in UNSCR 687. In fact, as is evident in the subsequent UNSCR 688, "repression" is also an aspect or component of international peace and security, and it is an aspect that was not "expressly" mentioned, and thus its nature was not "changed" in UNSCR 687. The specificity of UNSCR 687 and the much wider scope of the concept of "international peace and security" thus indicate that UNSCR 687 paragraph thirty-four does not require that *every* issue of international peace

[44] S.C. Res. 687, *supra* note 41, ¶ 34 (emphasis added).

and security arising out of the situation in Iraq be subject to the paragraph thirty-four caveat of "further steps" by the UNSC.

C. UNSCR 688

In paragraph two of UNSCR 688, passed April 5, 1991, the UNSC demanded that Iraq, "as a contribution to removing the [by implication continuing] threat to international peace and security," immediately end repression of its citizens (notably the Kurdish population).[45] This linkage of the issue of repression to international peace and security thus creates a connection between the purpose of ending repression and one of the three stated purposes of UNSCR 678, via the bridging concept of international peace and security. In paragraph eight, the UNSC decides to remain "seized of the matter," but does not repeat the "further steps required" phraseology of UNSCR 687 paragraph thirty-four. Thus the ambiguous phraseology of UNSCR 687 paragraph thirty-four is not repeated with respect to another, subsequent, UNSCR. In this case, it was covered by the "implementing subsequent relevant resolutions" purpose on UNSCR 678, which dealt explicitly with another, separate, sub-component of the purpose of restoring international peace and security.

Is this to be read as merely an absence of any need to add the "further steps" phrase because it has already been expressed (UNSCR 687 paragraph thirty-four) and is assumed to apply from thence onwards? Or, is it to be read in conjunction with the UNSCR 687 paragraph thirty-four ambiguity, with respect to "international peace and security," and the paragraph one assertion that only *express changes to meet the requirements of UNSCR 687* alter the otherwise extant construction of UNSCR 678, as evidence that the "further steps" caveat was never meant to apply to the much broader issue of international peace and security? As noted above, the significant scope of the concept of "international peace and security," coupled with continuing declarations by the UNSC that further specific issues come under that concept, lends significant credibility to the argument that UNSCR 687 paragraph thirty-four is not a limiting provision on the *general* applicability of UNSCR 678 paragraph two to the wider issue of international peace and security. UNSCR 687 paragraph thirty-four arguably only limits, as UNSCR 687 paragraph one indicates, those *specific* aspects of international peace and security that are expressly covered by UNSCR 687.

[45] S.C. Res. 688, U.N.SCOR, 46th Sess., 2982nd mtg. U.N. Doc. S/RES/688 (1991).

D. UNSCR 707

On April 11, 1991, Iraq formally informed the UNSC that it would fully implement the requirements of UNSCR 687, thus meeting a precondition for ceasefire as set out in paragraph thirty-three of UNSCR 687. After a series of reports concerning Iraq's failure to comply with various aspects of that resolution, the UNSC passed UNSCR 707 on August 15, 1991. This resolution explicitly noted that Iraq was in "material breach of its acceptance of the relevant provisions" of UNSCR 687, and again referred to the "conditions essential to the restoration of peace and security in the region" as a future and as yet unattained objective.[46] The UNSC then proceeded to recall UNSCR 687 and demand, at paragraph three (c), that Iraq cease attempting to conceal, move, or destroy material or equipment related to its WMD programs. The linkage back to UNSCR 678 paragraph two, via UNSCR 687 paragraphs one and eight, is clear. Arguably, however, UNSCR 687 paragraph thirty-four operates as a caveat over this issue, particularly noting the direct reference to WMD in UNSCR 687, indicating that "further steps" can only be taken after express consideration by the UNSC. Thus despite the fact that (as with UNSCR 688) UNSCR 707 paragraph six refers only to the UNSC "remaining seized of the matter," but not to any requirement for further steps, the UNSCR 687 paragraph thirty-four caveat requiring further UNSC decisions when dealing with those issues explicitly covered in UNSCR 687 (in this case, WMD) remains extant, and thus operates over UNSCR 707 by virtue of its subject matter.

Summary

Arguably, the combined effect of the immediate post-war UNSCRs can be summarized in three statements. First, there are three *explicit* umbrella purposes behind the UNSCR 678 paragraph two authorization to use "all necessary means": evicting Iraq from Kuwait and the associated requirements of UNSCR 660; implementing all subsequent relevant resolutions; and restoring international peace and security in the area. This last purpose was a general purpose, but also encompassed a range of specific aspects upon which the UNSC explicitly made further decisions, such as the eight issues (including WMD) in UNSCR 687, and the issue of repression of the Iraqi people in UNSCR 688.

The second point is that use of force was, and remained, only suspended, not ended. Indeed, the UNSCRs are clear that the wider purpose

[46] S.C. Res. 707, U.N.SCOR, 46th Sess., 3004th mtg. at 22, U.N. Doc. S/RES/707 (1991).

of restoring international peace and security is one that had *yet to be achieved*, and thus remained an extant purpose to which the UNSCR 678 paragraph two authorization continued to apply. These UNSCRs also clearly indicate that the UNSCR 678 "all necessary means" authorization still projects its authority forward to cover relevant UNSCRs subsequent to UNSCR 678. This authorization did not end with Iraq's April 11, 1991, acceptance (and almost immediate repudiation) of the requirements of UNSCR 687. Indeed, to have argued this interpretation would have made concurrent enforcement of the UNSCR 661, 687, 712, and ultimately the UNSCR 986 "oil for food" sanctions regime against Iraq impossible, because the authority to use force in the implementation of this regime (particularly in the seaward approaches to Iraq) rested squarely upon the continuing existence of the UNSCR 678 paragraph two authorization to use "all necessary means." Similarly, any argument that UNSCR 687 ended the UNSCR 678 paragraph two authorization to use force would need to confront the fact of a humanitarian relief operation in Northern (Kurdish) Iraq. This operation could not have occurred if the international community's view had been that the authorization to use force was no longer extant.

The third distilled point is that the authority to use "all necessary means" to implement the purposes in UNSCR 678, although it remained extant, was specifically caveated in relation to the eight issues outlined in UNSCR 687. These specific issues, including WMD inspection and disarmament, remained subject to the UNSCR 687 paragraph thirty-four requirement of "further steps" by the UNSC. These further steps would logically include a requirement for the UNSC to specifically lift abeyance on the UNSCR 678 authority to use force with respect to those issues addressed in UNSCR 687.

VI. THE *INTERREGNUM*: A CONTINUING AUTHORITY TO USE FORCE?

A. UNSCR 949

On October 6, 1994, Iraqi forces began massing on the border of Kuwait. The UNSC responded via UNSCR 949. The contribution of this short resolution to the debate over the existence of a continuing authorization to use force is important for two reasons. First, the UNSC recalled all its previous relevant resolutions, and explicitly reaffirmed UNSCR 678, "and *in particular paragraph two* of resolution 678 (1990)."[47] This explicit reference

[47] S.C. Res. 949, U.N.SCOR, 49th Sess., 3438th mtg. U.N. Doc. S/RES/949 (1994) (emphasis added).

clearly indicates that the authorization to use force was, in the view of the UNSC, alive and functional, and had not ended with Iraq's agreement to the terms of the UNSCR 687 ceasefire. The statements by a number of representatives at the UNSC meeting reinforce this interpretation. As Mr. Ayewah of Nigeria stated prior to the vote on UNSCR 949:

> The international community and more particularly the Security Council, has been seized of the Iraq-Kuwait matter for more than four years now. The dispute has been the subject of numerous Council resolutions, *all of which were aimed at resolving all implications of the problem, thus bringing a final solution to the matter*.[48]

The representative of Rwanda also stated that Iraqi conduct "*continues* to jeopardize peace and stability in Kuwait and throughout the region," and declared that "the only way *to establish peace* in the region is for Iraq to comply" with all UNSCRs.[49] The Russian delegate also spoke of the "achievement of a lasting post-crisis settlement," "the normalization of the situation in the Persian Gulf," and "the attainment of security and reliable stability in the region," as future, rather than achieved, objectives.[50] The Chinese representative referred to continued "efforts for peace" and the need to "achieve lasting peace and stability in the Gulf region as early as possible."[51] Clearly, the members of the UNSC understood the restoration of peace and security in the region, one of the UNSCR 678 myriad of purposes, to be unattained at that time.

Second, UNSCR 949 is also clear evidence that any argument to the effect that the UNSCR 678 authority was narrowly limited to dealings with Kuwait is also erroneous. Indeed, the preamble refers again to peace and security in the region as a whole and in paragraph three instructs Iraq against acts which "threaten *either its neighbors or United Nations operations* as a whole."[52] Indeed, the Spanish delegate was explicit that the conduct that UNSCR 949 addressed was not merely conduct that was threatening to Kuwait, but rather was more generally focused.[53]

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[48] S.C. Res. 949, U.N.SCOR, 49th Sess., 3438th mtg. U.N. Doc. S/PV.3438 (1994) [hereinafter U.N. Doc. S/PV.3438] (emphasis added).

[49] U.N. Doc. S/PV.3438, at 3 (emphasis added).

[50] U.N. Doc. S/PV.3438, at 3.

[51] U.N. Doc. S/PV.3438, at 9.

[52] S.C. Res. 949, *supra* note 48, ¶ 3 (emphasis added).

[53] U.N. Doc. S/PV.3438, at 8.

UNSCR 949 also represents one further point of importance in any discussion of the continuation or otherwise of the UNSCR 678 paragraph two authority from 1990-2003: the U.S. interpretation of the scope of that authority. As Secretary Albright declared after the unanimous acceptance of UNSCR 949:

> In closing, let me assure this Council that pursuant to the resolutions of this Council and Article 51 of the United Nations Charter, my Government will take all appropriate action if Iraq fails to comply with the demands of this resolution.[54]

Equally important for future analysis of the authorization to use force was the Russian delegate's opposite view, in which he stressed that "the draft resolution does not contain any provision that could have served as justification for the use of strikes or force."[55]

B. UNSCRs 1134 and 1137

On October 6, 1997, the Chairman of UNSCOM reported to the UNSC that Iraq continued to hinder the Inspection Commission's work. On October 23, 1997, the UNSC adopted UNSCR 1134, "reaffirming its determination to ensure full compliance by Iraq with all its obligations under all previous relevant resolutions."[56] The UNSC then recalled an earlier indication that it would impose "additional measures" if non-compliance continued.[57] In paragraph six of UNSCR 1134, the UNSC then specified the precise form those additional measures would take, declaring its "firm intention," in the face of further non-compliance, "to adopt measures which would oblige all States to prevent (without delay) the entry into or transit through their territories of all Iraqi officials and members of the Iraqi armed forces who are responsible for or participate in instances of non-compliance."[58] Six days later, in UNSCR 1137, the UNSC recalled UNSCRs 1115 and 1134, and determined that "this situation *continues to constitute* a threat to international peace and security." It then carried out its stated intention and

[54] U.N. Doc. S/PV.3438, at 4.

[55] U.N. Doc. S/PV.3438, at 4.

[56] S.C. Res. 1134, U.N.SCOR, 52nd Sess., 3826th mtg. U.N. Doc. S/RES/1134 (1997).

[57] *See* S.C. Res. 1115, U.N.SCOR, 52nd Sess., 3792nd mtg. U.N. Doc. S/RES/1115 (1997).

[58] S.C. Res. 1134, *supra* note 56, ¶ 6.

imposed the threatened travel bans.[59] The significance of this sub-string of resolutions, however, rests more in what they illustrate about process than what they substantively imposed. UNSCRs 1115, 1134, and 1137 deal with the inspection regime covering WMD, thus representing one of the eight issues at the heart of UNSCR 687, and therefore one of those issues subject to the paragraph thirty-four caveat requiring conscious "further steps." These resolutions, consequently, provide positive confirmation that the UNSC is quite explicit when dealing with UNSCR 687 paragraph thirty-four situations, insofar as it warned Iraq that it was considering further measures, detailed those further measures, and then imposed those further measures.

C. UNSCR 1154

In the preamble to UNSCR 1154, passed March 2, 1998, the UNSC addressed the issue of Iraqi non-compliance with its obligations under UNSCR 687, by recalling "all its previous relevant resolutions, which constitute the governing standard of Iraqi compliance." The UNSC then expressed its determination to ensure "immediate and full compliance by Iraq without conditions or restrictions with its obligations under resolution 687 and the other relevant resolutions."[60] In operative paragraph three, the UNSC explicitly not only noted that Iraq's implementation of its obligations under UNSC 687 is essential, but also that "any violation would have *severest consequences* for Iraq." In Paragraph five the UNSC decided "in accordance with its responsibility under the Charter, to remain actively seized of the matter, in order to ensure implementation of this resolution, *and to secure peace and security in the area*."[61] Again, the restoration of peace and security in the area, one of the three fundamental purposes enshrined in UNSCR 678, is referred to in the prospective sense, that is, as something yet to be achieved.

