

# THE AIR FORCE LAW REVIEW



## ARTICLES

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*Earl Warren, Chief Justice of the United States Supreme Court*

Introduction by *Major General Jack L. Rives*

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### PUTATIVE FATHER REGISTRY DEADLINES AND THE SERVICEMEMBERS CIVIL RELIEF ACT

*Mr. Erik L. Smith*

## THE AIR FORCE LAW REVIEW

AFPAM 51-106

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Cite this Law Review as 60 A.F. L. REV. (page number) (2007).

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Paid subscriptions to the Air Force Law Review are available from the Superintendent of Documents, U.S. Government Printing Office, Stop IDCC, Washington DC 20402.

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VOL. 60

2007

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# THE AIR FORCE LAW REVIEW

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INTRODUCTION: CHIEF JUSTICE WARREN ON  
THE BILL OF RIGHTS AND THE MILITARY

*MAJOR GENERAL JACK L. RIVES*  
*THE JUDGE ADVOCATE GENERAL OF THE AIR FORCE*

Forty-five years ago, United States Supreme Court Chief Justice Earl Warren delivered a remarkable lecture at the New York University Law Center.<sup>1</sup> He addressed the interplay between the Bill of Rights and the United States military, focusing on the balance between Constitutional protections and the sometimes competing considerations of national security. When he delivered his lecture, America was entrenched in the early years of the Cold War struggle. Today's challenges make this an apt time to review Chief Justice Warren's remarks.

We are grateful to the staff of the *New York University Law Review* for their gracious permission to reprint the lecture in the pages that follow. The lecture contains many memorable phrases and provides a superb overview of this important issue. As Chief Justice Warren noted years ago, the relationship of the Bill of Rights to the military has "rapidly assumed increasing importance because of changing domestic and world conditions."<sup>2</sup> Through the years, the tension between our free society's responsibility to maintain both the safety and the personal liberties of its people has remained a vibrant issue.

In the aftermath of the September 11, 2001 attacks on this Nation, the balance of Constitutional protections and national security interests has generated substantial debate. Consider, for example, the treatment and interrogation methods of enemy combatants and detainees; the rendition of suspected terrorists; and the National Security Agency's warrantless Terrorist Surveillance Program.

The men and women of our JAG Corps are making significant contributions during this historic period. We must heed the advice of Chief Justice Warren and be especially vigilant to "the day-to-day job of upholding the Constitution."<sup>3</sup>

In his lecture, Chief Justice Warren discusses a basic set of principles that has guided the Supreme Court in the resolution of cases involving the exercise of military power: subordination of the military

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<sup>1</sup> The lecture, entitled *The Bill of Rights and the Military*, was delivered on February 1, 1962, and first reported in the *New York University Law Review*. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962). Chief Justice Warren's was the third in a series of lectures addressing the role of the Bill of Rights in contemporary American life. See *infra* at 6 n.1,2.

<sup>2</sup> *Infra* at 6.

<sup>3</sup> *Infra* at 26.

to civil authority;<sup>4</sup> the fact that military members “may not be stripped of basic rights simply because they have doffed their civilian clothes”;<sup>5</sup> and the deference afforded claims of military necessity in times of war.<sup>6</sup>

While much has changed since Chief Justice Warren’s lecture, his basic construct for resolving disputes over the exercise of military power remains valid. Today, there are many sharp debates between the Executive and Legislative branches concerning the Constitutional division of authority over the military – but no one doubts civilian supremacy over the military.

Concerning the military’s treatment of its own personnel, Chief Justice Warren highlighted the establishment of the United States Court of Appeals for the Armed Forces<sup>7</sup> along with the creation of the Uniform Code of Military Justice as Congressional efforts to “insure that the military justice system is administered in accord with the demands of due process.”<sup>8</sup> Today, our military justice system provides protections above and beyond those afforded in the civilian criminal system (such as broader discovery obligations on the part of the government;<sup>9</sup> equal access to witnesses;<sup>10</sup> unparalleled opportunities for clemency;<sup>11</sup> and more frequent Supreme Court review of military cases;<sup>12</sup> to name a few<sup>13</sup>).

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<sup>4</sup> Chief Justice Warren described civilian supremacy as “an essential constituent of the fabric of our political life.” *Infra* at 10.

<sup>5</sup> *Infra* at 12.

<sup>6</sup> *Infra* at 15-16.

<sup>7</sup> Then the Court of Military Appeals. *See infra* at 12.

<sup>8</sup> *Id.*

<sup>9</sup> *See* MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES, R.C.M. 701(a) (2005).

<sup>10</sup> *See id.*, R.C.M. 701(e).

<sup>11</sup> *See id.*, R.C.M. 1105 (concerning post-trial matters submitted by the accused), 1107 (concerning action by the convening authority), 1108 (concerning suspension and remission of execution of sentence).

<sup>12</sup> *See id.*, R.C.M. 1205 (identifying cases subject to review by the Supreme Court); *see also* United States v. Scheffer, 523 U.S. 303 (1998) (concerning exclusion of polygraph results in courts-martial); Loving v. United States, 517 U.S. 748 (1996) (addressing death penalty procedures in courts-martial); Weiss v. United States, 510 U.S. 163 (1994) (involving the appointment of military judges).

<sup>13</sup> Within several years of Chief Justice Warren’s address, the Supreme Court seemed dismissive of the military justice system’s capacity to safeguard servicemembers’ constitutional rights. *See* O’Callahan v. Parker, 395 U.S. 258, 265 (1969), (stating military courts are designed to preserve military discipline; are incapable of upholding service members’ constitutional rights; and, therefore, lack jurisdiction over non-military crimes servicemember committed off-post while on pass) *overruled by* United States v. Solorio, 483 U.S. 669 (1987); Relford v. Commandant, United States Disciplinary Barracks, 401 U.S. 355, 363 (1971) (elaborating on the “service-connected” test of *O’Callahan* and commenting that “military courts, of necessity, are not impartial weighers of justice”). However, since *Relford* the Court has expressed increasing confidence in the fairness of the military justice system. *See* Parker v. Levy, 417 U.S. 733, 758-59 (1974) (finding UCMJ Articles 133 and 134 neither unconstitutionally vague nor overbroad); Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (“[I]t must

The final principle Chief Justice Warren identified – judicial deference to claims of military necessity – has received considerable attention in recent years. When he reviewed the Court’s scrutiny of “attempts of our civilian Government to extend military authority into other areas,”<sup>14</sup> the Chief Justice contrasted the Court’s tendency to defer to claims of military necessity during wartime with the more active judicial role during what he called the “recent years of peacetime tension.”<sup>15</sup> The World War II-era cases of *Hirabayashi v. United States*<sup>16</sup> and *Korematsu v. United States*,<sup>17</sup> sustained the detention of Japanese nationals and American citizens of Japanese descent living in the United States. In contrast, the Eisenhower-era case of *Reid v. Covert*<sup>18</sup> rejected the extension of court-martial jurisdiction over civilian dependents and employees of the Armed Forces overseas. In his lecture, Chief Justice Warren concluded that “[w]hile situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom.”<sup>19</sup>

These cases have modern-day parallels in the litigation arising out of the detainment program and whatever litigation may arise from the recent amendment to the Uniform Code of Military Justice (UCMJ) allowing for prosecution by courts-martial of civilians during contingency operations.<sup>20</sup> There are, of course, differences: unlike the interned Japanese, the detainees at Guantanamo Bay have been accused

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be assumed that the military court system will vindicate servicemen’s constitutional rights.”); *Solorio v. United States*, 483 U.S. 669 (1987) (overruling the *O’Callahan* “service-connected” test for jurisdiction); *Weiss v. United States*, 510 U.S. 163, 178-79 (1994) (finding the UCMJ and associated regulations insulate military judges from command influence and “sufficiently preserve judicial impartiality so as to satisfy the Due Process Clause”); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2770 (2006) (holding out court-martial procedures as the standard against which to measure the fairness of military commissions and restating its “expectation that the military court system established by Congress – with its substantial procedural protections and provision for appellate review by independent civilian judges – ‘will vindicate servicemen’s constitutional rights’” (quoting *Councilman*, 420 U.S. at 758)). And see generally Carr, John A., *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 43 A.F.L. Rev. 303 (1998).

<sup>14</sup> *Infra* at 15.

<sup>15</sup> *Infra* at 18.

<sup>16</sup> 320 U.S. 81 (1943).

<sup>17</sup> 323 U.S. 214 (1944).

<sup>18</sup> 354 U.S. 1 (1957).

<sup>19</sup> *Infra* at 21.

<sup>20</sup> The apparent purpose of the change is to extend UCMJ jurisdiction to contractor employees during contingency operations. Congress amended Article 2(a)(10), UCMJ, as part of the FY 2007 National Defense Authorization Act, to subject “persons serving with or accompanying an armed force in the field” to UCMJ jurisdiction when accompanying the Armed Forces in contingency operations, while UCMJ had been limited to a time of war.



of taking action against America and its allies; and, unlike the civilian court-martialed in the 1950s, the civilian contractors now subject to UCMJ jurisdiction frequently fulfill traditional military roles.

The nature of today's conflicts may lead to an expansive interpretation of military authority and jurisdiction under the Constitution. Nevertheless, we must be mindful of Chief Justice Warren's warning that while the America of 1962 faced a precarious peace, the America of 1787 also faced difficult problems. Nonetheless, "our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights."<sup>21</sup>

The same is true today. No one should conclude our Constitutional guarantees are merely the products of a bygone era. Chief Justice Warren quotes President Lincoln, who asked: "[Is] it possible to lose the nation and yet preserve the Constitution?"<sup>22</sup> Chief Justice Warren provides the timeless answer: "[o]ur Constitution and Nation are one. Neither can exist without the other."<sup>23</sup>

Members of the JAG Corps are known for doing the right things for the right reasons. In this critical area, we must continue to formulate and advocate approaches that preserve the Constitutional balance, assuring a strong and effective national security establishment while protecting the individual freedoms that have made this Nation great.

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<sup>21</sup> *Infra* at 17.

<sup>22</sup> *Infra* at 24.

<sup>23</sup> *Id.*

# THE BILL OF RIGHTS AND THE MILITARY\*

EARL WARREN

**I**T IS almost a commonplace to say that free government is on trial for its life. But it is the truth. And it has been so throughout history. What is almost as certain: It will probably be true throughout the foreseeable future. Why should this be so? Why is it that, over the centuries of world history, the right to liberty that our Declaration of Independence declares to be "inalienable" has been more often abridged than enforced?

One important reason, surely, is that the members of a free society are called upon to bear an extraordinarily heavy responsibility, for such a society is based upon the reciprocal self-imposed discipline of both the governed and their government. Many nations in the past have attempted to develop democratic institutions, only to lose them when either the people or their government lapsed from the rigorous self-control that is essential to the maintenance of a proper relation between freedom and order. Such failures have produced the totalitarianism or the anarchy that, however masked, are the twin mortal enemies of an ordered liberty.

Our forebears, well understanding this problem, sought to solve it in unique fashion by incorporating the concept of mutual restraint into our Nation's basic Charter. In the body of our Constitution, the Founding Fathers insured that the Government would have the power necessary to govern. Most of them felt that the self-discipline basic to a democratic government of delegated powers was implicit in that document in the light of our Anglo-Saxon heritage. But our people wanted explicit assurances. The Bill of Rights was the result.

This act of political creation was a remarkable beginning. It was only that, of course, for every generation of Americans must preserve its own freedoms. In so doing, we must turn time and again to the Bill of Rights, for it is that document that solemnly sets forth the political consensus that is our heritage. Nor should we confine ourselves to examining the diverse, complicated, and sometimes subordinate issues that arise in the day-to-day application of the Bill of Rights. It is perhaps more important that we seek to understand in its fullness the nature of the spirit of liberty that gave that document its birth.

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Earl Warren is Chief Justice of the United States.

\* This article was delivered as the third James Madison Lecture at the New York University Law Center on February 1, 1962.

Thus it is in keeping with the high purposes of this great University that its School of Law sponsor a series of lectures emphasizing the role of the Bill of Rights in contemporary American life. And it is particularly appropriate, after the splendid lectures of Mr. Justice Black<sup>1</sup> and Mr. Justice Brennan<sup>2</sup> on the relationship of the Bill of Rights to the Federal and State Governments, respectively, that you should delegate to someone the task of discussing the relationship of the Bill of Rights to the military establishment. This is a relationship that, perhaps more than any other, has rapidly assumed increasing importance because of changing domestic and world conditions. I am honored to undertake the assignment, not because I claim any expertise in the field, but because I want to cooperate with you in your contribution to the cause of preserving the spirit as well as the letter of the Bill of Rights.

Determining the proper role to be assigned to the military in a democratic society has been a troublesome problem for every nation that has aspired to a free political life. The military establishment is, of course, a necessary organ of government; but the reach of its power must be carefully limited lest the delicate balance between freedom and order be upset. The maintenance of the balance is made more difficult by the fact that while the military serves the vital function of preserving the existence of the nation, it is, at the same time, the one element of government that exercises a type of authority not easily assimilated in a free society.

The critical importance of achieving a proper accommodation is apparent when one considers the corrosive effect upon liberty of exaggerated military power. In the last analysis, it is the military—or at least a militant organization of power—that dominates life in totalitarian countries regardless of their nominal political arrangements. This is true, moreover, not only with respect to Iron Curtain countries, but also with respect to many countries that have all of the formal trappings of constitutional democracy.

Not infrequently in the course of its history the Supreme Court has been called upon to decide issues that bear directly upon the relationship between action taken in the name of the military and the protected freedoms of the Bill of Rights. I would like to discuss here some of the principal factors that have shaped the Court's response. From a broad perspective, it may be said that the questions raised in these cases are all variants of the same fundamental problem:

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1. Black, *The Bill of Rights*, 35 N.Y.U.L. Rev. 865 (1960).

2. Brennan, *The Bill of Rights and the States*, 36 N.Y.U.L. Rev. 761 (1961).

Whether the disputed exercise of power is compatible with preservation of the freedoms intended to be insulated by the Bill of Rights.

I believe it is reasonably clear that the Court, in cases involving a substantial claim that protected freedoms have been infringed in the name of military requirements, has consistently recognized the relevance of a basic group of principles. For one, of course, the Court has adhered to its mandate to safeguard freedom from excessive encroachment by governmental authority. In these cases, the Court's approach is reinforced by the American tradition of the separation of the military establishment from, and its subordination to, civil authority. On the other hand, the action in question is generally defended in the name of military necessity, or, to put it another way, in the name of national survival. I suggest that it is possible to discern in the Court's decisions a reasonably consistent pattern for the resolution of these competing claims, and more, that this pattern furnishes a sound guide for the future. Moreover, these decisions reveal, I believe, that while the judiciary plays an important role in this area, it is subject to certain significant limitations, with the result that other organs of government and the people themselves must bear a most heavy responsibility.

Before turning to some of the keystone decisions of the Court, I think it desirable to consider for a moment the principle of separation and subordination of the military establishment, for it is this principle that contributes in a vital way to a resolution of the problems engendered by the existence of a military establishment in a free society.

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. To strangers this might seem odd, since our country was born in war. It was the military that, under almost unbearable conditions, carried the burden of the Revolution and made possible our existence as a Nation.

But the people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military, that he had quartered troops among them in times of peace, and that through his

mercenaries he had committed other cruelties. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington's qualities of leadership and, above all, his abiding respect for civil authority.<sup>3</sup> This trait was probably best epitomized when, just prior to the War's end, some of his officers urged Washington to establish a monarchy, with himself at its head. He not only turned a deaf ear to their blandishments, but his reply, called by historian Edward Channing "possibly, the grandest single thing in his whole career,"<sup>4</sup> stated that nothing had given him more painful sensations than the information that such notions existed in the army, and that he thought their proposal "big with the greatest mischiefs that can befall my Country."<sup>5</sup>

Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution. Distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly. Their viewpoint is well summarized in the language of James Madison, whose name we honor in these lectures:

The veteran legions of Rome were an overmatch for the undisciplined valor of all other nations, and rendered her the mistress of the world. Not the less true is it, that the liberties of Rome proved the final victim of her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale it has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation will combine all these considerations; and, whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing both the necessity and the danger of resorting to one which may be inauspicious to its liberties.<sup>6</sup>

Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution. The Presi-

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3. 5 Freeman, *George Washington* 477 (1952).

4. 3 Channing, *A History of the United States* 376 (1912).

5. 24 Writings of Washington 272 (Fitzpatrick ed. 1938).

6. *The Federalist* No. 41, at 251 (Lodge ed. 1888) (Madison).

dent was made the Commander-in-Chief of the armed forces. But Congress was given the power to provide for the common defense, to declare war, to make rules for the Government and regulation of the land and naval forces, and to raise and support armies, with the added precaution that no appropriation could be made for the latter purpose for longer than two years at a time—as an antidote to a standing army. Further, provision was made for organizing and calling forth the state militia to execute the laws of the Nation in times of emergency.

Despite these safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had “effected to render the military independent and superior to the civil power.” They were reluctant to ratify the Constitution without further assurances, and thus we find in the Bill of Rights Amendments 2 and 3, specifically authorizing a decentralized militia, guaranteeing the right of the people to keep and bear arms, and prohibiting the quartering of troops in any house in time of peace without the consent of the owner. Other Amendments guarantee the right of the people to assemble, to be secure in their homes against unreasonable searches and seizures, and in criminal cases to be accorded a speedy and public trial by an impartial jury after indictment in the district and state wherein the crime was committed. The only exceptions made to these civilian trial procedures are for cases arising in the land and naval forces. Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders’ determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.<sup>7</sup>

Civil supremacy has consistently been the goal of our Government from colonial days to these. As late as 1947, when the Department of Defense was established, Congress specifically provided for a civilian chief officer. And when President Truman asked the Congress for an amendment to make an exception for a soldier and statesman as great as the late George C. Marshall, serious debate followed before the Act was modified to enable him to become Secre-

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7. See, e.g., Pinkney’s recommendations to the Federal Convention, 2 Records of the Federal Convention 341 (Farrand ed. 1911), and the discussion by Mason and Madison, *id.* at 617; Resolutions on Ratification of the Constitution by the States of Massachusetts, New Hampshire, New York and Virginia, reprinted in Documents Illustrative of Formation of the Union of American States, H.R. Doc. No. 398, 69th Cong., 1st Sess. 1018-20, 1024-44 (1927).

tary of Defense, and then only by a small majority of the total membership of the House and less than half of the Senate.<sup>8</sup> Those who opposed the amendment often expressed their high regard for General Marshall, but made known their fears concerning any deviation, even though temporary, from our traditional subordination of military to civil power.<sup>9</sup>

The history of our country does not indicate that there has ever been a widespread desire to change the relationship between the civil government and the military; and it can be fairly said that, with minor exceptions, military men throughout our history have not only recognized and accepted this relationship in the spirit of the Constitution, but that they have also cheerfully cooperated in preserving it.

Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life.

But sometimes competing with this principle—and with the “Thou Shalt Nots” of the Bill of Rights—is the claim of military necessity. Where such a conflict is asserted before the Court, the basic problem has been, as I have indicated, to determine whether and how these competing claims may be resolved in the framework of a lawsuit.

Cases of this nature appear to me to be divisible into three broad categories. The first involves questions concerning the military establishment's treatment of persons who are concededly subject to military authority—what may be termed the vertical reach of the Bill of Rights within the military. These questions have been dealt with quite differently than the second category of disputes, involving what may be called the horizontal reach of the Bill of Rights. Cases of this type pose principally the question whether the complaining party is a proper subject of military authority. Finally, there are cases which do not, strictly speaking, involve the action of the military, but rather the action of other government agencies taken in the name of military necessity.

So far as the relationship of the military to its own personnel is concerned, the basic attitude of the Court has been that the latter's jurisdiction is most limited. Thus, the Supreme Court has adhered

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8. The vote in the House was for: 220, against: 105, not voting: 104. In the Senate the vote was for: 47, against: 21, not voting: 28. 96 Cong. Rec. 14931, 14973 (1950).

9. See, e.g., Remarks of Representatives Wolverton and Hoffman and Senators Watkins and Cain, 96 Cong. Rec. 14835, 14919, 15177, A6561 (1950).

consistently to the 1863 holding of *Ex parte Vallandigham*<sup>10</sup> that it lacks jurisdiction to review by certiorari the decisions of military courts. The cases in which the Court has ordered the release of persons convicted by courts martial have, to date, been limited to instances in which it found lack of military jurisdiction over the person so tried, using the term "jurisdiction" in its narrowest sense. That is, they were all cases in which the defendant was found to be such that he was not constitutionally, or statutorily, amenable to military justice. Such was the classic formulation of the relation between civil courts and courts martial as expressed in *Dynes v. Hoover*,<sup>11</sup> decided in 1857.

This "hands off" attitude has strong historical support, of course. While I cannot here explore the matter completely, there is also no necessity to do so, since it is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

However, the obvious reason is not always the most important one. I suppose it cannot be said that the courts of today are more knowledgeable about the requirements of military discipline than the courts in the early days of the Republic. Nevertheless, events quite unrelated to the expertise of the judiciary have required a modification in the traditional theory of the autonomy of military authority.

These events can be expressed very simply in numerical terms. A few months after Washington's first inauguration, our army numbered a mere 672 of the 840 authorized by Congress.<sup>12</sup> Today, in dramatic contrast, the situation is this: Our armed forces number two and a half million;<sup>13</sup> every resident male is a potential member of the

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10. 68 U.S. (1 Wall.) 243 (1863).

11. 61 U.S. (20 How.) 65 (1857).

12. Report of Secretary of War Knox to the Congress on the Military Force in 1789, communicated to the Senate on August 10, 1789, 1 American State Papers—Military Affairs No. 1. At the time of the Constitutional Convention, consideration was given to limiting the size of the National Army for all time to a few thousand men, through express constitutional provision. 2 Records of the Federal Convention 323, 329, 330, 616-17 (Farrand ed. 1911).

13. Total strength of the armed forces on November 30, 1961, was estimated to be 2,780,975 by the Directorate of Statistical Services, Office of the Secretary of Defense, Pamphlet 22.1 (Dec. 20, 1961).



peacetime armed forces; such service may occupy a minimum of four per cent of the adult life of the average American male reaching draft age; reserve obligations extend over ten per cent of such a person's life;<sup>14</sup> and veterans are numbered in excess of twenty-two and a half million.<sup>15</sup> When the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.

Thus it was hardly surprising to find that, in 1953, the Supreme Court indicated in *Burns v. Wilson*<sup>16</sup> that court martial proceedings could be challenged through habeas corpus actions brought in civil courts, if those proceedings had denied the defendant fundamental rights. The various opinions of the members of the Court in *Burns* are not, perhaps, as clear on this point as they might be. Nevertheless, I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.

Despite *Burns*, however, it could hardly be expected that the regular federal judiciary would play a large role in regulating the military's treatment of its own personnel. The considerations militating against such intervention remain strong. Consequently, more important than *Burns* from a practical point of view was the action in 1951 of another guardian of the Bill of Rights, Congress, in enacting the Uniform Code of Military Justice and in establishing the Court of Military Appeals as a sort of civilian "Supreme Court" of the military.<sup>17</sup> The Code represents a diligent effort by Congress to insure that military justice is administered in accord with the demands of due process. Attesting to its success is the fact that since 1951 the number of habeas corpus petitions alleging a lack of fairness in courts martial has been quite insubstantial.<sup>18</sup> Moreover, I know of no case

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14. The Universal Military Training and Service Act of 1951, §§ 4(b), (d), establishes an active duty tour of two years and a reserve obligation of six years thereafter, as the norm for all persons subject to the Act. 65 Stat. 78 (1951), as amended, 50 U.S.C. App. §§ 454(b), (d) (1958). In statistics compiled in 1959, the American male between 20 and 25 had a life expectancy of another 49.5 years. Nat'l Office of Vital Statistics, Life Tables § 5-5 (Dep't of Health, Educ. & Welfare 1959).

15. On June 30, 1960, the Veterans Administration counted 22,534,000 veterans of all armed forces then living. 1960 Adm'r of Veterans Affairs Ann. Rep. 6-7 (1961).

16. 346 U.S. 137 (1953).

17. See Uniform Code of Military Justice, 10 U.S.C. §§ 867, 876 (1958).

18. Similarly, since the adoption of the Uniform Code of Military Justice, the Court of Claims has not granted relief in the form of back pay to claimants alleging wrongful dismissal from government service through court martial proceedings lacking fundamental fairness. Compare *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947).

since the adoption of the Code in which a civil court has issued the writ on the basis of such a claim. This development is undoubtedly due in good part to the supervision of military justice by the Court of Military Appeals. Chief Judge Quinn of that Court has recently stated:

[M]ilitary due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different.<sup>19</sup>

And the Court of Military Appeals has, itself, said unequivocally that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."<sup>20</sup>

Thus our recent experience has shown, I believe, that the Court of Military Appeals can be an effective guarantor of our citizens' rights to due process when they are subjected to trial by court martial. Moreover, the establishment of a special court to review these cases obviates, at least to some extent, the objection of lack of familiarity by the reviewing tribunal with the special problems of the military. In this connection, I think it significant that, despite the expanded application of our civilian concepts of fair play to military justice, the Chairman of the Joint Chiefs of Staff, General Lemnitzer, declared not long ago:

I believe the Army and the American people can take pride in the positive strides that have been made in the application of military law under the Uniform Code of Military Justice. The Army today has achieved the highest state of discipline and good order in its history.<sup>21</sup>

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19. Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225, 232 (1961). In an early opinion, the Court of Military Appeals said, "If, because of the peculiarities of the military service, a variation from civilian practice is necessary to assure a fair trial, we should unhesitatingly adopt the procedure best suited to the administration of military justice, even though by so doing we may bring about a departure from a prior service rule." *United States v. Hemp*, 1 U.S.C.M.A. 280, 286, 3 C.M.R. 14, 20 (1952). Compare the evolution of the court's approach to "military due process" in *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951), with *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

20. *United States v. Jacoby*, *supra* note 19, at 430-31, 29 C.M.R. at 246-47.

21. Dep't of the Army Pamphlet No. 27-101-18 (Oct. 7, 1959), reprinted in 1960 U.S.C.M.A. Ann. Rep. 4. Similar views have been expressed by ranking officers of the Army and Navy. See Army Chief of Staff General Decker, *id.*, and Navy Judge Advocate General Admiral Mott, *An Appraisal of Proposed Changes in the Uniform Code of Military Justice*, 35 St. John's L. Rev. 300 (1961).

These developments support my conviction that the guarantees of our Bill of Rights need not be considered antithetical to the maintenance of our defenses.

Nevertheless, we cannot fail to recognize how our burgeoning army has posed difficult and unique problems for the Court in the application of constitutional principles. Thus, you may recall the case of Specialist Girard,<sup>22</sup> who, having been sent to Japan by the Army, contended that the Constitution entitled him to a trial by an American court martial for an offense committed on an American army reservation in Japan against a Japanese national. The surrender of Girard to Japanese authorities was consonant with well-established rules of international law, and the Court's opinion cited, as its authority, the decision of Chief Justice Marshall in *The Schooner Exchange*,<sup>23</sup> written in 1812. But the case brought to light some problems we should consider in the light of developments unforeseen at the time the Constitution was written: the world-wide deployment of our citizens, called to duty and sent to foreign lands for extended tours of service, who may, by administrative decision of American authorities, be delivered to foreign governments for trial.<sup>24</sup> We are fortunate that our experience in this area has generally been a happy one,<sup>25</sup> and thus, to date, these constitutional problems have been largely submerged.

However, unique constitutional questions are, at times, presented for decision, which questions are, in part, an outgrowth of our expanded military forces. One of the most recent of these arose in *Trop v. Dulles*,<sup>26</sup> decided in 1958. In that case the Court considered a provision of our law that acted automatically to denationalize a citizen convicted of wartime desertion by a court martial. Under this provision, over 7,000 men who had served in the Army alone, in World War II, were rendered stateless. It was the decision of the Court that, by this Act, Congress had exceeded its constitutional powers by depriving citizens of their birthright. Four members of the Court, of which I was one, expressed the view that this law, effectively denying the person's rights to have rights, was a cruel and un-

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22. *Wilson v. Girard*, 354 U.S. 524 (1957).

23. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

24. A recent survey by the Department of Defense lists 19 countries with which the United States has entered Status of Forces Agreements similar to the one with which the Court dealt in *Girard*. In addition, this country is signatory to agreements with 56 nations (15 the same as SOFA signatories) in which military missions (as distinguished from troop deployments) have virtual diplomatic immunity. See also U.S. Dep't of State, *Treaties in Force* (Jan. 1, 1962).

25. See Senate Comm. on Armed Services, Operation of Article VII, NATO Status of Forces Treaty, S. Rep. No. 1041, 87th Cong., 1st Sess. 2 (1961).

26. 356 U.S. 86 (1958).

usual punishment proscribed by the Eighth Amendment. The need for military discipline was considered an inadequate foundation for expatriation.

The *Trop* case was an example, really, of how the Court has generally dealt with problems apart from the authority of the military in dealing with "its own." Rather, it was in the line of decisions dealing with attempts of our civilian Government to extend military authority into other areas. In these cases we find factors different from those the Court must consider persuasive in review of a soldier's disciplinary conviction by court martial. The contending parties still advance the same general argument: protected liberties versus military necessity. Here, however, the tradition of exclusive authority of the military over its uniformed personnel is generally not directly relevant. Here, the Court has usually been of the view that it can and should make its own judgment, at least to some degree, concerning the weight a claim of military necessity is to be given.

The landmark decision in this field was, of course, *Ex parte Milligan*,<sup>27</sup> decided in 1866. It established firmly the principle that when civil courts are open and operating, resort to military tribunals for the prosecution of civilians is impermissible. The events giving rise to the *Milligan* case occurred while we were in the throes of a great war. However, the military activities of that war had been confined to a certain section of the country; in the remainder, the civil government operated normally. In passing upon the validity of a military conviction returned against Milligan outside the theater of actual combat, the Court recognized that no "graver question" was ever previously before it. And yet the Court, speaking through Mr. Justice Davis, reminded us that

by the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify . . . [Milligan's] military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.<sup>28</sup>

I do not propose to discuss in detail other cases that have been decided in a wartime context, for the risk is too great that they lie outside the mainstream of American judicial thought. War is, of course, a pathological condition for our Nation. Military judgments sometimes breed action that, in more stable times, would be regarded as abhorrent. Judges cannot detach themselves from such judgments,

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27. 71 U.S. (4 Wall.) 2 (1866).

28. *Id.* at 119.

although by hindsight, from the vantage point of more tranquil times, they might conclude that some actions advanced in the name of national survival had in fact overridden the strictures of due process.<sup>29</sup>

Obviously such a charge could not be made against the Court in the *Milligan* case. However, some have pointed to cases like the companion decisions of *Hirabayashi v. United States*<sup>30</sup> and *Korematsu v. United States*<sup>31</sup> as aberrational. There, you will recall, the Court sustained the program under which, shortly after the attack on Pearl Harbor, over 100,000 Japanese nationals and citizens of that ancestry living in the western United States were, under Executive Order, with congressional sanction, placed under curfew and later excluded from areas within 750 miles of the Pacific Coast or confined in government detention camps.

Whatever may be the correct view of the specific holding of those cases, their importance for present purposes lies in a more general consideration. These decisions demonstrate dramatically that there are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity. Thus, in a case like *Hirabayashi*, only the Executive is qualified to determine whether, for example, an invasion is imminent. In such a situation, where time is of the essence, if the Court is to deny the asserted right of the military authorities, it must be on the theory that the claimed justification, though factually unassailable, is insufficient. Doubtless cases might arise in which such a response would be the only permissible one. After all, the truism that the end does not justify the means has at least as respectable a lineage as the dictum that the power to wage war is the power to wage war successfully.<sup>32</sup> But such cases would be extraordinary indeed.

The consequence of the limitations under which the Court must sometimes operate in this area is that other agencies of government must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution. To put

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29. In times of stress, the Court is not only vulnerable, to some extent, to the emotions of our people, but also to action by Congress in restricting what that body may consider judicial interference with the needs of security and defense. Following the Civil War, Congress actually exercised its constitutional powers to provide for the rules governing the appellate jurisdiction of the Supreme Court, for this very purpose. See *Ex parte McCordle*, 73 U.S. (6 Wall.) 318 (1867); 74 U.S. (7 Wall.) 506 (1868).

30. 320 U.S. 81 (1943).

31. 323 U.S. 214 (1944).

32. Chief Justice Hughes, speaking for the Court in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.

There is still another lesson to be learned from cases like *Hirabayashi*. Where the circumstances are such that the Court must accept uncritically the Government's description of the magnitude of the military need, actions may be permitted that restrict individual liberty in a grievous manner. Consequently, if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum. In this connection, it is instructive to compare the result in *Hirabayashi* with the result in cases that have been decided outside the context of war.

In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty. This has been true even in the all too imperfect peace that has been our lot for the past fifteen years—and quite rightly so, in my judgment. It is instructive to recall that our Nation at the time of the Constitutional Convention was also faced with formidable problems. The English, the French, the Spanish, and various tribes of hostile Indians were all ready and eager to subvert or occupy the fledgling Republic. Nevertheless, in that environment, our Founding Fathers conceived a Constitution and Bill of Rights replete with provisions indicating their determination to protect human rights. There was no call for a garrison state in those times of precarious peace. We should heed no such call now. If we were to fail in these days to enforce the freedom that until now has been the American citizen's birthright, we would be abandoning for the foreseeable future the constitutional balance of powers and rights in whose name we arm.

Moreover, most of the cases the Court has decided during this period indicate that such a capitulation to the claim of military necessity would be a needless sacrifice. These cases have not been argued or decided in an emergency context comparable to the early 1940's. There has been time, and time provides a margin of safety. There has been time for the Government to be put to the proof with respect to its claim of necessity; there has been time for reflection; there has been time for the Government to adjust to any adverse decision. The consequence is that the claim of necessity has generally not been put to the Court in the stark terms of a *Hirabayashi* case.<sup>33</sup>

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33. In this connection, we might also consider and compare the cases of *Ex parte*

An excellent example of the approach adopted by the Court in the recent years of peacetime tension is its disposition of the various cases raising the question of court-martial jurisdiction over civilian dependents and employees of the armed forces overseas. Such jurisdiction was explicitly granted by the Uniform Code of Military Justice, and hence the issue was whether the statutory provision was constitutional.

In what the Court came to recognize as a hasty decision, this exercise of jurisdiction was at first sustained in the most striking of the cases presenting the problem—the trial of the wife of an American soldier for a capital offense. During the summer following that decision, a rehearing was considered and finally ordered. The next June, the rewritten, landmark decision of *Reid v. Covert*<sup>34</sup> struck down this exercise of military jurisdiction as an unconstitutional expansion of Congress' power to provide for the government of the armed forces. In 1960, *Reid v. Covert* was followed by the Court in similarly invalidating court-martial convictions of civilians accompanying and those employed by our services overseas, whether or not the offenses for which they had been convicted were punishable by death.<sup>35</sup>

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Quirin, 317 U.S. 1 (1942), and *Abel v. United States*, 362 U.S. 217 (1960). The former came before the Court at the outset of World War II, at a time when the outlook for the survival of the free world was dim. On the floor of Congress, fears were expressed that Hitler could subdue the country even without an invasion, through the use of "fifth columnists" and German allies thought to exist in every State of the Union. See 87 Cong. Rec. 555 (1941). When a small group of Nazi saboteurs was discovered on our shores, they were brought before a military tribunal—not our civilian courts. They were treated as wartime belligerents and spies, and ordered executed. The Supreme Court denied an application for a writ of habeas corpus, sustaining the military's jurisdiction.

However, when, in June 1957, Rudolph Abel was apprehended in his New York hotel room and identified as a Colonel in the Russian army, he was not brought before a court martial. A full civilian trial, with all the safeguards of our Bill of Rights, was accorded this agent of our adversary. Abel brought his case to the Supreme Court claiming the protection of our Constitution. I was among those who dissented from the Court's judgment that he had not been the subject of a constitutionally proscribed search and seizure. But all of the opinions reiterated our fundamental approach—that neither the nature of the case nor the notoriety of the defendant could influence our decision on the constitutional issue presented.

Cf. *In re Yamashita*, 327 U.S. 1 (1946), in which the Court denied habeas corpus relief to an officer of the enemy vanquished in a war fought in the cause of the Constitution, but who, for his wartime actions, was subjected to an American military court whose procedures were questionably squared with the spirit of due process.

34. 354 U.S. 1 (1957), withdrawing 351 U.S. 487 (1956).

35. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (employee—noncapital offense); *Grisham v. Hagan*, 361 U.S. 278 (1960) (employee—capital offense); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (dependent—noncapital offense).

Several features of these cases are worthy of note. First of all, the urgency of wartime was absent. Extended analysis and deliberation on the part of the parties and the Court were possible. Secondly, while, of course, the Government rested heavily upon a claim of military necessity, that claim could not be pressed with the same force that it was in *Hirabayashi*. Alternative methods of dealing with the military's problems could be considered. Indeed, the Court itself suggested a possible alternative in one of its opinions—the creation of a military service akin to the Seabees to secure the services theretofore performed by civilians. And finally, the extension of military jurisdiction for which the Government contended was extraordinarily broad. At that time, there were 450,000 dependents and 25,000 civilian employees overseas.<sup>36</sup> We could not safely deal with such a problem on the basis of what General Anthony Wayne did or did not do to camp followers at frontier forts in the last decade of the 18th Century. In short, as in the case of trials of persons who are concededly part of the military, the burgeoning of our military establishment produced a situation so radically different from what the country had known in its distant past that the Court was required to return to first principles in coming to its judgment.

Another decision of the Court that is of significance in connection with the considerations I have been discussing was *Toth v. Quarles*.<sup>37</sup> There the Court held that a veteran holding an honorable discharge could not be recalled to active duty for the sole purpose of subjecting him to a court martial prosecution for offenses committed prior to his discharge. The question was of enormous significance in the context of present day circumstances, for the ranks of our veterans are estimated to number more than twenty-two-and-a-half-million. Thus a decision adverse to the petitioner would have left millions of former servicemen helpless before some latter-day revival of old military charges. So far as the claim of military necessity was concerned, the facts were such that the Court regarded itself as competent to deal with the problem directly. Mr. Justice Black, speaking for the Court, said:

It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefits of a civilian court trial when they are actually civilians . . . . Free countries of the world have tried to restrict

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36. Brief for Petitioner, the Secretary of Defense, pp. 12, 71, 110-11, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

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



military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.<sup>38</sup>

Attempts at extension of military control have not, of course, been confined to the field of criminal justice, nor have all of them been decided on constitutional grounds. *Harmon v. Brucker*<sup>39</sup> brought to the Court the Army's claim that it had the authority to issue to a draftee a discharge less than honorable on the basis of certain activities in which the soldier was said to have engaged prior to his induction, and which the Army thought made him a security risk. Again, the gravity of the constitutional issues raised was underscored by the existence of our system of peacetime conscription, for the sustaining of the Army's claim would have affirmed its authority to affect the pre-service political activities of every young American. A notable feature of the case was that the Solicitor General conceded that, if the Court had jurisdiction to rule upon the action of the Secretary of the Army, his action should be held to be unconstitutional. Thus the Government's case was placed entirely upon the asserted necessity for, and tradition of, the exclusive authority of the Secretary to act with unreviewable discretion in cases of this nature. The Court, however, found it unnecessary to reach constitutional issues. It disposed of the case on the non-constitutional ground that the Secretary lacked statutory authority to condition the type of discharge he issued upon any behavior other than that in which the soldier engaged during his period of service. Such emphasis upon proper directives by Congress with respect to these problems, may be regarded as, in part, a further reflection of the principle of subordination of the military establishment to civil authority.

I cannot, of course, discuss more than a handful of the Supreme Court decisions bearing upon the military establishment's efforts to extend the scope of its authority in one way or another beyond service members. The cases I have dealt with, however, disclose what I regard as the basic elements of the approach the Court has followed with reasonable consistency. There are many other decisions that echo that approach, and there are some, to be sure, that seem inconsistent with it. But I would point to *Duncan v. Kahanamoku*,<sup>40</sup> in which the Court held, in the spirit of *Milligan*, although on non-constitutional grounds, that, after the Pearl Harbor attack, civilians in the Hawaiian Islands were subject to trial only in civilian courts, once those courts were open. And, of course, there have been a number of cases that,

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38. *Id.* at 22.

39. 355 U.S. 579 (1958).

40. 327 U.S. 304 (1946). Cf. *Madsen v. Kinsella*, 343 U.S. 341 (1952).

like *Harmon v. Brucker*, emphasize the Court's view that the military, like any other organ of government, must adhere strictly to its legislative mandate.<sup>41</sup>

On the whole, it seems to me plain that the Court has viewed the separation and subordination of the military establishment as a compelling principle. When this principle supports an assertion of substantial violation of a precept of the Bill of Rights, a most extraordinary showing of military necessity in defense of the Nation has been required for the Court to conclude that the challenged action in fact squared with the injunctions of the Constitution. While situations may arise in which deference by the Court is compelling, the cases in which this has occurred demonstrate that such a restriction upon the scope of review is pregnant with danger to individual freedom. Fortunately, the Court has generally been in a position to apply an exacting standard. Thus, although the dangers inherent in the existence of a huge military establishment may well continue to grow, we need have no feeling of hopelessness. Our tradition of liberty has remained strong through recurring crises. We need only remain true to it.

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41. For example, in *Bell v. United States*, 366 U.S. 393 (1961), the Army was challenged for declining to pay former soldiers who, during the Korean War, and while prisoners of war of the enemy, had betrayed some fellow prisoners and had refused initial opportunities for repatriation. Despite the absence of any authority for withholding the pay earned and accrued by these men to the dates of their well-deserved dishonorable discharges, the Army refused to make payment. As the situation was summarized by the dissenting judge in the Court of Claims, "Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law." 181 F. Supp. 668, 675 (Ct. Cl. 1960). We agreed.

In similar vein have been the series of decisions concerning the conscription procedures of the Selective Service System. For example, this Term we have again had occasion to consider a conviction based on an alleged failure of a registrant to notify his draft board of a change of address. After three unsuccessful prosecutions for draft evasion, the Government secured a belated indictment, conviction and three-year prison sentence for the young man's questionable failure to notify his board promptly of a change of address. But, from the record, it seemed clear that it was the registrant's annoying persistence in pursuing appellate rights to secure an exemption from active duty on a claim of being a minister of Jehovah's Witnesses, that underlay the course of prosecution. *Venus v. United States*, 368 U.S. 345 (1961) (mem.). In 1955, in *Gonzales v. United States*, 348 U.S. 407 (1955), we were faced with a conviction for draft evasion, in which the draftee had not been accorded the simple right of examining a Department of Justice memorandum contesting his claims that he was a conscientious objector, and which memorandum had been presented to a Selective Service appeal board in reviewing Gonzales' classification. Understandably, we held that although the needs of the Army were great, it had to be fair in abiding by the law under which it sought conscripts. An additional factor of importance about these cases is that under the Selective Service law, violation of the call to military duty is a civil offense, punishable only in the civilian courts.

The last phase of the problem of the military in our society—the relationship of the military to civil government and affairs—is much more complex, and also perhaps much more important, than the subjects I have just discussed.

This relationship of the military to the rest of us raises issues that are less graphic, less tangible, less amenable to review or control by the courts. This aspect of the problem encompasses not only actions taken by our civil government in the name of defense that may impinge upon individual rights, but also matters such as the influence exerted on the civil government by uniformed personnel and the suppliers of arms. Such problems are not always clearly visible. Nor is the impact of our enormous financial, human and resource commitment to the needs of defense easy to measure.<sup>42</sup> Moreover, these problems often do not arise in a factual context suitable for a lawsuit and judicial review. Still, “cases and controversies” have occasionally arisen in recent years that suggest the magnitude of the difficulties we face.

Looking first at perhaps the broadest aspect of the problems generated by our defense needs, we could consider the question whether the industries basic to our defense are in all respects to be treated as “private” industry. In wartime, the total mobilization of our economy with its rationing, allocation of materials and manpower, and price and wage controls are acceptable restrictions for a free society locked in combat. The just compensation and due process provisions of the Constitution may be strained at such times. Are they to receive similar diminished deference in these days of “cold war”? This alone is a subject worthy of the most extended discussion. I can do no more here than suggest its pertinency. But it has been thrust upon the Court with a requirement for prompt decision in recent years.

You will recall the case of *Youngstown Sheet & Tube v. Sawyer*,<sup>43</sup> in which, in the midst of our military operations in Korea, the Court held that the President lacked the power, without specific Congressional sanction, to seize and operate the Nation’s steel industry following its shut-down by a nation-wide strike. The numerous and lengthy opinions of the various members of the Court reveal the tremendous complexity of the issues such a case presents. And on

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42. The Defense Department now spends over 50% of the total federal budget, a sum almost 10% of our gross national product. It is estimated that 10% of the entire national labor force is, in some manner, employed in defense industries or the defense establishment itself. See N.Y. Times, May 21, 1961, p. 48, cols. 4-5; U.S. Dept. of Commerce, Statistical Abstract of the United States 235, 301 (1961).

43. 343 U.S. 579 (1952).

what may the courts rely in such litigation? Consider these words from Mr. Justice Jackson's concurring opinion:

A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems . . . as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.<sup>44</sup>

The result in the *Youngstown* case may be compared to the decision seven years later in *United Steelworkers of America v. United States*,<sup>45</sup> a decision reached during a time that no actual armed conflict engaged this country. There, the Court upheld a finding that since one per cent of the Nation's steel industry output was needed for defense purposes, the President had the authority, under the Taft-Hartley Act, to enjoin the union from continuing its strike, at least for eighty days. The critical factor upon which the injunction was based and sustained was a determination that even the temporary unavailability of one per cent of the industry's output might imperil the Nation's safety. Considerations that the injunction might infringe upon the workers' constitutional rights of free association, or perhaps the right *not* to work, fell, at least temporarily, before these findings. Should Congressional intervention—the difference between the *Youngstown* and *Steelworkers* cases—be so decisive? Would recourse to Taft-Hartley or other legislation by President Truman in 1952 have avoided the issues that made the *Youngstown* case so difficult? We need not, indeed cannot, answer that now. However, these cases illustrate the extent to which public and private interests merge and clash in controversies so vitally affecting the security of the Nation. The resolution of such cases is made no more simple or certain by the multitude of considerations that, while indisputably relevant, are outside the records before the courts.

On a less grand scale than the steel industry litigation, but perhaps no less significant, are the cases that have stemmed from the competition between the claims of national security and personal rights. The bulk of the many recent decisions concerning the con-

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44. *Id.* at 634-35.

45. 361 U.S. 39 (1959).

tempt power of Congressional committees provides a graphic illustration. Some believe that these cases may be disposed of by the Court's balancing of the security of the Nation against the freedom of the individual litigant. If these are the appropriate weights to put in the scales, it is not surprising that the balance is usually struck against the individual. If balance we must, I wonder whether on the individual's side we might not also place the importance of our survival as a free nation. The issue, as I see it, is not the individual against society; it is rather the wise accommodation of the necessities of physical survival with the requirements of spiritual survival. Lincoln once asked, "[Is] it possible to lose the nation and yet preserve the Constitution?"<sup>46</sup> His rhetorical question called for a negative answer no less than its corollary: "Is it possible to lose the Constitution and yet preserve the Nation?" Our Constitution and Nation are one. Neither can exist without the other. It is with this thought in mind that we should gauge the claims of those who assert that national security requires what our Constitution appears to condemn.

Naturally the radiations of security requirements have come before the Court in contexts other than Congressional investigations. Even more closely connected with the defense effort have been the decisions concerning the right to employment in government and industry.

One may compare, for example, the 1959 case of *Greene v. McElroy*<sup>47</sup> with last Term's decision in *Cafeteria Workers v. McElroy*.<sup>48</sup> In the former, a serious constitutional issue was raised by the Navy's action in denying, on questionable grounds, security clearance to a privately employed aeronautical engineer. This, in turn, effectively precluded him from pursuing his occupation. The Court was able, however, to dispose of the case on the non-constitutional ground that requirements of confrontation prescribed by existing law had wrongfully been ignored.<sup>49</sup> In *Cafeteria Workers*, on the other hand, where a short-order cook employed by a concessionaire on a mili-

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46. 10 Complete Works of Abraham Lincoln 66 (Nicolay and Hay ed. 1894).

47. 360 U.S. 474 (1959).

48. 367 U.S. 886 (1961).

49. For decisions in a comparable vein, see *Cole v. Young*, 351 U.S. 536 (1956), limiting, through interpretation to those in "sensitive" positions, the power of the Executive summarily to dismiss government employees in the interest of "national security"; *Vitarelli v. Seaton*, 359 U.S. 535 (1959), requiring government agencies dismissing employees in nonsensitive positions on security grounds, to afford the employees an opportunity to see the charges against them and to confront adverse witnesses; *Kent v. Dulles*, 357 U.S. 116 (1958), upholding the right of citizens to travel freely in the absence of compelling restrictions clearly to be found in Congressional action.

tary base was summarily refused further security clearance without hearing, explanation, or opportunity to rebut, the Court reached the constitutional question and, by a five-to-four vote, decided it against the employee. I joined Mr. Justice Brennan's dissent, which took the position that the Court, while conceding petitioner's right not to be injured arbitrarily by the Government, in fact made that right non-enforceable by refusing to accord petitioner any procedural protection.

One of the principal difficulties presented by these "security risk" cases is that the claim of necessity takes the form of an assertion of the right of secrecy. Thus, the claim, by its very nature, tends to restrict the ability of the Court to evaluate its merit. This in turn impairs the efficacy of judicial review as an instrument for preserving the guarantees of the Bill of Rights. While the dilemma is in some cases serious, *Cafeteria Workers*, the most recent expression of the Court's views on the subject, does not, in my judgment, represent a satisfactory guidepost for resolution of the problem.

Our enormous national commitment of defense will, of course, pose still additional, difficult problems for the courts. We have, in the past considered,<sup>50</sup> and will probably be called upon in the future to review, cases arising out of the effort to accord our large number of veterans special compensation or preferences in return for their service to the country. While recognizing the need for such programs, we are also asked to consider to what extent such preferences impinge on opportunities of other citizens, whose public service and welfare are no less deserving of recognition. Questions concerning the review of military procurement, in the light of claims of emergency need, expert judgment and secrecy of information are still largely unresolved. The problem of the extent to which members of the armed forces may properly express their political views to other troops, particularly subordinates in the chain of command, and to the public at large, are subjects of controversy. Questions of the right of the people to know what their government is doing, their right to travel, speak, congregate, believe, and dissent will arise again and again. It is to the courts that the task of adjudicating many of these rights is delegated. I am one who believes firmly that the Court must be vigilant against neg-

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50. See, e.g., *McKinney v. Missouri-K. T.R.R.*, 357 U.S. 265 (1958); *Hyland v. Watson*, 287 F.2d 884 (6th Cir.), cert. denied, 368 U.S. 876 (1961). Cf. the recent decision of Australia's highest court invalidating a far reaching veteran's preference statute on the ground that with the World War II emergency past, the war power justification for such laws, under the Australian Constitution, had ceased. *Illawarra District County Council v. Wickham*, 101 Commw. L.R. 467 (Austl. 1959).

lect of the requirements of our Bill of Rights and the personal rights that document was intended to guarantee for all time. Legislative or executive action eroding our citizens' rights in the name of security cannot be placed on a scale that weighs the public's interest against that of the individual in a sort of "count the heads" fashion. Democracy under our Constitution calls for judicial deference to the coordinate branches of the Government and their judgment of what is essential to the protection of the Nation. But it calls no less for a steadfast protection of those fundamentals imbedded in the Constitution, so incorporated for the express purpose of insulating them from possible excesses of the moment. Our history has demonstrated that we must be as much on guard against the diminution of our rights through excessive fears for our security and a reliance on military solutions for our problems by the civil government, as we are against the usurpation of civil authority by the army. That is the important lesson of the Court cases, most of which have arisen not through the initiative of the military seeking power for itself, but rather through governmental authorization for intervention of military considerations in affairs properly reserved to our civilian institutions.

In concluding, I must say that I have, of course, not touched upon every type of situation having some relation to our military establishment which the Court considers. Those to which I have pointed might suggest to some that the Court has at times exceeded its role in this area. My view of the matter is the opposite. I see how limited is the role that the courts can truly play in protecting the heritage of our people against military supremacy. In our democracy it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution. Only an occasional aberration from norms of operation is brought before the Court by some zealous litigant. Thus we are sometimes provided with opportunities for reiterating the fundamental principles on which our country was founded and has grown mighty. But the day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen.

President Eisenhower, as he left the White House only a year ago, urged the American people to be alert to the changes that come about by reason of the coalescence of military and industrial power. His words were these:

[T]his conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every state

house, every office of the Federal Government. . . . [W]e must not fail to comprehend . . . [the] grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society.

[W]e must guard against the acquisition of unwarranted influence . . . by the military-industrial complex. . . .

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the . . . machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.<sup>51</sup>

Coming from one who was our great Field Commander in World War II and for eight years Commander-in-Chief as President of the United States, these words should find lodgment in the mind of every American. It is also significant that both his predecessor and his successor have conveyed the same thought in slightly different words.<sup>52</sup> I am sure that none of them thought for a moment that anyone was deliberately trying to change the relationship between the military and the civil government. But they realized, as we all must, that our freedoms must be protected not only against deliberate destruction but also against unwitting erosion.

We may happily note that the Constitution has remarkably weathered a variety of crises. Some were as acute as those we face today. Today, as always, the people, no less than their courts, must remain vigilant to preserve the principles of our Bill of Rights, lest in our desire to be secure we lose our ability to be free.

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51. N.Y. Times, Jan. 18, 1961, p. 22, cols. 5, 6.

52. President Kennedy, in his special message to Congress on the defense budget delivered shortly after taking office, declared, "Neither our strategy nor our psychology as a nation—and certainly not our economy—must become dependent upon our . . . maintenance of a large military establishment. . . . Our arms must be subject to ultimate civilian control and command at all times . . ." N.Y. Times, March 29, 1961, p. 16, cols. 1, 2.

Similarly, President Truman, on such occasions as his message to Congress urging the creation of a single Department of Defense, over which a civilian would preside, and his removal of General MacArthur as Commander of United Nations forces in Korea, reiterated these beliefs. 1945 Public Papers of the Presidents of the United States: Harry S. Truman 554-55, 558 (1961); 2 Truman, *Memoirs* 449 (1956).





THE 2006 ISRAELI INVASION OF LEBANON: AGGRESSION,  
SELF-DEFENSE, OR A REPRISAL GONE BAD?

MAJOR JASON S. WRACHFORD

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*What was self-defense in the eyes and especially in the words of one party was considered aggression or provocation in the eyes and words of another. One side's self-defense was the other side's aggression.*<sup>1</sup>

## I. INTRODUCTION

On 12 July 2006, Hezbollah<sup>2</sup> guerillas from Lebanon crossed into Israel, kidnapped two Israeli soldiers, and killed several others.<sup>3</sup> Israel responded by attacking targets throughout Lebanon, followed by a massive ground invasion into Lebanon that lasted until a cease-fire agreement was reached on 14 August 2006.<sup>4</sup>

This article will analyze whether Israel's response, in particular its invasion, was legitimate under the current status of international law. This article will first provide an overview of the Arab-Israeli conflict in general, followed by a summary of several Israeli military actions since 1948 and the international reaction to these incidents. This review is crucial to understanding the background and context of Israel's summer 2006 invasion of Lebanon. Without it, the invasion may seem like an extreme overreaction to what some might perceive as a relatively minor incident. But, as should become readily apparent, it is not quite so simple when placed against the backdrop of the past fifty-nine years since the formation of the State of Israel. Following this review, this article will analyze the evolution and development of self-defense in international law. Historical examples that formed customary international law, the United Nations Charter, case law, treatises and other learned scholarly work, and recent practices will provide the sources for this examination. This article will discuss the requirements for a legitimate use of self-defense and consider whether a reprisal is still legal under international law. This article will then analyze Israel's 2006 invasion of Lebanon against the international law previously identified.

In various places, this article raises numerous questions concerning the legitimacy of the invasion. For example, is self-defense to terrorist acts sufficient justification for a full-scale invasion of the country where the terrorists are based? Is a full-scale invasion

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<sup>1</sup> Rein Mullerson, *Self-Defense in the Contemporary World*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 13-14 (Lori Fisler Damrosch & David J. Scheffer eds. 1991).

<sup>2</sup> The name of this organization has several different spellings. For simplicity's sake, unless in a title of a document or in a quotation, this term will be spelled as Hezbollah. In that same vein, the term "self-defense" will oftentimes be spelled as "self-defence" in many quotations and sources to reflect the international spelling.

<sup>3</sup> See *infra* notes 120-51 and accompanying text.

<sup>4</sup> *Id.*

proportional in response to ongoing border wars and skirmishes? Is the kidnapping of two Israeli soldiers enough justification for invasion, especially considering both sides to the conflict have used kidnappings as a tactic? Has Israel essentially waived its right to self-defense by repeatedly taking aggressive acts? Was Israel justified under international law in violating the territorial sovereignty of Lebanon when Lebanon was unable or unwilling to fulfill its legal obligations to control the militia groups within its borders? Did the United Nations' inability to fulfill its obligations under the U.N. Charter and applicable Security Council Resolutions afford Israel the legal right under both the U.N. Charter and customary international law to take matters into its own hands? Resolution of these questions is necessary in analyzing whether Israel's use of force, particularly its invasion of Lebanon, was justified under international law.

In sum, this article draws the conclusion that Israel did have the right to use armed force in self-defense in response to Hezbollah, but that its response was disproportional. Furthermore, this article concludes that Israel's targeting of Lebanon itself was not in compliance with the current state of international law.

## II. EARLY JEWISH/ARAB HISTORY

Many historians and religious scholars believe the conflict between Arabs and Jews dates back thousands of years ago to the time of Abraham and his two sons, Ishmael and Isaac, who are the forefathers of the Arab and Jewish people, respectively.<sup>5</sup> God promised the land encompassing Palestine (which includes modern-day Israel) to the sons of Abraham,<sup>6</sup> thus giving the descendents of both sons an ancient claim to the land of Palestine.<sup>7</sup>

The Jews began to settle in the land of Israel around 1300 B.C.E., and controlled the area for several hundred years until other nations conquered their lands.<sup>8</sup> There were short periods where Jews

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<sup>5</sup> JOEL BEININ & LISA HAJJAR, PALESTINE, ISRAEL AND THE ARAB-ISRAELI CONFLICT, A PRIMER 1, [http://merip.org/palestine-israel\\_primer/Palestine-Israel\\_Primer\\_MERIP.pdf](http://merip.org/palestine-israel_primer/Palestine-Israel_Primer_MERIP.pdf) (last visited May 11, 2007) [hereinafter PRIMER]. Ishmael was the firstborn son of Abraham and his wife's Egyptian maiden, Hagar, and is generally considered the forefather of the Arabs. *Genesis* 16:1-16; PRIMER, *supra* at 1; AM. UNIV. FOREIGN AREA STUDIES DEP'T, ISRAEL: A COUNTRY STUDY 6 (Richard F. Nyrop ed., 2d ed. 1979) [hereinafter COUNTRY STUDY]. Isaac was the son of Abraham and his wife Sarah, and became one of the patriarchs of the Jewish people. *Genesis* 21:3; COUNTRY STUDY, *supra* at 10. Conflict existed between the mothers of Ishmael and Isaac, even before Isaac was born, and this conflict continued between the sons and their descendents for generations. *See, e.g., Genesis* 17:19-21; 21:9-21.

<sup>6</sup> *Genesis* 17:8.

<sup>7</sup> PRIMER, *supra* note 5, at 1.

<sup>8</sup> MITCHELL G. BARD, MYTHS AND FACTS: A GUIDE TO THE ARAB-ISRAELI CONFLICT 8 (2002). In approximately 1000 B.C.E., King David established Jerusalem as the capital.

controlled portions of modern-day Israel, but in 135 C.E., the Jews were completely dispersed from their ancient homeland.<sup>9</sup> Arabs gradually came to control the area of Palestine, and by the end of the seventh century, most of the population spoke Arabic and were primarily Muslim.<sup>10</sup> Over the next 1,200 years, Arabs, Jews, and Christians fought many wars over the land of Palestine, including the Crusades, but Arabs constituted the vast majority of the population in Palestine throughout this period.<sup>11</sup>

### III. FORMATION OF THE ISRAELI STATE

During the 19th century, the land of Palestine was part of the Ottoman Empire and was separated into various political provinces and districts.<sup>12</sup> During this time, as nation-states were continuing to develop and emerge, Jews and Palestinians both embraced this emerging trend toward nationalism.<sup>13</sup> The Palestinians, who were mostly Muslim and of Arab decent, believed they should form their own nation in Palestine.<sup>14</sup> Jews, who were spread throughout the world, believed Palestine was the obvious location for their planned formation, or rather reformation, of the nation of Israel.<sup>15</sup> This Jewish movement, to be called Zionism, began in earnest in 1882, when European Jews first began immigrating to Palestine.<sup>16</sup>

By the end of World War I, the Ottoman Empire had completely collapsed and British forces were in control of Jerusalem.<sup>17</sup> Following the war, the newly formed League of Nations granted a mandate to

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However, within a few generations, the nation was divided into two. The northern kingdom, known as Israel, fell to the Assyrians in 722 B.C.E., and the southern kingdom, known as Judah, fell to the Babylonians in 586 B.C.E. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 9-10.

<sup>12</sup> PRIMER, *supra* note 5, at 1-2. Jerusalem, because of its significant religious ties to Islam, Christianity, and Judaism, was under the direct control of the Ottoman capital of Istanbul. *Id.* at 2. The great majority of the inhabitants of Palestine during this time period were Muslims, with Christians and Jews accounting for a relatively small percentage of the population. *Id.* at 2 (stating that “[a]ccording to Ottoman records, in 1878 there were 462,465 subject inhabitants of the Jerusalem, Nablus and Acre districts [the main districts in Palestine]: 403,795 Muslims . . . , 43,659 Christians, and 15,011 Jews”).

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* By 1914 and the outbreak of World War I, the Jewish population in Palestine had grown to approximately 60,000, more than half of which had recently arrived. *Id.* at 2. While this increase may seem significant, the Arab population in Palestine had grown to around 683,000, from just over 400,000 in 1878. *Id.*

<sup>17</sup> *British Mandate Overview*, [http://www.palestinefacts.org/pf\\_mandate\\_overview.php](http://www.palestinefacts.org/pf_mandate_overview.php) (last visited May 11, 2007).