Subsequent to UNSCR 1154, and other UNSCRs concerning Iraqi non-compliance with the WMD inspection regime,[62] the U.S. and U.K. conducted missile and air strikes on Iraq (December 16-20, 1998 – Operation Desert Fox). Shortly after the commencement of Operation Desert Fox, the inevitable question arose of whether the phrase "severest consequences" for non-compliance, was authority enough to use such force. Russia and China expressed the view that this phrase was not sufficient to "authorize" these

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[59] S.C. Res. 1137, U.N.SCOR, 52nd Sess., 3831st mtg. U.N. Doc. S/RES/1137 (1997).

[60] S.C. Res. 1154, U.N.SCOR, 53rd Sess., 3858th mtg. U.N. Doc. S/RES/1154 (1998).

[61] *Id.* at ¶¶ 3, 5 (emphasis added).

[62] *See* S.C. Res. 1205, 53rd Sess., 3939th mtg. U.N. Doc. S/PV.3939 (1998) [hereinafter U.N. Doc. S/PV.3939].

strikes. The U.S./U.K. argued, although 1998 probably represents the first clear differentiation between their approaches, that the continuing authorization under UNSCR 678 was sufficient to justify the air strikes. Indeed, the debates of November and December 1998 are significant in that they herald a further, but more forceful (and more forcefully opposed) statement of the U.S./U.K. interpretation of UNSCR 678. Advocating a "live and extant" approach, the U.S. delegate consistently described the authorization in broad terms. On November 5, 1998, after UNSCR 1205 was passed, the U.S. delegate recalled UNSCR 687 "and other resolutions," declaring that "all options are on the table, and the United States has the authority to act."[63] On December 16, 1998, just hours after Operation Desert Fox had commenced, the U.S. delegate outlined a long litany of Iraqi non-compliance, and concluded that "the coalition today exercised the authority given by Security Council Resolution 678 of 1990, for Member States to employ all necessary means to secure Iraqi compliance with the Council's resolutions *and* to restore international peace and security in the area."[64] The reference back to the two remaining (and in U.S. opinion, extant) of the three UNSCR 678 purposes (the third, the liberation of Kuwait, having already been achieved) is unmistakable, and indicates affirmation of a continuing and live authorization.

The U.K. delegate, however, outlined a more limited "revivalist" thread of authority. It was a subtle yet significant distinction. In November, the U.K. confronted the issue and declared:

> Certain speakers have given their views on the meaning of this resolution as regards the possible use of force. Let me set out briefly the view of the United Kingdom. It is well established that the authorization to use force given by the Security Council in 1990 may be *revived* if the Council decides that there has been a sufficiently serious breach of the conditions laid down by the Council for the ceasefire. In the resolution we have just adopted [1205], the Council has condemned the Iraqi decision to cease all cooperation as a flagrant violation of its obligations.[65]

This interpretation, one of revival of dormant powers linked to breaches of the ceasefire obligations (UNSCR 687), clearly differs from the broader U.S.

[63] U.N. Doc. S/PV.3939, at 11.

[64] U.N.SCOR, 53rd Sess., 3955th mtg. at 9, U.N. Doc. S/PV.3955 (1998) [hereinafter U.N. Doc. S/PV.3955] (emphasis added).

[65] U.N. Doc. S/PV.3939, at 10 (emphasis added).

approach in two ways. First, the U.K. revivalist approach is more narrowly based than the U.S. approach (which is founded on the authority articulated in UNSCR 678). Second, the U.K. revivalist approach implicitly required a revivalist act, something short of a total re-authorization of "all necessary means," but enough to indicate that a "next step" would follow on the heels of continued violation of UNSCR 687. The phrase "severest consequences" was that most consistently referred to by the U.K. in this context.[66] A little over a month later, in the hours after Operation Desert Fox had commenced, the U.K. made its "revivalist" approach explicit once more:

> There is a clear legal basis for military action in the resolutions adopted by the Security Council. Resolution 1154 (1998) made it clear that any violation by Iraq of its obligations to allow the Special Commission and the International Atomic Energy Agency unrestricted access would have the "*severest consequences*." That was three resolutions and nine months ago. Resolution 1205 (1998) established that Iraq's decision of October 31, 1998 to cease cooperation, was a flagrant violation of resolution 687 (1991), which lays down the conditions for the 1991 ceasefire. By this resolution, therefore, the Council implicitly *revived* the authorization to use force in resolution 678 (1990).[67]

Thus the U.K. has clearly and consistently tied the use of force back to a "revival" of UNSCR 678, *but via the ceasefire provisions of UNSCR 687.* This is an important distinction because UNSCR 1154, which at that time was one of the U.K.'s claimed linkages back to UNSCR 687, relates to the inspection and disarmament regime for WMD, which is an issue specifically covered by the UNSCR 687 paragraph thirty-four caveat of "further steps" previously discussed in Part V. UNSCR 1154 does not relate directly to the wider, more amorphous issue of international peace and security, but it does relate directly to WMD and thus further UNSC "steps" were required to authorize a specific use of force in that instance. In this case, the U.K. argued that the phrase "severest consequences" met this need. However, UNSC practice, as discussed above in relation to UNSCRs 1134 and 1137, was to be very precise when considering "further steps," and this must weaken the U.K. argument. Indeed, the language of paragraph five, that the UNSC "remains actively seized of the matter, *in order to ensure implementation of this*

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[66] *See* S.C. Res. 1154, *supra* note 60; S.C. Res. 1441, U.N.SCOR, 57th Sess., 4644th mtg. U.N. Doc. S/RES/1441 (2002).

[67] U.N. Doc. SS/PV.3955, at 6 (emphasis added).

resolution," effectively answers any argument to the effect that UNSCR 1154's "severest consequences" was itself the "further step" required in accordance with the caveat/abeyance on "all necessary means" placed on the WMD issue by the combined effect of UNSCR 687 paragraphs one and thirty-four. Again, however, there is nothing in this resolution to indicate that this caveat applies to international peace and security issues not covered by UNSCR 687. Arguably, the broader U.S. approach is sustainable, but the more specific U.K. approach is substantially undermined by the actual terms of the basis of authority, that is, a specific breach of the UNSCR 687 ceasefire provisions, which the U.K. explicitly claimed.

D. UNSCR 1284

The preamble to UNSCR 1284, passed December 17, 1999, recalls UNSCR 687, and stresses the need for a comprehensive approach to the full implementation of all relevant UNSCRs regarding Iraq and the need for Iraqi compliance. Acting under Chapter VII, the UNSC also took into account "that the operative provisions of this resolution (1284) relate to previous resolutions adopted under Chapter VII."[68] This inherently included UNSCR 678 and explicitly included UNSCR 687.[69] The operative provisions then relate to the WMD inspection process, the return of missing Kuwaitis believed to be held in Iraq, and the continuing sanctions regime. In paragraph thirty-nine, the UNSC decided to "remain actively seized of the matter and expresse[d] its intention to consider action in accordance with paragraph thirty-three above (rewarding Iraqi cooperation with easing of sanctions) no later than twelve months from the date of the adoption of this resolution provided the conditions set out in paragraph thirty-three above have been satisfied by Iraq."[70] In this case, as with UNSCR 687, the UNSC explicitly caveated a specific issue, the revised sanctions regime, by making it subject to further consideration. It is thus arguable that the UNSC has continually evidenced an intention to be *explicit* as to when "further steps" are required. This buttresses the argument that unless the UNSC has explicitly done so (UNSCRs 687, 1154 and 1284) the extant UNSCR 678 paragraph two authorization to use "all necessary means" continued to apply over the UNSC's previously and explicitly expressed purposes. And these purposes included both the general restoration of international peace and security in the area, and the efficacy of all subsequent resolutions, with the exception of those issues which had been caveated by a requirement for "further steps."

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[68] S.C. Res. 1284, U.N.SCOR, 54th Sess., 4084th mtg. U.N. Doc. S/RES/1284 (1999).

[69] *Id.*

[70] S.C. Res. 1284, *supra* note 68, ¶¶ 33-39.

VII. GULF WAR II: AUTHORITY OR ILLEGALITY?

A. UNSCR 1441

The preamble of UNSCR 1441, passed November 8, 2002, contained an explicit recall of UNSCR 678 and its authorization for member states to use "all necessary means" for the restoration of international peace and security in the area. In fact, the UNSC expressly noted that its approval of all necessary means in UNSCR 678 applied to *both* "all relevant resolutions subsequent to resolution 660 (1990) *and* to restore international peace and security in the area."[71] There can be no clearer indication of the UNSC's own opinion that at least two of the triptych of purposes underlying the UNSCR 678 authorization for force remained in some manner live, or revivable, extant and afoot. The UNSC then referred to the obligations imposed in UNSCR 687 "as *a necessary step* for the achievement of its stated objective of restoring international peace and security in the area." Quite clearly, UNSCR 687 is *not* the totality of those steps, as any assertion that UNSCR 687 ended the UNSCR 678 authorization would necessarily have to prove. This reinforces the argument that the UNSCR 687 paragraph thirty-four "further steps" caveat was never meant to apply across the whole spectrum of issues that come under the aegis of "international peace and security in the area." Clearly, the specific issues addressed in UNSCR 687, and thus subject to the UNSCR 687 paragraph thirty-four caveat, were never considered to be the totality of international peace and security, as evidenced by references to the wider concept of international peace and security, and the addition of other subsequent aspects to the list of UNSC concerns (such as domestic repression in UNSCR 688). UNSCR 1441 is but the final confirmation that full compliance with the obligations established under UNSCR 687 are but one, albeit a necessary, step in the wider process of restoring international peace and security to the area. Further, the UNSC explicitly recalled that in UNSCR 687 (paragraph thirty-three), the UNSC "declared that a ceasefire would be based on acceptance by Iraq of the provisions of that resolution [687]," and noted that it is "determined to secure full compliance with its decisions," once again confirming that it was acting under Chapter VII.

The operative paragraphs of UNSCR 1441 deal with WMD. In paragraph two, the UNSC stated that it was affording Iraq "a *final opportunity* to comply with its disarmament obligations." In paragraph four, the UNSC put Iraq on notice that false statements or omissions in the required declarations, or any failure to fully cooperate with the inspections regime,

[71] S.C. Res. 1441, *supra* note 66 (emphasis added).

would constitute a "further material breach of Iraq's obligations," and would be reported to the UNSC for assessment in accordance with UNSCR 1441 paragraphs eleven and twelve. Paragraph eleven directed the Executive Chairman of UNMOVIC and the Director-General of IAEA to report immediately any Iraqi interference or failures to comply with the inspection regime.[72]

In paragraph twelve, the UNSC determined that it would "convene immediately upon receipt of a report in accordance with paragraphs four or eleven above, in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security." The UNSC concluded, in paragraph thirteen, by recalling "in that context, that the Council has repeatedly warned Iraq that it will face *serious consequences* as a result of its continued violations of its obligations," and in paragraph fourteen, by deciding to remain seized of the matter.[73] That UNSCR 1441 evidences an explicit requirement to return to the UNSC after a breach of UNSCR 1441 is absolutely clear. There is no "automaticity" and no "hidden trigger" for use of force with respect to a material breach of UNSCR 1441. This was entirely consistent with the long-standing procedural requirement that additional actions relating to the WMD inspection and disarmament regime, subject to the earlier UNSCR 687 paragraph thirty-four caveat of "further steps," needed to first be authorized by the UNSC.

The statements delivered by the ambassadors who passed UNSCR 1441 are similarly explicit. The U.S. representative, Mr. Negroponte, began by recalling "that the ceasefire ending the 1991 Gulf war was conditioned on Iraq's disarmament with respect to nuclear, chemical and biological weapons, together with their support infrastructures; ending its involvement in, and support for, terrorism; and its accounting for, and restoration of, foreign nationals and foreign property wrongfully seized." He then went on to declare that "[A]s we have said on numerous occasions to Council members, this resolution contains no 'hidden triggers' and no 'automaticity' with respect to the use of force." Importantly, however, the U.S. delegate then asserted that "[I]f the Security Council fails to act decisively in the event of further Iraqi violations, this resolution does not constrain any Member State from acting to defend itself against the threat posed by Iraq *or to enforce relevant United Nations resolutions and protect world peace and security*."[74] Thus the US

[72] S.C. Res. 1441, *supra* note 66, ¶¶ 2,4,11.