Great Britain over the area of Palestine, which includes modern-day Israel and Jordan.<sup>18</sup> Palestine was subsequently divided into two regions,<sup>19</sup> with Arabs controlling a large portion of land east of the Jordan River, known as Transjordan.<sup>20</sup> While Arabs now had a nation they could largely call their own, both Arabs and Jews alike wanted control over the land on the western side of the Jordan River, mainly due to its historical and religious significance.<sup>21</sup> This land became known as Palestine.<sup>22</sup> Both British and international politics prevented the formal creation of either an Arab or Israeli state in Palestine, and several armed skirmishes arose in the years that followed.<sup>23</sup>

Following World War II and the Holocaust, the hostilities between Arabs and Jews over Palestine reached the level of an international crisis,<sup>24</sup> as the British were unable to stabilize the conflict or broker an agreement between the groups.<sup>25</sup> In early 1947, the British requested the assistance of the recently established United Nations, and the U.N. subsequently created the Special Commission on Palestine (UNSCOP) to find a viable solution.<sup>26</sup> On 29 November 1947, the U.N.

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<sup>18</sup> *Id.* The official mandate, commonly referred to as the British Mandate for Palestine, was based on the original Balfour Declaration of 1917, was written at the League of Nations San Remo Conference in 1920, was officially confirmed by the Council of the League of Nations on 24 July 1922, and officially came into operation in September 1923. *Id.* Nations, however, were acting upon this document since its formation in 1920. *Id.* In relevant part, this Mandate stated:

[The Parties are] in favor of the establishment in Palestine of a national home for the Jewish people, it being clearly understood that nothing should be done which might prejudice the civil and religious rights of existing non-Jewish communities in Palestine or the rights and political status enjoyed by Jews in any other country.

League of Nations San Remo Conference, *British Mandate for Palestine*, Apr. 24, 1920, available at <http://www.yale.edu/lawweb/avalon/mideast/palmanda.htm> (last visited May 11, 2007). Furthermore, it gave special “recognition . . . to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country.” *Id.* For an excellent discussion on the League of Nations and the British Mandate, see generally Douglas J. Feith, *The League of Nations Mandate for Palestine*, in *ISRAEL’S LEGITIMACY IN LAW AND HISTORY* 1-15 (Edward M. Seigel ed., 1993).

<sup>19</sup> BARD, *supra* note 8, at 20-21. In 1921, Colonial Secretary Winston Churchill drafted a paper that was adopted by the League of Nations which essentially divided the British Mandate area in two. *Id.*

<sup>20</sup> *Id.* This area constituted nearly 80% of the entire British Mandate and was completely closed to Jewish settlement in 1921. *Id.*

<sup>21</sup> PRIMER, *supra* note 5, at 4.

<sup>22</sup> *Id.* This area of land now called Palestine was therefore only 20% of the area originally called Palestine.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> BARD, *supra* note 8, at 32.

<sup>26</sup> *Id.*; COUNTRY STUDY, *supra* note 5, at 39.

General Assembly voted to partition Palestine into separate Arab and Jewish states, with Jerusalem holding a special international status.<sup>27</sup> On 14 May 1948, the British Mandate over Palestine expired at midnight, and Israel officially declared itself a sovereign nation.<sup>28</sup>

#### IV. SAMPLING OF POST-CREATION CONFLICTS

As noted in the introduction, Israel has been involved in many conflicts since its formation in 1948.<sup>29</sup> A review of just a portion of these conflicts, and the international reaction to them, is necessary to put Israel's recent actions into context and to provide a framework from which Israel's actions should be judged.

##### A. Initial Conflict

Following the November 1947 partitioning of Palestine by the U.N. General Assembly, violence escalated between Jews and Arabs.<sup>30</sup> In January 1948, Arabs attacked several Jewish cities in northern Palestine, and the British, who were technically still in control of the area at the time, were unable to quell the violence.<sup>31</sup> On 15 May 1948, following the British withdrawal and the Israeli declaration of sovereignty, more than 25,000 Arab military troops from across the Middle East, in addition to more than 35,000 Arab irregulars, attacked the Israeli portion of Palestine.<sup>32</sup> By January 1949, Israeli armed forces

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<sup>27</sup> G.A. Res. 181 (II), U.N. Doc. A/526 (Nov. 29, 1947). In addition, there would be an economic union among these three areas. COUNTRY STUDY, *supra* note 5, at 39.

<sup>28</sup> COUNTRY STUDY, *supra* note 5, at 40. Many nations, including the United States, recognized Israel's status from May 1948. *Id.* at 42. However, it was not until May 1949 that the United Nations General Assembly, upon recommendation of the Security Council, officially admitted Israel into the U.N.. S.C. Res. 69, U.N. Doc. S/1277 (Mar. 4, 1949); G.A. Res. 273 (III), U.N. Doc. A/829 (May 11, 1949).

<sup>29</sup> The author has reviewed the more than 1,700 United Nations Security Council Resolutions, which can be accessed at <http://www.un.org/documents/scres.htm>. Israel's involvement in armed conflicts has led the Security Council to issue more than 265 resolutions dealing with Israel since 1948. This number is astounding, especially when considering how many resolutions dealing with Israel have likely been vetoed or not brought forward due to a likely veto.

<sup>30</sup> COUNTRY STUDY, *supra* note 5, at 39.

<sup>31</sup> BARD, *supra* note 8, at 38.

<sup>32</sup> COUNTRY STUDY, *supra* note 5, at 40. Mitchell Bard described the nature and intent of this invasion in the following way:

Five Arab armies (Egypt, Syria, Transjordan, Lebanon, and Iraq) immediately invaded Israel. Their intentions were declared by Azzam Pasha, Secretary of the Arab League: "This will be a war of extermination and a momentous massacre which will be spoken of like the Mongolian massacres and the Crusades."



had soundly defeated the Arab forces and had conquered territory well beyond the U.N. partition plan.<sup>33</sup> Throughout this conflict, the U.N. Security Council adopted numerous resolutions calling upon the parties to cease hostilities, and it ultimately established an armistice agreement.<sup>34</sup>

## B. Sinai Campaign

In 1955, Egypt permitted, if not sponsored, raids by armed bands of *fedayeen* (Arab guerrillas or commandos) from various regions into Israel, and Israel reacted by attacking several Arab communities in Gaza (controlled by Egypt) and the West Bank (controlled by Jordan).<sup>35</sup> Following international outcry over these attacks against purely civilian targets, Israel began directing its attacks against solely military Arab targets.<sup>36</sup>

In 1956, in addition to its continued support of the *fedayeen*, Egypt renewed its blockage of all passage of ships bound for Israel from coming through the Suez Canal.<sup>37</sup> Egypt had also begun a large-scale buildup of troops along the Israeli border and had publicly indicated their “hostile intent toward Israel.”<sup>38</sup> This combination of actions led Israel to invade Egypt in the Sinai Peninsula on 29 October 1956.<sup>39</sup> The matter was then referred to the U.N. Security Council, but the Council was unable to pass a resolution.<sup>40</sup> As a result, the U.N. General

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BARD, *supra* note 8, at 39 (citing ISI LEIBLER, THE CASE FOR ISRAEL 15 (1972)).

<sup>33</sup> COUNTRY STUDY, *supra* note 5, at 40. As a result, more than 700,000 Palestinian Arabs became refugees, and the Arab Palestinian state planned by the U.N. partition was never realized. PRIMER, *supra* note 5, at 5.

<sup>34</sup> STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 126 (1996) (referencing several U.N. Security Council Resolutions). Although various factions within the U.N. had differing opinions on the legitimacy of the Arab attacks and the Israeli annexation of land previously designated for the Arabs, it is interesting to note that in the Security Council and General Assembly resolutions regarding Israel’s admission to the U.N., each body specifically referred to Israel as a “peace-loving state.” *Id.*; S.C. Res. 69, *supra* note 28; G.A. Res. 273, *supra* note 28.

<sup>35</sup> COUNTRY STUDY, *supra* note 5, at 237.

<sup>36</sup> *Id.*

<sup>37</sup> ALEXANDROV, *supra* note 34, at 150. Egypt had been blocking Israeli shipping through the Suez Canal off and on since 1949, and continued to do so despite a 1951 U.N. Security Council Resolution which had ordered Egypt to allow Israeli shipping through the Canal. BARD, *supra* note 8, at 46-47.

<sup>38</sup> MARY ELLEN O’CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS 246 (2005).

<sup>39</sup> ALEXANDROV, *supra* note 34, at 150.

<sup>40</sup> *Id.* While debates over a resolution were ongoing, the United Kingdom (UK) and France issued certain ultimatums to both Egypt and Israel. *Id.* at 150-51. The UK and France originally owned the Suez Canal Company, but in July 1956, Egypt nationalized the company. *Id.* Angered by this action, the UK and France attempted to force all parties to cease hostilities and to accept their occupation over certain areas along the

Assembly called an emergency special session and passed a resolution demanding a ceasefire and withdrawal by the attacking forces.<sup>41</sup> With passage of this resolution and its progeny, the U.N. was finally able to negotiate a truce among the various parties.<sup>42</sup>

### C. Six-Day War

In May 1967, Egypt began a massive buildup of forces in the Sinai Peninsula, and the United Nations Emergency Force (UNEF)<sup>43</sup> was evacuated on order of the Egyptian President.<sup>44</sup> In addition, Egypt prevented all Israel-bound ships from passing through the Straits of Tiran.<sup>45</sup> Forces from other Arab nations, including Jordan, Algeria, Kuwait, and Iraq, joined forces with Egypt, resulting in more than 465,000 troops, 810 aircraft, and 2,880 tanks being emplaced along Israel's borders.<sup>46</sup> After diplomatic efforts at resolving the crisis had failed, Israel launched a preemptive attack against the Egyptian-controlled forces on 5 June 1967.<sup>47</sup> By 10 June,<sup>48</sup> Israel had virtually eliminated all Arab air forces and had rendered ineffective the vast

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Suez Canal. *Id.* After a series of failed resolutions by the U.N. Security Council and rejection of the British and French ultimatums, these two countries began to bomb Egyptian airfields and then sent in ground troops. *Id.* The Security Council was effectively inhibited from condemning the attacks, as two of the warring parties (the UK and France) exercised their veto power. *Id.* at 152.

<sup>41</sup> *Id.*; G.A. Res. 997 (ES-1), U.N. Doc. A/3354 (Nov. 2, 1956). This resolution received nearly unanimous support, as only five countries voted against it, namely Israel, France, the UK, and two British Commonwealth States (Australia and New Zealand). ALEXANDROV, *supra* note 34, at 152. It should be noted, however, that with the exception of internal matters such as the budget, “[General] Assembly resolutions in themselves cannot establish binding legal obligations for member states.” MALCOLM N. SHAW, INTERNATIONAL LAW 831 (4th ed. 1997).

<sup>42</sup> ALEXANDROV, *supra* note 34, at 152. In addition, the U.N. established the United Nations Emergency Force (UNEF) in order to maintain peace and security in the region, to oversee the withdrawal of military forces from Egypt, and to protect Israel from further attacks by the *fedayeen*. *Id.*; COUNTRY STUDY, *supra* note 5, at 238. This is significant, for although the U.N. did not accept Israeli (or the British and French) self-defense justification for invading Egypt, it did recognize that Israel was in need of protection and sent in troops for that very reason. ALEXANDROV, *supra* note 34, at 152-53.

<sup>43</sup> See *supra* note 42 for an explanation of UNEF's role.

<sup>44</sup> Robert A. Zayac, Jr., *United States' Authority to Legally Implement the Self-Defense and Anticipatory Self-Defense Doctrines to Eradicate the Threat Posed by Countries Harboring Terrorists and Producing Weapons of Mass Destruction*, 29 S. ILL. U. L.J. 433, 455 (2005).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 455-56.

<sup>47</sup> *Id.* at 456.

<sup>48</sup> This war lasted only six days; thus, it has been commonly referred to as the “Six-Day War.” COUNTRY STUDY, *supra* note 5, at 240.

majority of the Arab ground forces.<sup>49</sup> The international reaction to Israel's attack was mixed, and the Security Council was never able to pass a resolution either condemning or affirming Israel's claim of preemptive/anticipatory self-defense.<sup>50</sup> It was, however, able to pass a resolution calling for the withdrawal of Israeli forces in exchange for peace throughout the region.<sup>51</sup>

#### D. 1968 Israeli Attack on Beirut Airport

In December 1968, Israel launched an attack against the Beirut airport in response to a previous terrorist attack against an Israeli plane at the Athens airport.<sup>52</sup> Israel claimed that Lebanon had permitted terrorist organizations to maintain their headquarters in Beirut and train their followers there.<sup>53</sup> Israel argued that Lebanon was responsible for the terrorists' activities, and believed that it was justified in responding against Lebanon as an act of self-defense.<sup>54</sup> Israel's claims received little to no support in the international community, and the Security Council unanimously condemned the Israeli attack.<sup>55</sup>

#### E. The October 1973 War

On 28 September 1973, a band of Palestinian guerrillas attacked an Austrian train with Jews onboard on the first leg of their trip to Israel.<sup>56</sup> At the same time, Egypt and Syria began amassing troops along Israel's borders.<sup>57</sup> Israel believed that these troop movements were defensive in nature in the event it would take action in reprisal for

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<sup>49</sup> *Id.* As a result of this overwhelming military victory, Israel occupied the Gaza Strip, the Golan Heights of Syria, the West Bank of Jordan, including East Jerusalem, and the Sinai Peninsula to the east bank of the Suez Canal. *Id.*; PRIMER, *supra* note 5, at 7. A large portion of these occupied territories have been returned, but many areas captured during this war are still occupied and are the source of ongoing tensions. BARD, *supra* note 8, at 59.

<sup>50</sup> Zayac, *supra* note 44, at 456 (noting that both the U.N. Security Council and the U.N. General Assembly failed to pass resolutions condemning Israel's actions, with the United States acting as the lead inhibitor). Israel "claimed that it was entitled to act in self-defense because of the clear implication that Syrian and Egyptian forces had been deployed as part of impending attack." ALEXANDROV, *supra* note 34, at 153-54 (citing Statement of Mr. Eban, U.N. Doc. S/PV 1348 (1967), at 71).

<sup>51</sup> S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967).

<sup>52</sup> CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 161 (2d ed. 2004).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> ALEXANDROV, *supra* note 34, at 173-74; S.C. Res. 262, U.N. Doc. S/RES/262 (Dec. 31, 1968) (unanimous resolution, including United States concurrence, describing Israel's attack as "premeditated and of a large scale and carefully planned nature").

<sup>56</sup> COUNTRY STUDY, *supra* note 5, at 241.

<sup>57</sup> *Id.*

the train attack.<sup>58</sup> Therefore, Israel did not mobilize its forces until October 6 (Yom Kippur),<sup>59</sup> but by that time, it was too late. On that afternoon, in the Golan Heights region, more than 1,400 Syrian tanks attacked the 180 mobilized Israeli tanks.<sup>60</sup> In the Suez Canal region, 80,000 Egyptians began the offensive against only 500 Israeli troops.<sup>61</sup> Despite some devastating initial setbacks, Israel was able to thwart the attack and soon launched a counterattack.<sup>62</sup> On 22 October, the U.N. Security Council adopted a resolution calling for a cease-fire,<sup>63</sup> which was ultimately implemented on October 24.<sup>64</sup> Despite what clearly appeared to be a surprise attack by Egyptian and Syrian forces against Israel, the U.N. Security Council did not denounce Egypt and Syria.<sup>65</sup> A United Nations Disengagement Observer Force (UNDOF) was then sent to the region to assist in the disengagement process.<sup>66</sup>

#### F. Israeli Raid on Entebbe

On 27 June 1976, Arab terrorists hijacked a plane from Israel and ultimately diverted it to Uganda's Entebbe Airport.<sup>67</sup> Many countries and international organizations attempted to negotiate the release of the hostages, and by the morning of July 4, all hostages had been released except for those with direct ties to Israel.<sup>68</sup> Although it denied any collusion with the hijackers, the Government of Uganda was believed to be complicit with them.<sup>69</sup> Therefore, seeing no other viable

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* In Israel, this conflict is known as the Yom Kippur War, since it began on this important Jewish holiday. The Arab world refers to this conflict as the Ramadan War. *Id.* For an excellent book on this war, see FRANK AKER, *OCTOBER 1973: THE ARAB-ISRAELI WAR* (1985).

<sup>60</sup> BARD, *supra* note 8, at 74.

<sup>61</sup> *Id.*

<sup>62</sup> COUNTRY STUDY, *supra* note 5, at 241-42. For an interesting discussion of the international politics during the initial weeks of the war, see BARD, *supra* note 8, at 74.

<sup>63</sup> S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973).

<sup>64</sup> COUNTRY STUDY, *supra* note 5, at 242.

<sup>65</sup> S.C. Res. 338, *supra* note 63. This is quite ironic, for in the resolution immediately preceding the resolution calling for a cease-fire, the Security Council had "condemn[ed] the Government of Israel for violating Lebanon's sovereignty and territorial integrity and for the forcible diversion and seizure by the Israeli air force of a Lebanese airliner from Lebanon's air space." S.C. Res. 337, U.N. Doc. S/RES/337 (Aug. 15, 1973). This resolution further stated "that these actions by Israel constitute a violation of . . . the principles of international law and morality," and warned Israel against taking any future actions of this nature. *Id.*

<sup>66</sup> COUNTRY STUDY, *supra* note 5, at 242.

<sup>67</sup> Thomas R. Krift, *Self-Defense and Self-Help: The Israeli Raid on Entebbe*, 4 *BROOK. J. INT'L L.* 43, 43 (1978).

<sup>68</sup> *Id.* at 43-44.

<sup>69</sup> *Id.* at 44-47.

alternative, Israel sent commandos into Uganda and raided the airport.<sup>70</sup> They destroyed or disabled Ugandan aircraft and military equipment and killed approximately 20 Ugandan troops during the rescue.<sup>71</sup> In addition, seven hijackers and three hostages were killed.<sup>72</sup>

The Security Council was unable to come to a consensus on the legality of Israel's actions.<sup>73</sup> The United States supported the raid as a legitimate act of defense of Israel's nationals which involved only a limited incursion into the sovereign territory of another state.<sup>74</sup> The majority of the Security Council, however, did not accept this argument, and viewed Israel's actions as a violation of the U.N. Charter's prohibitions against the use of force since Israel itself was not directly attacked.<sup>75</sup>

#### G. Attack on Osirak

In 1981, Israel attacked a nuclear reactor in Iraq before it could become operational and produce the nuclear fuel necessary to develop the warhead for nuclear missiles.<sup>76</sup> Israel claimed it had a right to "preemptive" self-defense, asserting that this reactor would be a direct step toward Iraq developing nuclear weapons that could be used against it.<sup>77</sup> For years, Iraq had not recognized Israel's status as a State and had openly endorsed action against Israel.<sup>78</sup> Despite this, the U.N. Security Council, including the United States, publicly decried Israel's claims to

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<sup>70</sup> *Id.* at 44.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> ALEXANDROV, *supra* note 34, at 195-96.

<sup>74</sup> Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1630 (1984).

<sup>75</sup> GRAY, *supra* note 52, at 31-32; ALEXANDROV, *supra* note 34, at 196-97. Although outside the scope of this article, this raises an interesting issue on whether self-defense of one's nationals on foreign soil is legitimate under international law. See generally Krift, *supra* note 67; see also *infra* note 246 and accompanying text.

<sup>76</sup> Louis Rene Beres & Colonel Yoash Tsiddon-Chatto, *Reconsidering Israel's Destruction of Iraq's Osirak Nuclear Reactor*, 9 TEMP. INT'L & COMP. L.J. 437, 437-38 (1995) (citing many sources giving background to the incident). For a closer look at the threat this reactor posed to Israel, see Lieutenant Colonel Uri Shoham, *The Israeli Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 MIL. L. REV. 191, 207-13 (1985) [hereinafter Shoham].

<sup>77</sup> Zayac, *supra* note 44, at 456.

<sup>78</sup> *Id.* In fact, Iran had attacked the reactor the previous year in the Iraq-Iran War, and had slightly damaged it. Rebecca Grant, *Osirak and Beyond*, AIR FORCE MAGAZINE, Aug. 2002, at 74-75, available at <http://www.afa.org/magazine/aug2002/0802osirik.pdf>. In response, the official Iraqi, government-controlled news agency issued the following statement: "The Iranian people should not fear the Iraqi nuclear reactor, which is not intended to be used against Iran, but against the Zionist entity." *Id.*; see also Shoham, *supra* note 76, at 204-07 (providing an insightful discussion on the Iraqi attitude toward the "Zionist entity").

self-defense, and even recommended that Israel pay reparations to Iraq.<sup>79</sup>

## V. INVASION OF LEBANON

Israel has been involved in many other conflicts with several nations and entities since its attack on Osirak in 1982.<sup>80</sup> This section, however, focuses on Israel's clashes in Lebanon, and with Hezbollah in particular, which ultimately led to the 2006 invasion of Lebanon.

### A. Earlier Invasions of Lebanon

By 1978, Israel had been dealing with attacks from Lebanon for the thirty years since its formation as a state.<sup>81</sup> In March 1978, a Palestinian Liberation Organization (PLO) commando unit from Lebanon attacked a town in Israel that left many dead and wounded.<sup>82</sup> In response, Israel invaded Lebanon, and within a few days had occupied virtually the entire southern portion of the country.<sup>83</sup> Although the U.N. Security Council did not condemn Israel's actions, it did call for Israel's immediate withdrawal from Lebanese territory—which was only partially complied with—and the establishment of a U.N. Force in Lebanon.<sup>84</sup>

In 1981, with some Israeli forces still in Lebanon, Israel struck several civilian targets in Beirut following a number of terrorist actions Israel believed had been launched from Beirut.<sup>85</sup> Israel justified its attacks as legitimate acts of self-defense.<sup>86</sup> Critics of the action claimed that self-defense must be “proportionate to the seriousness of the attack and justified by the seriousness of the danger,” and that Israel's attacks were illegal reprisals.<sup>87</sup> The Security Council condemned Israel's

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<sup>79</sup> S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981). For a more in-depth analysis of the international reaction to this incident, see ALEXANDROV, *supra* note 34, at 159-62; Beres & Tsiddon-Chatto, *supra* note 76, at 437-40; GRAY, *supra* note 52, at 17-19; Schachter, *supra* note 74, at 1635.

<sup>80</sup> See e.g., BARD, *supra* note 8, at 195-216. For an excellent discussion on Israel's attack on Tunisia in response to terrorist attacks and the U.N.'s scathing criticism of Israel, see Jackson Nyamuya Maogoto, *Walking an International Law Tightrope: Use of Military Force to Counter Terrorism—Willing the Ends*, 31 BROOK. J. INT'L L. 405, 431-33 (2006).

<sup>81</sup> ALEXANDROV, *supra* note 34, at 174-77.

<sup>82</sup> United Nations, *Lebanon-UNIFIL-Background*, <http://www.un.org/Depts/dpko/missions/unifil/background.html> (last visited May 11, 2007) [hereinafter UNIFIL Background].

<sup>83</sup> *Id.*

<sup>84</sup> S.C. Res. 425, U.N. Doc. S/RES/425 (Mar. 19, 1978); S.C. Res. 426, U.N. Doc. S/RES/426 (Mar. 19, 1978).

<sup>85</sup> ALEXANDROV, *supra* note 34, at 177. Israel had repeatedly gone to the U.N. Security Council about these terrorist attacks, but had received no support. *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* See *infra* notes 281-92 and accompanying text for a discussion on reprisals.

actions and unanimously passed a resolution demanding the cessation of further attacks.<sup>88</sup>

In June 1982, after more than 270 attacks against Israel by the PLO, which was operating primarily out of Lebanon, Israel invaded Lebanon.<sup>89</sup> Israel claimed that these PLO actions were equal to an armed attack, and that “Lebanon’s incapacity or unwillingness to control the inhabitants in its territory also amounted to an armed attack.”<sup>90</sup> Israel felt justified in responding as a right of self-defense, but was careful not to exchange blows directly with Lebanese forces for fear of escalating the situation even further.<sup>91</sup> Furthermore, Israel claimed that it had the right to take action to deter future acts of terrorism.<sup>92</sup>

In a number of resolutions, the Security Council repeatedly rejected Israel’s claims.<sup>93</sup> “[T]he use of force by Israel was found [by the Security Council] to be of preemptive or punitive character, disproportionate and not dictated by the necessity to repel an attack; the Israeli actions were considered in the nature of reprisals rather than self-defense.”<sup>94</sup>

## B. Conflict With Hezbollah

Hezbollah, which means “Party of God,” first formed itself as an organization in opposition to Israel’s invasion of Lebanon in 1982.<sup>95</sup>

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<sup>88</sup> S.C. Res. 490, U.N. Doc. S/RES/490 (July 21, 1981).

<sup>89</sup> BARD, *supra* note 8, at 95.

<sup>90</sup> ALEXANDROV, *supra* note 34, at 177-78. See *infra* notes 206-48 and accompanying text for a discussion of the significance of an incident being deemed an “armed attack.” Yoram Dinstein summed up the basis and nature of this conflict in Lebanon in the following way:

[T]he best contemporary illustration of extra-territorial law enforcement was provided by the Israeli incursion into Lebanon, in 1982, designed to destroy a vast complex of Palestinian bases from which multiple armed attacks across the international frontier had originated. The Government of Lebanon was incapable of putting an end to the formidable Palestinian military presence within its territory, and Israel felt compelled to cope with the problem by sending a sizeable expeditionary force into southern Lebanon. Israeli and Lebanese forces did not exchange fire at any point in 1982, and the Israeli operation did not amount to a war with Lebanon.

YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 218 (3d ed. 2001).

<sup>91</sup> *Id.*

<sup>92</sup> ALEXANDROV, *supra* note 34, at 178.

<sup>93</sup> See *id.* at 178 n.280 (referencing several U.N. Security Council Resolutions between June and September 1982).

<sup>94</sup> *Id.* at 179. This article addresses reprisals *infra* notes 281-92 and accompanying text.

<sup>95</sup> Neil MacFarquhar & Hassan M. Fattah, *In Hezbollah Mix of Politics and Arms, Arms Win Out*, N.Y. TIMES, July 16, 2006, at A1; Linda McQuaig, Editorial, *Our*

Its members are almost exclusively radical Islamic Shiites who want to establish a Muslim fundamentalist state similar to Iran.<sup>96</sup> To accomplish this, one of Hezbollah's stated goals is to permanently remove Israel from Lebanon, followed by Israel's "final obliteration from existence."<sup>97</sup> From its very roots, Hezbollah has resorted to suicide attacks and other asymmetric methods of warfare.<sup>98</sup> For years, it has received logistical and political support from Syria<sup>99</sup> and significant military and financial support from Iran.<sup>100</sup> Hezbollah had (and still has) virtual control over a large area of land in southern Lebanon,<sup>101</sup> especially since Israel removed all of its troops from southern Lebanon in 2000.<sup>102</sup> Much like the situation with the PLO in the 1980s, Lebanon

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*Governments Have Usually Tried To Be Fair*, TORONTO STAR, Aug. 6, 2006, at A16 (commenting that Hezbollah did not exist before the 1982 Israeli invasion of Lebanon, and that it was Israel's 18-year occupation that "sparked" Hezbollah's emergence).

<sup>96</sup> Council on Foreign Relations, *Hezbollah*, July 17, 2006, <http://www.cfr.org/publication/9155> [hereinafter CFR Report]. For an outstanding overview of Hezbollah's overarching philosophy and actions, see Lara Deeb, *Hizballah: A Primer*, July 31, 2006, <http://merip.org/mero/mero073106.html>.

<sup>97</sup> Deeb, *supra* note 96. Although Deeb questions whether Hezbollah really intends to follow through with the rhetoric of annihilating Israel, she does say that "[t]his perspective is supported by [Hezbollah's] 1985 Open Letter, which includes statements such as, 'Israel's final departure from Lebanon is a prelude to its final obliteration from existence and the liberation of venerable Jerusalem from the talons of occupation.'" *Id.*

<sup>98</sup> CFR Report, *supra* note 96. Some of these attacks include the 1983 suicide truck bombing that killed more than 200 U.S. Marines in Lebanon, numerous hijackings, a series of kidnappings, and attacks against Jewish targets in Argentina. *Id.* Not including the continuous shelling of Israel, which will be discussed further below, Hezbollah has been responsible for nearly 200 attacks worldwide, which have killed more than 800 people. *Id.* Hezbollah has also been on the U.S. Terrorism List for many years. *Id.*

<sup>99</sup> *Id.*; BARD, *supra* note 8, at 103. Large numbers of Syrian armed forces were actually in Lebanon until 2005, when these forces finally left to fulfill a U.N. Security Council Resolution calling for their withdrawal. Robin Wright, *Strikes Are Called Part of Broad Strategy; U.S., Israel Aim to Weaken Hezbollah, Region's Militants*, WASH. POST, July 16, 2006, at A15.

<sup>100</sup> MacFarquhar & Fattah, *supra* note 95, at A1. Recent Congressional testimony citing various intelligence reports estimates that Iran provides Hezbollah with between \$100 million and \$200 million annually, with even more funds coming from Shiite expatriates living outside of the Middle East. *Id.* Hezbollah's leader, Sheik Hassan Nasrallah, claimed in 2005 to having more than 12,000 rockets, which are believed to be Katyusha rockets provided by Iran. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* In 1985, Israel withdrew the vast majority of its troops that had been occupying portions of Lebanon since the 1982 invasion. BARD, *supra* note 8, at 99. Only 1,000 Israeli troops remained along a narrow strip of territory which extended eight miles into southern Lebanon until the May 2000 complete withdrawal from Lebanon. *Id.* at 99-100. This withdrawal was conducted with the approval and under the supervision of the United Nations. *Id.* at 100. There still is an ongoing dispute over a small area called the Shebaa Farms, which is currently under Israeli control. Joshua Mitnick, *Behind the Dispute Over Shebaa Farms*, CHRISTIAN SCI. MONITOR, Aug. 22, 2006, at 15. Israel and the U.N. claim that this area was part of the Golan Heights captured from Syria during the Six-Day War, while Syria and Lebanon claim that it rightfully belongs to Lebanon.



has been either unwilling or unable to prevent Hezbollah from carrying out its operations.<sup>103</sup> In a relatively recent turn of events, Hezbollah has even integrated itself into the Lebanese government by obtaining seats in the Lebanese Parliament and Cabinet.<sup>104</sup>

From its very formation in 1982, Hezbollah has been fighting with Israel.<sup>105</sup> Over the years, Hezbollah's tactics have modernized, and its weapons capabilities have become very advanced.<sup>106</sup> Although Hezbollah is relatively small in number, its military arm is very well-trained in guerilla warfare and has "special units for intelligence, anti-tank warfare, explosives, engineering, communications, and rocket launching."<sup>107</sup> This rocket launching and the Israeli responses became routine, resulting in thousands of Israeli and Hezbollah fighters killed

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*Id.* At the time of the Israeli withdrawal from Lebanon in 2000, the U.N. permitted this territory to remain in Israeli hands. *Id.* Thus, when it declared that Israel had completed its withdrawal from Lebanon, it tacitly approved of Israel's claim to this land. *Id.* The Lebanese government protested this, and Hezbollah has been using this issue as an excuse to attack Israel. *Id.* On a side note, although this area of land is arid and virtually unusable, it does have historical and religious significance as the alleged site of Abraham's "divine covenant" with God and the promise of the land to his sons. *Id.*; see *supra* notes 5-7 and accompanying text (discussing this promise).

<sup>103</sup> BARD, *supra* note 8, at 99; GRAY, *supra* note 52, at 172-75.