[73] S.C. Res. 1441, *supra* note 66, ¶¶ 12-14 (emphasis added).

[74] U.N.SCOR, 57th Sess., 4644th mtg. at 3, U.N. Doc. S/PV.4644 (2002) (emphasis added) [hereinafter U.N. Doc. S/PV.4644].

again referred to its interpretation of the UNSCR 678 authority as being wider than those issues covered by, and thus subject to, the UNSCR 687 paragraph thirty-four caveat of "further steps." It would therefore be quite unfair to accuse the US in particular of a "convenient interpretation" of UNSCR 1441, for it has evidenced since 1994 a consistent opinion to this effect. Whether that interpretation is correct is of course another matter entirely.

> Mr. Greenstock of the U.K. noted that:
>
> [The UNSC] heard loud and clear during the negotiations the concerns about "automaticity" and "hidden triggers," the concern that on a decision so crucial we should not rush into military action; that on a decision so crucial any Iraqi violations should be discussed by the Council. Let me be equally clear . . . . There is no "automaticity" in this resolution. If there is a further Iraqi breach of its *disarmament obligations*, the matter will return to the Council for discussion as required in paragraph twelve.[75]

The U.K. statement indicated that UNSCR 1441 required breaches of *disarmament obligations* to be returned to the UNSC for further consideration. However, during the 1998-1999 crisis, the U.K. (as well as the U.S., as noted above) had also expressed the opinion that it could in certain circumstances access the preserved UNSCR 678 paragraph two authorization to use force. It is thus possible to draw the implication that the U.K. had also reserved authority under *other* UNSCRs regarding *issues other than disarmament*, such as the wider issue of international peace and security, to use "all necessary means" without a further UNSCR. With respect to the U.K., however, this argument is fatally flawed because the U.K. delegate explicitly tied the potential use of force without further UNSC authorization to the specific goal of WMD disarmament, a matter expressly covered by the UNSCR 687 paragraph thirty-four caveat of "further steps." As Mr. Greenstock concluded:

> The disarmament of Iraq in the area of weapons of mass destruction by peaceful means remains the United Kingdom's firm preference. But if Iraq chooses defiance and concealment, rejecting the final opportunity it has been given by the Council in paragraph two, the United Kingdom, together, we trust, with other members of the Security

[75] U.N. Doc. S/PV.4644, at 4 (emphasis added).

> Council, will ensure that the *task of disarmament required by the resolutions* is completed.[76]

Further, any argument to the effect that the U.K. was simply stating that the use of force would be the "serious consequence" or "further step" already alluded to in UNSCR 1441 paragraph thirteen, is also mortally wounded by the fact that UNSC practice, as illustrated above, has always been much more explicit with respect to additional measures. It is interesting to note, consequently, that the U.K. reservation, linked explicitly to WMD disarmament and thus to the subject matter of UNSCR 1441 and the procedural caveat of UNSCR 687 paragraph thirty-four, is essentially *ultra vires*. The representatives of France, Russia, China, Ireland, Bulgaria, Norway, Columbia, and Cameroon, all explicitly reiterated their national positions to the effect that UNSCR 1441 did not contain any provisions for the automatic use of force, and that breaches required referral back to the UNSC. It is, it therefore seems, the U.S. reservation of a consistent authorization to use force for the more general purpose of restoring peace and security, a purpose not subject to the UNSCR 687/1441 caveat except where explicitly described as such, that is the more logically and legally supportable dissenter's position.

VIII. AN ASSESSMENT OF THE "TENSIONS"

From the assessment outlined above, the record indicates that the UNSC had clearly assumed, and there clearly existed, a continuing authority to use force in respect of Iraq (traced back to UNSCR 678 paragraph two) for the purposes of securing compliance with subsequent UNSCRs and to secure international peace and security in the region. This has a range of important implications. First, it provides seemingly solid evidence to the effect that the "continuity" tension must be resolved in favor of the "live and unbroken linkage" interpretation. Indeed, the fact of twelve years of continuous post Gulf War sanctions enforcement, an operation which was based upon, and would not have been possible in the absence of, the UNSCR 678 paragraph two authorization, is clear evidence of this continuity.

Second, this analysis therefore tends towards a resolution of the "purpose" tension that favors the wider view asserting the continuing viability and validity of at least two of the triptych of purposes evident in UNSCR 678, that is, the enforcement of relevant future UNSCRs, the general restoration of peace and security in the Gulf region, and the liberation of Kuwait. Indeed, in the month before Operation Desert Fox in 1998, the Chinese, traditionally

[76] U.N. Doc. S/PV.4644, at 5 (emphasis added).

very narrow interpreters of UNSC authorizations to use force, tacitly indicated that at the very least the general "restoration of peace and security in the area" purpose was as yet alive and unfulfilled.[77]

Third, this authority has clearly been segmented with respect to certain issues, at least since UNSCR 687. WMD disarmament, for example, has consistently been referred to in terms of a requirement for "further steps" by the UNSC prior to lifting the abeyance on use of force with respect to this issue. UNSCRs 707, 1137, 1154, and most importantly 1441, all provide testament to this practice, and to its express nature. The procedure whereby further caveats were subsequently imposed over additional specific subject matters, for example in UNSCR 1284, primarily concerning new aspects of sanctions enforcement, provides further evidence of this practice. Thus the "subject matter" tension can be at least partially resolved by determining that a continuing authority to use force in Iraq, traced back to UNSCR 678 paragraph two, for the wider purposes of *restoring international peace and security generally* and *implementing other subsequent resolutions* existed concurrently with a range of explicitly caveated subject matters which required "further steps." The authority in UNSCR 1441, therefore, was clearly subject to the UNSCR 687 paragraph thirty-four caveat because it concerned WMD, and the "referral back" requirement arising out of UNSCR 1441 paragraphs four, eleven, and twelve merely reflects and reinforces this long-standing caveat regarding the WMD inspection and disarmament process.[78] However, the UNSCR 678 authorization remains extant, and arguably does not require further steps by the UNSC with respect to non-caveated matters of international peace and security which appear in subsequent (to UNSCR 678) relevant resolutions, unless the UNSC chose to make an explicit statement to that effect. One subsequent, specific, international peace and security issue which the UNSC did *not* place under caveat, for example, is UNSCR 688, repression of the Iraqi population. At this point it is also prudent to note that the Williams and Hovell argument to the effect that the ceasefire was entrenched merely by Iraq's *acceptance* of the conditions in UNSCR 687,

[77] "At the same time the Security Council, in accordance with the provisions of its relevant resolutions, should also make a timely and objective assessment of Iraq's compliance. *Only then can the Council resolutions be fully and effectively implemented. It is our hope that questions left over from the Gulf war can be properly resolved as soon as possible*." U.N. Doc. S/PV.3939, at 9.

[78] Indeed, the Chilean delegate at the UNSC meeting made this clear in the wake of Secretary of State Powell's presentation on February 5, 2003, when he specifically linked UNSC Resolution 687 to UNSC Resolution 1441. "After more then 12 years of resolutions by this Council reiterating that demand, resolution 1441 (2002) gave Iraq, in terms that allow no double interpretation, a final opportunity to fulfill its disarmament obligations." U.N.SCOR, 58th Sess., 4701st mtg. at 30, U.N. Doc. S/PV.4701 (2003).

rather than its *fulfillment* of those conditions, is not supported by UNSC practice. As UNSCR 833, for example, made clear, the UNSC was concerned with Iraq's "*obligations* under 687," which formed "the basis for the ceasefire,"[79] and not with its mere *acceptance* of those terms.

The UNSCRs do not, however, disclose any firm resolution to the final tension, *unilateralism*. The highly political nature of this tension also militates against any definitive resolution. Williams and Hovell's argument, based in the wider purposes of the Charter that force should be viewed as such an undesirable last step that its use should always be explicitly approved or revived, is legally and politically strong. However, the underlying assumption in most critical analysis seems to be that the U.S, U.K. and also Australian position is legally unsustainable and politically opportunistic. It is arguable that the "unilateral" argument cannot be written off quite so neatly. Either way, however, it seems clear that any resolution must hinge upon the interplay between four factors. The first is the *consistency* of the U.S./U.K. position on the procedural character of the UNSCR 678 authority. To defenders of the U.S./U.K. interpretation of this authority, a further UNSCR explicitly re-authorizing UNSCR 678's "all necessary means" might have been politically desirable, but it was not legally necessary.[80] The U.S./U.K. had clearly and consistently asserted this view. As noted previously, the U.S. was firm during the 1994 border build-up crisis that the continuing authority to use force did not require any further positive UNSC act of "revival." Regular subsequent U.S., U.K., and on occasion French, air and naval strikes, and the continuing use of force at sea in support of the sanctions regime, provide strong practical evidence of this continuing authority as a "live" rather than a "dormant" issue. In January 1998, eleven months before Operation Desert Fox, but in the face of continued Iraqi "material breaches" of UNSCR 687, U.S. Ambassador Richardson asserted that "no additional Security Council action to justify the use of force" was required.[81] Prime Minister Blair similarly spoke of enforcing the UNSC's previously declared "will."[82] Subsequently, the debates

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[79] S.C. Res. 833, U.N.SCOR, 48th Sess., 3224th mtg. at 1, U.N. Doc. S/RES/833 (1993) (emphasis added).

[80] PAUL SCHOTT STEVENS ET AL., THE JUST DEMANDS OF PEACE AND SECURITY: INTERNATIONAL LAW AND THE CASE AGAINST IRAQ 1 (The Federalist Society for Law and Public Policy 2003), *available at* http://www.fed-soc.org/War%20on%20Terror/iraqfinal--web.pdf. *See also* D.A. Leurdijk & R.C.R. Siekmann, *The Legal Basis for Military Action Against Iraq*, 5 INT'L PEACEKEEPING 71, at 75 (1998).

[81] Bill Richardson, Former U.S. Ambassador to the U.N., Press Conference (Jan. 30, 1998) (transcript available at http://www.un.int/use/98_11.htm). *See also* Marc Weller, *The US, Iraq and the Use of Force in a Unipolar World*, 41 SURVIVAL 81, 85-6 (1999), for a discussion of the US claims.

[82] Prime Minister Blair, Address (January 31, 1998), *quoted in supra*, note 81, at 85.

surrounding Operation Desert Fox in December 1998 (discussed above) confirm the U.S./U.K.'s continued adherence to this interpretation. Although not a member of the UNSC since the mid-1980s, Australia, whenever moved to comment on the issue, such as with Operation Desert Fox, confirmed its positive view of the legality of U.S./U.K. actions. Thus in many respects, the consistency of U.S. claims since 1994, and U.K. claims since at least 1998, that the general authorization under UNSCR 678 had remained afoot and did not (except for caveated issues) require re-authorization for invigoration, cannot be easily dismissed.

The second issue is the *uniqueness* of the Iraq situation. The *sui generis* nature of the Iraq dilemma, in terms of longevity as an issue before the UNSC, the almost institutionalized nature of routine use of force with respect to Iraq, and the (at that time) stand-off character (rather than present in country) of the UNSC's military involvement with Iraq, lends some weight to assertions of unique rights and powers under the UNSCRs. As Condron and others note, the UNSC "has never before adopted a ceasefire resolution as extensive as 687,"[83] an action "entirely unique in U.N. history and world practice."[84] It is certainly valid to assert that the U.S. and U.K. have not argued similar interpretations with respect to any other similar UNSC matters (Yugoslavia or Rwanda, for example) but the effect of this general argument on the "good faith" nature of the U.S./U.K. claims with respect to Iraq specifically, should not be overstated. This situation has not previously arisen in this form. Thus any lack of U.S./U.K. precedent with respect to other threats to international peace and security might equally be attributable to the lack of any previous opportunity to assert a consistent interpretation in another context, rather than mere opportunism in this particular context. Peter Singer, for example, argues that the U.S. has not acted to unilaterally enforce resolutions involving the Israeli/Palestinian conflict, which represents a similar quagmire in the hands of the UNSC.[85] This is misdirected, particularly given that not all of these resolutions are UNSCRs, and they do not authorize the use of "all necessary means" in their enforcement. Thus any assertion of a situationally specific right unique to the Iraq context need not, and should not, be read as an assertion of a more general right.[86] As Condron, discussing the

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[83] Sean M. Condron, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation DESERT FOX*, 161 MIL. L. REV. 115, 167-68 (1999).

[84] David M. Morris, *From War to Peace: A Study of Cease-Fire Agreements and the Evolving Role of the United Nations*, 36 VA. J. INT'L L. 801, at 896 (1996).

[85] SINGER, *supra* note 11, at 5.