<sup>104</sup> MacFarquhar & Fattah, *supra* note 95, at A1; Neil MacFarquhar, *Leader of Hezbollah Discovers A New Fray: Lebanese Politics*, N.Y. TIMES, Mar. 13, 2005, at A1; CFR Report, *supra* note 96; Michael Slackman, *Hezbollah Uses Influence to Jockey for Power in Beirut*, N.Y. TIMES, Nov. 6, 2006, at A3 [hereinafter Slackman]; see also Deeb, *supra* note 96 (providing an overview of Hezbollah's political and philanthropic agenda); Anthony Shadid, *Rival Groups Clash in Beirut Streets*, WASH. POST, Jan. 26, 2007, at A10 (describing Hezbollah's ability to influence Lebanese politics).

<sup>105</sup> CFR Report, *supra* note 96.

<sup>106</sup> Steven Erlanger & Richard A. Oppel, Jr., *A Disciplined Hezbollah Surprises Israel With Its Training, Tactics and Weapons*, N.Y. TIMES, Aug. 7, 2006, at A8; John Kifner, *In Long Fight with Israel, Hezbollah Tactics Evolved*, N.Y. TIMES, July 19, 2000, at A12 (discussing Hezbollah's use of information operations). In addition to the sophisticated Iranian-made missiles mentioned above, Hezbollah's arsenal includes satellite communications, Semtex plastic explosives, wire-guided and laser-guided anti-tank missiles with double-phased explosive warheads, the C-802 (a ground-to-ship missile), Syrian-made 220-mm and 302-mm missiles equipped with anti-personnel warheads, and other sophisticated equipment. *Id.*; see also Mark Mazzetti & Thom Shanker, *Arming of Hezbollah Reveals U.S. and Israeli Blind Spots*, N.Y. TIMES, July 19, 2006, at A12 (describing the sophistication of Hezbollah's weapons). According to the *New York Times*, Hezbollah is known to have over 10,000 Arash rockets (12-mile range, 40 lb. warhead), 100 Fajr rockets (Fajr-3s have a 28-mile range with a 99 lb. warhead and Fajr-5s have a 47-mile range with a 198 lb. warhead), about a dozen Zelzal missiles (62-124-mile range, 1,323 lb. warhead), and an unknown number of C-802 cruise missiles (75-mile range, 364 lb. warhead). *Hezbollah's Arsenal*, <http://topics.nytimes.com/top/news/international/countriesandterritories/israel/index.html?inline=nyt-geo> (follow Interactive Graphic: Attacks, Day by Day link and then click on the Hezbollah Arsenal dropdown) (last visited May 11, 2007). This website also displays an interactive map demonstrating the range of these missiles if launched from the Lebanese-Israeli border into Israel. *Id.*

<sup>107</sup> Erlanger & Oppel, *supra* note 106, at A8.

and wounded, and many Israeli and Lebanese civilian casualties.<sup>108</sup> Kidnappings by both sides also became a normal part of the so-called “rules of the game” between Hezbollah and Israel, and have been used by the parties in negotiations for release of prisoners and other concessions.<sup>109</sup>

### C. United Nations Actions in Lebanon from 1978 to 2006

As noted above, in 1978, the United Nations created the United Nations Interim Force in Lebanon (UNIFIL) after the Israeli invasion of Lebanon.<sup>110</sup> The U.N. created this Force for the purposes of “confirming the withdrawal of Israeli forces; restoring international peace and security; and assisting the Government of Lebanon in ensuring the return of its effective authority in the area.”<sup>111</sup> During the 1982 invasion of Lebanon by Israel, UNIFIL forces stayed behind Israeli lines “providing protection and humanitarian assistance to the local population . . . .”<sup>112</sup> During the entire period of Israeli occupation of southern Lebanon, UNIFIL Forces still remained.<sup>113</sup> In 2000, even following Israel’s complete withdrawal from Lebanon in accordance with U.N. resolutions, the U.N. extended UNIFIL’s mandate again for successive six-month periods, as tension still existed in the area.<sup>114</sup>

From 2000 through 2006, in a series of resolutions, the Security Council called on Lebanon to reassert its control over its entire territory and ensure peace and security in the area.<sup>115</sup> Of particular significance

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<sup>108</sup> See Greg Myre & Hassan M. Fattah, *Israel and Militants Trade Fire Across Lebanese Border*, N.Y. TIMES, May 29, 2006, at A3 (discussing at length the details of ongoing fighting between Israel and Hezbollah); Hassan M. Fattah, *Israeli Troops and Hezbollah Clash Again Near the Border*, N.Y. TIMES, Nov. 24, 2005, at A16 (discussing fighting that left four Hezbollah guerillas dead and eleven Israelis wounded); Greg Myre, *Israelis and Hezbollah Clash at Lebanon Line*, N.Y. TIMES, May 8, 2004, at A6; Greg Myre, *Israeli Warplane Attacks 2 Hezbollah Bases in Lebanon*, N.Y. TIMES, Jan. 21, 2004, at A6 (describing ongoing conflict); James Bennet, *Israeli Youth Killed by Shelling from Lebanon*, N.Y. TIMES, Aug. 11, 2003, at A2; Kifner, *supra* note 106, at A12 (stating that by the year 2000, Hezbollah had lost 1,200 fighters and Israel had lost hundreds of soldiers).

<sup>109</sup> Deeb, *supra* note 96.

<sup>110</sup> UNIFIL Background, *supra* note 82.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> S.C. Res. 1310, U.N. Doc. S/RES/1310 (July 27, 2000); S.C. Res. 1337, U.N. Doc. S/RES/1337 (Jan. 30, 2001); S.C. Res. 1365, U.N. Doc. S/RES/1365 (July 31, 2001); S.C. Res. 1391, U.N. Doc. S/RES/1391 (Jan. 28, 2002); S.C. Res. 1428, U.N. Doc. S/RES/1428 (July 30, 2002); S.C. Res. 1461, U.N. Doc. S/RES/1461 (Jan. 30, 2003); S.C. Res. 1490, U.N. Doc. S/RES/1490 (July 31, 2003); S.C. Res. 1525, U.N. Doc. S/RES/1525 (Jan. 30, 2004); S.C. Res. 1553, U.N. Doc. S/RES/1553 (July 29, 2004); S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004); S.C. Res. 1583, U.N. Doc.

is UNSCR 1559 of September 2, 2004, in which the Security Council stated that it was “[g]ravelly concerned at the continued presence of armed militias in Lebanon, which prevent the Lebanese Government from exercising its full sovereignty over all Lebanese territory.”<sup>116</sup> Furthermore, it “call[ed] for the disbanding and disarmament of all Lebanese and non-Lebanese militias.”<sup>117</sup> Obviously, Lebanon was unable to fulfill its U.N.-mandated and nation-state obligations to control and disarm Hezbollah, and the fighting has continued.<sup>118</sup> The U.N.’s efforts at removing the Hezbollah threat met, and continues to meet, with little success.<sup>119</sup>

#### D. Invasion

As noted earlier, since Israel’s 2000 withdrawal from Lebanon the fighting between Hezbollah and Israel has continued in a rather predictable manner.<sup>120</sup> Hezbollah has launched Katyusha rockets at Israel, targeted random Israelis in a number of shootings, and kidnapped Israeli soldiers and civilians.<sup>121</sup> These kidnappings have reaped benefits for Hezbollah. For example, in 2004, Israel released hundreds of Palestinian and Lebanese imprisoned terrorists in exchange for a kidnapped Israeli businessman and the bodies of three Israeli soldiers.<sup>122</sup>

In response to Hezbollah’s attacks and actions, Israel typically launched retaliatory airstrikes, coupled with an occasional kidnapping of its own.<sup>123</sup> This routine became rather predictable, and empowered Hezbollah even further. As one author noted, “[o]ver the past six and a half years, Israel’s handling of the Hezbollah threat from Lebanon is a compendium of failure and self-delusion by governments of the right,

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S/RES/1583 (Jan. 28, 2005); S.C. Res. 1614, U.N. Doc. S/RES/1614 (July 29, 2005); S.C. Res. 1655, U.N. Doc. S/RES/1655 (Jan. 31, 2006); S.C. Res. 1680, U.N. Doc. S/RES/1680 (May 17, 2006).

<sup>116</sup> S.C. Res. 1559, *supra* note 115 (emphasis in original).

<sup>117</sup> *Id.* (emphasis in original).

<sup>118</sup> Edward Mortimer, *Arab Land Carved Up*, NEW STATESMAN, July 31, 2006, at 14 (describing the political and military impotency of the Lebanese government in controlling Hezbollah, thus paving the way for the 2006 Israeli invasion).

<sup>119</sup> For a biting critique of the U.N.’s failures in Lebanon, both by its resolutions and UNIFIL, see UN Watch, *Lebanon and the Many Faces of the UN*, (July 26, 2006), <http://www.unwatch.org/site/apps/nl/content2.asp?c=bdKKISNqEmG&b=1314451&ct=2842505>. See also Hassan M. Fattah & Warren Hoge, *U.N. Force in Lebanon Offers Harsh Realities and Lessons*, N.Y. TIMES, July 19, 2006, at A10 (discussing the ineffectiveness of UNIFIL and quoting UNIFIL officials who recognized the failure of UNIFIL).

<sup>120</sup> See *supra* notes 105-09 and accompanying text.

<sup>121</sup> Editorial, *Rebuilding Israel’s Deterrent*, WASH. TIMES, Aug. 15, 2006, at A14 [hereinafter *Deterrent*].

<sup>122</sup> *Id.*; Deeb, *supra* note 96.

<sup>123</sup> *Deterrent*, *supra* note 121, at A14; Deeb, *supra* note 96 (stating that Israel has kidnapped Lebanese civilians such as shepherds and fishermen).

left and center that have emboldened Israel's enemies and endangered its people."<sup>124</sup>

In the months prior to the invasion, Hezbollah's leader, Sheikh Hassan Nasrallah, had openly stated Hezbollah's intention to kidnap Israeli soldiers and use them as "bargaining chips in indirect negotiations for the release of three Lebanese detained [by Israel] without due process and in defiance of the Supreme Court of Israel."<sup>125</sup> Hezbollah had a kidnapping plan in place for months, and had even previously attempted to kidnap some Israeli soldiers.<sup>126</sup>

On July 12, 2006, Hezbollah launched a series of rocket attacks at Israeli Defense Forces (IDF) positions.<sup>127</sup> At the same time, Hezbollah fighters crossed into Israel and attacked an Israeli patrol, killing three Israeli soldiers and wounding two more.<sup>128</sup> Hezbollah accomplished its original goal and kidnapped two Israeli soldiers, taking them back into Lebanon.<sup>129</sup> When Israeli forces made an initial attempt to rescue these two soldiers, three more Israeli soldiers were killed.<sup>130</sup> Hezbollah apparently expected Israel to respond to the kidnapping in its typical fashion, perhaps by launching a retaliatory airstrike and entering into negotiations for the return of the kidnapped soldiers.<sup>131</sup>

Hezbollah's expectation was flawed, as Israel did not react in its normal fashion. Following the attack on the patrol and the kidnapping, Israel launched a series of air and sea attacks on Hezbollah positions in southern Lebanon, as well as on specified targets in Beirut and northern Lebanon.<sup>132</sup> Israel also immediately initiated a naval blockade of Lebanon.<sup>133</sup> Over the next thirty-three days, Israel bombed Hezbollah strongholds in the south, as well as many infrastructure and civilian targets throughout all of Lebanon, many of which had no ties to

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<sup>124</sup> *Deterrent*, *supra* note 121, at A14.

<sup>125</sup> Deeb, *supra* note 96; *Deterrent*, *supra* note 121, at A14. During the 2004 exchange of kidnapped individuals and prisoners, Israel, at the last minute, decided to keep three Lebanese prisoners. Deeb, *supra* note 96. The Israeli Supreme Court ruled that these prisoners should be released as part of the agreement, but Israeli officials defied the order and kept them. *Id.* For an overall background of prisoners previously and currently held by Israel, see Craig S. Smith, *Freeing Prisoners Key Goal in Fight Against Israel*, N.Y. TIMES, Aug. 4, 2006, at A1.

<sup>126</sup> Deeb, *supra* note 26.

<sup>127</sup> UNIFIL Background, *supra* note 82.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Deterrent*, *supra* note 121, at A14. Hezbollah's leader, Sheik Hassan Nasrallah, later made a statement "that he would not have ordered the abduction of two Israeli soldiers if he had known it would lead to a large war." *State Department Surprised by Hezbollah*, Aug. 28, 2006, [http://www.foxnews.com/printer\\_friendly\\_wires/2006Aug28/0,4675,USLebanon,00.html](http://www.foxnews.com/printer_friendly_wires/2006Aug28/0,4675,USLebanon,00.html).

<sup>132</sup> UNIFIL Background, *supra* note 82.

<sup>133</sup> Deeb, *supra* note 96.

Hezbollah.<sup>134</sup> Hezbollah responded with thousands of rocket and missile attacks against Israel.<sup>135</sup> Israeli troops moved into southern Lebanon on July 22, and over the course of the next several weeks, Israeli ground forces were bogged down in southern Lebanon.<sup>136</sup> On August 12, Israel's ground forces in Lebanon had reached nearly 30,000 troops, and they began an offensive to the north out of southern Lebanon.<sup>137</sup> The timing of this operation is curious, as on the previous day, the U.N. Security Council had finally passed a resolution calling for an end to the hostilities, and "in particular, the immediate cessation by Hizbollah of all attacks and the immediate cessation by Israel of all offensive military operations."<sup>138</sup> The cease-fire agreement was ultimately reached, and major hostilities ended on August 14.<sup>139</sup> Israel withdrew its last troops from southern Lebanon on October 1, thereby fulfilling a key condition of the cease-fire agreement.<sup>140</sup>

Israel's actions during the war have been, and continue to be, a cause for great concern. Although this article focuses on whether Israel was legally justified in attacking and invading Lebanon to begin with, Israel's military actions during the conflict are relevant when discussing the proportionality of Israel's claim to self-defense. As this article explains in further detail later, Israel's questionable tactics during the war tend to undermine the validity of its arguments for launching the war in the first place.<sup>141</sup>

Human rights groups have stated that many of Israel's targets during the conflict had "dubious," if any, ties to being legitimate military targets, and that these attacks caused severe civilian casualties

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<sup>134</sup> *Major Attacks in Lebanon Israel and the Gaza Strip*, <http://topics.nytimes.com/top/news/international/countriesandterritories/israel/index.html?inline=nyt-geo> (follow Interactive Graphic: Attacks, Day by Day link) (last visited May 11, 2007) [hereinafter Attacks Graphic]. This website provides an interactive module with day-by-day narratives and graphics of the entire 2006 conflict between Israel and Hezbollah/Lebanon. See also Deeb, *supra* note 96, where the author describes the bombings as follows:

In Lebanon, entire villages in the south have been flattened, as have whole neighborhoods in the southern suburbs of Beirut. Runways and fuel tanks at Beirut International Airport, roads, ports, power plants, bridges, gas stations, TV transmitters, cell phone towers, a dairy and other factories, and wheat silos have been targeted and destroyed, as well as trucks carrying medical supplies, ambulances, and minivans full of civilians.

<sup>135</sup> Erlanger & Oppel, *supra* note 106, at A8.

<sup>136</sup> Attacks Graphic, *supra* note 134.

<sup>137</sup> *Id.*

<sup>138</sup> S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

<sup>139</sup> Attacks Graphic, *supra* note 134.

<sup>140</sup> Matti Friedman, *Israel Withdraws Last Troops from Lebanon*, WASH. POST, Oct. 1, 2006, at A20.

<sup>141</sup> See *infra* notes 320-37 and accompanying text.

and other “collateral damage.”<sup>142</sup> In addition, Israel’s extensive use of cluster bombs near the end of the conflict,<sup>143</sup> in addition to its use of

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<sup>142</sup> Human Rights Watch, *Israel: Government Committee Should Probe Lebanon Laws of War Violations*, Sept. 22, 2006, [http://hrw.org/english/docs/2006/09/22/isrlpa14250\\_txt.htm](http://hrw.org/english/docs/2006/09/22/isrlpa14250_txt.htm); HUMAN RIGHTS WATCH, *FATAL STRIKES: ISRAEL’S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON* (2006), <http://hrw.org/reports/2006/lebanon0806/lebanon0806webwcover.pdf>. In the summary of its report on Israel’s attacks in Lebanon, Human Rights Watch harshly criticizes Israel’s attacks resulting in civilian casualties as follows:

This report documents serious violations of international humanitarian law (the laws of war) by Israel Defense Forces (IDF) in Lebanon between July 12 and July 27, 2006, as well as the July 30 attack in Qana. During this period, the IDF killed an estimated 400 people, the vast majority of them civilians, and that number climbed to over 500 by the time this report went to print. The Israeli government claims it is taking all possible measures to minimize civilian harm, but the cases documented here reveal a systematic failure by the IDF to distinguish between combatants and civilians. Since the start of the conflict, Israeli forces have consistently launched artillery and air attacks with limited or dubious military gain but excessive civilian cost. In dozens of attacks, Israeli forces struck an area with no apparent military target. In some cases, the timing and intensity of the attack, the absence of a military target, as well as return strikes on rescuers, suggest that Israeli forces deliberately targeted civilians.

The Israeli government claims that it targets only Hezbollah, and that fighters from the group are using civilians as human shields, thereby placing them at risk. Human Rights Watch found no cases in which Hezbollah deliberately used civilians as shields to protect them from retaliatory IDF attack. Hezbollah occasionally did store weapons in or near civilian homes and fighters placed rocket launchers within populated areas or near U.N. observers, which are serious violations of the laws of war because they violate the duty to take all feasible precautions to avoid civilian casualties. However, those cases do not justify the IDF’s extensive use of indiscriminate force which has cost so many civilian lives. In none of the cases of civilian deaths documented in this report is there evidence to suggest that Hezbollah forces or weapons were in or near the area that the IDF targeted during or just prior to the attack.

By consistently failing to distinguish between combatants and civilians, Israel has violated one of the most fundamental tenets of the laws of war: the duty to carry out attacks on only military targets. The pattern of attacks during the Israeli offensive in Lebanon suggests that the failures cannot be explained or dismissed as mere accidents; the extent of the pattern and the seriousness of the consequences indicate the commission of war crimes.

*Id.* at 3.

phosphorus weapons which injured civilians,<sup>144</sup> have severely damaged Israel's international credibility.

In all, the death tolls on both sides of the conflict were great. Recent numbers indicate that Israel had 120 combat deaths and 39 civilians killed by Hezbollah rockets.<sup>145</sup> The number of Hezbollah fighters killed ranges from 250 (Lebanese Government and AP figures) to 600 (Israeli claim).<sup>146</sup> The total number of Lebanese citizens killed is greatly disputed, as many of the figures include both civilians and Hezbollah fighters due to the frequent difficulty in distinguishing between the groups.<sup>147</sup> One independent group, the United Nations Children's Fund, puts the number at 1,183 Lebanese killed, with the vast majority of them being civilians and about one-third of them being children.<sup>148</sup> As a result of the conflict, the entire infrastructure of

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<sup>143</sup> Michael Slackman, *Israeli Bomblets Plague Lebanon*, N.Y. TIMES, Oct. 6, 2006, at A1. United Nations personnel have estimated that more than one million unexploded cluster munitions bomblets are scattered throughout southern Lebanon. *Id.* Only a small percentage of these have been disposed of, and it will likely take more than a year to properly dispose of most of them. *Id.* Many people have been killed or wounded, and thousands have been prevented from entering their land and homes as a result of these unexploded munitions. *Id.* Many countries and groups have also criticized the timing of Israel's use of these munitions, as it was done in the last few days of the war when Israel knew the cease-fire would soon go into effect and when it was on its way out of Lebanon. *Id.* "In Lebanon, there are two explanations of why Israel unleashed cluster bombs at the end of the war: to inflict as much damage as possible on Hezbollah before withdrawing, or to litter the south with unexploded cluster bombs as a strategy to keep people from returning right away." *Id.* It should also be noted that Hezbollah used cluster munitions against Israel during the conflict. Human Rights Watch, *Lebanon/Israel: Hezbollah Hit Israel with Cluster Munitions During Conflict*, Oct. 19, 2006, [http://hrw.org/english/docs/2006/10/18/lebano14412\\_txt.htm](http://hrw.org/english/docs/2006/10/18/lebano14412_txt.htm). This use of cluster munitions by both sides raises serious concerns over the law of war principle of distinction, which "obliges warring parties to distinguish between combatants and civilians . . ." *Id.*; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

<sup>144</sup> Conal Urquhart, *Israel Admits It Used Phosphorus Weapons*, GUARDIAN (London), Oct. 23, 2006, available at <http://www.guardian.co.uk/international/story/0,,1928918,00.html> (stating that "[w]hite phosphorus weapons are not forbidden by international law, but some human rights groups believe they should be re-classified as chemical weapons and banned"). The ongoing controversy over use of phosphorus munitions is whether they violate the Chemical Weapons Convention or Protocol III to the 1980 Convention on the Prohibitions of Certain Conventional Weapons, which either prohibits or restricts the use of incendiary weapons. See Major R. Craig Burton, *Recent Issues with the Use of MatchKing Bullets and White Phosphorus Weapons in Iraq*, 2006 ARMY LAW. 19, 21 (discussing controversial use of and legal arguments surrounding white phosphorus weapons).

<sup>145</sup> Sam F. Ghattas, *Lebanon Sees More Than 1,000 War Deaths*, Dec. 28, 2006, <http://www.foxnews.com/wires/2006Dec28/0,4670,LebanonWarDeaths,00.html>.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Lebanon was severely damaged,<sup>149</sup> and between 700,000 and 1,000,000 people were displaced.<sup>150</sup> On the Israeli side, several cities sustained heavy damage, and approximately 300,000 people were displaced.<sup>151</sup>

## VI. EVOLUTION OF SELF-DEFENSE ARGUMENTS

### A. Customary International Law Before the U.N. Charter

#### 1. *Grotius and Self-Defense*

Nations and empires have used self-defense as a justification for the use of force throughout the ages. Hugo Grotius,<sup>152</sup> in his seminal work on just war theory, *On the Law of War and Peace*, listed three legitimate causes for going to war: “defence, recovery of property, and punishment.”<sup>153</sup> Self-defense was an important basis, as he clearly did not espouse the “turn the other cheek” philosophy preached by many ecclesiastical scholars.<sup>154</sup> In fact, Grotius’s work instituted a key philosophical shift in legal reasoning, as he based his philosophy on natural law rather than relying solely on divine revelation and the guidance of ecclesiastical dogma.<sup>155</sup> Human reason was the focus, not divine will.<sup>156</sup>

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<sup>149</sup> UNIFIL Background, *supra* note 82 (U.N. “estimated that the conflict caused physical damage amounting to \$3.6 billion, including the destruction of 80 bridges, 600 km of roads; 900 factories, markets, farms and other commercial buildings; 31 airports, ports, water- and sewage-treatment plants, dams and electrical plants; and 25 fuel stations . . . . An estimated 15,000 homes were destroyed.”).

<sup>150</sup> *Id.*; Dina Kraft, *Israeli Refugees Seek Friends and Family*, N.Y. TIMES, July 31, 2006, at A12.

<sup>151</sup> Kraft, *supra* note 150, at A12; UNIFIL Background, *supra* note 82 (stating that during the war, “3,970 rockets landed in Israel, 901 of them in urban areas; 300,000 residents were displaced and more than a million were forced to live for some of the time in shelters, according to official Israeli figures”).

<sup>152</sup> Grotius was a Dutch scholar born in 1583. He was skilled in a variety of subjects and had a mastery of theology, mathematics, history, and the law. In addition to his work on the legal nature of war, he wrote many opinions and treatises on the freedom of the seas. Many have branded Grotius as the “father of international law,” as he “conceived of a comprehensive system of international law and his work rapidly became a university textbook.” SHAW, *supra* note 41, at 20-21.

<sup>153</sup> 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 171 (Francis W. Kelsey trans., 1925) (1646), in THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1925) [hereinafter GROTIUS]. In this context, Grotius uses defense and self-defense in the same context. The legal justifications of recovery of property and punishment are beyond the scope of this article.

<sup>154</sup> O’CONNELL, *supra* note 38, at 111.

<sup>155</sup> *Id.* Malcolm Shaw, a noted international law author, summarized Grotius’s philosophy on the relationship between theology and international law in the following way:

Grotius finally excised theology from international law



Using human reasoning as his guiding force, Grotius articulated the key self-defense principles of necessity and imminence. One author summarized Grotius's theory on self-defense as follows: "self-defense requires necessity, and necessity means that the danger is imminent. Danger is not imminent unless the potential victim is certain of both an attack and the assailant's ability to carry out the attack."<sup>157</sup> Grotius himself explained necessity in terms of an individual or nation having no other choice but to defend one's self: "If an attack by violence is made on one's person, endangering life, and no other means of escape is open, under such circumstances war is permissible."<sup>158</sup> As for the timing of an action in self-defense, or the principle of imminence, Grotius stated that the danger "must be immediate and imminent in point of time."<sup>159</sup>

## 2. *The Caroline Incident*

### a. Background

United States Secretary of State Daniel Webster reiterated and expanded two of Grotius's key elements of self-defense, namely necessity and imminence (also called immediacy), in what is now known as the *Caroline* incident. In 1837, many American citizens were sympathetic to a rebellion that was taking place in British Canada, and eventually took an active part in aiding the insurgency.<sup>160</sup> The *Caroline*

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and emphasized the irrelevance in such a study from any conception of a divine law. He remarked that the law of nature would be valid even if there were no God. A statement which, although suitably clothed in religious protestation, was extremely daring. The law of nature now reverted to being founded exclusively on reason. Justice was part of man's social make-up and thus not only useful, but essential.

SHAW, *supra* note 41, at 21.

<sup>156</sup> O'CONNELL, *supra* note 38, at 111; *see also* Major Russell K. Jackson, *Lawlessness Within a Foreign State As a Legal Basis for United States Military Intervention to Restore the Rule of Law*, 187 MIL. L. REV. 1, 9-10 (2006); SHAW, *supra* note 41, at 21.

<sup>157</sup> Jackson, *supra* note 156, at 13 (citing GROTIUS, *supra* note 153, at 549).

<sup>158</sup> GROTIUS, *supra* note 153, at 172.

<sup>159</sup> *Id.* at 173. Major Russell Jackson recognized Grotius's temporal limitation by noting that "Grotius justified the anticipatory use of force to halt a pending attack, but drew the line at the use of force to prevent a possible attack. He simply was not ready to embrace a 'might harm' standard." Jackson, *supra* note 156, at 11 (citing GROTIUS, *supra* note 153, at 174-75, 184). This standard changed, however, when it was a state actor versus a private individual. Grotius seemed to allow a state a lot more leeway to act against private individuals and did not require "the same degree of certainty for a state to act anticipatorily." *Id.* at 11-12.

<sup>160</sup> R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938). The United States Government's attempts to prevent its citizens from participating in the

was an American steamer used by the insurgents to transport men, weapons, ammunition, and supplies from New York to the British-controlled Navy Island.<sup>161</sup> Colonel McNab, the commander of the British forces in Canada, observed this use of the *Caroline* and decided to destroy the ship.<sup>162</sup> He had hoped to attack the ship while it was in Canadian territory, but by nightfall on 29 December 1837, the ship had returned to the U.S. side of the Niagara River.<sup>163</sup> Deciding he could not wait any longer, Colonel McNab crossed into U.S. territory and boarded the ship.<sup>164</sup> Meeting little resistance, the British subsequently set the ship on fire and set it adrift into the Niagara River, where it soon descended over Niagara Falls.<sup>165</sup>

In January 1838, the U.S. Secretary of State at the time, Mr. John Forsyth, sent an official note to Mr. Henry Stephen Fox, the British Minister in Washington, which stated that the *Caroline* incident “would be ‘made the subject of a demand for redress.’”<sup>166</sup> Mr. Fox then sent a reply in February 1838, which listed “the necessity of self-defence and self-preservation” as among the reasons why the attack on the *Caroline* was legitimate.<sup>167</sup>

#### b. Legal Arguments Formed from the *Caroline* Incident

In his 24 April 1841 letter to Mr. Fox, the newly appointed Secretary of State, Daniel Webster, addressed the British claim that the

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rebellion failed, and the rebellion received overwhelming support from Americans along the border. Timothy Kearley, *Raising the Caroline*, 17 WIS. INT’L L.J. 325, 328 (1999). Following a defeat at the hands of the British, many of the remaining Canadian insurgents fled into U.S. territory seeking refuge and support, both of which were readily available. Jennings, *supra* at 82. These insurgents, joined by American supporters, invaded Navy Island, which was located in British-Canadian territory. Kearley, *supra* at 328. The insurgents then used the island to stage attacks against mainland Canada. *Id.*

<sup>161</sup> Kearley, *supra* note 160, at 328.

<sup>162</sup> Jennings, *supra* note 160, at 83-84. Colonel McNab had two reasons for destroying the ship. First, its destruction would prevent further resupply operations from America. *Id.* at 83. Second, it would deprive the rebels of their means of transport and attack from Navy Island to the Canadian mainland. *Id.* at 83-84.

<sup>163</sup> Kearley, *supra* note 160, at 328.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Jennings, *supra* note 160, at 85 (citing Note from Secretary of State John Forsyth on the *Caroline* Incident, Jan. 5, 1838, H. Ex. Docs. 302 and 73, 25th Cong., 2d Sess.).

<sup>167</sup> *Id.* (citing Note from British Minister Henry Stephen Fox on the *Caroline* Incident, Feb. 6, 1838, H. Ex. Doc. 302, 25th Cong., 2d Sess.). Official correspondence on the subject then lay dormant for several years until after the arrest of Alexander McLeod, who was charged with murder and arson for his participation in the British action taken in connection with the *Caroline*. *Id.*

attack on the *Caroline* was a legitimate action of self-defense.<sup>168</sup> Specifically, Webster stated the following:

[I]t will be for Her Majesty's Government to show, upon what state of facts, and what rules of national law, the destruction of the "Caroline" is to be defended. It will be for that Government to show *a necessity of self-defence, 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 necessity of self-defence, must be limited by that necessity, and kept clearly within it.*<sup>169</sup>

Webster listed three essential criteria for self-defense under these circumstances, which are necessity, immediacy, and proportionality, with proportionality being the additional element not fully addressed by Grotius.<sup>170</sup> These three elements have been commonly referred to as the "*Caroline* doctrine,"<sup>171</sup> and will be addressed in turn below.

Although subsequent international law has failed to fully define the term "necessity,"<sup>172</sup> Webster's terminology of "leaving no choice of means" indicates that the analysis should consider whether viable alternative methods of resolving the dispute are available. The focus should be on the actual viability of the alternative methods, rather than simply articulating possible alternative methods. After a discussion on Webster's formulation of self-defense, Oscar Schachter eloquently described the necessity element and the issue of exhausting alternative methods in the following way:

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<sup>168</sup> 1 THE PAPERS OF DANIEL WEBSTER, DIPLOMATIC PAPERS, 1841-1843, at 58-68 (Kenneth E. Shewmaker ed., 1983) [hereinafter THE PAPERS OF DANIEL WEBSTER].

<sup>169</sup> *Id.* at 67 (emphasis added). The document most often cited for Webster's renowned articulation on the *Caroline* incident is his July 27, 1842 letter to Lord Ashburton, the British Special Minister who was appointed to handle many of the ongoing disputes between Great Britain and the United States. Kearley, *supra* note 160, at 328-29 & n.13. This letter to Lord Ashburton, however, merely contained excerpts and references to the April 24, 1841 letter to Mr. Fox. *Id.* at 328-29.

<sup>170</sup> Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1, 8 (2003).

<sup>171</sup> Kearley, *supra* note 160, at 325.