[86] *See* Michael Byers, *The Shifting Foundations of International Law: A Decade of Forceful Measures Against Iraq*, 13 EUR. J. INT'L L. 21 (2002), *available at* http://www.ejil.org/journal/Vol13/No1/130021.pdf. Byers examines the U.S. approach to Iraq

existence of an Iraq-specific right in the context of Operation Desert Fox, neatly proposed, "[T]his conclusion does not mean that in the future the United States has the authority to act unilaterally, using military force against other nations. Under these particular circumstances, however, the United States action was legally justified."[87]

The third issue is the fact that from 1991-2003, there was an almost continuous *practice* of actually using force against Iraq without any explicit or positive act of re-authorization in a UNSCR. Between the ceasefire in 1991, and late 2002, U.S., U.K., and French aircraft flew more than 250,000 sorties over Iraq, regularly using force either in self-defense or in the offensive targeting of military sites.[88] In January 1993, U.S., U.K., and French forces responded to Iraq's closure of an airfield, effectively jeopardizing the efficacy of short notice inspections, with air strikes.[89] Also in January 1993, U.S., U.K., and French aircraft engaged missile and air defense sites, and a nuclear fabrication facility in Iraq, actions which apparently raised little murmur in the UNSC.[90] And whilst these actions have engendered a good deal of important academic debate,[91] it is important to remember that state practice lies closer to the core of legitimacy than the writings of experts,[92] and it is thus significant that then U.N. Secretary General Ghali stated of the January 13 action:

> The raid yesterday, and the forces which carried out the raid, have received a mandate from the Security Council, according to resolution 678, and the cause of the raid was the violation by Iraq of resolution 687 concerning the ceasefire.

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within the context of a more general question regarding state practice and the "existence or potential for change in three fundamental, underlying areas of international law: the rules concerning the interpretation of Security Council resolutions and treaties; the rules concerning how customary international law is made and changed; and the rules concerning the interaction of customary international law and treaties."

[87] Condron, *supra* note 83, at 124.

[88] *See* Mark Thompson, *The Forgotten War*, TIME, Sept. 23, 2002, at 43.

[89] STEVENS ET AL., *supra* note 80, at 8. *See also* U.N. Doc. S/25091 (1993).

[90] STEVENS ET AL., *supra* note 80, at 9.

[91] *See also* Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120 (1994); Christine Gray, *After the Ceasefire: Iraq, the Security Council and Use of Force*, 65 BRIT. Y.B. INT'L L. 135 (1994); Dino Kritsiotis, *The Legality of the 1993 U.S. Missile Strike on Iraq and the Right of Self-Defense in International Law*, 45 INT'L & COMP. L.Q. 162 (1996); Ruth Wedgewood, *The Enforcement of Security Council Resolution 687: The Threat of Force Against Iraq's Weapons of Mass Destruction* 92 AM. J. INT'L L. 724 (1998); Nigel White & Robert Cryer, *Unilateral Enforcement of Resolution 687: A Threat to Far?* 29 CAL. W. INT'L L.J. 243 (1999).

[92] *See* the Namibia Advisory Opinion on the interpretation of UNSC Resolutions. *Supra*, note 19.

> So, as the Secretary-General of the United Nations, I can say that this action was taken and conforms to the resolutions of the Security Council and conforms to the Charter of the United Nations.[93]

During the border build-up crisis in 1994, as previously discussed, the U.S. again explicitly affirmed its interpretation of an extant and partially unfettered UNSCR 678 authorization. In December 1998 (Operation Desert Fox), the U.S. and U.K. again affirmed this interpretation, although, after what one trenchant critic of U.S./U.K. policy admitted had been "the silence with which delegations to the Council had met previous outlandish justifications for the use of force against Iraq,"[94] Russia and China became significantly more resolute in opposing this view. Between 1999 and 2001, there were in excess of 1000 engagements and targeting operations involving use of force in Iraq.[95] Similarly, continuous naval sanctions enforcement between 1990 and 2003 was arguably only possible because of the extant authorization to use force without a requirement to return to the UNSC for a positive re-authorization on each occasion in which the authorization was practically used.

The final issue is that of *acquiescence* in any consistent U.S./U.K. interpretation of the procedural requirements surrounding the UNSCR 678 authorization. Any ambit claim to the effect that "[A]lthough contrary opinions exist, the coalition action following the Gulf War and the United Nations acquiescence in that action, indicate that a State may be allowed to act unilaterally in addressing a material breach of a Security Council resolution"[96] is not only excessive, it is also wrong.[97] But with respect to the curious, particular, and singular Iraq situation, the acquiescence claim, based on actual consistent state practice, is not so easily dismissed.[98] As Byers recently noted, assertions of "implied authorization" attracted "widespread support, particularly from Western governments, when used to justify the 1991

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[93] Boutros Boutros Ghali, *quoted in* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 201 (Oxford University Press 2001).

[94] Marc Weller, *The Threat or Use of Force in a Unipolar World: The Iraq Crisis of Winter 1997/98*, 4 INT'L PEACEKEEPING 63, at 71 (1998).

[95] U.S. Department of Defense news brief (Aug. 10, 2001), *cited in* STEVENS ET AL., *supra* note 80, at 9.

[96] Condron, *supra* note 83, at 180.

[97] In distinction to the wider implications which Byers and others see reflected in this example of state practice, this author is more inclined to view it narrowly within the specific context of Iraq.

[98] *See* Weller, *supra* note 81, at 91, for a discussion of the UNGA's potential "Uniting for Peace" role, in resolving such UNSC stalemate situations.

intervention in northern Iraq and the 1992 establishment of the no-fly zones."[99] Nor have the U.S. or U.K. been alone in actively asserting this interpretation before the UNSC. In relation to the January 13, 1993 raids on Iraq, the assertion by the then U.N. Secretary-General that the action was authorized under UNSCR 678 must carry some weight. In the course of UNSC debate on December 16, 1998, during Operation Desert Fox, Japan declared its positive support for the U.S./U.K. actions. Portugal and Slovenia also referred uncritically to Operation Desert Fox, declaring that Iraq had been put on notice of this likely consequence, and that the "cause of the current crisis [was] the obstinate policy of Iraq's rulers in refusing to comply with Security Council resolutions."[100] It is equally clear, however, that Russia and China have consistently (at least since 1998) opposed the U.S./U.K. view. In response to Operation Desert Fox, Russia labeled the U.S./U.K. action an "unprovoked act of force" which "grossly violated the Charter of the United Nations, the principles of international law and the generally recognized norms and rules of responsible behavior on the part of States in the international arena."[101] The Russian delegate forcefully declared that:

> [Russia] reject[s] outright the attempts made in the letters from the United States and the United Kingdom to justify the use of force on the basis of a mandate that was previously issued by the Security Council. The resolutions of the Council provide no grounds whatsoever for such actions . . . . No one is entitled to act independently on behalf of the United Nations.[102]

China also declared that the actions "violated the United Nations Charter and norms governing international law" and condemned the U.S./U.K. stance.[103] Sweden, Costa Rica, and Kenya also expressed varying degrees of disquiet at U.S./U.K. actions.[104] Thus it would not be fair to dismiss the U.S./U.K. 2003 position by simply declaring it to be an opportunistic *volte-face* serving national political ends. That their approach served national political ends is clear, but it was equally clearly linked to a long held, often expressed, and consistently asserted interpretation of the authorities enshrined in UNSCR 678.

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[99] Byers, *supra* note 86.

[100] For Mr. Konishi's (Japan) remark, *see* U.N. Doc. S/PV.3955, at 11. For Mr. Monteiro's (Portugal) remark *see* U.N. Doc. S/PV.3955, at 8. For Mr. Turk's (Slovenia) remark *see* U.N. Doc. S/PV.3955, at 7.

[101] U.N. Doc. S/PV.39554, at 4.

[102] *Id.*

[103] U.N. Doc. S/PV.3955, at 5.

[104] U.N. Doc. S/PV.3955, at 11,7,12.

The position of France, the fifth Permanent Member of the UNSC, thus bears significant potential weight in assessing the validity of any U.S. or U.K. claim to a history of acquiescence in their interpretation. Unfortunately, the pre-2002 French record on this issue is mixed. As noted above, France actively joined U.S./U.K. forces in air and naval strikes on Iraq in 1993, and thus at that time obviously held no concerns regarding any requirement to return to the UNSC for a positive re-authorization of the UNSCR 678 authorization. In the wake of Operation Desert Fox in 1998, the French position was at best equivocal. In a very short statement, the French delegate avoided the issue by "deplor[ing] *the chain of events* that led to the American military strikes against Iraq," and "regret[ed] that the Iraqi leaders were not able to demonstrate the spirit of full cooperation called for" in recent UNSCRs and the February 23, 1998 Annan-Aziz "Baghdad Agreement" on inspections.[105] And although it is clearly arguable that France asserted itself on the issue in 2002 because the context of debate was much larger, invasion as opposed to pinprick strikes, there was no consistent pre-2002 French objection to the U.S./U.K. interpretation over the previous twelve years of practice and debate. And because state practice lies at the very core of international law, it is important that we interpret claims such as that of the U.S./U.K. regarding UNSCR 678 in the light of what that practice has actually been, rather than as we may wish it to have been.

There is one final point of significance with respect to this matter. If it is accepted that the U.S., U.K., and Australia were recognized beneficiaries in 2003 of a form of "persistent permissive interpretation" with respect to UNSCR 678 and Iraq, it was arguably only the U.S. and Australia that could properly claim this right. This is a consequence of the fact that both states consistently expressed a belief that UNSCR 678 preserved an ability to act in support of international peace and security generally. Indeed, by again explicitly tying its affirmation of a right to act without further UNSC consent to the caveated issue of WMD disarmament, the U.K., although twice claiming that "severest consequences" satisfied the need for "further steps," has nonetheless arguably deprived itself of this thin veil of legality.

IX. CONCLUSION

It is clear that the Australian Government's first assertion of an extant and unfettered authority to use of force directed towards *disarming Iraq of*

[105] U.N. Doc. S/PV.3955, at 12 (emphasis added).

WMD[106] is simply wrong. This specific subject matter is explicitly covered by the UNSCR 687 paragraph thirty-four and UNSCR 1441 paragraph twelve caveat of positive, precisely detailed "further steps," as was the case in the UNSCR 1337 travel bans, and the UNSCR 1441 decision to reconvene to assess the Blix and Al Baradei reports on Iraqi compliance. However, the Australian Government's second grounds for authority, the more general asserted right of action to *restore international peace and security* in the area,[107] remains *theoretically* viable as an authorization. But in *practical* terms, the viability of this authority rests upon whether the unilateralism tension can be resolved in favor of a consistent interpretive practice to that effect. In the Australian context, this assertion of an extant and live authority to act with respect to the, as yet unachieved, purpose of restoring peace and security in the area, is reflective of the U.S. position (consistently asserted, and backed up by the fact of previous instances of use of force and significant evidence of previous acquiescence) rather than the U.K.'s more problematic "revivalist" approach. Perhaps, with respect to this limb of claimed authority in the Australian context, the ultimate conclusion can only be that although military operations in Iraq in 2003 may not appear definitively legal, neither were they definitively illegal. However, it is equally important to contextualize this narrowly legal conclusion. Formal possible lawfulness, whilst correctly of significant importance, is but one of the contextual factors governing any assessment of the ultimate "rightness" of use of force.

[106] Campbell & Moraitis, *supra* note 23, para. 14.

[107] Campbell & Moraitis, *supra* note 23, para. 16.

CONSTITUTIONAL ASPECTS OF FOREIGN AFFAIRS: HOW THE WAR ON TERROR HAS CHANGED THE INTELLIGENCE GATHERING PARADIGM

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I. THE MODERN CONSTITUTIONAL CONFLICT.

The President's powers to conduct defensive wars and engage in foreign affairs are broad and necessarily include the power to gather foreign intelligence. This power has been asserted time and again by various Presidents explicitly through legislation,[1] implicitly authorized by Congress's approval of such legislation and has been supported by the courts.[2] Notwithstanding a congressional decision to limit or prohibit funding for this purpose, there is no constitutional basis for limiting the President's power as Commander-in-Chief to gather intelligence on foreign powers during war or when engaging in foreign affairs outside the United States. The power to see and hear the agents of a foreign enemy on the battlefield undoubtedly provides tremendous value during wartime. It provides our Commander-in-Chief with the ability to infiltrate, disrupt and harass these foreign powers and helps our

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[1] This legislation includes, but is not limited to, various intelligence authorization bills, The Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 (1978), and Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[2] Katz v. United States, 389 U.S. 347 (1967) (holding that the Fourth Amendment's warrant requirement did apply to electronic surveillances, but expressly declining to extend this holding to cases "involving the national security"); United States v. U.S. Dist. Ct., 407 U.S. 297 (1972) (the *Keith* case)(reserving the question of whether the Fourth Amendment's warrant requirement applies to foreign intelligence surveillance on domestic targets); United States v. Truong Dinh Hung, 629 F.2d 908, 912-13 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) (acknowledging a foreign intelligence exception to the warrant requirement for national security cases); United States v. Duggan, 743 F.2d 59, 77 (2d Cir. 1984) (following *Truong* in the post-FISA context); United States v. Badia, 827 F.2d 1458, 1464 (11th Cir. 1987) (following *Truong* in the post-FISA context); United States v. Johnson, 952 F.2d 565, 571-73 (1st Cir. 1991) (following *Truong* in the post-FISA context); *In re*: Sealed Case, 310 F.3d 717 (Foreign Intelligence Surveillance Ct. of Rev. 2002) (holding that FISA as amended by the USA PATRIOT ACT does not violate the Fourth Amendment).

troops avoid ambush and unbalanced attacks. Similarly, the ability to see and hear foreign powers and their agents around the world provides valuable insight when the President seeks to create or implement his foreign policies.

Assuming the President has the power to collect intelligence on foreign powers in the context of war and foreign affairs, the question then becomes whether and to what extent Congress can limit this power when war or foreign affairs are conducted inside the United States. In the war on terror, for example, the battlefield is not clearly defined. Our enemy is a global terrorist network with tentacles that extend well into domestic territory and involve U.S. persons, business and charities (hereinafter referred to as "domestic targets"). However, as soon as the President exercises his Commander-in-Chief power to gather intelligence on the domestic agents of these terrorist networks, he is faced a number of counter-balancing forces. The most obvious counter-forces include the Fourth Amendment and specific congressional legislation that requires the President to obtain judicial approval before his exercise of power can be used against domestic targets. Therein lies the question: can the Executive, a unitary body, be insulated from itself? One might hypothesize that if the President has the power to collect intelligence without congressional restraint or prior judicial approval when he or she is engaged in war or foreign affairs abroad, then the President should have that same power domestically as long as he or she continues to act within the scope of their constitutional authority.

Notwithstanding this basic premise, there has long been a debate on the scope of the President's power to collect foreign intelligence on domestic targets during wartime, specifically U.S. persons, without having to obtain a judicially sanctioned warrant. Many critics argue that the President's power should be substantially limited because of the fear that he will abuse his discretion and rely exclusively on foreign intelligence surveillance as a means of furthering criminal investigations. This debate has become a flashpoint in the aftermath of September 11th when the full capabilities of foreign terrorist agents operating in the United States was finally realized.

II. SCOPE OF THIS PAPER.

This paper will examine the scope of the President's power to collect foreign intelligence on domestic targets during wartime and the extent to which Congress can limit it. This paper is divided into several parts including: (1) a brief history of the Presidents' attempt to exercise this power and the responses by Congress and the Judiciary; (2) the current legal framework for conducting foreign intelligence surveillance inside the United States; and (3) an analysis of

the extent to which this Presidential power can be constrained by Congress. The first section examines the steps various Administrations have taken to promote domestic intelligence gathering in matters that concern national security. In the following section, the paper outlines the requirements of the Foreign Intelligence Surveillance Act (FISA) of 1978 and the amendments imposed by the USA PATRIOT ACT.[3] Next, the paper will attempt to identify the source of the President's power to conduct intelligence on domestic targets during wartime and analyze the extent to which this power is ingrained in the Constitution. Assuming that the President does have this power, the paper will finally examine the question of whether and to what extent Congress can constrain the President when exercising it.

III. AN ABBREVIATED HISTORY OF DOMESTIC INTELLIGENCE GATHERING.

It's useful to understand the extent to which past Presidents have attempted to exercise their power to gather intelligence inside the United States and the extent to which Congress and the Courts have attempted to limit this power. This section will highlight events that show the interplay between these three branches and set the stage for the debate that has been fueled by the USA PATRIOT ACT and a recent FISA Court of Review's decision.

The Executive Exercise of Power: 1920-27. When the Federal Bureau of Investigation (FBI) was created in 1920, its policies prohibited wiretapping.[4] At the time, however, other agencies, such as the Treasury Department's Bureau of Prohibition, regularly used wiretaps for the purpose of investigating and prosecuting the unlawful possession and sale of liquor and other domestic crimes.[5]

The Judicial Response: 1928. In *Olmstead v. United States*,[6] the Supreme Court upheld the prosecutions of several criminal defendants in a prohibition case where government agents used evidence obtained through wiretaps after concluding that the Fourth Amendment did not extend to the seizure of conversations. Although this opinion would later be reversed, the

[3] Pub. L. No. 107-56, 115 Stat. 272 (2001).
[4] *See, e.g.,* Socialist Workers Party v. United States, 642 F. Supp. 1357, 1390 (S.D.N.Y. 1986) (discussing, generally, the history of domestic intelligence gathering in the United States.)
[5] *Id*.
[6] 277 U.S. 438 (1928) (later overruled by Katz v. United States, 389 U.S. 347 (1967), holding that the Fourth Amendment's warrant requirement did apply to electronic surveillances; but it expressly declined to extend this holding to cases "involving the national security").

case expanded the use of domestic intelligence gathering for the purpose of criminal prosecution.[7]

The Executive Exercise of Power: 1930. Shortly after *Olmstead*, the FBI was merged with the Treasury Department's Bureau of Prohibition. In response, President Hoover's Attorney General, William Mitchell, reversed the FBI's policy against wiretapping and bugging on domestic targets "in cases involving . . . espionage and sabotage and other cases considered to be of major law enforcement importance."[8] The policy for the entire Department of Justice (DOJ) was changed shortly thereafter.[9] Eventually, the added threat of another World War led President Franklin D. Roosevelt to order then FBI Director, J. Edgar Hoover, to investigate foreign and foreign-inspired subversion within the United States. After the war, these foreign intelligence duties were reassigned to the newly established Central Intelligence Agency (CIA).[10]

The Congressional Response: 1934. In 1934, Congress passed the Federal Communications Act, which prohibits the "unauthorized" interception and disclosure of electronic communications.[11] At the time, DOJ believed that the Communications Act did not place any restraints on its ability to use wiretaps because, as a matter of practice, the Agency did not disclose the information it obtained outside of the Executive branch.[12]

The Judicial Response: 1939. Just a few years later, in 1939, the Supreme Court decided *Nardone v. United States*,[13] which held that the Communications Act applied to both government and non-government actors and expressly prohibited the admission of any evidence or information obtained through the use of wiretaps in criminal proceedings.[14] *Nardone* was silent on the issue of national security surveillance.

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[7] *Id*.

[8] Staff of Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Warrantless FBI Electronic Surveillance (1976), *available at* http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIIe.htm (last visited July 26, 2005)(citing Memorandum from William Olson, Assistant Attorney General for Internal Security, to Attorney General Elliot Richardson (undated)) [hereinafter *Senate Staff Report*].

[9] *Id*. (citing FBI Manual of Rules and Regulations, Rule change issued February 19, 1931).

[10] The National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report 74, *available at* http://www.9-11commission.gov/report/911Report.pdf) (last visited July 26, 2005).

[11] Federal Communications Act, 47 U.S.C. § 151 (1934).

[12] *Socialist Workers Party*, 642 F. Supp. at 1390.

[13] 308 U.S. 338 (1939).

[14] *Id*.

The Executive Exercise of Power: 1940-46. Following *Nardone*, then Attorney General Jackson suspended the use of wiretaps within the DOJ.[15] Jackson's decision stood for only a few weeks until President Roosevelt issued a memorandum stating that the Court's decision in *Nardone* did not apply to "grave matters involving the defense of the nation."[16] President Roosevelt was concerned that foreign nations were actively engaged in domestic sabotage, referred to as "fifth column" activities.[17] Roosevelt ordered his Attorney General to approve electronic surveillances on domestic targets in an effort to secure vital information needed to prevent subversive activities against the U.S. Government.[18] In 1946, President Truman affirmed Roosevelt's policy and supported the FBI's use of wiretaps in "cases vitally affecting domestic security."[19]

The Congressional Response: 1947-50. In 1947, Congress passed the National Security Act, which effectively reorganized and separated the foreign policy and military establishments of the U.S. government from their domestic executive branch counterparts.[20] The Act created many of the agencies that modern Presidents use to formulate and implement foreign policy including the CIA and the Department of Defense (DOD). The statute clearly shows that Congress intended to separate the President's role as Commander-in-Chief from his role as Chief Executive charged with faithfully executing the laws of the United States. Interestingly, this separation was not met with White House opposition. In a post-9/11 environment, the President would be unlikely to support congressional attempts to bifurcate the intelligence-gathering and war-making functions of the Executive branch. Simply put, there is a functional overlap between the FBI's law enforcement and national security responsibilities.

The Executive Exercise of Power: 1950-53. The expansion of Communism in the early 1950's led to the fear of subversive activities taking place inside the United States. In response, then Attorney General

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[15] *Socialist Workers Party*, 642 F. Supp. at 1390.
[16] *Id*. (citing Memorandum from President Franklin D. Roosevelt to Attorney General Jackson (May 21, 1940)).
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] National Security Act, ch. 343, Title I, § 103 (1947) (current version at 50 U.S.C. § 403-3(d)(1) (2004)) (The text of the Act, itself, provided that the CIA, through the Agency Director, shall: "(1) collect intelligence through human sources and by other appropriate means, except that the *Agency shall have no police, subpoena, or law enforcement powers or internal security functions*;" *Id*. (emphasis added).

Brownell promoted the use of warrantless surveillances in the national security context.[21] Brownell authorized a number of national security surveillances on domestic targets relying heavily on: (1) the letter from President Roosevelt, dated May 21, 1940 (discussed above), and (2) a memorandum from Attorney General Clark, dated July 17, 1946, which was signed by President Truman. Brownell contended that "the responsibility [to decide these matters] should be centralized in the hands of the Attorney General."[22]

The Judicial Response: 1954. In 1954, the Supreme Court spoke again, issuing *Irvine v. California,*[23] which holds that surreptitious installation of bugs and other eavesdropping devices violated the Fourth Amendment rights of criminal defendants. The opinion also states that courts are not required to exclude evidence obtained by such means at trial.[24]

The Executive Exercise of Power: 1955-66. Attorney General Brownell responded to the *Irvine* decision in a memorandum that supported the FBI's continued use of warrantless intelligence gathering arguing that such techniques were essential to the FBI's domestic intelligence and national security functions.[25] Brownell stated that this "paramount" executive duty "may compel the unrestricted use of this technique in the national interest" in certain situations.[26] The Justice Department continued to gather information on a number of domestic targets including U.S. persons, charities and other organizations that were believed to be acting on behalf of communist nations and other foreign powers.

In the early 1960's, the National Security Agency (NSA) began a "watch list," that included nearly one thousand American citizens and organizations "whose communications were segregated from the mass of communications intercepted by the Agency, transcribed, and frequently

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[21] *Senate Staff Report*.

[22] *Senate Staff Report* (Attorney General Brownell further argued that warrantless "national security" wiretapping was essential because "the communists . . . and conspirators working fanatically in the interests of a hostile foreign power . . . [are] almost impossible to 'spot'" and believed that it was "neither reasonable, nor realistic that Communists should be allowed to have the free use of every modern communication device to carry out their unlawful conspiracies, but that law enforcement agencies should be barred from confronting these persons with what they have said." *Id*. (quoting Herbert Brownell, Jr., *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195 (1954)).

[23] 347 U.S. 128 (1954).

[24] *Id*. (citing Wolf v. Colorado, 338 U.S. 25 (1949)).

[25] *Socialist Workers Party*, 642 F. Supp. at 1391 (citing Memorandum from Attorney General Herbert Brownell, Jr., to J. Edgar Hoover, Director, FBI (May 28, 1954)).