<sup>172</sup> See Zayac, *supra* note 44, at 451 (citing Wallace F. Warriner, *The Unilateral Use of Coercion Under International Law: A Legal Analysis of The United States Raid on Libya on April 14, 1986*, 37 NAVAL L. REV. 49, 62-63 (1988)).

The requirement of necessity for self-defense is not controversial as a general proposition. However, its application in particular cases calls for assessments of intentions and conditions bearing upon the likelihood of attack or, if an attack has taken place, of the likelihood that peaceful means may be effective to restore peace and remove the attackers. As a matter of principle, there should be no quarrel with the proposition that force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile. However, to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense.<sup>173</sup>

Thus, on one hand, if your country is being overrun, there would not be a requirement to use solely diplomatic or economic measures to resolve the dispute. The use of force in self-defense in that context would certainly comply with the necessity prong of the self-defense analysis. On the other hand, if the actions of the offending party are relatively minor, alternative methods of resolving the dispute short of the use of force would certainly be more appropriate, depending of course on the exact facts of the current situation and the historical relationship between the parties.<sup>174</sup>

Webster explained the principle of immediacy as requiring the danger to be both “instant” and “overwhelming.”<sup>175</sup> Webster’s sense of timing by using the phrase “leaving . . . no moment for deliberation” would clearly limit a response to a situation where a State has no time to explore other options, and must act immediately to defend itself.<sup>176</sup> Some commentators have couched the term immediate threat or danger as being a “direct threat”<sup>177</sup> or a “real and ongoing” threat.<sup>178</sup> Yoram Dinstein comments on Webster’s formulation by stating that “[t]he condition of immediacy requires that the [response in self-defense] takes

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<sup>173</sup> Schachter, *supra* note 74, at 1635.

<sup>174</sup> Yoram Dinstein, in his respected book on self-defense, posits that “[t]he absence of alternative means for putting an end to the operations of the [attackers] has to be demonstrated *beyond reasonable doubt*.” DINSTEIN, *supra* note 90, at 220 (emphasis added). While this lofty burden of proof would seem to be almost unrealistic to achieve in many cases, it does demonstrate the extreme importance of exploring alternative options short of force and having the ability to prove such actions were taken.

<sup>175</sup> THE PAPERS OF DANIEL WEBSTER, *supra* note 168, at 67.

<sup>176</sup> *Id.*

<sup>177</sup> Zayac, *supra* note 44, at 451.

<sup>178</sup> Ziyad Motala & David T. ButleRitchie, *Self-Defense in International Law, The United Nations, and the Bosnian Conflict*, 57 U. PITT. L. REV. 1, 29 (1995).

place soon after the [initial attack], so that the cause (armed attack) and the effect (self-defence) are plain for all to see.”<sup>179</sup>

Proportionality<sup>180</sup> in this context refers to whether the use and amount of force are appropriate in both quantity and duration to the actual or imminent attack. Again, using Webster’s terms, the amount of force used should not be “unreasonable or excessive” in relation to the nature of the attack or proposed attack.<sup>181</sup> Webster further indicated that the limitation on the amount of force used must be directly tied to the necessity of acting in self-defense in the first instance.<sup>182</sup> In his view, if the threat that necessitated the use of force in self-defense were no longer present, then any further use of force beyond that would be excessive. Modern viewpoints on the application of the principle of proportionality, and whether this restrictive view is appropriate in the modern context, will be discussed in further detail below.

### c. Recognition of the Caroline Doctrine

Over the past 165 years, the *Caroline* doctrine has received international recognition.<sup>183</sup> R. Y. Jennings remarked that “[i]t was in the *Caroline* case that self-defence was changed from a political excuse to a legal doctrine” and that this case was the “*locus classicus* of the law of self-defence.”<sup>184</sup> Professors Martin A. Rogoff and Edward Collins, Jr. described this incident’s significance in the following way:

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<sup>179</sup> DINSTEIN, *supra* note 90, at 220.

<sup>180</sup> The term proportionality is used in two situations in the law of war, and each has a different meaning depending on the stage of the conflict. Proportionality in *jus ad bellum* (legal justifications for using force) circumstances is what is described in detail above. Proportionality in *jus in bello* (laws governing the conduct in war) situations refers to the fundamental law of war principle which holds that the anticipated loss of civilian life and damage to property must not be excessive compared to the military advantage to be gained. The law recognizes that military activities inevitably cause incidental injury and collateral damage, but force that needlessly or unnecessarily causes or aggravates either human suffering or physical destruction is prohibited. AP I, *supra* note 143, art. 57. Although not specifically called “proportionality” in law of war treaties, this principle is articulated in one of them in the following way:

Among others, the following types of attacks are to be considered as indiscriminate: . . . (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Id.*, art. 51(5)(b).

<sup>181</sup> THE PAPERS OF DANIEL WEBSTER, *supra* note 168, at 67.

<sup>182</sup> *Id.*

<sup>183</sup> See generally Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT’L LAW 493 (1990).

<sup>184</sup> Jennings, *supra* note 160, at 82, 92 (emphasis in original).

Few such incidents have had greater effect on the development of international law than the destruction of the privately owned United States steamboat *Caroline* . . . . To this day, . . . scholars and practitioners of international law and diplomacy continue to make appeal to the norms that were generated and clarified by the destruction of the *Caroline* and the dispute that followed it . . . .<sup>185</sup>

Even nations that most would consider the aggressors both in the conflicts leading up to World War II and the war itself recognized the importance of the *Caroline* doctrine by attempting to argue that they had met its requirements. In 1931, Japan invaded Manchuria, and China subsequently filed a complaint with the League of Nations Council.<sup>186</sup> In his report on the League of Nations proceedings, Phillip Brown noted the following:

In the statement of the Japanese Government concerning Manchuria presented to the Council of the League of Nations . . . , [Japan defended its actions] as “vital and justified measures of self-protection as the standard principle laid down in the *Caroline* case, that every act of self-defence must depend for its justification on the importance of the interests to be defended, or the imminence of the danger and on the necessity of the act . . . .”<sup>187</sup>

Germany attempted to justify its invasion of Norway in much the same way. The International Military Tribunal at Nuremberg in 1946 specifically cited Webster’s formulation of self-defense in rejecting the German defendants’ claims that their attack on Norway was legitimate under this formulation.<sup>188</sup> In fact, the Tribunal’s ruling

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<sup>185</sup> Rogoff & Collins, *supra* note 183, at 493. Rogoff and Collins further state that “[t]he great significance of the *Caroline* doctrine in modern international law results from a radical transformation of norms relating to resort to force, and from an acceptance of Webster’s formulation on resort to force in self-defense as authoritative customary law.” *Id.* at 504.

<sup>186</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 242 (1963).

<sup>187</sup> Philip Marshall Brown, Comment, *Japanese Interpretation of the Kellogg Pact*, 27 AM. J. INT’L L. 100, 100 (1933) (quoting the Japanese Representative to the League of Nations Council).

<sup>188</sup> 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 204-09 (Nuremberg, International Military Tribunal, 1947).

in this case “is the most commonly cited example of the acceptance of the *Caroline* standard as customary international law.”<sup>189</sup>

More recently, the International Court of Justice (ICJ) in the *Nicaragua* case recognized that Webster’s formulation of the requirements for self-defense, namely necessity, immediacy, and proportionality, had risen to the status of customary international law, although it did not specifically mention Webster or the *Caroline* case by name.<sup>190</sup>

As noted above, scholars and courts have commonly referred to the *Caroline* doctrine and have cited it as customary international law in all cases of self-defense. However, some authors, including Timothy Kearley, believe that the *Caroline* doctrine has been taken out of its proper context.<sup>191</sup> Kearley, a Professor of Law at the University of Wyoming, wrote that Webster’s three criteria were, up until the United Nations Charter era, only applied to “extra-territorial uses of force by a state in peacetime against another state which was unable or unwilling to prevent its territory from being used as a base of operations for hostile activities against the state taking action.”<sup>192</sup> In other words, Kearley believes that Webster’s criteria should only be applied to a very narrow set of circumstances, such as in situations that would later give rise to the doctrines of anticipatory and preemptive self-defense, and not to all actions in self-defense.<sup>193</sup> Kearley does recognize, however, that these three key elements of self-defense, although sometimes intermingled into two (necessity and proportionality),<sup>194</sup> have become the standard requirements for self-defense under customary international law in all contexts.<sup>195</sup>

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<sup>189</sup> Robert F. Teplitz, *Taking Assassination Attempts Seriously: Did the United States Violate International Law in Forcefully Responding to the Iraqi Plot to Kill George Bush?*, 28 CORNELL INT’L L.J. 569, 578 (1995).

<sup>190</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 102-03 (June 27). A further discussion on the background and holding of this case will follow *infra* pp. 45-47. The same court in the recent *Oil Platforms* case confirmed that these same criteria “must be observed if a measure is to be qualified as self-defence.” *Oil Platforms* (Iran v. U.S.), (Judgment of Nov. 6, 2003), at 24, available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.pdf](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.pdf) (last visited May 11, 2007).

<sup>191</sup> See, e.g., GRAY, *supra* note 52, at 120-21 (discussing arguments of authors who “challenge the authority of [the *Caroline*] episode for the modern doctrine of self-defence, seeing it rather as an episode of self-help pre-dating the modern law on the use of force and as a one-off episode of pre-emptive action not of relevance to the conduct of a wider scale conflict”); Kearley, *supra* note 160, at 325.

<sup>192</sup> Kearley, *supra* note 160, at 325.

<sup>193</sup> *Id.* at 330-45.

<sup>194</sup> See, e.g., Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 778 (2003).

<sup>195</sup> Kearley, *supra* note 160, at 330-45 (citing numerous examples of these two principles from various treatises and articles on international law, with the immediacy

## B. U.N. Charter

### 1. Article 2(4)

On 24 October 24 1945, the U.N. Charter came into force.<sup>196</sup> The key prohibition on the use of force in the Charter is found in Article 2(4), which states that “[a]ll 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.”<sup>197</sup> A literal reading of this article might lead one to conclude that unless the use of force is designed to affect the “territorial integrity or political independence” of another state, it would not be prohibited. The consistent and traditional international view on this, however, is that this phrase was not qualified, and that virtually all incursions into another’s territory would violate this Article.<sup>198</sup> To do otherwise would seemingly allow states to continuously attack another state, clearly using force, so long as their intent was not to change the borders or institute a regime change. Actions such as these would also seem “inconsistent with the Purposes of the United Nations.”

The use of the word “continuously” in the preceding paragraph was intentional and potentially places a different qualification on this prohibition. The case of terrorists located in a state that is either permitting or unable to prevent the terrorists from carrying out their attacks against another state poses an interesting question. Would a limited attack against the terrorists in the host state be in violation of the U.N. Charter? Gregory Travalio believes it would not and phrases this theory in the following way:

The argument is simply that the use of limited, temporary force to eliminate a terrorist threat does not violate the territorial integrity or political independence of the state in which the terrorists are being harbored, and is otherwise consistent with the United Nations Charter. Therefore, the use of force in these

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requirement originally articulated by Webster being intertwined with the principle of necessity).

<sup>196</sup> O’CONNELL, *supra* note 38, at 211.

<sup>197</sup> U.N. Charter art. 2, para. 4.

<sup>198</sup> BROWNLIE, *supra* note 186, at 265-68; 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE, DISPUTES, WAR AND NEUTRALITY 153-54 (H. Lauterpacht ed., 7th ed. 1952); Maogoto, *supra* note 80, at 412 (stating that “an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory or if the invading troops are meant to withdraw immediately after completing a temporary and limited operation”).



circumstances is completely outside the proscription against the use of force in Article 2(4). Because the use of force is limited to eliminating the terrorist threat, is not directed against the persons or property of the “host” country, is not designed to gain or hold territory, and does not seek to overthrow or otherwise influence the nature of the host government (except perhaps to deter the continued support of the terrorists), the use of force does not threaten the state’s territorial integrity or political independence.<sup>199</sup>

This theory, especially if it could be restricted to incursions of limited duration and effect on the host nation, would seem to have some merit, especially in light of the relatively recent “phenomenon” of terrorism.<sup>200</sup> One potential advantage to using this theory is that it takes the matter out of the U.N. Charter regime and mechanism.<sup>201</sup>

## 2. Article 51

Two clear exceptions to the prohibition on the threat or use of force exist within the Charter. The first is when the U.N. Security Council has “determine[d] the existence of any threat to the peace, breach of the peace, or act of aggression” under Article 39,<sup>202</sup> and then specifically authorizes the use of force under Article 42.<sup>203</sup>

The second exception to the use of force under the Charter, and the one to be discussed at length here, is the right to self-defense under Article 51. This Article states, in part: “[n]othing 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.”<sup>204</sup>

Scholars have proposed two differing theories on the interpretation of Article 51 over the years, and there have been countless

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<sup>199</sup> Gregory Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 166 (2000) (citing Jordan J. Paust, *Responding Lawfully to International Terrorism*, 8 WHITTIER L. REV. 711, 716-17 (1986)).

<sup>200</sup> *Id.* at 168. Many well-known legal scholars have seemingly endorsed this theory. *Id.* at 166 n.89 (citing John Norton Moore, Louis Henkin, Robert Lillich, Jean Kirkpatrick, and Allan Gerson as supporters of this view). Others, however, have specifically rejected the theory. *Id.* at 166 n.89, 169 nn.96-97 (stating that Oscar Schachter, Roslyn Higgins, Detlev Vagts, and Monroe Leigh do not support this argument).

<sup>201</sup> *Id.* at 170.

<sup>202</sup> U.N. Charter art. 39.

<sup>203</sup> *Id.* art. 42.

<sup>204</sup> *Id.* art. 51.

articles and writings delineating the disagreement over the scope of self-defense.<sup>205</sup> Although this issue alone could be the subject of a complete book or article, an attempt will be made to summarize the two arguments.

The first interpretation of Article 51 is that this article created a very narrow exception to Article 2(4)'s prohibition on the use of force.<sup>206</sup> Under this view, self-defense should be limited only to cases of an armed attack, as that limiting factor was intentionally placed on Article 51's recognition of a state's "inherent right of individual or collective self-defence."<sup>207</sup> Thus, under this approach, any customary international law right of self-defense in existence before the Charter could be expressly limited by the Charter, which in this case it was, as to do otherwise would render the Charter meaningless.<sup>208</sup> Although the general principles of self-defense set out by Webster would still be applicable in all cases of self-defense, under this theory, they could only be utilized if an armed attack occurred, and not in any preemptive or anticipatory manner like that formulated in the *Caroline* incident.<sup>209</sup>

The second and more expansive interpretation of Article 51 holds that the Charter's reference to the "inherent"<sup>210</sup> right of self-

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<sup>205</sup> GRAY, *supra* note 52, at 98. For an excellent summary of the two approaches, see Maogoto, *supra* note 80, at 414-17 (using the terms "Restrictionist" and "Counter-Restrictionist" to describe the two schools of thought). For a more thorough discussion of the differing interpretations of Article 51, see ALEXANDROV, *supra* note 34, at 93-120; Motala & ButleRitchie, *supra* note 178, at 20-28; Teplitz, *supra* note 189, at 579-94; Michael Skopets, Comment, *Battered Nation Syndrome: Relaxing the Imminence Requirement of Self-Defense in International Law*, 55 AM. U. L. REV. 753, 771-73 (2006). See generally 1 BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS, A COMMENTARY (2d ed. 2002); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002); George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321 (1998); Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663 (2003).

<sup>206</sup> GRAY, *supra* note 52, at 98; Maogoto, *supra* note 80, at 414-16.

<sup>207</sup> Teplitz, *supra* note 189, at 580.

<sup>208</sup> GRAY, *supra* note 52, at 98.

<sup>209</sup> See *supra* notes 160-95 and accompanying text.

<sup>210</sup> In describing the everlasting nature of the term "inherent," Ziyad Motala and David ButleRitchie stated:

The term "inherent" seems to denote a sense of permanence and inviolability that transcends mere positive prescripts. The characterization of a state's right to defend itself as "inherent" seems to suggest that the drafters of the Charter meant to incorporate the *jus cogens* understanding of self-defense into Article 51 . . . . [T]he French language edition of the Charter used the term *droit naturel*, which has very definite overtones of natural law. Traditionally, principles that are attributed to such a foundation are considered to be absolute. Apparently, these principles cannot be ousted by any positive human act.

defense preserves all customary international law in regard to self-defense.<sup>211</sup> Therefore, any customary international law that existed prior to the Charter, such as anticipatory self-defense or in defense of one's own nationals, was not superseded by the U.N. Charter, and they can run concurrently.<sup>212</sup>

a. Armed Attack

If one takes the more restrictive view and initially presupposes that the right of self-defense is only permitted in cases of an actual armed attack, one must first determine what constitutes an "armed attack." This term has been subject to many different interpretations, with each having a certain appeal.<sup>213</sup>

The International Court of Justice (ICJ) analyzed the term "armed attack" in *Nicaragua v. United States*.<sup>214</sup> In this case, the United States argued that Nicaragua's supplying of weapons and logistical support to rebels in El Salvador constituted an armed attack against El Salvador.<sup>215</sup> In addition, the United States believed that Nicaragua's provision of similar support that allowed cross-border attacks on Costa

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Motala & ButleRitchie, *supra* note 178, at 22.

<sup>211</sup> *Id.* at 21-22; Maogoto, *supra* note 80, at 416-17.

<sup>212</sup> GRAY, *supra* note 52, at 98. In *Nicaragua v. United States*, the ICJ ruled that "[i]t cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that . . . customary law continues to exist alongside treaty law." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 (June 27).

<sup>213</sup> Teplitz, *supra* note 189, at 581. Robert Teplitz has excellently summarized these various views in the following way:

As with the whole of Article 51 itself, there are broad and restrictive views regarding the proper interpretation of the term "armed attack." The most restrictive view maintains that the term refers only to a direct physical invasion by one state into the territory of another and not to any other direct or indirect forms of aggression. Critics of the restrictive view argue that it fails to address modern issues such as terrorism, biological warfare, and nuclear weapons. Yet there are broader interpretations of "armed attack" which include: any aggressive event against the victim state; a number of smaller actions that constitute a continuous campaign of attacks against the victim state; a state allowing terrorists to launch their activities from its territory against the victim state; an attack on nationals outside of the territory of the victim state; and apparent preparations to attack the victim state soon.

*Id.* (citing various sources for the different theories).

<sup>214</sup> *Military and Paramilitary Activities*, 1986 I.C.J. at 126-27.

<sup>215</sup> Zayac, *supra* note 44, at 445.

Rica and Honduras was an armed attack by Nicaragua.<sup>216</sup> Therefore, under Article 51 of the U.N. Charter, the United States claimed it was justified in assisting these countries as an act of collective self-defense in response to an armed attack.<sup>217</sup>

The ICJ specifically rejected this argument by holding that “while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with an armed attack.”<sup>218</sup> It did say, however, that this assistance could be illegal intervention into the affairs of another State that could be responded to with actions short of an armed response.<sup>219</sup>

Within this framework, we must analyze two different potential sources of the armed attack. The first, and the one more fully addressed in the *Nicaragua* decision, is that of a state that is not actually executing the attack, but which is either aiding or permitting the attack. The second is that of a group within a state, such as a terrorist group, that is attacking another state, and whether these attacks rise to the level of an “armed attack.”

There are two different views regarding whether a state’s actions can constitute an armed attack, despite the fact that it is not directly carrying out the attacks.<sup>220</sup> The restrictive view contends that passive support, such as in the supplying of arms, would not be enough to constitute an armed attack.<sup>221</sup> This view would seem to be consistent with the *Nicaragua* decision.<sup>222</sup> Furthermore, under this approach, acquiescence or impotence<sup>223</sup> by a state in regard to another’s attack would not be an armed attack by the state.<sup>224</sup> Therefore, under the

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Military and Paramilitary Activities*, 1986 I.C.J. at 126-27.

<sup>219</sup> *Id.* at 103-04, 126-27.

<sup>220</sup> See GRAY, *supra* note 52, at 109 (stating that “the controversy centers on the degree of state involvement that is necessary to make the actions attributable to the state and to justify action in self-defence in particular cases”).

<sup>221</sup> *Id.*

<sup>222</sup> Glennon, *supra* note 205, at 542 (contending that the restrictive view held by the ICJ was not “aberrational,” as commentators have been taking this approach for many years).

<sup>223</sup> In the case of impotence, Mary O’Connell adds an element of good faith on the part of the state to try to curb the attacks by whatever means it has. Specifically, she writes:

If the state or states where the terrorist group is found happens to be making a good faith effort to stop the terrorist group and has some basic ability to do so, then the victim state cannot hold the territorial state responsible for the acts of terrorism and may not respond with armed force on the territory of that state.

O’CONNELL, *supra* note 38, at 276-77.

<sup>224</sup> On this approach, Christine Gray writes:

restrictive view of the U.N. Charter's Article 51 framework, use of force in self-defense would not be authorized against the state in that circumstance.<sup>225</sup>

The broader view would permit either the "host" state's passive support or impotence to be considered an armed attack justifying a response in self-defense.<sup>226</sup> This view has seen a significant increase in support following the attacks of 11 September 2001 and the use of force against Afghanistan.<sup>227</sup> However, even within this broader approach,

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[The ICJ] did not expressly go into the issue of whether a lesser degree of state involvement, such as acquiescence or even inability to control armed bands operating on its territory, could ever be enough to constitute an armed attack, but it seems implicit in this judgment that armed attack is narrower than this.

GRAY, *supra* note 52, at 111. In this same vein, Gregory Travalio comments:

It appears to be generally accepted that the mere inability of a state to control terrorist activity within its borders does not constitute an armed attack by that state . . . . A state that is so weak that it literally cannot control terrorist activity emanating from within its borders can hardly be said to have acted at all . . . . [T]he impotence of a state to control international terrorist organizations would not be an armed attack against another state, and, therefore the use of force in response is not expressly sanctioned by Article 51.

Travalio, *supra* note 199, at 152-53. Travalio notes that "the issue becomes more difficult when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it." *Id.* at 154. He fears, however, that use of force in these circumstances "creates a potential slippery slope" that may best be avoided. *Id.* at 156.

<sup>225</sup> GRAY, *supra* note 52, at 109-10.

<sup>226</sup> Maogoto, *supra* note 80, at 416-17.

<sup>227</sup> *Id.* at 165-67; SIMMA, *supra* note 205, at 799-802 (arguing that Article 51 of the U.N. Charter never envisioned allowing terrorists to use "reluctant," "unwilling," or "unable" states as "safe havens"). Robert Zayac takes this a step further by positing that "a State harboring terrorists who use force against other States, should also constitute an 'armed attack' by the harboring State." Zayac, *supra* note 44, at 446. Michael Glennon, in a biting criticism of the U.N.'s overall approach in dealing with terrorism, writes:

In contemporary times, non-state actors are as capable of inflicting widespread injury as many state actors. If a host state is unable or unwilling to curtail harmful private conduct when that conduct originates from within the host state's territory, it makes no sense to insist that the victim state remain indifferent to such conduct, effectively sacrificing the integrity of its own territorial sovereignty for that of the host state. Similarly, it does not make sense to permit defensive force against the wrongdoer but not against the wrongdoer's host if the wrongdoer's capability to inflict harm depends upon the indifference of a host government that can curtail that harm simply by withdrawing its hospitality. *Acts of omission in*

there is significant disagreement on the exact level of complicity by the host state that is necessary to attribute the armed attack to the state.<sup>228</sup> Using Afghanistan as an example, some authors have held that the invasion of Afghanistan by the United States and its allies signifies a sweeping change in international law that permits a direct attack against the host state in a wide range of circumstances.<sup>229</sup> Others would agree that the law has expanded to permit a response against a host state that is supporting or harboring terrorists, but that there must be a high level of complicity by the host state, such as existed between the Taliban and Al Qaida, for this to rise to the level of an armed attack by the host state.<sup>230</sup>

As for when actions of irregular forces can constitute an armed attack justifying a response in self-defense, the ICJ in the *Nicaragua* case held that actions taken by guerrillas or other irregular forces would be considered armed attacks under customary international law if, “because of [their] scale and effects, [they] would have been classified as an armed attack . . . had [they] been carried out by regular armed forces.”<sup>231</sup> Although the court did not expand on this statement and clarify exactly what constitutes an armed attack in general terms, it did use the phrase “acts occur[ring] on a significant scale”<sup>232</sup> and implied that to be considered an armed attack, the action must be more than an isolated incident and have more than mere trivial effects.<sup>233</sup>

Scholars have continued to debate over the “scale and effects” necessary for an incident to rise to the level of an armed attack.<sup>234</sup> On the one hand, the mere firing of a shot across the border resulting in no damage would likely not be considered an armed attack as envisioned by Article 51.<sup>235</sup> On the other hand, an incident does not need to

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*such circumstances shade into acts of commission, and aggrieved states should not be faulted for treating them the same.*

Glennon, *supra* note 205, at 550 (emphasis added).

<sup>228</sup> GRAY, *supra* note 52, at 166-67.

<sup>229</sup> *Id.* (citing various authors who support this proposition).

<sup>230</sup> *Id.* (citing several authors who would limit the expansion of this theory).

<sup>231</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27).

<sup>232</sup> *Id.* at 103-04.

<sup>233</sup> DINSTEIN, *supra* note 90, at 174-76. In describing the “scale and effects” test, Mikael Nabati writes:

[T]he concept of armed attack, as conventionally read, requires both a quantitative and a qualitative element. Quantitatively, an attack must reach a certain threshold of force, with a sufficient level of gravity and severity, in order to qualify as an armed attack. Qualitatively, only the use of force through military means triggers the right of self-defense.

Nabati, *supra* note 194, at 776-77.

<sup>234</sup> DINSTEIN, *supra* note 90, at 174-76.

<sup>235</sup> *Id.* at 175.

involve a “massive military operation” to be classified as an armed attack.<sup>236</sup> In short, “unless the scale and effects are trifling, below the *de minimis* threshold . . . , [t]here is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks.”<sup>237</sup> This threshold determination would then need to be made based on the facts and circumstances of the particular case.

On the issue of whether actions by a terrorist or guerilla group constitute an armed attack, Karl Meessen posits that Article 51’s requirement of an armed attack to invoke the right of self-defense should only apply between states, and should not apply to terrorist acts.<sup>238</sup> He argues that the Charter was designed to govern the relationship between states, and that “[t]he armed attack requirement was clearly coined to preserve or restore peace with regard to the only type of attacks known at the time of the Charter’s drafting . . . .”<sup>239</sup> Therefore, “society-induced terrorist attacks are outside the purview of Article 2(4),” and the armed attack requirement in Article 51 would not apply to such attacks.<sup>240</sup> Although novel in its approach, this argument in relation to Article 51 would only seem to be applicable if the terrorist attacks were below the *de minimis* threshold for an armed attack discussed above. Otherwise, even under the Charter framework, a state could respond in self-defense to the armed attack.

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<sup>236</sup> *Id.* at 176. Dinstein finds support for this proposition in the ICJ’s *Nicaragua* opinion by writing:

The fact that an armed attack – justifying self-defence as a response under Article 51 – need not take the shape of a massive military operation, was conceded by the Court when it held that the sending of armed bands into the territory of another State may count as an armed attack. If ‘low intensity’ fighting qualifies, the ‘scale and effects’ required as a condition for armed attack are minimal.

*Id.* (citing *Military and Paramilitary Activities*, 1986 I.C.J. at 103). An opposite view is held by Mikael Nabati, who writes that “the *Nicaragua* decision limited the right of self-defense to an armed attack of ‘significant scale.’ Under such [a] standard, a low-intensity attack might not reach the high threshold of an armed attack, even though the cumulative effects of repeated terrorist attacks could amount directly to an attack of significant scale.” Nabati, *supra* note 194, at 780.

<sup>237</sup> DINSTEIN, *supra* note 90, at 176. Again, there is disagreement on this issue. Antonio Cassese, for example, states that “[a]rmed attack’ in this context means a very serious attack either on the territory of an injured State or on its agents or citizens while at home or abroad.” Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 596 (1989).

<sup>238</sup> Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT’L L. 341, 346 (2003).

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

b. Absence of Armed Attack

Meessen's argument, however, does raise the question as to what actions can be taken if an act does not constitute an armed attack against the victim state. As noted earlier, many scholars have contended that Article 51 limited the right to respond with use of force in self-defense only to cases of armed attack.<sup>241</sup> The court in the *Nicaragua* case stated that "[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."<sup>242</sup>

There is a view, however, "that the presence of an armed attack is *one* of the bases for the exercise of the right of self-defense under Article 51, but not the *exclusive* basis."<sup>243</sup> Therefore, any rights to self-defense that exist under customary international law<sup>244</sup> would be permitted as well. Preemptive or anticipatory self-defense<sup>245</sup> and the defense of one's nationals<sup>246</sup> might constitute other legitimate bases of

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<sup>241</sup> Travalio, *supra* note 199, at 161.

<sup>242</sup> Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27). It is important to note, however, that in the paragraph preceding this statement, the court stated that it was making its decision "in the case of an armed attack which has already occurred," and that it was not going to address an attack that might simply be imminent, as that issue had not been raised. *Id.* Thus, the court did not specifically hold that a state could not respond in self-defense in an anticipatory or preemptive manner, which would obviously be lacking the supposed "armed attack" requirement.

<sup>243</sup> Travalio, *supra* note 199, at 160 (emphasis in original); *see also* Maogoto, *supra* note 80, at 449-50 (noting that state practice has proven this contention).

<sup>244</sup> Under Meessen's theory, responses to terrorist attacks could be freed from the Charter framework altogether, and states would be free to respond without the other limitations of Article 51. Meessen, *supra* note 238, at 346-49. As will be discussed in further detail *infra* at pp. 54-56, Article 51 imposes a notice requirement on the state acting in self-defense and arguably grants the right to self-defense only until the Security Council takes action. Even if responses to terrorist attacks are not completely free of Article 51, Meessen argues that "the absence of a constant practice of exclusive resource to collective security [under the Charter framework] open[s] the way toward the development of new customary law, which may allow for a unilateral action against society-induced terrorist attacks." Meessen, *supra* note 238, at 349. Any response in self-defense under either existing customary international law or under a new emerging theory, however, would still be subject to the traditional principles of immediacy, necessity, and proportionality.

<sup>245</sup> Scholars have written numerous articles and books on these theories of self-defense. Christine Gray and Stanimir Alexandrov, respectively, each provide an excellent summary of the various arguments on these theories, including references to several historical examples. GRAY, *supra* note 52, at 129-34, 171-86; ALEXANDROV, *supra* note 34, at 149-214. *See generally* Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7 (2003) (providing an overview of the legal arguments for and against preemptive self-defense).

<sup>246</sup> Travalio, *supra* note 199, at 160-61 (citing several authorities for the proposition that defense of one's own nationals, especially in the context of terrorist attacks, would be permissible under international law as an exception to the "armed attack" requirement);



self-defense. Both of these obviously lack the armed attack against the state requirement, and would permit the use of force in self-defense.

Even if we adhere to the stricter view of the U.N. Charter framework and the ICJ's *Nicaragua* opinion, states may still respond to actions that fall short of an armed attack, but not necessarily as an act of self-defense or with a large-scale use of force.<sup>247</sup> The ICJ opinion did not adequately cover exactly what these "proportionate countermeasures" could entail and "left undetermined the range of means available . . . to the victim State."<sup>248</sup> Suffice it to say, under this framework, so long as the principles of immediacy, necessity, and proportionality are followed, a response to an act that falls short of an armed attack would be permitted, but must in and of itself not rise to the level of an armed attack.

### c. Security Council Action

As noted earlier, if a state has invoked its right to self-defense under Article 51 of the Charter, its actions "shall be immediately reported to the Security Council."<sup>249</sup> Furthermore, Article 51 states:

Measures taken by Members in the exercise of this right of self-defense . . . 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.<sup>250</sup>

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ALEXANDROV, *supra* note 34, at 188-201 (giving several historical examples of countries using defense of one's own nationals as a basis for self-defense and limited incursions into the sovereign territory of another state); GRAY, *supra* note 52, at 126-29 (noting that before World War II this practice was more commonly accepted and practiced than it is now and that there has been extensive academic debate over its legality). As previously noted, Israel attempted to use this theory in its raid on the Entebbe airport, and the majority of the Security Council viewed Israel's actions as violative of the U.N. Charter's prohibition on the use of force since Israel was not directly attacked. *See supra* pp. 13-14. Any potential use of this theory, however, should be limited in its scope and duration. "[L]imited action may be taken for the exclusive purpose of removing those nationals from a situation of peril -- not of course as a pretext for destroying the sovereignty of the country concerned." Richard N. Gardner, *Commentary on the Law of Self-Defense*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER* 52 (Lori Fisler Damrosch & David J. Scheffer eds. 1991).

<sup>247</sup> ALEXANDROV, *supra* note 34, at 138.

<sup>248</sup> *Id.* at 138 (citing *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108-10 (June 27)).

<sup>249</sup> *See supra* note 244. States have generally complied with this requirement, and have perhaps even "over-reported." GRAY, *supra* note 52, at 101-04.

<sup>250</sup> U.N. Charter art. 51.

As this article previously discussed, the articles of the U.N. Charter are subject to multiple interpretations, and this portion of Article 51 is no different. A state clearly has the right to take actions in self-defense until the Security Council has taken action. The more debatable issue is whether action by the Security Council terminates a state's right to self-defense.<sup>251</sup> Many would argue that it does, such as Christine Gray, when she writes, "[g]iven that the UN Charter aims not only to limit, but also to centralize, the use of force under UN control, it seems clear that the intention was to give the Security Council itself the right to decide whether such measures terminating the right to self-defense had been taken."<sup>252</sup> Therefore, under this view, once the Security Council has been notified and takes *some* action, a state's right to self-defense has been divested by the Security Council.<sup>253</sup>

The opposite view contends that the right to self-defense does not end simply by virtue of the Security Council taking *some* action.<sup>254</sup> Under this interpretation, a state can still exercise its "inherent" right of self-defense until the Security Council has fulfilled its obligations to "maintain or restore international peace and security."<sup>255</sup> Thus, under this view, a state's "inherent" right of self-defense and Security Council action run concurrently until "effective" measures have been instituted by the Security Council.<sup>256</sup> Once again, even under this more expansive

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<sup>251</sup> See generally Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229 (1996).

<sup>252</sup> GRAY, *supra* note 52, at 104.

<sup>253</sup> Although they ultimately conclude that this interpretation of Article 51 is incorrect, Ziyad Motala and David ButleRitchie summarize it as follows:

To some commentators, the latter part of Article 51 qualifies an individual country's right to self-defense in favor of the judgment of the Security Council after the Council has acted on the matter. Under this interpretation, the right of self-defense only operates in the absence of action by the Security Council. Once the Council has acted (regardless of the nature of the Council action), all parties are bound by its decision. This interpretation suggests that the adoption of the Charter has produced a new norm of international law, which does away with the traditional right to self-defense once the Security Council has spoken on the dispute.

Motala and ButleRitchie, *supra* note 178, at 22 (citing PHILIP JESSUP, A MODERN LAW OF NATIONS 164-65 (1948); John F. Murphy, *Force and Arms*, in 1 UNITED NATIONS LEGAL ORDER 284-85 (Oscar Schachter & Christopher C. Joyner eds., 1995)).

<sup>254</sup> *Id.* at 26 ("The preemptory right [of self-defense] operates before the Security Council takes a matter under consideration. The right does not disappear once the Security Council is seized of a situation in which defense is the issue.")

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 26-27 (contending that "[t]he effort employed by the U.N. must be greater than, or at least equal to, that which the victim state would exercise on its own behalf; anything less would be a denial of the preemptory norm of self-defense"). In summarizing their argument, the authors conclude:

view, the “inherent” right of self-defense is still limited by the aforementioned fundamental principles of self-defense, namely immediacy, necessity, and proportionality.<sup>257</sup>

### C. Recent Commentary on Self-Defense Elements

This article previously examined the traditional customary international law elements of self-defense and noted that they have continued to survive even after the formation of the U.N. Charter.<sup>258</sup> Modern commentary, however, especially in view of the relatively recent phenomenon of international or transnational terrorism, has put a different spin on these elements. Recent interpretations of each of these elements will be discussed in turn, although some of them overlap.

#### 1. *Immediacy*

As noted earlier, the principle of immediacy (also called imminence) normally requires that a state’s response in self-defense take place within a short time after the state has been attacked, so that the connection between the attack and the response is clear.<sup>259</sup> Several

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The Security Council must take action that effectively reinstates international peace and security to the zone of conflict, and, most importantly, effectively defends the victim state. Put another way, measures necessary is the equivalent to measures effective. Article 51 cannot be interpreted as vitiating a victim state’s right of self-defense when the Security Council cannot or will not effectively protect the victim state. The state retains its peremptory right of self-defense regardless of U.N. measures. Members of the United Nations expect the Security Council to effectively exercise this right on their behalf. If the Council cannot effectively [do so](or if a Council act is imperfect – that is, insufficient to defend the victim state), the victim state needs no assent from the U.N. to defend itself.

*Id.* at 27.

<sup>257</sup> In support of this proposition, David B. Rivkin, Jr. contends that “Article 51, properly construed, means that the right of self-defense does not encompass revenge; once the threat to international peace and security has been eliminated, it would be inappropriate for the victim or its friends to engage in further use of force.” David B. Rivkin, Jr., *Commentary on Aggression and Self-Defense*, in *LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 57* (Lori Fisler Damrosch & David J. Scheffer eds. 1991). Rivkin argues that this principle applies both before the Security Council has taken action and after it has taken steps to “maintain international peace and security.” *Id.* He, however, takes this expansive view further and would leave the ultimate decision on whether “international peace and security” has been restored up to the individual victim state. *Id.* at 57-58.

<sup>258</sup> See *supra* notes 152-257 and accompanying text.

<sup>259</sup> See *supra* notes 175-79 and accompanying text.

recent articles, however, have criticized this limitation as applied to terrorist acts, and have analogized it to battered woman syndrome.<sup>260</sup> Women frequently find themselves in abusive relationships where they “are subject to repeated and prolonged violence. Battering has a ‘cyclical nature’ and is often unpredictable.”<sup>261</sup> When the woman finally “snaps” and kills her husband at a time when he is not actually harming her, most courts have rejected her claim of self-defense, since the imminent threat of death or grievous bodily harm did not exist at the time of her actions.<sup>262</sup> Victim advocates continue to argue for the elimination of the imminence requirement in such cases by contending that:

“[T]he imminency of the danger should not be discounted merely because it had briefly subsided. This brief interval of tranquility is typically nothing more than a lull in the ongoing beating. Furthermore, the woman continues to experience a sense of impending danger during these lulls because of the cyclical nature of the physical and emotional abuse she has sustained over the years. The traditional rules of self-defense in the United States are unjust when applied to battered women because they do not accommodate this lull.”<sup>263</sup>

Although proponents of the analogy between battered woman syndrome and terrorism recognize that it is “imperfect,”<sup>264</sup> and perhaps may even be somewhat of a stretch, there are some comparisons that we can draw from it. Terrorism is often “ongoing, intermittent, or cyclical in nature,” and therefore, it is frequently difficult to determine when the imminence requirement is met.<sup>265</sup> Relaxing this requirement when applied to terrorism does have merit, for to do otherwise would require a state to respond to a terrorist attack only immediately after an attack.<sup>266</sup>

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<sup>260</sup> See, e.g., Skopets, *supra* note 205, at 753-83; Nabati, *supra* note 194, at 797-99.

<sup>261</sup> Nabati, *supra* note 194, at 798.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* (quoting Danielle R. Dubin, *A Woman's Cry for Help: Why the United States Should Apply Germany's Model of Self-Defense for the Battered Woman*, 2 ILSA J. INT'L & COMP. L. 235, 248 (1995)).

<sup>264</sup> *Id.* at 799.

<sup>265</sup> *Id.*

<sup>266</sup> In arguing that the traditional view of imminence is outdated in the context of terrorism, Gregory Travalio writes:

Thus, even if the right of self-defense extends beyond the “armed attack” of Article 51, there are, at the very least, serious hurdles that must be overcome before self-defense, as traditionally understood, can be used to justify attacks against terrorists or terrorist facilities located in another state. If the anticipated action

When the threat is ongoing, a state should be given more leeway in responding.

## 2. Necessity

Along the same lines as the above discussion on immediacy, there is recent commentary over whether isolated attacks by terrorists satisfy the necessity element of self-defense. In the usual case, a state should explore and exhaust reasonable alternative methods of resolving the dispute before resorting to armed force.<sup>267</sup> This principle, however, would seem virtually inapplicable in the context of terrorism, as many terrorists have goals that simply are not negotiable, such as the destruction of another state.<sup>268</sup>

Commentary over this issue is similar to the arguments previously discussed concerning whether an incident has risen to the level of an armed attack.<sup>269</sup> One author writes that “states may use force not in response to each incursion in isolation but to the whole series of incursions as collectively amounting to an armed attack.”<sup>270</sup> Taking this a step further, Antonio Cassese states, without citing any authority for it, that “[t]o qualify as an armed attack, international law requires that terrorist acts form part of a consistent pattern of violent terrorist action rather than just being isolated or sporadic attacks.”<sup>271</sup> He further argues that since “[s]tates can only have recourse to force *as a last resort* . . . ,

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by terrorists is not sufficiently imminent, the right to use force is not available for purposes of deterrence. On the other hand, if past terrorist actions by a group are too remote in time, the response by force is likely to be characterized as an illegal reprisal. It appears that if a right to use force in self-defense exists apart from an armed attack, it is a right that presents a very narrow window of opportunity. In fact, this window of opportunity, under the traditional criteria for self-defense, will almost never exist in the context of terrorist attacks. The traditional requirements for self-defense are simply too restrictive to reasonably respond to the threat posed by international terrorism.

Travalio, *supra* note 199, at 165-66.

<sup>267</sup> See *supra* notes 172-74 and accompanying text.

<sup>268</sup> See, e.g., *supra* notes 95-109 and accompanying text.

<sup>269</sup> See *supra* notes 213-48 and accompanying text.

<sup>270</sup> GRAY, *supra* note 52, at 125 (noting that the ICJ in its *Nicaragua* opinion clearly implied that a series of minor events could collectively be considered an armed attack). Some authors even place a clear prohibition against any isolated terrorist attack as authorizing action in self-defense. See, e.g., O’CONNELL, *supra* note 38, at 277 (stating that “[i]f a state experiences a single attack on its territory and has no evidence of future attacks, then it has no case for military force for the purpose of self-defense against attacks”).

<sup>271</sup> Cassese, *supra* note 237, at 596.

it follows that sporadic or minor attacks do not warrant such a serious and conspicuous response as the use of force in self-defense.”<sup>272</sup>

While these arguments may sound good in theory, they are missing a crucial point in practicality. Both an isolated attack, such as the 11 September attacks, and a series of sporadic attacks may have such devastating effects that resort to force may be the only appropriate recourse, and therefore necessary. The above theories tend to focus on the number of attacks, rather than on the “scale and effects” of the attacks and the nature of attacker, when determining necessity.<sup>273</sup> By looking at the entire picture and available alternatives, either an isolated event or a series of smaller attacks could still meet the necessity requirement for use of force in self-defense.<sup>274</sup>

### 3. *Proportionality*

Much like when analyzing the principles of immediacy and necessity, the proportionality of a response might very well be dependent upon the frequency and location of the attacks. Oscar Schachter writes:

Geography may also be a significant factor in determining proportionality. An isolated attack in one place – say, in a disputed territorial zone – would not normally warrant a defensive action deep into the territory of the attacking state. However, the situation may change when a series of attacks in one area leads to the conclusion that defense requires a counterattack against the “source” of the attack on a scale that would deter future attacks.<sup>275</sup>

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<sup>272</sup> *Id.* (emphasis in original).

<sup>273</sup> See *supra* notes 213-40 and accompanying text; see also Nabati, *supra* note 194, at 780 (noting that the cumulative effects of repeated terrorist acts could be enough to justify an armed response).

<sup>274</sup> The ICJ was asked in two recent cases whether a series of incidents could cumulatively serve as justification for an armed response or if they should be considered separately. The court was able to sidestep the issue, and did not make a ruling on the issue in either case. See *The Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig., Eq. Guinea Intervening)*, (Judgment of Oct. 10, 2002), available at [http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn\\_ijudgment\\_20021010.pdf](http://www.icj-cij.org/icjwww/idocket/icn/icnjudgment/icn_ijudgment_20021010.pdf) (last visited May 11, 2007); *Oil Platforms (Iran v. U.S.)*, (Judgment of Nov. 6, 2003), available at [http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop\\_ijudgment\\_20031106.pdf](http://www.icj-cij.org/icjwww/idocket/iop/iopjudgment/iop_ijudgment_20031106.pdf) (last visited May 11, 2007).

<sup>275</sup> Schachter, *supra* note 74, at 1637-38.

Therefore, if the attacks are sufficiently severe and occur frequently in a particular area, a more severe response, such as a deeper incursion into the *attacker's* territory, might be proportionate as a deterrent effect.

This raises a key question in determining the proportionality of a response. Does the use of force in self-defense contain some aspect of deterrence? Michael Glennon, a noted author on international law, stated that “proportionality is at war with deterrence.”<sup>276</sup> He further argued that “[w]hereas proportionality counsels that harm returned should not exceed harm received, deterrence warns that harm returned *should* exceed harm received, for the greater the disproportionality, the greater the chance of avoiding harm to either party by avoiding conflict altogether.”<sup>277</sup>

Robert A. Zayac, Jr. commented on Glennon’s argument in a recent article by stating that “Professor Glennon is incorrect in his analysis because proportionality does not necessarily mean the ‘harm returned should not exceed the harm received.’”<sup>278</sup> Zayac summed up his argument as follows:

Proportionality, in terms of use of force, cannot be an objective standard as in mathematical equations. Proportionality in the context of self-defense must be subjective and analyzed by examining not only the defending State’s actions but also its intent. If a State responds to an “armed attack” by ridding itself of the threat, it is not unreasonable or excessive.<sup>279</sup>

Both of the arguments presented above seem to overgeneralize the concept of proportionality. Zayac is correct in pointing out Glennon’s error in limiting proportionality to essentially an “in-kind” type of response in self-defense.<sup>280</sup> However, Zayac takes the argument too far in making a blanket statement regarding the intent element. While intent may be an important factor, the concept of proportionality

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<sup>276</sup> Glennon, *supra* note 205, at 552.

<sup>277</sup> *Id.* at 552 (emphasis in original).

<sup>278</sup> Zayac, *supra* note 44, at 452 (quoting and commenting on Glennon, *supra* note 205, at 552).

<sup>279</sup> *Id.*

<sup>280</sup> By way of example, the ICJ in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* stated that “[t]he proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defense in all circumstances.” *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8). The court further stated that it “cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” *Id.* Therefore, the court indicated that proportionality was not limited to an equal exchange of harm, as even nuclear weapons could potentially be used in some circumstances despite the fact that nuclear weapons were not used in the first instance.

should not be totally subjective. This would essentially give *carte blanche* authority to a state to take any action it desires to meet the ultimate objective of removing any threat, including the complete annihilation of the opposing party. By completely removing any objective standard, Zayac is essentially nullifying the entire principle of proportionality. To argue that whatever the state deems necessary to remove the threat would not be considered “unreasonable or excessive” is taking it outside the realm of any standard at all. Certainly a balance between the approaches is more appropriate. While a proportional response may have some element of deterrence to it, it would not permit the use of force solely to punish an aggressor once the threat has been subdued.

## VII. REPRISALS

Scholars frequently refer to reprisals in the use of force context, and that term has been utilized throughout this paper.<sup>281</sup> Reprisals can be defined as “prima facie unlawful measures taken by one state against another in response to a prior violation by the latter and for the purpose of coercing that state to observe the laws in force.”<sup>282</sup> The United States has defined this term as:

[A]cts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.<sup>283</sup>

A key word to keep in mind, however, is use of the term “belligerent” when discussing reprisals. Yoram Dinstein believes that there is an important distinction between a “belligerent” reprisal and an “armed” reprisal.<sup>284</sup> According to Dinstein, a “belligerent” reprisal is an action taken by one state against another during a time of actual international armed conflict (a *jus in bello* situation), while an “armed”

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<sup>281</sup> See *supra* text accompanying notes 81, 87, 94.

<sup>282</sup> Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 184-86 (2003).

<sup>283</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 497 (18 July 1956) [hereinafter FM 27-10].

<sup>284</sup> DINSTEIN, *supra* note 90, at 194-203.



reprisal is an action taken by one state against another as a “counter-measure” short of war (*jus ad bellum* situation).<sup>285</sup>

States repeatedly utilized both belligerent and armed reprisals, as defined above, prior to the League of Nations and the U.N. Charter, which purport to regulate the use of force.<sup>286</sup> These uses, however, “were lawful only if preceded by an unsuccessful request for redress (necessity) and if proportionate to the wrongful acts that provide the reprisal (proportionality).”<sup>287</sup>

Although states, in particular the United States and Israel, have attempted to conduct reprisals of both types in the U.N. Charter era,<sup>288</sup> the use of an “armed” reprisal is “generally agreed to be unlawful,” regardless of whether the action is taken against another state or a non-state actor located in another state.<sup>289</sup> The U.N. Security Council has repeatedly condemned armed reprisals and has even stated that they are “incompatible with the purposes and principles of the United

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<sup>285</sup> *Id.* at 194-95; *see also* Darcy, *supra* note 282, at 186-87 (discussing the difference between a belligerent reprisal and an armed reprisal).

<sup>286</sup> Maogoto, *supra* note 80, at 419-20.

<sup>287</sup> Rogoff & Collins, *supra* note 183, at 502 (parentheses in original). The United States generally agrees with these standards, and in one of its military manuals, has further limited its potential use as “an unavoidable last resort.” FM 27-10, *supra* note 283, at ¶ 497.

<sup>288</sup> *See* ALEXANDROV, *supra* note 34, at 168-88 (detailing numerous post-Charter instances in which countries have relied, at least in part, on the concept of reprisal to justify an armed response). States usually also couched these claims in terms of self-defense, which tends to blur the distinction between these two concepts. *Id.* Alexandrov provides an excellent summary of these two concepts in the context of the “accumulation of events” issue discussed throughout this paper:

It is very difficult to distinguish between the “accumulations of events” theory and reprisals since the purpose of the use of force in response to an accumulation of events is also to punish the other side for several cases of use of force and to deter it from future use of force. The International Law Commission has drawn a line between armed reprisals and self-defense on the basis of the concept that the purpose of reprisals is always punitive rather than defensive, and they take place “after the event and when the harm has already been inflicted.” Based on this distinction, the use of force in response to “an accumulation of events” would qualify as reprisals rather than as self-defense.

*Id.* at 166.

<sup>289</sup> GRAY, *supra* note 52, at 121, 163-64; Travalio, *supra* note 199, at 164 (stating that a reprisal “is widely agreed to have been outlawed by the United Nations Charter”); NATIONAL SECURITY LAW 131 (John Norton Moore et al. eds., 1990) (stating that “[m]ost scholars today would support the position that forceful reprisals as a justification for initiation of coercion . . . are not sanctioned by the Charter. The language of Article 2(4), however, does not by itself require the conclusion that all forceful reprisals are unlawful.”).

Nations.”<sup>290</sup> In addition, the U.N. General Assembly supported this conclusion in a resolution which clarifies that “States have a duty to refrain from acts of reprisal involving the use of force.”<sup>291</sup> Dinstein rejected this complete prohibition, however, when he stated that “armed reprisals are prohibited unless they qualify as an exercise of self-defence under Article 51 [of the UN Charter],” and further required any such use to meet the traditional “requirements of legitimate self-defence,” namely necessity, proportionality, and immediacy.<sup>292</sup>

## VIII. ANALYSIS OF 2006 ISRAELI INVASION

### A. Violation of Article 2(4)?

#### 1. *Threshold Determination*

As noted earlier, there are differing views on whether a country is in violation of the U.N. Charter’s prohibition on the use of force (assuming no exception under Article 42 or Article 51 is triggered) if it does not affect the “territorial integrity or political independence” of the other country.<sup>293</sup> By way of review, the more restrictive approach would not permit any incursion into another country’s territory. In the terrorism context, a broader approach would consider limited and temporary incursions into another country to eliminate a terrorist threat as being outside the scope of Article 2(4) and therefore legal under international law. These small-scale incursions, however, would only be valid if they are not against the persons or property of the host country and do not seek to influence that government’s actions. Although this approach would not permit actions directly against the host government (assuming of course that the host country’s actions are not akin to an armed attack, as discussed above), attacks against the terrorists could have an indirect deterrent effect on the host country causing it to change its courses of action toward the terrorists. Under this approach, this indirect influence would still fall outside the scope of Article 2(4).

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<sup>290</sup> S.C. Res. 188, U.N. Doc. S/RES/5650 (Apr. 9, 1964) (9-0 vote, with the United States and United Kingdom abstaining); S.C. Res. 270, U.N. Doc. S/RES/270 (Aug. 26, 1969) (condemning Israel’s attacks against Lebanon); S.C. Res. 316, U.N. Doc. S/RES/316 (June 26, 1972) (condemning Israel’s attacks against and abduction of Lebanese personnel). Other Security Council draft resolutions condemning reprisals were vetoed by the United States and others. Maogoto, *supra* note 80, at 422-25, 457.

<sup>291</sup> G.A. Res. 2625 (XXV), U.N. Doc. A/8018 (Oct. 24, 1970). *See also* G.A. Res. 41/38, U.N. Doc. A/RES/41/38 (Nov. 20, 1986) (condemning the 1986 raid on Libya by the United States).

<sup>292</sup> DINSTEIN, *supra* note 90, at 194-95.

<sup>293</sup> *See supra* notes 196-201 and accompanying text.

Israel's attacks against non-Hezbollah-related targets in Lebanon<sup>294</sup> are within Article 2(4)'s proscription of the use of force under either of the aforementioned interpretations. Israel, both by land and air, clearly crossed deep into Lebanese territory, well beyond the areas controlled by Hezbollah. Its actions against non-Hezbollah targets and areas were not limited in scope, duration, or effect. Furthermore, these attacks were designed to directly affect and influence the Government of Lebanon into taking action to subdue Hezbollah.<sup>295</sup> Therefore, the initial threshold question found in Article 2(4) has been met when applied to non-Hezbollah-related attacks against Lebanon.

If Israel had limited its attacks solely to Hezbollah-related targets and areas of control, then a broader approach, perhaps even broader than the one described above, might be appropriate in the circumstances at hand. Hezbollah controlled (and still does control) a significant part of southern Lebanon, and the Lebanese Government was virtually powerless in this area.<sup>296</sup> The Lebanese Army did not actively operate in southern Lebanon at that time, and Israel had repeatedly crossed into this territory to attack Hezbollah targets without any response from Lebanon. Any attacks in this area would therefore have even less of a connection to the "territorial integrity or political independence" of Lebanon, since this area can barely be called Lebanon's sovereign territory. This broader approach could be utilized, and perhaps even expanded, to allow for more than limited incursions without invoking Article 2(4). This approach should still be limited, however, to removing the *immediate* terrorist threat, and not for sustained acts of punishment, deterrence, or for gaining or occupying territory. At that point, such acts would likely fall within the scope of Article 2(4).

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<sup>294</sup> See *supra* notes 144-51 and accompanying text (describing many instances where Israel's targets had little to no military significance, and no ties to Hezbollah); see also International Crisis Group, *Israel/Palestine/Lebanon: Climbing Out of the Abyss*, Middle East Report No. 57, July 25, 2006, at 11-14 [hereinafter ICG Report] (detailing Israeli attacks against non-military targets and areas not under Hezbollah control, such as largely Christian sections of Lebanon). This Report also details some attacks against the Lebanese Army and describes them as "highly questionable since the army has stayed out of the conflict and avoided using its anti-aircraft capacity despite the onslaught." *Id.*

<sup>295</sup> Israel has stated that it holds the Lebanese Government responsible for the attacks. Orly Halpern & Nicholas Blanford, *A Second Front Opens for Israel*, CHRISTIAN SCI. MONITOR, July 13, 2006, at 1 [hereinafter Halpern & Blanford]; Chris McGreal, *Capture of Soldiers Was "Act of War" Says Israel*, GUARDIAN (London), July 13, 2006, available at <http://www.guardian.co.uk/print/0,,329528075-117700,00.html> (quoting the Israeli Prime Minister who said the July 12 attacks were an "act of war by the government in Beirut . . . [and that] [t]he Lebanese government, of which Hizbullah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions.").

<sup>296</sup> See *supra* notes 95-119 and accompanying notes. The Security Council has recognized this fact on many occasions. *Id.*

## 2. Article 51 Exception

Article 51 on its face requires the existence of an armed attack for the self-defense exception to apply directly under the Charter. As previously discussed, there is debate over whether an armed attack is the only circumstance under which self-defense can be used, or whether Article 51 would still permit self-defense under customary international law outside of the Charter framework.<sup>297</sup> The following discussion will focus on whether the armed attack threshold for self-defense directly under the Charter has been met in the Israel/Lebanon/Hezbollah conflict, and if so, whether Israel complied with Article 51's other requirements.

### a. Hezbollah

There can be little debate that Hezbollah has attacked Israel on numerous occasions over the years, causing many casualties and extensive property damage.<sup>298</sup> Hezbollah has also frequently kidnapped Israeli citizens and used them as hostages, in clear violation of international law.<sup>299</sup> On July 12, 2006, Hezbollah launched a series of rocket attacks against Israeli military posts, crossed the border into Israel, kidnapped Israeli soldiers, and killed Israeli soldiers.

Commentators disagree on the "scale and effects" necessary for either an isolated event or a series of events to be considered an "armed attack," and therefore permitting the use of force in self-defense.<sup>300</sup> The most restrictive view would base the analysis solely on a single major incident, rather than on an accumulation of minor events. This approach fails to take the nature of terrorism into effect, as 9/11-type attacks are actually quite rare. Although Hezbollah is not your typical terrorist organization given its span of territorial control, concentrated military capability, and insertion into local and national politics, its attacks against Israel prior to the recent conflict were on a relatively small scale when viewed in isolation. If we follow the single incident approach to decide whether an armed attack has occurred, then many of the prior attacks might not meet the necessary "scale and effects."

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<sup>297</sup> See *supra* notes 206-12 and accompanying text.

<sup>298</sup> See *supra* notes 95-109 and accompanying text. Similarly, Israel has done the same to Hezbollah, although it is usually in response to the ongoing Hezbollah attacks. *Id.*

<sup>299</sup> Israel has also utilized kidnappings as a tool, but not to the same scale as Hezbollah. See *supra* notes 110-24 and accompanying text. Israel's limited use of kidnappings, however, does not in any way make Hezbollah's use any less of a violation of international law or lessen this factor when considering whether an armed attack occurred.

<sup>300</sup> See *supra* notes 213-40 and accompanying text.

Even under this restrictive view, however, what nation (taken out of either its idealistic or politically-motivated rhetoric) would not believe it was the victim of an armed attack based on the events of July 12? Multiple military posts were shelled, and Israeli soldiers were either killed, wounded, or kidnapped. This was not the typical isolated terrorist attack against civilians, but rather a carefully planned and coordinated military-style operation on multiple fronts against the state itself. Even if considered as a single event, the “scale and effects” were more than “trivial,” and a military response was legitimate in response to an armed attack.<sup>301</sup> Obviously then, the broader “accumulation of events” approach would conclude that an armed attack had occurred.<sup>302</sup> Therefore, even if we utilize the more restrictive view of Article 51 and consider an “armed attack” as a prerequisite to utilizing force in self-defense in any situation, Israel met this threshold question in its conflict with Hezbollah.

b. Lebanon

Whether Israel was the victim of an armed attack by Lebanon is a much more difficult question. Lebanese armed forces clearly did not attack Israel, nor is there any indication that the Lebanese Government supplied any military or logistical support to Hezbollah.<sup>303</sup> Under the more restrictive view adhered to by the ICJ in the *Nicaragua* case,<sup>304</sup> even if Lebanon had been supplying arms and logistical support, this still would not be considered an armed attack. Utilizing this approach, the analysis would likely stop there. Any other type of passive support would clearly not be an armed attack. The broader approach would allow this military or logistical support to be an armed attack, especially in the post-9/11 era.<sup>305</sup> But since there is no evidence of this type of support, we must go deeper into the passive support analysis.

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<sup>301</sup> It should be noted that the U.N. Security Council, in condemning Israel’s attack against the Beirut airport in 1968, described it as “premeditated and of a large scale and carefully planned nature.” See *supra* note 55 and accompanying text. If this attack on the Beirut airport is considered significant, then Hezbollah’s actions on July 12, 2006 should be considered significant as well.

<sup>302</sup> The continuous shelling by Hezbollah and the repeated Israeli military response, albeit on a smaller scale than what occurred during the recent conflict, indicates that perhaps the “armed attack” threshold was met much earlier.

<sup>303</sup> If anything, Syria and Iran are to blame on this issue, and a response against them on these grounds may have been more legitimate. See *supra* notes 99-100 and accompanying text.

<sup>304</sup> See *supra* notes 214-25 and accompanying text.

<sup>305</sup> See *supra* notes 226-30 and accompanying text.

There has been, and continues to be, immense political instability within Lebanon.<sup>306</sup> There are Hezbollah members in the Lebanese Parliament and Cabinet, but at the same time, there are factions within the Lebanese Government that openly oppose Hezbollah.<sup>307</sup> There is support for Hezbollah among large sections of Lebanon, especially due to its philanthropic efforts in areas under its control, which complicates the political process even further.<sup>308</sup>

The Government of Lebanon has clearly not complied with the U.N.'s demands on them to gain control over its territory and disband and disarm the militias within its borders.<sup>309</sup> Outside factors have limited its ability to do so, as foreign armed forces have been in its country for many years, with Syrian armed forces (Hezbollah's strong ally) leaving only in 2005 with a continued intelligence presence. With military and logistical support continuously being provided to Hezbollah by other countries, thereby making it a very formidable military entity, is it any surprise that, when coupled with the political instability of the country, the Lebanese Government has not adequately dealt with Hezbollah?

While some would argue that Lebanon itself can be made the object of attack to force it to comply with its U.N. obligations,<sup>310</sup> Israel

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<sup>306</sup> Shadid, *supra* note 104, at A10; Slackman, *supra* note 104, at A3; MacFarquhar & Fattah, *supra* note 95, at A1; Wright, *supra* note 99, at A15 (discussing the assassination of the former Prime Minister of Lebanon and its ties to Syria).

<sup>307</sup> Halpern & Blanford, *supra* note 295, at 1.

<sup>308</sup> Deeb, *supra* note 96.

<sup>309</sup> See *supra* notes 95-119 and accompanying text. Lebanese Prime Minister Fouad Siniora has attempted to justify Lebanon's non-compliance with the U.N.'s disbanding and disarmament of militias by "describing [Hezbollah's] military wing as resistance rather than militia, and thus exempt from UN Security Council Resolution 1559." Halpern & Blanford, *supra* note 295, at 1. This argument is fallacious, as it is clear from the context that this resolution was directly aimed at dismantling Hezbollah.