[26] *Id*.

disseminated to other agencies for intelligence purposes."[27] Many of the U.S. citizens on the NSA's watch list were targeted because of their participation in the anti-war and civil rights movements.[28] This NSA initiative did not have prior approval from the Attorney General and it has been reported that, "for many years in fact, no Attorney General even knew of this project's existence."[29]

In 1965, the Johnson Administration began placing limits on the use of domestic intelligence surveillance. Then Attorney General Katzenbach suggested to FBI Director J. Edgar Hoover that President Johnson issue a directive that would limit wiretap authorizations to six months without seeking reauthorization.[30] In June of that year, President Johnson did indeed issue a directive which went further, "prohibiting the nonconsensual interception of telephone communications by federal personnel within the United States 'except in connection with investigations related to the national security,' and then only after first obtaining the written approval of the Attorney General."[31] In President Johnson's view, "the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake."[32]

The Judicial Response: 1967. Two years later, in 1967, the Supreme Court reached its landmark decision in *Katz v. United States*,[33] in which it restricted the government's use of electronic surveillance in the domestic criminal context, but expressly reserved the question of national security surveillance.[34] In a concurring opinion, Justice White stated that national security surveillances, "should not require the warrant procedure . . . if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."[35]

The Congressional Response: 1968. Just one year later, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, which addressed the use of electronic intelligence gathering in the law enforcement

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[27] *Senate Staff Report*; see also *Socialist Workers Party*, 642 F. Supp. at 1390.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Senate Staff Report* (quoting Directive from President Lyndon Johnson to Heads of Agencies (June 30, 1965)).
[32] *Id*.
[33] 389 U.S. 347 (1967).
[34] *Katz*, 389 U.S. at 358.
[35] *Katz*, 389 U.S. at 364 (White, J., concurring).

context.[36] Interestingly, Title III of the Act contains language that specifically addressed the President's power to conduct national security surveillance. Title III states that:

> nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the *constitutional power* of the President to take such measures as he deems necessary to protect the nation against hostile actual or potential attack or other hostile acts of a foreign power, *to obtain foreign intelligence* information *deemed essential to the national security* of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."[37]

The Executive Exercise of Power: 1969-71. The Executive branch viewed Title III as an endorsement of the President's power and, as a matter of policy, considered the restrictions contained therein to apply only in situations that did not involve matters of national security.[38] In fact, Justice Department policy mirrored the language of the statute and permitted intelligence gathering on domestic targets in situations where the surveillance was: (1) necessary to protect the nation against actual or potential attack or any other hostile action of a foreign power; (2) necessary to obtain foreign intelligence information deemed essential to the security of the United States; (3) necessary to protect national security information against foreign intelligence activities; (4) necessary to protect the United States against the overthrow of the Government by force or other unlawful means; or (5) necessary to protect the United States against a clear or present danger to the structure or the existence of its Government.[39]

The Judicial Response: 1972. This provision became the central focus of the Supreme Court's 1972 decision in *United States v. United States District Court* (the *Keith* case).[40] In *Keith*, the Court held that Title III

[36] Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511.
[37] 18 U.S.C. § 2511 (3), *repealed by* Pub. L. No. 95-511, § 201(c) (emphasis added).
[38] *Senate Staff Report*.
[39] *Id*. (citing Letter from William Olson to Attorney General Elliot Richardson (undated)).
[40] 407 U.S. 297 (1972).

prohibited the Government from engaging in electronic intelligence gathering against a citizen of the U.S. who did not have a significant connection with a foreign power or any of its agents or agencies without a judicially sanctioned warrant.[41] The Court considered the language that Congress placed in Title III, which spoke to the President's constitutional power to obtain foreign intelligence, and concluded that in issuing this "expression of neutrality"[42] Congress "simply left presidential powers where it found them."[43]

Keith stands for the proposition that the President's power to gather foreign intelligence is broad. The Supreme Court drew a bright line between the President's power to "authorize electronic surveillance in internal [or domestic] security matters without prior judicial approval"[44] and his power to do so in matters concerning national security where a foreign power or an agent thereof has entered the United States.[45] While the court made it clear that it was not deciding the extent of the President's power to authorize electronic surveillance of U.S. citizens who act as agents of a foreign power, it did acknowledge that other procedures besides prior judicial approval of warrants may be "compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of the Government for intelligence information and the protected rights of our citizens."[46] *Keith* is the last time the Supreme Court has spoken on this issue.

The Executive Exercise of Power: 1973-77. In response to *Keith*, DOJ modified its policies to limit warrantless foreign intelligence gathering to situations where there is a "significant connection with a foreign power, its agents or agencies."[47] In making these determinations, the Department looked

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[41] *Id*. at 321-24.
[42] *Id*. at 308.
[43] *Id*. at 303.
[44] *Id*. at 299.
[45] *Id*. at 322.
[46] *Id*. at 322-23.
[47] *Senate Staff Report* (quoting Testimony of Deputy Assistant Attorney General Kevin Maroney, Hearings before the Senate Subcommittee on Administrative Practice and Procedure (June 29, 1972)) (The executive branch firmly believed that the President's power to authorize warrantless electronic surveillance on domestic foreign intelligence targets derived from the Constitution as a power that is:

> necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power; to obtain foreign intelligence deemed essential to the security of the nation; to protect national security information against foreign intelligence activities; or to obtain information certified as necessary for the conduct of foreign affairs matters important to the national security of the United States.

for "the presence of such factors as substantial financing, control by or active collaboration with a foreign government and agencies thereof in unlawful activities directed against the Government of the United States" which sufficiently satisfied "the Attorney General . . . that the subject of the surveillance is either assisting a foreign power or foreign-based political group, or plans unlawful activity."[48] This authority was left to the Attorney General who reviewed written requests, "set[ting] forth the relevant factual circumstances that justify the proposed surveillance [and the identity of] [b]oth the agency and the Presidential appointee initiating the request."[49]

Senate Staff Report (quoting Public Testimony of Attorney General Edward H. Levi testimony, Hearings before the Senate Committee on Intelligence Activities (November 6, 1975)).

[48] Senate Staff Report (quoting Letter from Attorney General Edward Levi to Senators Frank Church and Edward Kennedy (June 24, 1975)).

[49] *Id*.

IV. THE CURRENT LEGAL FRAMEWORK FOR GATHERING FOREIGN INTELLIGENCE ON DOMESTIC TARGETS.

Congress Attempts to Regulate the President's Power: 1978. After years of silence, the 95th Congress passed a law that established special procedures for the application, approval, and extension of orders authorizing the use of electronic intelligence gathering on domestic targets, including U.S. citizens, for foreign intelligence purposes.[50] This law, known as the Foreign Intelligence Surveillance Act of 1978 (FISA), allows the President to collect foreign intelligence on domestic targets upon showing that the target is the "agent of a foreign power."[51] Much of the debate surrounding FISA dealt with whether the President, in exercising his constitutional power on U.S. citizens, should have to satisfy a "'criminal standard,' i.e., an additional requirement that no American be a target unless that individual's activities can be shown to constitute a violation of United States criminal law."[52] The FISA statute contains no such "criminal standard" provisions.

Even though *Keith* eliminated the need for the President to secure a traditional judicially-sanctioned warrant in situations where there is a connection between a U.S. person and a foreign power, Congress nevertheless continued the prophylactic role of the courts by requiring the President, through the Attorney General, to appear before Article III judges and certify, on a case-by-case basis, that the "primary purpose" of his surveillance is to collect "foreign intelligence information"[53] and not criminal evidence.[54] Moreover, in cases involving U.S. persons, Congress requires the court to: (1) examine whether the President believes that "the target of the electronic surveillance is a foreign power or an agent of a foreign power;"[55] (2) ensure that "each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or an agent [thereof];"[56] and (3) determine whether "the information cannot be obtained through normal

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[50] 50 U.S.C. § 1801.
[51] *Id*.
[52] Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 809 (1989).
[53] 50 U.S.C. § 1801. ("Foreign intelligence information" means either: (1) "information that related to, and if concerning a U.S. person is necessary to, the ability of the U.S. to protect against: (A) actual or potential attack or other grave hostile acts (B) sabotage or international terrorism; and (C) clandestine intelligence activities by an intelligence service or network." 50 U.S.C. § 1801(e)(1) or (2) "information necessary to the national defense or the security or foreign affairs of the United States." 50 U.S.C. § 1801(e)(2)).
[54] *Id*.
[55] *In re*: Sealed Case, 310 F.3d at 722 (citing 50 U.S.C. § 1805(a)(3)(A)).
[56] *Id*. (citing 50 U.S.C. § 1805(a)(3)(B)).

investigative techniques."[57] Congress enforces this check on the President's power, by requiring the Chief Justice of the United States to designate seven district court judges to hear applications for, and grant orders approving, electronic surveillance anywhere within the United States.[58] Interestingly, the statute does not require the court to examine "the government's proposed use of that information."[59]

The FISA statute also gives the President broad emergency powers.[60] The Attorney General may authorize emergency surveillance in the absence of a judicial order if he or she determines that: "(1) an emergency situation exists; . . . and (2) the factual basis for issuance of a [judicial] order . . . exists."[61] Assuming these prerequisites are satisfied, the Attorney General may authorize the emergency employment of electronic surveillance on a domestic target as long as a FISA court judge is "informed . . . and an application [to employ surveillance equipment] . . . is made . . . not more than 72 hours after the Attorney General authorizes such surveillance."[62] More interesting is the fact that the statute does not penalize the President for failing to meet the standards for exercising his emergency power. FISA states that:

> in the event that such [emergency] application for approval is denied . . . no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, *legislative committee, or other authority of the United States, a State, or political subdivision thereof*, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, *except with the approval of the Attorney General* if the information

[57] *Id*. at 724 (citing 50 U.S.C. § 1804(a)(7)(E)) ("The definition of agent of a foreign power, if it pertains to a U.S. person . . . is closely tied to criminal activity" and "includes any person who 'knowingly engages in clandestine intelligence gathering activities . . . which activities involve or may involve a violation of the criminal statutes of the United States,' or 'knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor." *In re*: Sealed Case, 310 F.3d at 723 (citing 50 U.S.C. § 1801(b)(2)(A), (C)).
[58] 50 U.S.C. § 1801 et. seq.
[59] *In re*: Sealed Case, 310 F.3d at 724.
[60] 50 U.S.C. § 1805(f)
[61] *Id*.
[62] *Id*.

> indicates a *threat of death or serious bodily harm* to any person.[63]

In other words, in an "emergency," the President may unilaterally authorize domestic intelligence collections on U.S. persons without any FISA court participation beyond the required notification. Moreover, if the FISA court later denies the President's application, the President may still selectively reveal the contents of his collection effort as long as "the information indicates a threat of death or serious bodily harm to any person."[64] Alternatively, the President may, at his discretion, choose not to reveal that information to anyone, including Congress.

The Courts Refine the Foreign Intelligence Exception: 1980. Two years later, the Fourth Circuit decided a non-FISA case that substantially expanded the powers of the President in this area. In *United States v. Truong Dinh Hung*, [65] two men were convicted of espionage after government surveillance revealed they had transmitted classified information to the representatives of the government of the Socialist Republic of Vietnam. [66] The men challenged their convictions claiming, among other arguments, that their Fourth Amendment rights had been violated.[67] The first question the Fourth Circuit considered was whether the President had the authority to authorize foreign intelligence surveillance without a warrant even before FISA was enacted. Pointing to the Supreme Court's decision in *Keith*, the Fourth Circuit concluded that the executive branch's authority derived from its role as the "constitutional[ly] designated . . . pre-eminent authority in foreign affairs."[68]

Convinced that the Constitution vested this authority with the President, the court then considered the extent to which the President was constrained by the Fourth Amendment. Relying primarily on *Keith*, the court concluded that while the President's searches must be reasonable, there is no need to obtain a judicially sanctioned warrant in advance of the surveillance.[69] The court believed that this exception to the warrant requirement was critical to "the principle responsibility of the President for foreign affairs and

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[63] *Id*. (emphasis added).
[64] *Id*.
[65] 629 F.2d 908 (4th Cir. 1980); *cert. denied*, Truong Dinh Hung v. United States, 454 U.S. 1144 (1982) (*Truong* is a non-FISA related case where the underlying crime had been committed several years before the statute was enacted).
[66] *Truong* at 908 (the government's investigation included a number of techniques and was not limited to foreign intelligence surveillance).
[67] *Id*.
[68] *Id*. at 914 (citing First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)).
[69] *Id*. at 913.

concomitantly for foreign intelligence surveillance"[70] and warned that such a "requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operation."[71]

The court further determined that "the needs of the executive are so compelling in the area of foreign intelligence, unlike that in domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate' the President in carrying out his foreign affairs responsibilities."[72] The Fourth Circuit went on to say that "the courts should not require the executive to secure a warrant *each time* it conducts foreign intelligence surveillance."[73]

Finally, the Fourth Circuit articulated a test that the President could use to determine whether he was acting within the scope of his constitutional authority. The court explained that foreign intelligence surveillance on domestic targets is permissible when: (1) "the object of the search or the surveillance is a foreign power, its agent or collaborators,"[74] and (2) "the surveillance is conducted 'primarily' for foreign intelligence reasons."[75] In explaining the second prong of this exception, the court stated that the Government could have the alternative purpose of furthering a criminal investigation as long as that the primary purpose in instituting the surveillance is foreign intelligence gathering.[76]

While *Truon*g lent support for the proposition that foreign intelligence surveillance on domestic targets is a constitutionally permissible, the decision was handed down in the pre-FISA context. After *Truong*, the executive branch committed to following the special procedures that Congress outlined in FISA rather than assert the authority *Truong* provided. If Congress had not passed FISA, the President could have exercised his surveillance power using *Truong*'s precedent. Perhaps the biggest difference between the FISA process and *Truong* deals with the role of the courts. Under FISA, the judicial branch must give advance approval for surveillances, not unlike the procedures used to issue traditional warrants in the criminal context. This requirement is

[70] *Id*. at 914.
[71] *Id*. at 913.
[72] *Id*.
[73] *Id*. at 914 (emphasis added).
[74] *Id*. at 915 (citing Zweibon v. Mitchell, 516 F.2d 594, 613 n. 42 (D.C. Cir. 1975)) (applying the Fourth Amendment to a case involving surveillance of domestic organization having an effect on foreign relations but acting neither as the agent of, nor in collaboration with, a foreign power).
[75] *Id*. at 915.
[76] *Id*. at 915.

inconsistent with *Truong*, which appears to suggest that the executive branch is capable of ensuring that the standards of the foreign intelligence exception are met before conducting surveillance.