<sup>310</sup> See, e.g., William H. Taft, IV, *Council Comment: Military Conflict in Lebanon in Northern Israel*, ASIL NEWSL. (American Society of International Law), Sept./Oct. 2006, at 5, 12 (stating that "[w]hile one may question their effectiveness, Israeli attacks on critical infrastructure and similar targets unconnected with Hezbollah, intended to convince the Government of Lebanon to carry out its responsibility to prevent Hezbollah from using Lebanese territory to attack Israel, were clearly legitimate acts of self defense"). In a rather surprising, yet confusing statement, Human Rights Watch said the following:

International humanitarian law would not prohibit attacks on Lebanese government military forces as a way of pressing the government to rein in Hezbollah, but in making that point, Human Rights Watch takes no position on whether the Lebanese government is capable of reining in Hezbollah or whether it would be an appropriate use of force under *jus ad bellum* standards to target the Lebanese government.

should not have attacked any targets in Lebanon not connected with Hezbollah.<sup>311</sup> Whether Lebanon could not or did not control Hezbollah because of political or military inhibitors, the relationship between these two entities was not so close as to make Lebanon guilty of an armed attack and thereby subject to an armed response as an act of self-defense under Article 51.<sup>312</sup> Israel's targeting of areas outside of Hezbollah control, in a seeming attempt to force Lebanon to deal with Hezbollah, appears to be closer to a reprisal<sup>313</sup> rather than an action done in self-defense. Thus, Israel's actions directed against Lebanon should not fall within the direct Article 51 self-defense exception to Article 2(4). As noted earlier, outside of the Charter framework, direct action against Lebanon *might* have been permitted under customary international law if Israel had complied with the principles of immediacy, necessity, and proportionality.<sup>314</sup>

### c. Security Council Action

The Security Council issued several resolutions in relation to the conflict between Israel and Hezbollah prior to the July 12 attacks and kidnapping, including one specifically on Lebanon's responsibility to disarm Hezbollah.<sup>315</sup> This does not mean, however, that the Security Council was completely "seized of the matter" already, thereby prohibiting Israel from responding in self-defense against Hezbollah. To do so would prohibit Israel from exercising its "inherent" right of self-defense.<sup>316</sup>

The Security Council did not pass a resolution following the July 12 incident and ensuing invasion until August 11, and Israel should certainly be permitted to invoke any legitimate right to self-defense

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Human Rights Watch, *Questions and Answers on Hostilities Between Israel and Hezbollah*, Aug. 2, 2006, [http://hrw.org/english/docs/2006/07/17/lebano13748\\_txt.htm](http://hrw.org/english/docs/2006/07/17/lebano13748_txt.htm).

<sup>311</sup> This again is solely under the U.N. Charter framework, and does not take into account any "inherent" right of self-defense under customary international law that might be triggered, thereby permitting the use of force against Lebanon.

<sup>312</sup> See *supra* notes 229-30 and accompanying text (discussing the close relationship between the Taliban and Al Qaida that permitted the Taliban government to be directly attacked).

<sup>313</sup> As earlier discussed, the intent of reprisals is predominantly to punish and deter, and they are done in response to another country's violation of the law of war. See *supra* notes 281-92 and accompanying text. Although Lebanon's failure to control, disarm, and disband Hezbollah would not likely be considered a law of war violation, the overarching purpose and mechanism of a reprisal in this circumstance is closely analogous.

<sup>314</sup> See *supra* notes 247-48 and accompanying text.

<sup>315</sup> See *supra* note 115 and accompanying text.

<sup>316</sup> See *supra* notes 152-95 and accompanying text.

during this time.<sup>317</sup> This August 11 resolution called upon the parties to cease hostilities and broker a cease-fire agreement.<sup>318</sup> Whether this supplants Israel's right of self-defense at this point is debatable. Israel's actions after the resolution, however, such as launching a deeper invasion into Lebanese territory not controlled by Hezbollah, followed by a swift retreat utilizing cluster munitions (while not being attacked),<sup>319</sup> would certainly be of questionable character and potentially outside of its "inherent" right of self-defense.

## B. Compliance With Self-Defense Elements

Whether a state is claiming the right to self-defense directly under Article 51 of the U.N. Charter or by utilizing its "inherent" right under customary international law, it still must comply with the elements of immediacy, necessity, and proportionality.

### 1. *Immediacy*

The element of immediacy has sometimes been blended into the necessity element, but this article will treat it as a separate element. The close connection between the time of attack and the defensive response is the key. If the response is a significant amount of time after the attack, then it would hardly seem "instant," unless the battered woman syndrome theory is invoked. In the case at hand, on July 12, Israel was clearly attacked by Hezbollah via rockets and a deadly incursion into Israeli territory. Israel quickly responded, and the conflict escalated from there. The immediacy requirement would seem at first glance to be easily met.

Several authors, however, have claimed that Israel had been waiting for a "unique moment" to attack Hezbollah and Lebanon, and that the July 12 attack, which was not so different from others, provided it with such a moment.<sup>320</sup> Taking this a step further, there are several

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<sup>317</sup> The phrase "legitimate right of self-defense" is significant here, as a country must still comply with the traditional requirements of self-defense during this interval and beyond. Delays in the passing of resolutions call into question whether the U.N. Security Council mechanism is an appropriate mechanism for handling disputes and "maintaining international peace and security." The process seems subject to potential abuse by the parties involved, as delays might be intentionally sought to allow for questionable actions. *See, e.g.,* Wright, *supra* note 99, at A15 ("[S]enior Israeli and U.S. officials [stated that] Israel, with U.S. support [and therefore veto power], intends to resist calls for a cease-fire and continue a longer-term strategy of punishing Hezbollah, which is likely to include several weeks of precision bombing in Lebanon.").

<sup>318</sup> *See supra* note 138 and accompanying text.

<sup>319</sup> *See supra* notes 141-44 and accompanying text.

<sup>320</sup> Wright, *supra* note 99, at A15 (quoting an Israeli senior official who said that "Hezbollah's cross-border raid . . . provided a 'unique moment' with a 'convergence of interests' among Israel, some Arab regimes and even those in Lebanon who want to rein



reports which claim that Israel had planned and rehearsed the operations it ultimately used against Hezbollah and Lebanon as early as 2004.<sup>321</sup> At first blush, this may seem to violate the immediacy principle, since it was not an “instant” type of response. This principle, however, focuses on the timing of the actual response and not on whether the response was readily prepared. Any modern and competent military should maintain plans for different operations and responses. The fact that Israel executed a planned response does not violate the immediacy principle. Even if Israel had been looking for an excuse to execute a response, it got one when it was attacked. Furthermore, using the battered woman syndrome analogy, repeated acts of terrorism should give a state more leeway in timely responding to these ongoing attacks. Under any approach, Israel clearly responded in a timely fashion.

## 2. Necessity

Israel’s response to the July 12 attacks must be put into its complete and proper context to determine whether Israel’s actions were necessary. Certainly, a response was necessary, but whether that response could involve armed force, especially on a large scale,<sup>322</sup> is more debatable. Were viable alternative methods of dealing with the situation available? A brief look at recent history from the Israeli perspective is “necessary” in answering this question.<sup>323</sup>

Prior to World War II, as the Zionist movement was in full swing, Jews and Arabs were involved in several armed skirmishes over land in Palestine. During the war, the horrors of the Holocaust and the attempted annihilation of the Jewish race, although not perpetrated by Arabs, should not be discounted, as they had a dramatic effect on the relationship between Jews and the international community. In 1947 and 1948, even before Israel’s declaration of sovereignty, Arabs attacked several Jewish cities in northern Palestine. On the first day after Israel’s declaration, 60,000 Arabs attacked Israel. Since that time, Israel itself and Israelis and Jews throughout the world have been attacked over and over again.<sup>324</sup> While Israel may not be a completely innocent victim in all of these circumstances, there have been, and

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in the country’s last private army”); George Monbiot, *Israel Responded to an Unprovoked Attack by Hizbullah, Right? Wrong*, GUARDIAN (London), Aug. 8, 2006, available at <http://www.globalpolicy.org/security/issues/Lebanon/2006/0808rightwrong.htm> [hereinafter Monbiot].

<sup>321</sup> Monbiot, *supra* note 319 (citing to reports in the *San Francisco Chronicle*, the *Washington Post*, and the *New Statesman*).

<sup>322</sup> This is where the principles of necessity and proportionality overlap to a certain extent.

<sup>323</sup> See *supra* notes 12-119 and accompanying text.

<sup>324</sup> See *supra* notes 23-109 and accompanying text (providing multiple examples of attacks on Israelis and Jews throughout the world).

continue to be, numerous countries, organizations, and individuals who would like nothing better than the complete annihilation and destruction of the “Zionist entity.”

The U.N., and in particular the Security Council, has been largely ineffective in dealing with Israeli conflicts. Time and time again it has condemned Israel’s responses to the threat or use of force by terrorists and state actors.<sup>325</sup> On many other occasions, even when Israel was the clear victim, the politics of the Security Council prevented it from taking appropriate action against the perpetrators of attacks against Israel.<sup>326</sup> The U.N. has dispatched three sets of U.N. Forces to the Israeli region, with UNIFIL being continuously located along the Israeli-Lebanese border since 1978. The Security Council has passed numerous resolutions since 2000 demanding that Lebanon control its own territory and a resolution specifically requiring Lebanon to disarm and disband all militias in its territory. Lebanon has not fulfilled its obligations, and the U.N.’s efforts to enforce its resolutions have been futile.<sup>327</sup>

In regard to Hezbollah, one of its key pillars is the destruction of Israel.<sup>328</sup> Hezbollah has built itself, with the aid of other relatively powerful nations, into a very capable and sophisticated armed force, as was demonstrated in the recent conflict. It has continuously committed terrorist acts throughout the world, shelled Israel for many years, and kidnapped Israeli citizens. It declared 2006 as the “year of retrieving the prisoners”<sup>329</sup> and had openly expressed its intention to kidnap Israeli soldiers and hold them hostage until hundreds of imprisoned terrorists were freed.

Was it necessary for Israel to respond by using force? Would other methods have worked? Last summer, Mortimer Zuckerman summed up the answer to these questions in the following way:

Hezbollah is not an organization that can be managed by appeasement. Nasrallah [the leader of Hezbollah] showed his true colors when he said Olmert [the Prime Minister of Israel] was “small fry,” without the capacity to retaliate. For six years, Israel has suffered under sporadic attacks from Hezbollah while the legitimate government of Lebanon (undermined by

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<sup>325</sup> See *supra* notes 34-94 and accompanying text.

<sup>326</sup> See *supra* notes 34-75 and accompanying text.

<sup>327</sup> For a well-written analysis on the U.N.’s handling of the situation among Lebanon, Hezbollah, and Israel in the post-9/11 era, see GRAY, *supra* note 52, at 172-75 (discussing the arguments of the various parties and the difficulty in determining what is aggression, self-defense, terrorism, and legitimate resistance to occupation).

<sup>328</sup> See *supra* note 97 and accompanying text.

<sup>329</sup> ICG Report, *supra* note 294, at 10.

Syria) and the international community did nothing. Nothing. Israel would have been justified long ago in forcing the issue, and now it is forced to insist that Hezbollah can no longer be allowed to act as a state within a state. It's terrible to think what things might have been like in five years if Israel had not taken action, with Hezbollah in possession of even longer-range, more-lethal, and more-accurate rockets.<sup>330</sup>

It was absolutely necessary for Israel to respond to Hezbollah by using force, just as it had been for quite some time, although not to the same scale. Hezbollah is not an entity that “plays by the rules,” and a country should not have to be the continuing victim of Hezbollah’s attacks. Alternative methods, such as negotiation, were simply no longer a viable option.

On the flip side, however, the attacks against non-Hezbollah-related, civilian targets throughout Lebanon “to impose a cost on Lebanese civilians to impel them to press their government to rein in Hezbollah” were simply not necessary and are in fact prohibited under international law.<sup>331</sup> Attacks against purely Lebanese government facilities are a little closer to being legitimate, but they too might not have been completely “necessary” under the circumstances. Measures short of force may have still been viable and should have been fully explored in the international arena. Even if they were not viable and force could be utilized against Lebanese targets, the numerous Israeli attacks and ground invasion into areas not under Hezbollah control went way too far, which leads us to the principle of proportionality.

### 3. *Proportionality*

Israel had the right to respond, and as argued above, had the right to use armed force against Hezbollah. It perhaps even had the right to use a limited amount of armed force against Lebanon itself. The question then becomes whether Israel’s massive retaliation went beyond the limits of a proportional response. While there certainly was severe death and destruction as a result of Israel’s response,<sup>332</sup> as there

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<sup>330</sup> Mortimer B. Zuckerman, *A Matter of Timing*, U.S. NEWS & WORLD REP., Aug. 14, 2006, at 75-76.

<sup>331</sup> Michael P. Scharf, *Council Comment: Military Conflict in Lebanon in Northern Israel*, ASIL NEWSL. (American Society of International Law), Sept./Oct. 2006, at 5, 12 (stating that “[i]nternational humanitarian law simply does not permit use of military force for the purpose of attacking the morale of the civilian population, regardless of the loftiness of the ultimate goal”); AP I, *supra* note 143, art. 51.

<sup>332</sup> One author summarized Israel’s retaliation and its effects as follows:

In Lebanon alone, Israel launched more than 7,000 air attacks and

frequently is in armed conflict, that is not necessarily the sole determining factor.

When a conflict escalates after the initial defensive act, it is difficult to determine whether the amount of force used should still be analyzed as part of the *jus ad bellum* right to respond in self-defense, or should rather become subject to only the *jus in bello* rules of warfare. Israel's immediate response was a failed effort to get its soldiers back, followed by extensive air attacks and a blockade. At virtually the same time as these "defensive" actions were taken, Hezbollah began a massive rocket and missile barrage deep into Israeli territory. The conflict escalated even further from there, and Israeli ground forces eventually drove deep into Lebanese territory.

In principle, as soon as Hezbollah responded to Israel's initial defensive response with attacks of its own, thereby escalating the conflict, Israel's actions during the conflict from that point on should probably not be considered when determining the *jus ad bellum* concept of a proportional response.<sup>333</sup> The *jus in bello* principle of proportionality, which demands that the collateral damage not be excessive in relation to the military advantage gained, would likely be the only concept of proportionality still in play once the situation had escalated to a full-fledged armed conflict.<sup>334</sup>

Israel's intent, both from the outset of hostilities and during the conflict itself, might not allow for the aforementioned general rule to apply. Israel appears to have planned and rehearsed the exact operations it attempted to execute in Lebanon well in advance. As previously noted, within a few days after the start of the conflict, "senior Israeli and U.S. officials" spoke of a "longer-term strategy of punishing Hezbollah, which is likely to include several weeks of precision bombing in Lebanon."<sup>335</sup> In fact, the Israeli Ambassador to the United States publicly stated that "[i]t seems like we will go all the way now. We will not go part way and be held hostage again. We'll have to go for the kill – Hezbollah neutralization."<sup>336</sup> Then, following the U.N. Security Council resolution calling for a cease-fire, Israel launched a deeper

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2,500 naval shells; 1,200 people, mostly civilians, were killed, 4,000 wounded, and 970,000 – one quarter of Lebanon's population – displaced. Israeli targeting destroyed 30,000 Lebanese residential, commercial, and office units; 80 bridges; 31 infrastructure works such as airports, electric plants; and two government hospitals.

Douglass W. Cassel, Jr., *Council Comment: Military Conflict in Lebanon and Northern Israel*, ASIL NEWSL. (American Society of International Law), Sept./Oct. 2006, at 5.

<sup>333</sup> See *supra* note 180.

<sup>334</sup> *Id.*

<sup>335</sup> See *supra* note 316.

<sup>336</sup> Wright, *supra* note 99, at A15.

incursion into Lebanese territory followed by a hasty retreat utilizing cluster bombs as the weapon of choice.<sup>337</sup>

Israel's stated intent and resulting actions (encompassing subjective and objective elements) demonstrate that it felt entitled to do whatever was necessary to remove itself of the threat, including the complete annihilation of Hezbollah. Dealing with terrorists who are acting as "a state within a state" and who have the expressed intention of destroying your country may seem like a situation where this argument should be valid. Many, if not most, people would agree that the destruction of an organization like Hezbollah would be a good thing. Perhaps Hezbollah should not even be entitled to the self-defense concept of proportionality and should be targeted at will.

Overutilization of this argument, however, would result in a slippery slope where nations could justify any attacks against another state or a "quasi-state" in an attempt to permanently remove the threat against them. This would likely result in a never-ending cycle of violence. While it may seem like a good approach, it would potentially nullify the entire principle of proportionality, as each party to the conflict would claim the other side was not entitled to it. Who is to be the judge? That is why proportionality should still have an objective aspect to it, and should have been applied to the conflict in question. While proportionality may very well have some notion of deterrence, and possibly even some aspect of punishment to it, deterrence and punishment should not be the ultimate purpose for continued use of armed force. This would turn the military action into more of a reprisal, rather than an act of self-defense.

Israel's attacks against Lebanese infrastructure and areas not under Hezbollah control went far beyond any reasonable aspect of proportionality. Besides subjecting itself to claims of war crimes due to the excessive loss of civilian life and damage to non-military targets, Israel's extensive actions against Lebanon itself were simply not proportional in response to Lebanon's failure to control Hezbollah.

## IX. CONCLUSION

Israel's attacks against and incursion into Hezbollah-controlled Lebanese territory might fall outside of the prohibition against the use of force found in Article 2(4). Even if it did violate the "territorial integrity and political independence" of Lebanon, Israel was the victim of an armed attack by Hezbollah, and therefore had the right to respond in self-defense directly under Article 51 of the Charter. Israel's use of armed force against Hezbollah was immediate and quite necessary. Whether Israel's response was proportional is debatable, since the issue

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<sup>337</sup> See *supra* pp. 26-28.

of proportionality is blurred once the conflict escalates, especially in the terrorism context. Israel's stated intent and actions, however, demonstrate that it seemed to be acting not out of self-defense, but more out of punishment and deterrence. Therefore, its response likely was not proportional in the traditional sense.

Israel's incursion into Lebanese territory outside of Hezbollah control and attacks against non-Hezbollah-related infrastructure fall within Article 2(4)'s prohibition against the use of force. Lebanon's failure to control Hezbollah did not rise to the level of an armed attack, and so Israel could not invoke Article 51's right to self-defense exception. Even if Israel invoked an "inherent" right of self-defense outside of the Charter framework, its military actions against Lebanon were likely not necessary nor were they proportional given the extensive damage in Lebanon.

Israel's overwhelming, although not very successful, response to the events of July 12, 2006, is certainly understandable given the history and struggles this small nation has gone through over the years. The current U.N. structure has been ineffective in dealing with the Arab/Jewish crisis in the Middle East, and Israel felt compelled to take serious action. Not all of its actions were likely permissible under the current status of international law, but they do demonstrate that combining terrorism and jurisprudence is a difficult task that needs to be more fully developed.



ENSURING CICA STAY OVERRIDES ARE REASONABLE,  
SUPPORTABLE, AND LESS VULNERABLE TO ATTACK:  
PRACTICAL RECOMMENDATIONS IN LIGHT OF  
RECENT COFC CASES

*MAJOR KEVIN J. WILKINSON*  
*MAJOR DENNIS C. EHLERS*

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## I. INTRODUCTION

The Competition in Contracting Act of 1984 (“CICA”)<sup>1</sup> provides for the automatic stay of a contract award and suspension of performance of a newly-awarded contract after the timely filing of a bid protest at the Government Accountability Office (GAO) and notice to the procuring agency.<sup>2</sup> These stays are known colloquially as “CICA stays.” Agencies are required to withhold contract award when they receive notice of a protest from GAO prior to award of the contract, and to suspend performance of an awarded contract when notice of the protest is received from GAO within ten calendar days of the contract award date<sup>3</sup> or within five days of a required debriefing.<sup>4</sup>

An agency can override a CICA stay under certain defined circumstances,<sup>5</sup> and they often do. The override has become so common that it may appear that the exception is swallowing the rule. It is not uncommon for agencies to attempt to justify an override when the circumstances of the procurement do not present truly urgent, compelling, and/or sufficiently significant Government interests, as those standards are interpreted and applied by the courts. As a result, a protester (frequently the incumbent) often turns to the only avenue of relief available and files suit in federal court alleging a violation of CICA. Faced with a request for injunctive or declaratory relief by a protester, the courts do not hesitate to prevent the agency from awarding

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<sup>1</sup> 31 U.S.C. §§ 3551-56 (2007).

<sup>2</sup> *Id.* at § 3553.

<sup>3</sup> The automatic stay is triggered only by notice from the Comptroller General, head of the GAO, and not by anyone else. *See McDonald Welding v. Webb*, 829 F.2d 593, 596 (6th Cir. 1987); *Survival Technology Inc. v. Marsh*, 719 F. Supp. 18 (D.D.C. 1989); *see also Florida Professional Review Org.*, B-253908.2, Jan. 10, 1994, 94-1 CPD ¶ 17 (no duty to suspend performance where protest filed on eighth day after award (Friday) but GAO notified agency of protest on eleventh day after award (Monday)).

<sup>4</sup> FAR 33.104(c). A debriefing is required if the agency receives a written request from an offeror within three days after the date on which the offeror received notification of contract award. FAR 15.506(a)(1).

<sup>5</sup> Two insightful commentaries on recent CICA stay override cases have been published this year: Michael F. Mason & Christopher G. Dean, *Living the Life of Reilly's: Recent U.S. Court of Federal Claims Decisions Highlight Need for Improved Regulatory Guidance in CICA Override Determinations*, 87 FED. CONT. REP. (BNA) 90 (Jan. 23, 2007), and Paul E. Pompeo, FEATURE COMMENT: *Establishing Trends in Override Case Law*, 49 No. 9 GOV'T CONT. ¶ 87 (March 8, 2007). Two excellent discussions of pre-2006 automatic stay overrides and the related legal standards are provided by Young Cho, *Judicial Review of "The Best Interest of the United States" Justification for CICA Overrides: Overstepping Boundaries or Giving the Bite Back?*, 34 PUB. CONT. L.J. 337 (Winter 2005), and Major Timothy A. Saviano, *Overriding a Competition in Contracting Act Stay: A Trap for the Wary*, 1995 ARMY LAW. 22 (June 1995). Another valuable resource is the Army Contracting Agency's *CICA Automatic Stay Override Guide*, April 2004, available at [http://www.aca.army.mil/docs/Community/aca\\_ovrid\\_gd.doc](http://www.aca.army.mil/docs/Community/aca_ovrid_gd.doc).

the contract or continuing performance of an awarded contract where they find the agency's justification for an override decision to be weak or unsupported.

In 2006, the United States Court of Federal Claims (COFC) overturned four CICA stay overrides;<sup>6</sup> in a fifth override-related case, the court let the agency's override stand, but only after the agency's third attempt at demonstrating that the contract at issue involved "interests of national defense and national security."<sup>7</sup>

This article addresses CICA stay override determinations in light of recent case law discussing, if not establishing, the specific factors to be considered in an override decision, the evolution of the standard of review in the COFC for post-award best interests override, and the dicta suggesting where the COFC may be headed in this area. It also discusses United States Air Force guidance to acquisition personnel regarding what it calls "HCA Overrides,"<sup>8</sup> the weaknesses in existing Air Force guidance, especially in light of recent cases, and recommendations to override decision makers and reviewers to ensure overrides are reasonable, supportable, and less vulnerable to attack.

## II. THE CICA STAY: PURPOSE AND STANDARDS

The purpose of the CICA stay is to preserve the *status quo* during the pendency of a protest and allow a successful protester meaningful relief.<sup>9</sup> Although the stay may result in significant

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<sup>6</sup> Reilly's Wholesale Produce v. United States, 73 Fed. Cl. 705 (Allegra, J., 2006); Automation Tech., Inc. v. United States, 72 Fed. Cl. 723 (Horn, J., 2006); Advanced Sys. Dev., Inc. v. United States, 72 Fed. Cl. 25 (Baskir, J., 2006); Cigna Gov't Servs., LLC v. United States, 70 Fed. Cl. 100 (Williams, J., 2006).

<sup>7</sup> Maden Tech Consulting, Inc. v. United States, 74 Fed. Cl. 786, 792 (Braden, J., 2006). The agency "established in a . . . D&F that the contract services at issue in this bid protest involved legitimate interests of national defense and national security. Therefore, the court has declined to exercise jurisdiction regarding the agency's decision . . . . *Id.* at 793. Thus, the court did not review the merits of the override decision. *See id.* at 790 ("[W]here legitimate 'interests of national defense and national security' have been asserted and established to the court's satisfaction, it is 'not necessary' for the court to reach the merits of whether 31 U.S.C. § 3553(d)(3)(C)(i) is violated.")

<sup>8</sup> HCA is an acronym for "Head of Contracting Activity," the agency official with overall responsibility for managing the contracting activity. *See* FAR 2.101(b). As discussed below, the HCA of an agency has the nondelegable duty to make the override decision.

<sup>9</sup> "[T]he automatic stay is intended to preserve the *status quo* during the pendency of the protest so that an agency would not cavalierly disregard the GAO's recommendations to cancel the challenged award. . . . The overarching goal of the stay is to preserve competition in contracting and ensure a fair and effective process at the GAO." *Advanced Sys. Dev.*, 72 Fed. Cl. at 31; *see also* H. Rep. No. 99-138, 4 (1985) ("Congress included these bid protest provisions to help ensure that the mandate for competition would be followed and that vendors wrongly excluded from Federal contracts would receive fair relief.")

disruption and inconvenience to the agency, it furthers full and open competition and otherwise protects the integrity of the procurement process, all of which serve the interests of the Air Force and of the United States. Recognizing this, Congress purposely set the bar for overriding a stay rather high, intending that overrides be the exception and not the rule.

In the pre-award protest setting, the standard for overriding the stay is that “urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO.”<sup>10</sup> In the post-award protest setting, the same urgent and compelling circumstances standard applies but CICA adds an alternative “best interests” standard, under which an agency may override the stay if “performance of the contract is in the best interests of the United States.”<sup>11</sup> The “best interests” standard has provided agencies greater latitude than the “urgent and compelling circumstances” standard in overriding a stay, and at least one federal court went so far as to say that it involved a discretionary determination not reviewable by the courts.<sup>12</sup> Nonetheless, the COFC has since asserted jurisdiction over post-award best interests override decisions<sup>13</sup> and has strongly suggested that the latitude previously afforded a “best interests” decision is inappropriate.<sup>14</sup> Three of the 2006 CICA stay override decisions reviewed *and overturned* “best interests” decisions.<sup>15</sup>

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<sup>10</sup> FAR 33.104(b)(i); *see also* 31 U.S.C. § 3553(c)(2)(A). The finding must also include that “[a]ward is likely to occur within 30 days of the written finding.” FAR 33.104(b)(ii).

<sup>11</sup> 31 U.S.C. § 3553(d)(3)(c); FAR 33.104(c)(2).

<sup>12</sup> *See* Topgallant Group, Inc. v. United States, 704 F. Supp. 265, 266 (D.D.C. 1988); Foundation Health Fed. Servs. v. United States, 39 Cont. Cas. Fed. (CCH) ¶ 76,681 (D.D.C. 1993).

<sup>13</sup> *See* Automation Tech., Inc. v. United States, 72 Fed. Cl. 723 (2006); University Research Co. v. United States, 65 Fed. Cl. 500 (2005); SDS Int’l, Inc. v. United States, 55 Fed. Cl. 363 (2003); PGBA, LLC v. United States, 57 Fed. Cl. 655 (2003). The United States Court of Appeals for the Federal Circuit (“CAFC”) has not directly addressed reviewability of post-award “best interests” override decisions. In *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286 (Fed. Cir. 1999), CAFC held that the COFC has jurisdiction under the Administrative Disputes Resolution Act, 28 U.S.C. § 1491(b), to review a pre-award override decision based on “urgent and compelling circumstances.” *Id.* at 1288-91. The COFC has since referenced *RAMCOR* as authority for review of all CICA stay overrides based on urgent and compelling circumstances, as well as those based on best interests of the United States. *See, e.g.,* *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 29 (Baskir, J., 2006); *PGBA*, 57 Fed. Cl. at 658-59.

<sup>14</sup> *See, e.g.,* *Advanced Sys. Dev.*, 72 Fed. Cl. at 31.

<sup>15</sup> *Automation Tech.*, 72 Fed. Cl. at 731; *Advanced Sys. Dev.*, 72 Fed. Cl. at 37; *Cigna*, 70 Fed. Cl. at 114.

### III. THE CICA STAY AND THE FAR

The Federal Acquisition Regulation (FAR) Part 33 sets forth, in general terms, the procedural requirements for CICA stay overrides. Under FAR 33.104(b)(1) and (c)(2), the override authority is the agency Head of Contracting Activity (HCA).<sup>16</sup> The HCA's decision must be based on a written finding (known as a "Determination and Finding" or "D&F") that the applicable override standard is met based on the circumstances presented.<sup>17</sup>

At times, there are both pre-award and post-award protests in the same acquisition. One possible scenario is that a pre-award protest is filed, the stay is overridden, the contract is awarded and a timely post-award protest is filed (perhaps by the original protester), which triggers a second automatic CICA stay. The second protest requires another independent and stand-alone HCA decision and D&F.<sup>18</sup>

The CICA and the FAR require the agency to notify the GAO of its finding and decision prior to awarding the contract, as well as prior to continuing performance under an awarded contract.<sup>19</sup> Although the GAO has no authority to review agency override decisions, the standard used by the agency in its override decision does affect what the GAO may consider in fashioning its recommendation if the protest is sustained.<sup>20</sup> The FAR also requires that the agency provide notice of the override decision to the protester and other interested parties<sup>21</sup> and makes clear that the HCA override determination must be made "in accordance with agency procedures."<sup>22</sup> Accordingly, Federal agencies, including the Air Force, have established procedures for agency override determinations.

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<sup>16</sup> This duty is nondelegable. FAR 33.104(b)(1).

<sup>17</sup> FAR 33.104(b)(1) & C(2).

<sup>18</sup> See *CICA Automatic Stay Override Guide*, *supra* note 5, at 10.

<sup>19</sup> See FAR 33.104(b)(2) and (c)(3).

<sup>20</sup> Under CICA, the GAO must make its recommendation "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract" if the override decision is based on "best interests." 31 U.S.C. § 3554(b)(2). However, if the agency overrides the stay based upon "urgent and compelling circumstances," CICA permits the GAO to "consider all circumstances," including cost and disruption to the government – in fashioning the appropriate remedy under a sustained protest. 4 C.F.R. § 21.8(b); *Department of the Navy – Modification of Remedy*, B-274944.4, July 15, 1997, 97-2 CPD ¶ 16 n.2. Thus, although the threshold standard for challenging a decision based on "best interests" is arguably higher, the agency has more to lose if the protest is sustained, as the GAO's recommendation might be more costly and disruptive.

<sup>21</sup> FAR 33.104(d).

<sup>22</sup> FAR 33.104(b) and (c)(2).