The Executive Exercise of Power: 1980-2000. In addition to expanding the role of the courts, FISA placed significant bureaucratic limitations on the executive branch's ability to share intelligence.[77] Since FISA required the President to disclose detailed information concerning any ongoing criminal investigation as well as the substance of any consultations between the FBI and federal prosecutors when seeking FISA court approval,[78] concerns grew that unfettered contact between law enforcement and intelligence officials might create a problem. As a result, prosecutors were warned not to advise intelligence officials in a way that could be viewed as taking "direction or control" of the intelligence investigation.[79] The end result was an interpretation of FISA that "chilled the substance of consultations between intelligence and law enforcement officials."[80] This reinforced to what is commonly referred to as the "wall" between the intelligence and law enforcement community.[81]

In 1995, Attorney General Reno issued a memorandum establishing minimization procedures that formalized the divide between intelligence and law enforcement officials within the Department of Justice.[82] These procedures prohibited the criminal division from "instruct[ing] the FBI on the operation, continuation, or expansion of FISA electronic surveillance or physical searches."[83] These procedures were aimed at "preserving the option of a criminal prosecution."[84] As a practical consequence, however, the Justice Department was required to police itself through a "chaperone requirement" that mandated the attendance of a member from the Office of Intelligence and

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[77] *See* The 9/11 Commission Report.
[78] William Zolla II, *The War at Home: Rising Tensions Between Our Civil Liberties and Our National Security*, CHICAGO BAR ASSOCIATION, 17 MAR CBAR 32, 34 (2003).
[79] Brief for the United States, In re: Sealed Case, on appeal from the United States Foreign Intelligence Surveillance Court (August 21, 2002) *available at* http://www.fas.org/irp/agency/doj/fisa/082102appeal.html (redacted copy, non-paginated) (last visited on July 26, 2005).
[80] *Id*.
[81] *See* MARK RIEBLING, WEDGE: FROM PEARL HARBOR TO 9/11: HOW THE SECRET WAR BETWEEN THE FBI AND THE CIA HAS ENDANGERED NATIONAL SECURITY (2002) (Riebling and other scholars go further, arguing that this intelligence "wall" existed many years prior to FISA and dates back as early as World War II).
[82] Memorandum from Attorney General Janet Reno to Assistant Attorney General, Criminal Division; Director, FBI; Counsel for Intelligence Policy; United States Attorneys (July 19, 1995).
[83] *Id*. at 2.
[84] *Id*.

Policy review at all meetings between the FBI and the Justice Department's Criminal Division on matters involving with foreign intelligence.[85]

The actual and perceived separation between the U.S. law enforcement and intelligence portions of the executive branch contributed to one of the largest executive branch failures in U.S. history. "Before 9/11, with the exception of one portion of the FBI, very little of the sprawling U.S. law enforcement community was engaged in countering terrorism. Moreover, law enforcement could be effective only after specific individuals were identified, a plot had formed, or an attack had already occurred."[86] It was not until after the events of September 11th had taken place that Congress realized how badly FISA's "primary purpose" test, among other things, had tied the hands of the executive branch.

The Congressional Response: 2001. Many of these bureaucratic obstacles have been eliminated by the passage of the USA PATRIOT ACT, which among other things, authorizes coordination between law enforcement and intelligence agents. In addition, the USA PATRIOT ACT has amended FISA in a way that only requires the President to certify that a "significant purpose" of his investigation is to collect foreign intelligence information. This language is a substantial departure from the traditional "primary purpose" language contained in FISA and discussed in *Truong*. This change provides evidence that Congress understands how the international war on terror has impacted the President's need to collect foreign intelligence on domestic targets and supports the hypothesis that the President may choose to combat foreign enemies using a variety of techniques including prosecution for domestic crimes.

The Judicial Response: 2002. In 2002, President Bush sought to have the FISA court eliminate many of the bureaucratic and procedural hurdles that had been established over time.[87] In the first-ever convening of the Foreign Intelligence Surveillance Court of Review, the Solicitor General argued that by passing the USA PATRIOT ACT, Congress intended to: (1) permit better communication between the law enforcement and intelligence communities; and (2) make it easier to obtain evidence for prosecution in national security crimes.[88] The court agreed that the constraints the FISA had

[85] *In re*: Sealed Case, 310 F.3d at 720 (describing the practical effects of FISA on law enforcement agencies).
[86] The 9/11 Commission Report at 82.
[87] *See In re*: Sealed Case, 310 F.3d 717.
[88] Brief for the United States, *In re*: Sealed Case.

placed on the President were not required by the Constitution.[89] In a veiled reference to *Truong*, the court also stated that the decision to free the President of FISA's constraints could be made, "without taking into account the president's inherent constitutional authority to conduct warrantless foreign intelligence surveillance," suggesting that the President's power may be broader than what the USA PATRIOT ACT allows. [90]

V. THE SOURCE AND SCOPE OF THE PRESIDENT'S POWER TO GATHER FOREIGN INTELLIGENCE ON DOMESTIC TARGETS.

The atrocities of September 11th changed the world both for the U.S. and the rest of the world. They marked the start of a new war where the enemy is a global network whose roots may extend to U.S. citizens, businesses, charities and other domestic targets. Many Americans would reject the idea of limiting the President's power to gather and distribute foreign intelligence on the battlefield. Equally offensive are constraints that hinder the President's ability to coordinate, gather and share intelligence about agents of a terrorist power operating inside the United States. Before September 11th, it was possible to separate the powers of President as Commander in Chief and chief law enforcement officer. Once the war on terrorism exposed the vulnerabilities of America's homeland, this paradigm was no longer possible. It became critical for America to achieve cohesion between its law enforcement and war-making components. The 9/11 Commission, itself, has recommended that "[i]nformation procedures should provide incentives for sharing, to restore a better balance between security and shared knowledge."[91]

The cited improvements of the USA PATRIOT ACT provide much needed relief and are consistent with the constitutional powers given to the President. Nevertheless, critics complain that these new USA PATRIOT ACT procedures, which have been adopted by the FISA Appeals Court of Review, give the President too much power. They are concerned that future decisions by Congress and the courts may "reduce the FISA court to a rubber stamp for the Justice Department, potentially eroding both privacy and the separation of powers."[92] These concerns seem to rest on the premise that the President's power to gather intelligence on domestic targets during wartime is somehow

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[89] *In re*: Sealed Case, 310 F.3d at 719-20.
[90] *Id*. at 746.
[91] The 9/11 Commission Report at 417.
[92] Recent Cases, *Foreign Intelligence Surveillance Court of Review Holds That Prosecutors May Spy on American Agents of Foreign Powers Without a Warrant*, 116 HARV. L. REV. 2246 (2003).

constitutionally limited. They are precipitated by fears that the President's power will be erroneously used against undeserving Americans.

It is true that the nature of intelligence is such that a domestic target's identity as a terrorist actor can never be fully assured. Intelligence is too circuitous to provide the assurances that the American public need in exchange for even the most *de minimus* decrease in their civil liberties. Perhaps these concerns explain why Congress originally drafted FISA to include a procedure similar to what is traditionally required for criminal warrants. Nevertheless, if the constitution gives the President the power to gather foreign intelligence on domestic targets during wartime, then he should be free to exercise that power without undue congressional restraint. As the Fourth Circuit in *Truong* stated, "the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance." [93] The next section will examine the constitutional source and scope of the President's power to gather foreign intelligence on domestic targets.

The Source of the President's Power. Before exploring the scope of the President's power, we must be convinced that such power exists. "The President's power, if any . . . must stem either from an act of Congress or from the Constitution itself." [94] Clearly, the power to gather foreign intelligence is not expressly enumerated in the Constitution. Therefore, the question remains whether this power: (1) can be constitutionally derived from the President's power as Commander-in-Chief, Chief Executive and the sole organ of foreign affairs; or (2) has been granted to the President by Congress. The power appears to come from both sources.

The President's power to gather foreign intelligence on domestic targets during wartime can be derived from the Constitution. Article II, which states that: (1) "[t]he executive Power shall be vested in a President . . . ;"[95] (2) that "he shall take Care that the Laws be faithfully executed;"[96] and (3) that he "shall be Commander in Chief of the Army and Navy of the United States"[97] presupposes that the President's power as Commander-in-Chief and chief law enforcement officer will overlap. The Constitution gives the

[93] *Truong*, 629 F.2d 908, 913 (citing New York Times Co. v. United States, 403 U.S. 713, 727-30 (1971) (Stewart, J., concurring); United States v. Belmont, 301 U.S. 324 (1937)).
[94] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).
[95] U.S. CONST. art. II, § 1, cl. 1.
[96] U.S. CONST. art. II, § 3.
[97] U.S. CONST. art. II, § 2, cl. 1.

President wide latitude in deciding whether to fight terrorism using troops or prosecutors and what methods of intelligence gathering they will use. Whereas conventional warfare historically required little, if any, participation from law enforcement, the war on terror requires full participation from both. Thus, the power to conduct foreign intelligence on U.S. persons, business and charities during wartime is both an exercise of the President's military power and his power to investigate crimes against the United States. This conclusion can be reached even without taking into additional constitutional powers given to the President to "conduct . . . the foreign policy of the United States in times of war and peace."[98]

The power of the President can also be said to derive from grants of congressional authority. According to *Youngstown*, if the Congress authorizes the President to gather foreign intelligence, then the proposition that the President can do so "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[99] Even before the USA PATRIOT ACT amendments, FISA authorized the President to gather intelligence on domestic targets under certain circumstances. In addition, Congress has historically granted a number of authorization bills for intelligence and law enforcement purposes. As demonstrated in the previous section, every Administration in modern history has relied on these authorizations to conduct intelligence on domestic targets in matters concerning the national security.

The Scope of the President's Power. Having shown that the President has the power to gather intelligence on domestic targets during wartime, the question becomes to what extent it can be limited by Congress. Just because Congress has not expressly authorized the President to conduct foreign intelligence on domestic targets without prior judicial consultation does not mean that the President does not have that authority. Further, the enactment of recent legislation closely related to this question evidences Congress's intent to give the President broader discretion than what was originally intended.

Prior to 1978, Congress had a long history of acknowledging and acquiescing to the President's power to conduct foreign intelligence on U.S. persons without a judicial warrant. While statutes like the Federal Communications Act of 1934, the National Security Act of 1947, and the

[98] *Truong*, 629 F.2d at 914 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).
[99] *Youngstown*, 343 U.S. at 637.

Omnibus Crime Control and Safe Streets Act of 1968 sought to reorganize the intelligence community and regulate electronic surveillance, none directly applied to the President's power to conduct foreign intelligence on domestic targets.[100] As discussed, various Presidents exercised their power with nothing more than approval from the Attorney General, yet Congress remained silent in the face of these surveillance decisions. In short, "[n]othing can be plainer than that Congress made a conscious choice of policy in a field full of perplexity and peculiarly within legislative responsibility for choice."[101]

When Congress eventually decided to regulate the President's power to gather foreign intelligence on domestic targets through FISA, it did not require the President to make a traditional probable cause showing prior to starting his foreign intelligence collection. Rather, as the Foreign Intelligence Court of Review stated, "Congress clearly intended a lesser showing of probable cause for these activities than that applicable to ordinary criminal cases."[102] Congress's decision to amend FISA through the USA PATRIOT ACT is constitutional notwithstanding the fact that it has expanded the President's power and dramatically reduced the functional purpose for the court's pre-surveillance role. When USA PATRIOT ACT was debated, Congress was attuned to the issues presented by modern-day international terrorists. After reevaluating the impact of the terrorist threat and the need to gather foreign intelligence on domestic targets, Congress made two decisions vis-à-vis the USA PATRIOT ACT that expanded the President's power. First, Congress clarified the intelligence exception to the warrant requirement, making it clear that prior laws prohibiting wiretapping and other forms of electronic surveillance are no impediment to the President's power to collect foreign intelligence on domestic targets.[103] More importantly, Congress also dramatically reduced the legal standard for approving applications.[104]

Congress's Power to Regulate. While Congress is free to reduce the pre-surveillance role of the Court, there are limits as to what it can do to increase it. While Congress may impose on the President's ability to investigate and prosecute crimes, it cannot unduly impede the President's

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[100] *See Keith*, 407 U.S. at 306.

[101] *Youngstown*, 343 U.S. at 602 (Frankfurter, J., concurring).

[102] *In re*: Sealed Case, 310 F.3d at 738 (Rather, Congress merely intended to develop an administrative standard that requires the President to show that: (1) the application which has been filed contains all statements and certifications, and (2) if the target is a U.S. person, the certification or certifications are not clearly erroneous on the basis of the statement made that: (a) the target is an agent of a foreign power, and (b) a 'significant purpose' of his investigation is to collect foreign intelligence information.)

[103] USA PATRIOT ACT § 204.

[104] USA PATRIOT ACT § 218.

ability to perform his constitutional duty if that duty has, in fact, been exclusively granted to him by the Constitution. The Supreme Court has, through *Katz* and its progeny,[105] specifically refrained from imposing the traditional warrant requirement on the President in matters involving the national security. The standard of probable cause required in the criminal context has been extensively written about and is not worth repeating. For our purposes, it is sufficient to say that the President's power to gather criminal intelligence requires judicial consent, which is not always granted. However, as *Keith* suggests, foreign intelligence surveillance is different and does not necessarily violate the Fourth Amendment if there are sufficient safeguards in place to render the surveillance reasonable.[106]

It is possible that legislation that imposes more than the traditional foreign intelligence requirement for domestic intelligence gathering during wartime could be considered congressional overreaching under the Constitution. As the Fourth Circuit stated in *Truong*, FISA does not "transport the Fourth Amendment warrant requirement unaltered into the foreign intelligence field."[107] While the statute requires executive officials to seek prior judicial approval absent an emergency, the judiciary, in those instances, works only to ensure that "the government is not clearly erroneous in believing that the information sought is the desired foreign intelligence information and that the information cannot be reasonable obtained by normal methods."[108] The court agreed that "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance."[109] Moreover, "it would be unwise for the judiciary, inexpert in foreign intelligence, to attempt to enunciate an equally elaborate structure for core foreign intelligence surveillance under the guise of a constitutional decision."[110]

VI. FINAL THOUGHTS

The inherent power of the President as Commander-in-Chief, chief law enforcement officer, and the sole organ of foreign affairs makes it clear

[105] *Katz*, 389 U.S. at 358, n. 23 (specifically reserving the question of whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in situations involving the national security).
[106] *Keith*, 407 U.S. at 322-23 (suggesting that surveillance of a foreign power may not require a judicial warrant if the search is reasonable).
[107] *Truong,* 629 F.2d at 915, n. 4.
[108] *Id*.
[109] *Id*. at 914.
[110] *Id*. at 915, n. 4.

that he has broad power to redirect his national security forces inward. Cleary the academic observations made in this paper would be different if it had been determined that the Constitution requires the Fourth Amendment's probable cause requirement to transported into the foreign intelligence field in its entirety [111] or if Congress had long sought to specifically prohibit the President's power through legislation. Perhaps Congress and the courts have drawn comfort from the protections that are already afforded to domestic targets that are subjected to criminal prosecution. [112] In any event, the President's power to conduct defensive wars and engage in foreign affairs is broad and necessarily includes the power to collect foreign intelligence on U.S. persons during wartime without undue restraint from Congress. Of course, any President who may, in the future, seek to expand his power beyond what Congress has provided in the USA PATRIOT ACT should be made aware of the social, political, economic, and constitutional impact of his or her decision. It is unlikely that Congress, the Judiciary, or the American public will allow the pendulum to swing much further than what the USA PATRIOT ACT allows. At some point, the paradigm will undoubtedly shift back.

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[111] *Id*. at 915.

[112] In addition to the other constitutional protections afforded to these individuals, "FISA permits aggrieved persons to seek suppression of evidence on the ground that it was unlawfully acquired or that the surveillance was not conducted in conformity with the order of authorization." United States v Cavanagh, 807 F.2d 787, 789 (Cal. 9th Cir. 1987) (holding that there was no error in denying suppression of telephone conversation obtained in government wiretap of facility connected with foreign power, and which depicts defendant offering to sell intelligence secrets to a foreign power, since wiretap was properly authorized and conducted pursuant to FISA). This protection is extended to any a party to an intercepted communication. *See* United States v. Belfield, 692 F.2d 141, 143 (D.C. Cir. 1982) (party "incidentally overheard during the course of surveillance of another target" is an aggrieved party). These "aggrieved persons" have standing to challenge the government's compliance with the statute.

BOOK REVIEW
INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS
By Mary Ellen O'Connell
2005 Foundation Press, New York, NY, USA

Captain Stephen R. Sarnoski, JAGC, USNR*

Perhaps more today than at any time in the last fifty years the rules and conventions surrounding the use of force during international armed conflict are being tested and questioned by international scholars, political leaders, and military practitioners alike. The onset of the Global War on Terror following the tragic events of September 11, 2001 has poignantly demonstrated that existing paradigms concerning the use of force during international armed conflict must be re-examined in light of this emerging threat to international peace and security and where necessary adapted to meet the realities of war in the 21st century. The range of issues, however, transcends the boundary of any single military operation, even one so broadly defined as the Global War on Terror. Whether it is over concerns regarding the introduction of regional peace-keeping forces into the West-African state of Liberia, the humanitarian crises in Rwanda, the Balkans, and the Sudan, the construction of a wall through the occupied Palestinian territory by Israel, or the detention and interrogation of suspected members of Al Qaeda by the United States in the Middle East, the body of "international humanitarian law" -- referring to all law relevant to the application of force during international conflicts -- is today both complex and rapidly growing.

In 1992 French Lieutenant-General Bernard Janvier, the Commander of the United Nations Protection Force (UNPROFOR) in the Former Republic of Yugoslavia, aptly observed that, "[o]ne cannot make war and peace at the

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same time."[1] Oddly enough, however, the overarching objective of the former is preservation of the latter; even so, the means by which peace can be achieved through war are not unlimited. Far from static throughout history, international humanitarian law has developed and continues to develop around two basic concepts designed to curtail the destructive scope and intensity of armed conflict -- the principles of necessity and proportionality. An understanding of the development and evolution of these two principles throughout history is essential to an appreciation for international humanitarian law as it currently exists as well as for an understanding of how and to what extent this body of law is and ought to be changed.

In her recently published book *International Law and the Use of Force: Cases and Materials,* Professor Mary Ellen O'Connell moves beyond the classic concepts of traditional armed conflict and considers all uses of force governed by international law including conflicts with terrorists and the efforts of insurgents to oust occupying powers. She begins by discussing what is meant by the "use of force" and how that term differs from "war," "armed conflict," and other related concepts in international law. She then discusses several case studies -- the 1991 Persian Gulf War and the 2003 Iraq War -- using the facts of these conflicts to support later discussions in the book and to demonstrate the role of law in two actual conflicts. Next the author considers the role of law regarding the use of force in more depth. In so doing she focuses upon several comments from such well-known historical luminaries as Carl von Clausewitz as well as more contemporary writers such as Thomas Franck, Louis Henkin, and Sir Christopher Greenwood, juxtaposing a series of divergent thoughts and views upon the subject. Here the author also introduces the reader to the major categories of law regarding the use of force: *jus ad bellum,* the body of law governing the decision to resort to force, and *jus in bello,* the body of law governing the conduct of hostilities. She correctly observes that although legally separate the two bodies of law are inextricably related such that it is not always easy to distinguish between the two.

In the succeeding chapters the author guides the reader through the historical development of international law concerning the resort to use of force (*jus ad bellum*). From the early Christian doctrine of "just war" introduced by St. Augustine in the third and fourth centuries and further developed by St. Thomas Aquinas in the thirteenth century through the 1648 Treaty of Westphalia and the Hague and Geneva Conventions of the late

[1] United Nations, General Assembly, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica,* ¶ 51 (15 November 1999), consulted online on April 29, 2005 at http://www.un.org/peace/srebrenica.pdf.

nineteenth and early twentieth Centuries, the League of Nations, and the Post-World War II Nuremberg Tribunals, she traces the historical evolution of international law and the use of force. The author then focuses on contemporary interpretations of the law. Using excerpts from the United Nations Charter, Security Council Resolutions and decisions of the International Court of Justice, she creates a framework through which the reader is better able to understand the application of modern international law to actual events. As a part of this framework the author dallies briefly with the 1949 Third Geneva Convention Relative to Prisoners of War and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Here the author introduces the principle of distinction -- the requirement to distinguish between civilians and combatants in the use of force -- as perhaps the third major concept upon which modern international humanitarian law is founded. The author then fleshes out the structure of the law using insightful commentary from contemporary writers on such controversial topics as the use of force by third-party states to suppress internal conflicts at the request of a beleaguered government and to address humanitarian crises in such cases where an invitation to do so is not so clearly forthcoming. Professor O'Connell deals with the thorny question of what rights are enjoyed by persons detained as combatants -- particularly as this question applies to the ongoing Iraq War. The author includes excerpts from the recent decision of the Supreme Court of the United States in the case of *Hamdi v. Rumsfeld* (2004), regarding the detention of a U.S. citizen as an enemy combatant. She also includes in the discussion the 2002 memorandum of William J. Haynes II, General Counsel of the Department of Defense regarding the identity of and authority to detain enemy combatants in the Global War on Terror. Additionally, the author discusses problems concerning the permissible limits of interrogation and treatment with regard to persons detained as prisoners of war, illegal enemy combatants, and civilian detainees.

In Part III of her book dealing with contemporary international law and the use of force Professor O'Connell examines the concept of self defense in some detail, illustrating the legal principles presented by reference to authoritative opinions on the subject from the International Court of Justice in the *Corfu Channel Case* (1949), the case regarding *Military and Paramilitary Activities of the United States In and Against Nicaragua* (1986), and the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996), among others. The author points out the diversity of opinions among scholars regarding the applicability of the right of self-defense under Article 51 of the UN Charter in circumstances where an armed attack has not yet occurred but appears to be imminent. Whereas some argue that there is no right of self-defense unless an armed attack has actually commenced, others

argue that the right of self-defense is implicated in circumstances where an armed attack is "imminent" or where a state has committed itself to an armed attack in an "ostensibly irrevocable way." Finally, the author analyzes the evolving role of the United Nations in peacekeeping and peace enforcement and explores the increasing responsibility of regional organizations and collective action in this area.

Lastly, the author provides valuable insight concerning the future development of international law on the use of force. She offers the thoughts of contemporary international legal analysts on the road ahead with regard to both *jus ad bellum* and *jus in bello*. Professor O'Connell observes that as a result of recent experiences the future of international law on the use of force may well see an increasing convergence of the law between these two related disciplines around the concepts of necessity and proportionality, resulting in greater restrictions on both the resort to force and the conduct of hostilities.

International Law and the Use of Force: Cases and Materials is a concise, well-organized summary of the history and development of modern international humanitarian law regarding the use of force. More than this, however, the author unabashedly raises difficult yet important questions concerning contemporary applications of the law and leaves the reader to consider how best to resolve these questions in the context of actual events. The book does not pretend to provide a comprehensive rendition of the rules, treaties, and conventions of international law regarding the use of force. More importantly it attempts to provide the reader with an understanding of the basic legal concepts which form the core of these rules. The author recognizes that it is not enough for one who desires a true understanding of international law on the use of force to simply read and understand the existing rules. The body of international law on the use of force is a rapidly evolving discipline, mastery of which requires more than rote memorization of contemporary formulae. The reader who desires a full appreciation of not only international law on the use of force as it exists today, but also for how and why it will evolve in the years to come, is well-advised to study this text in depth, and to consider the questions and problems raised by the author at the conclusion of each chapter. In this way, the reader will be better prepared to appreciate the potential pitfalls and the difficulty of decision making in this unforgiving area of international legal practice. This book is a valuable addition to the library of novice and experienced academicians, political leaders, and military practitioners who seek a better understanding of when and how to use force in the context of 21st century international armed conflict.

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