#### IV. AIR FORCE MANDATORY PROCEDURES FOR HCA OVERRIDES

The Air Force has established procedures for requesting, justifying, and obtaining HCA approval of CICA stay overrides. These procedures are contained in the Air Force Federal Acquisition Regulation Supplement (AFFARS) Mandatory Procedure (MP) 5333.104, *Protests to the GAO*, paragraph (h).<sup>23</sup> In MP 5333.104, the Air Force acknowledges the different standards for pre-award and post-award stay overrides, noting that “urgent and compelling circumstances” may include “delays, work stoppages, or performance degradations that severely impact mission-critical operations,”<sup>24</sup> and that the Air Force’s discretion in determining what is in its best interests is “broad but not unfettered.”<sup>25</sup> Subparagraph (h)(1)(iii)(A) requires that an override request include findings required by FAR 33.104(b) or (c) as well as those required by MP 5333.104(h)(4)(i). Confusingly, FAR 33.104 does not include any required findings; it only states the allowable bases for overrides. It also does not provide detailed guidance as to what the D&F should (let alone must) include. Fortunately, MP 5333.104(h)(4)(i) does list substantive requirements for Air Force D&Fs:

- (A) A description of the goods or services requested and the type of contract.
- (B) A concise summary of the protest and the Air Force position on the merits.
- (C) If applicable, the required award date and rationale.
- (D) A statement of the impact on the Air Force if award or performance is delayed 30, 60, or 90 days.
- (E) A description of alternative methods for obtaining the required supplies or services (e.g., options, organic capabilities, purchase orders), including a detailed explanation of why such alternatives are not feasible.
- (F) An estimate of termination costs if the protest is sustained and the contract terminated 30, 60, or 90 days after award.

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<sup>23</sup> The MP is available through <http://farsite.hill.af.mil>, accessible from a hyperlink at AFFARS 5333.104. The Army’s procedures are found in the Army Federal Acquisition Regulation Supplement (AFARS) 5133.104. Detailed guidance is found in the Army Contracting Agency’s *CICA Automatic Stay Override Guide*, *supra* note 5.

<sup>24</sup> Air Force MP 5333.104(h)(2)(i) & (3)(ii).

<sup>25</sup> *Id.* at (h)(3)(iii). “Schedule delays, mission degradation, and other disruptions may be considered.” *Id.*

(G) The name and telephone number of any point of contact at SAF or HQ USAF who knows the impact of delay in contract award or performance.<sup>26</sup>

This guidance,<sup>27</sup> while helpful, does not capture the depth and breadth of the deliberative process required by the COFC. This leads to one of two results, sometimes both. The first result is override decisions that the COFC deems to be unwarranted. The second is D&Fs that are not sufficiently documented and, thus, particularly vulnerable to challenge. Therefore, in addition to FAR 33.104 and MP 53333.014, Air Force acquisition personnel must consider recent guidance from the COFC and factor it into any override decision and supporting D&F.

## V. JUDICIAL REVIEW OF AGENCY OVERRIDES

Faced with a suit for declaratory or injunctive relief based on an alleged violation of the CICA, the COFC<sup>28</sup> will review the agency's actions under the Administrative Procedures Act (APA).<sup>29</sup> If the court finds, based on the administrative record, that the agency's justification is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"<sup>30</sup> and that the protester meets the requirements for injunctive relief,<sup>31</sup> it can – and often does – enjoin award or continued performance.<sup>32</sup>

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<sup>26</sup> *Id.* at (h)(4)(i).

<sup>27</sup> Air Force guidance is illustrative of what commentators have observed regarding other agencies' guidance. Although the Air Force recently updated its MP, it still "does not encompass all of the *Reilly's* factors." See Mason & Dean, *supra* note 5, at 96 n.64. (emphasis added).

<sup>28</sup> It is likely that the only viable forum for these cases today is the COFC. See *Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1080 (Fed. Cir. 2001) (stating the COFC is "the only judicial forum to bring any governmental contract procurement protest").

<sup>29</sup> 5 U.S.C. §§ 701-06 (2007).

<sup>30</sup> *Id.* at § 706(2)(A).

<sup>31</sup> In order to obtain a preliminary injunction, a plaintiff must demonstrate:

- (1) a likelihood of success on the merits,
- (2) the harm to plaintiff outweighs the harm to defendant,
- (3) the public interest is served by enjoining defendant, and
- (4) irreparable injury to plaintiff if defendant is not enjoined, including, but not limited to, the absence of an adequate remedy at law.

*Reilly's*, 73 Fed. Cl. at 708-09.

<sup>32</sup> There is a debate within the COFC as to whether the requirements for injunctive relief apply to challenges against CICA stay override decisions and, accordingly, whether they need to be addressed in a D&F. Compare *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 36 (Baskir, J., 2006) (adopting approach that "[b]ecause the declaratory judgment will reinstate the stay and vacate the override, having the same effect as an injunction, the Court does not reach the issue of injunctive relief" and finding "despite

Some district courts initially refused to review best interests override decisions on the ground, *inter alia*, that “a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”<sup>33</sup> This led to agency guidance to invoke the best interests standard to the maximum extent possible in override decisions.<sup>34</sup> However, the COFC has not been shy about asserting jurisdiction over these best interests cases.<sup>35</sup> For example, in a 2003 case, *PGBA, L.L.C. v. United States*,<sup>36</sup> Judge Allegra responded to the district courts that refused to review best interests decisions, stating “[o]n balance, this

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the fact that Plaintiff requests an injunction, . . . a declaratory judgment achieves the same effect”) with *Reilly’s Wholesale Produce, Inc. v. United States*, 73 Fed. Cl. 705, 709 (Allegra, J., 2006) (stating “this court doubts whether, as several of these cases have stated, a declaration, that could immediately be superseded by a new override decision, is the equivalent of an injunction. Accordingly, at least in the circumstances presented, the court believes that injunctive relief is the more appropriate remedy.”); *see also* Pompeo, *supra* note 5, at 4-5 (discussing injunction/declaratory relief debate and citing *Maden* as example where agency overrode a “reinstated” stay in face of declaratory judgment invalidating initial agency override. Maden “received no relief whatsoever and the agency received a second bite at the apple to overcome the automatic stay.”) Given this difference of opinion among COFC judges, the court’s application of the elements of injunctive relief in its review of an override decision may depend on the “luck of the draw” as to which judge will hear the case. To be safe, D&Fs should include and discuss all four elements of injunctive relief. *See Reilly’s*, 73 Fed. Cl. at 709; *Advanced Sys. Dev., Inc.*, 72 Fed. Cl. at 36.

<sup>33</sup> *Topgallant Group, Inc. v. United States*, 704 F. Supp. 265, 267 (D.D.C. 1988) (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985)). Reversal of an agency decision would only occur “where such a decision [was] shown to have been made with ‘gross impropriety, bad faith, fraud, or conscious wrong doing.’” *Id.* at 266; *see also* Cho, *supra* note 5, at 342-345 (discussing in detail the reasoning for the courts’ refusal to review and the limited bases for reversal); Pompeo, *supra* note 5, at 2 (noting that in the days of *Scanwell* jurisdiction, where district courts and the COFC exercised concurrent jurisdiction over bid protests, “offerors rarely challenged override decisions” (citing generally Judith A. Sukol, *The Competition in Contracting Act’s Automatic Stay Provision and Judicial Review: A Trap for the Unwary*, 43 ADM. L. REV. 439 (1991)). Pompeo suggests “[t]his may be due, in part, to conflicting case law from the U.S. District Court for the District of Columbia, then the most common venue for challenges to agency overrides, regarding whether the court had standing to review agency override decisions.” Pompeo, *supra* note 5, at 2.

<sup>34</sup> *See CICA Automatic Stay Override Guide*, *supra* note 5, at 7.

<sup>35</sup> Pursuant to the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b), United States district courts and the COFC shared jurisdiction over bid protests until January 1, 2001, when district court jurisdiction “sunset” and the COFC jurisdiction became exclusive. *See* Pompeo, *supra* note 5, at 2. In 1999, the Federal Circuit held the COFC had jurisdiction over agency override decisions. *See supra* note 13. *RAMCOR* specifically addressed a pre-award override decision based on “urgent and compelling circumstances.” *RAMCOR*, 185 F.3d 1286 (Fed. Cir. 1999). The COFC has since referenced *RAMCOR* as authority for review of all CICA Stay overrides, including post-award overrides based on “best interests of the United States.” *See, e.g., Reilly’s*, 73 Fed. Cl. at 710.

<sup>36</sup> 57 Fed. Cl. 655 (2003).

court believes that a ‘best interest’ finding in support of an override decision *is reviewable*.<sup>37</sup>

In *PGBA*, Judge Allegra performed a standard APA review consistent with what COFC judges now appear to apply uniformly.<sup>38</sup> However, cases contemporary with *PGBA* suggest that the then-current standard of review was not uniformly settled. In another 2003 case, *SDS International, Inc. v. United States*,<sup>39</sup> Judge Futey upheld a best interests-based CICA Stay override, citing both the “nonreviewability” line of cases and the APA, in the alternative, and finding that “[u]nder either standard the court must defer to the agency decision.”<sup>40</sup> In *Spherix, Inc. v. United States*,<sup>41</sup> decided in 2004, Judge Miller also found the court had jurisdiction but argued for a more deferential review of best interests overrides than for urgent and compelling circumstances.<sup>42</sup> However, the era of nonreviewability and higher deference to agency decisions soon came to an end. Two years later, in *Advanced Systems Development, Inc. v. United States*,<sup>43</sup> Judge Baskir expressly disagreed that different approaches applied to these standards.<sup>44</sup> And, as mentioned previously, in 2006 the COFC judges not only reviewed three “best interests” decisions, they overturned them.

In one of the 2006 cases, *Automation Technologies, Inc. v. United States*,<sup>45</sup> Judge Horn articulated the COFC’s standard for reviewing post-award best interests override decisions as follows:

The court’s role is to determine if the override was based on “a consideration of the relevant factors and whether there has been a clear error in judgment” by the agency. The court’s role is to determine if the agency

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<sup>37</sup> *Id.* at 659 (emphasis added).

<sup>38</sup> *Id.* at 659-60.

<sup>39</sup> 55 Fed. Cl. 363 (Futey, J. 2003).

<sup>40</sup> *Id.* at 365. The court gave “due regard to the interests of national defense and national security” in accordance with 28 U.S.C. § 1491(b)(3), found no irreparable injury to SDS, and that any harm was outweighed by the harm that would be suffered by the United States. *Id.* at 366 (quoting 28 U.S.C. § 1491(b)(3)).

<sup>41</sup> 62 Fed. Cl. 497 (2004).

<sup>42</sup> *Id.* at 505.

<sup>43</sup> 72 Fed. Cl. 25 (2006).

<sup>44</sup> *Id.* at 31. Judge Baskir found that, notwithstanding the argument for a more deferential standard, the *Spherix* court actually imposed a higher standard. *Id.* Regardless, recent cases seem to have blurred the distinction between the standards. *See, e.g.,* Reilly’s Wholesale Produce, Inc. v. United States, 73 Fed. Cl. 705, 711 (Allegra, J. 2006) (employing rationale from “best interest” cases to an “urgent and compelling circumstances” case). This is not surprising given “urgent and compelling” is usually a significant element of “best interests” determinations. Agencies used the “best interests” basis in order to take advantage of the more deferential standards (and refusal of some courts to review) likely contributing to the blurring of the distinctions between them. *See, e.g., CICA Automatic Stay Override Guide, supra* note 5, at 7.

<sup>45</sup> 72 Fed. Cl. 723 (Horn, J., 2006).



relied on factors Congress did not intend for the agency to consider; failed entirely to consider an important aspect of the problem; offered an explanation for its decision which is not supported by the evidence before it; or, whether the agency's decision is simply too implausible. Basically, the court must determine whether the agency "considered the relevant factors and made a rational decision based on those factors."<sup>46</sup>

This is the standard the COFC will apply in reviewing post-award best interests override decisions, and the agency should consider this standard in making and documenting its override decisions. Above all, the agency must fully consider all relevant factors and reach a rational decision supported by the the evidence.

Although the court will not substitute its judgment for the agency's,<sup>47</sup> the COFC has narrowed the scope of agency discretion in recent cases, most obviously in *Reilly's*.<sup>48</sup> In *Reilly's*, Judge Allegra distilled from prior COFC cases the "relevant" factors – *i.e.*, factors the agency "must consider" and address when considering an override decision – and those that are "off-limits" – *i.e.*, "irrelevant."<sup>49</sup> The "must consider" factors include:

(i) whether significant adverse consequences will necessarily occur if the stay is not overridden; (ii) conversely, whether reasonable alternatives to the override exist that would adequately address the circumstances presented; (iii) how the potential cost of proceeding with the override, including the costs associated with the potential that the GAO might sustain the protest, compare to the benefits associated with the approach being considered for addressing the agency's needs; and (iv) the impact of the override on competition and the integrity of the procurement system, as reflected in the Competition in Contracting Act.<sup>50</sup>

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<sup>46</sup> *Id.* at 727 (citations omitted).

<sup>47</sup> *Reilly's*, 73 Fed. Cl. at 709 (noting that "there exists a zone of acceptable results in a particular case and requires only that the final decision reached by an agency be the result of a process which 'consider[s] the relevant factors' and is 'within the bounds of reasoned decision-making'").

<sup>48</sup> *Id.* at 710-11.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 711 (citations omitted).

Judge Allegra’s two “irrelevant” factors are (i) that the new contract would be better than the old one, and (ii) that the override and continuation of the contract would be preferable to the agency.<sup>51</sup> As noted, for its override decision to be upheld, the agency must not only sort through relevant and irrelevant factors, addressing the relevant ones; it must also base its decision and findings on the relevant factors that do not “run[] counter to the evidence before the agency.”<sup>52</sup> The court further noted that while some of the cases it cited for the factors that are legally relevant and irrelevant were cases in which the agency override decision was based upon the “best interests” standard, “in the court’s view, the rationale employed in those cases has, where indicated, application to the review of an override decision based upon urgent and compelling circumstances.”<sup>53</sup>

#### VI. ANALYSIS: KEYS TO ENSURING OVERRIDES ARE REASONABLE, SUPPORTABLE, AND LESS VULNERABLE TO ATTACK

Recent COFC cases, especially the 2006 cases cited above, apply the “must consider” and “may not consider” factors from which agency officials can learn how to make override decisions less vulnerable to protest and less likely to be overturned by the courts. We make the following observations and recommendations based on the recent case law discussed above. The considerations are interrelated, overlap, and are generally applicable regardless of whether the basis for the override is best interests of the United States or urgent and compelling circumstances. While these considerations need not be included in all D&Fs in order to survive judicial scrutiny, they should be included in all override deliberations and, where possible and appropriate, addressed in the D&F.

##### A. Impact on the Air Force if Award or Performance is Delayed

As discussed above, CICA sets the standard for post-award agency overrides: urgent and compelling circumstances, or best interests of the United States. The written findings (D&F) should start with a succinct statement of the standard that is being applied and cogent reasoning upon which it is based. “Little explanation and generalized conclusions” will not suffice.<sup>54</sup> As MP 53333.014 directs, the D&F should address the impact on the Air Force if award or

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<sup>51</sup> *Id.* (citations omitted).

<sup>52</sup> *Id.* (citations omitted).

<sup>53</sup> *Id.* at 711 n.10.

<sup>54</sup> *Cigna Gov’t Servs., LLC v. United States*, 70 Fed. Cl. 100, 110 (Williams, J., 2006). See Section VI.G, *infra*, for more guidance on the administrative record.

performance is delayed,<sup>55</sup> recognizing that delay and impact are generally assumed and expected. The courts are not persuaded by the fact that there will be some delay and impact; rather, they consider whether “*significant* adverse consequences will *necessarily* occur if the stay is not overridden.”<sup>56</sup> Thus, the agency should consider the probability, significance, and extent of the impact in deciding whether this standard is met, including the criticality of the item or service being procured and the necessity of continued performance.<sup>57</sup> Clearly, the more critical or unique the procurement<sup>58</sup> and the more critical the time schedule,<sup>59</sup> the stronger the argument that *significant* adverse consequences will occur absent an override.

Among the most critical procurements are those involving interests of national defense and national security. One COFC judge has held “where legitimate ‘interests of national defense and national security’ [are] asserted and established to the court’s satisfaction,” the court will not “reach the merits of whether [CICA] is violated.”<sup>60</sup> Although the judge did not go so far as to say cases involving national security and defense are not justiciable, it held that “reach[ing] the merits of an override decision should be the exception, rather than the rule.”<sup>61</sup> Another COFC judge maintained jurisdiction and gave “due regard to the interests of national defense and national security” in its balance of harms analysis when deciding whether injunctive relief was appropriate.<sup>62</sup> An agency asserting interests of national defense or

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<sup>55</sup> Clearly, the cost of delaying performance under a stay is an important aspect of the impact. Although cost is not expressly stated in the MP 5333.104(h)(4)(i) list of D&F requirements, it is mentioned as a point of consideration earlier in the MP (subparagraph (h)(3)(iii)).

<sup>56</sup> *Reilly’s*, 73 Fed. Cl. at 711 (emphasis added).

<sup>57</sup> See *CICA Automatic Stay Override Guide*, *supra* note 5, at 8.

<sup>58</sup> For example, in *Spherix*, the COFC upheld the override, finding the program had “Presidential priority, not an ordinary government program,” and the agency’s “assessment as to the effect of a further constraint on implementation was reasonable.” 62 Fed. Cl. 497, 506 (2004) (finding delay would mean “new [Forest Service reservation] system could not be operational during the busy reservation season”).

<sup>59</sup> In *Advance Sys. Dev.*, the court described the *Spherix* override as supported by “the unique nature of the program and critical scheduling issues.” 72 Fed. Cl. 25, 31 (2006).

<sup>60</sup> *Maden Tech Consulting Inc. v. United States*, 74 Fed. Cl. 786, 790 (Braden, J., 2006) (citing *Kropp Holdings, Inc. v. United States*, 63 Fed. Cl. 537, 549 (Braden, J., 2005)).

<sup>61</sup> See *Kropp*, 63 Fed. Cl. at 549.

<sup>62</sup> *Gentex Corp. v. United States*, 58 Fed. Cl. 634, 655 (Williams, J., 2003); see Pompeo, *supra* note 5, at 3. Pompeo also refers to *Beta Analytics Int’l, Inc. v. United States*, 69 Fed. Cl. 431, 433 (Wolski, J., 2005), which involved the same services as the *Maden* case. Pompeo, *supra* note 5, at 3. “[T]he COFC identified the procurement as involving interests of national defense and specifically cited 28 USCA § 1491(b)(3), but made no further reference and rendered a decision on a bid protest.” *Id.* In *Gentex Corp.*, Judge Williams cites to numerous cases involving assertions of interests of national defense and national security. She makes clear that assertions of such interests are subject to review: “[C]laims of national security . . . are often advanced by the Government in challenges to procurement decisions. The Court will not blindly accede to such claims

national security will be given more deference,<sup>63</sup> but the assertion may not guarantee the COFC will not review the merits of the case. Where the procurement gives rise to issues of national defense or national security, such issues must be legitimate and paramount to the procurement itself.<sup>64</sup>

## B. The Incumbent versus the Awardee, and Other Reasonable Alternatives

The D&F should address why the current contract is not being extended, why the particular contractor (*i.e.*, the awardee) is essential, and other reasonable alternatives to an override.

### 1. *Incumbent Contractor*

The failure by an agency to consider extending the incumbent's contract will almost certainly result in a finding for the protester with respect to the unreasonableness of a stay override.<sup>65</sup> In that regard, specific questions to ask include (1) whether the incumbent could continue to provide the "urgent and compelling" product or service without interruption<sup>66</sup> and (2) whether the incumbent's contract has

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but is bound to give them the most careful consideration." *Gentex Corp.*, 58 Fed. Cl. at 655 (quoting *Harris Corp. v. United States*, 628 F. Supp. 813, 822 n.13 (D.D.C. 1986) (citation omitted)). She further states, "While the Court certainly must give serious consideration to national defense concerns and arguably should err on the side of caution when such vital interests are at stake, allegations involving national security must be evaluated with the same analytical rigor as other allegations of potential harm to parties or to the public." *Id.* (citing *ATA Defense Indus., Inc. v. United States*, 38 Fed. Cl. 489, 506 (1997)).

<sup>63</sup> In *Gentex Corp.*, Judge Williams notes that "the importance of this factor is *inflated*" and cites cases where "national security concerns and the balance of the equities tipped the scales *decisively* against injunctive relief" and "injunctive relief would be denied even if the plaintiff could have succeeded on the merits." *Id.* at 656 (emphasis added). Judge Williams denied injunctive relief, but awarded bid preparation and proposal costs. *Id.*

<sup>64</sup> U.S. DEP'T OF ARMY, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, *VERRIDE OF CICA STAYS: A GUIDEBOOK 9* (undated), *available at* [https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/FiscalLaw.nsf/\(JAGCNetDocID\)/A497D9EF52B31798852572BA00527979/\\$FILE/CICA%20Override%20Guidebook%20\(Nov%2005\).pdf](https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/FiscalLaw.nsf/(JAGCNetDocID)/A497D9EF52B31798852572BA00527979/$FILE/CICA%20Override%20Guidebook%20(Nov%2005).pdf) (last visited July 28, 2007).

<sup>65</sup> See *Automation Tech., Inc. v. United States*, 72 Fed. Cl. 723, 730 (2006) (stating "[t]he ability to extend a contract, . . . without difficulty, . . . is another important factor" as part of the finding that override was unreasonable); *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 32 (2006) (stating "[t]here is no discussion of extending or modifying current contracts during the GAO case" as part of the finding that override was unreasonable); see also Saviano, *supra* note 5, at 37 ("The court must be convinced that the agency seriously considered extending the member's contract.")

<sup>66</sup> See, e.g., *Automation Tech.*, 72 Fed. Cl. at 730; *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.C. 1987).

been extended once or multiple times under similar circumstances.<sup>67</sup> An objective assessment by the agency of the incumbent's ability to provide the product or service under an extension to its contract during the pendency of the GAO protest often will result in a decision that extension of the incumbent is an acceptable business decision and the best course of action, since it will significantly reduce litigation risks. The ability to extend the current contract with little or no difficulty or impact is clearly an important factor, and the existence of such circumstances puts a heavy burden on the agency to overcome.

## 2. *Particular Awardee*

Historically, an agency decision has had a better chance of surviving judicial scrutiny if it focuses less on the item or service being provided and more on whether the need for performance by the particular awardee is urgent and compelling.<sup>68</sup> The Army's *CICA Automatic Stay Override Guide* is instructive on this point. It recommends that agency officials consider the following regarding the awardee: (1) special or technical skills; (2) cost considerations or savings; (3) scope and nature of the work or item; and (4) any other special considerations.<sup>69</sup> In post-award best interests decisions where the awardee has already commenced performance, agency officials should also consider how and why the United States' interests would be harmed if the proposed contractor were not allowed to continue performance.<sup>70</sup>

Recent COFC cases place a limit on such considerations and agency officials must be cautious in their comparisons of the old and new contracts as justification for the override. As discussed previously, one COFC judge asserted that there are factors altogether "irrelevant to this analysis."<sup>71</sup> They are: (1) that the new contract would be better; and (2) that the override and continuation simply would be preferable to the agency.<sup>72</sup> These so-called "irrelevant" factors appear to be conclusions drawn from override decision justifications and not factors

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<sup>67</sup> See, e.g., *Dairy Maid Dairy v. United States*, 837 F. Supp. 1370, 1374-75 (E.D. Va. 1993).

<sup>68</sup> See, e.g., *DTH Mgmt. Group v. Kelso*, 844 F. Supp. 251, 256 (E.D.N.C. 1993); *Ace-Federal Reporter v. FERC*, 1990 U.S. Dist. LEXIS 13823, 1993 WL 518641 at \*4-5 (D.D.C. 1990); *Samson Tug & Barge Co., Inc. v. United States*, 695 F. Supp. 25, 27, (D.D.C. 1988); *Universal Shipping Co., Inc. v. United States*, 652 F. Supp. 668, 675 (D.D.C. 1987).

<sup>69</sup> *CICA Automatic Stay Override Guide*, *supra* note 5, at 8.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Reilly's Wholesale Produce v. United States*, 73 Fed. Cl. 705, 711 (2006).

<sup>72</sup> Agency counsel would be wise to scrutinize such proposed bases for override, especially if such "agency preferences" were the *only* bases upon which an override is based.

expressly identified in those decisions, as the cases upon which the court relied did not dismiss consideration of a “better contract” as “irrelevant.”<sup>73</sup> In fact, the court expressly considered the new contract as part of the override decision analysis, but found that while “it will almost always be the expectation that the new contract will be an improvement over the old,”<sup>74</sup> such factors *alone* did not justify an override.<sup>75</sup> If these two factors are the *only* considerations in support of an override decision, they may not be sufficient. Agency override deliberations should include careful, thorough, and objective consideration of all factors, including the so-called irrelevant factors.<sup>76</sup>

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<sup>73</sup> As commentators have noted regarding the relevancy of such factors,

If the court’s statements are interpreted broadly and inflexibly, these two “non-factors” could become quite controversial. One can fairly envision circumstances where a comparison of new and old contracts warrants at least some weight. For example, where the incumbent contractor is performing very poorly and the circumstances are such that a CICA override would not provide the awardee a meaningful competitive advantage vis-à-vis the plaintiff incumbent contractor should GAO sustain the plaintiff’s bid protest, a direct comparison of contracts would seem to be a relevant factor in the agency’s override determination.

Mason & Dean, *supra* note 5, at 95.

<sup>74</sup> *Advanced Sys. Dev., Inc., v. United States*, 72 Fed. Cl. 25, 31 (2006) (“To allow a best interests determination to rest on such a common ground would permit the override exception to swallow the Congressionally mandated rule that stays be automatic.”)

<sup>75</sup> In *Automation Technologies*, Judge Horn found that a \$103,000 per month savings on a five-year \$46.6 million contract did not warrant overriding the stay. 72 Fed. Cl. 723, 730 (2006). However, she expressly stated that “cost savings may be sufficient to support an override in the proper case.” *Id.* But the savings must be balanced against other factors, “including the ramifications of an agency loss in the GAO protest.” *Id.* In *Cigna*, Judge Williams stated that “[t]he prospect of newer, better contracts is not itself a sufficient basis to override a stay.” 70 Fed. Cl. 100, 113 (2006). In *Advanced Sys. Dev.*, Judge Baskir found the fact that “the new contract is better than the old one in terms of cost or performance is not enough to justify a best interests determination.” 72 Fed. Cl. 25, 31 (2006). Therefore, it appears unlikely that these factors will be treated as “broadly and inflexibly” as Judge Allegra’s opinion may suggest. However, they are two of several factors to consider.

<sup>76</sup> Pompeo warns, “In proving these factors, the Government must be wary to issue a complete D&F addressing the approved factors and *avoiding the others.*” Pompeo, *supra* note 5, at 4 (emphasis added). Clearly, we disagree that the COFC case law mandates “avoiding” altogether what Judge Allegra calls the “irrelevant” factors. We agree that a warning is appropriate for agencies resting their decision solely on such conclusions.

### 3. “All” Reasonable Alternatives

The APA provides that the “court’s role is to determine if the override was based on ‘a consideration of the relevant factors and whether there has been a clear error in judgment.’”<sup>77</sup> And “[b]y its very definition, this standard recognizes the possibility that there exists a zone of acceptable results in a particular case.”<sup>78</sup> As long as the agency “considered the relevant factors and made a rational decision based on those factors,” the courts should uphold the decision.<sup>79</sup> Consistent with that standard, the court in *Reilly’s* rejected the Government’s argument that it had no alternative but to employ the override, stating “it does not appear that [the agency] adequately considered reasonable alternatives” and found that “it is not so much the way in which these alternatives were explored, but the fact that most of them apparently were not explored at all.”<sup>80</sup> That being said, the COFC has demanded more of agency decision makers. The court narrowed any perceived “wiggle room” in the agency’s consideration of reasonable alternatives, stating “awarding the [bridge] contract to [the awardee] should have been viewed not as a first, but a *last resort*, undertaken only after *all* reasonable alternatives were fully explored.”<sup>81</sup> This statement suggests that all options should be vetted, with the override being the *only* decision that reasonably could be made. Failure to mention all alternatives in the analysis and D&F could raise a red flag for the protester and the court that certain alternatives were not considered. Given the restrictions on supplementing the administrative record (to be discussed below), it is safer for the agency to consider and document its rejection of less reasonable options than to fail to address them or explain why they were not reasonable.

The AFFARS MP requires that the writing (D&F) include a “description of alternative methods for obtaining the required supplies or services . . . , including a detailed explanation of why such alternatives are not feasible.”<sup>82</sup> Although, as commentators note, “the existence of a reasonable alternative alone is not necessarily fatal to the agency’s override decision if the agency adequately considered that

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<sup>77</sup> *Automation Tech.*, 72 Fed. Cl. at 727 (quoting *Advanced Sys. Dev.*, 72 Fed. Cl. at 30).

<sup>78</sup> *Reilly’s Wholesale Produce v. United States*, 73 Fed. Cl. 705, 709 (2006).

<sup>79</sup> *Advanced Sys. Dev.*, 72 Fed. Cl. at 30.

<sup>80</sup> 73 Fed. Cl. at 714. The court noted a number of alternatives the agency could have considered, including (1) reissuing existing blanket purchase agreements, (2) conducting a broader interim procurement (for a bridge contract the court found to be tantamount to overriding an automatic stay), (3) use of sole-source procurements with vendors other than the awardee, or (4) exploring ways to simplify or streamline its requirements for the affected region during the interim period. *Id.*

<sup>81</sup> *Id.* at 715 (emphasis added).

<sup>82</sup> MP 5333.104(h)(4)(i)(E).

alternative but reasonably opted for another course,”<sup>83</sup> the *Reilly*’s decision’s “last resort” language suggests the court will apply more than the typical APA standard and that the zone of acceptable results is quite narrow. The bottom line is that all alternatives, reasonable or not, should be considered and explained.

### C. Likelihood, Risks, and Costs of GAO Sustaining the Protest

The AFFARS MP also requires that the D&F include “an estimate of termination costs if the protest is sustained,”<sup>84</sup> but the COFC has been much more expansive in what considerations are required. COFC case law requires that agencies evaluate the risks to the agency and bidders and offerors if the GAO sustains the protest. For example, in *Automation Technologies*, the court noted that “an agency’s discretion is not unfettered, but constrained by a consideration of relevant factors, including the ramifications of an agency loss in the GAO protest.”<sup>85</sup> In *Cigna Government Services*, the court noted that

[n]either [the] written finding nor its administrative record contains any assessment of the potential risks to the agency if GAO were to grant Cigna’s protest and direct a recompetition, as Cigna is urging. . . . [The agency] did not evaluate the ramifications of Cigna prevailing on its protest at all—even in the most cursory fashion. Nor did [the agency] attempt to quantify the costs of recompeting these contracts and redoing the activities it is not conducting with potentially different vendors.<sup>86</sup>

The decision also failed to reflect any “consideration of the termination and transition costs involved if the contract awardees continue performance but GAO sustains Cigna’s protest.”<sup>87</sup> The practical lesson is that it is important for the Air Force to document the protest grounds and the Air Force’s position on the merits, including the

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<sup>83</sup> Mason & Dean, *supra* note 5, at 94.

<sup>84</sup> MP 5333.104(h)(3)(iii). Although not listed as a D&F item specifically, the guidance suggests that “[c]osts of delaying performance under a stay, to the extent they are quantifiable, should be compared to potential termination costs.” *Id.*

<sup>85</sup> 72 Fed. Cl. 723, 730 (2006).

<sup>86</sup> 70 Fed. Cl. 100, 111 (2006).

<sup>87</sup> *Id.* The court notes that the agency failed to consider potential confusion and cost involved for the “beneficiaries, suppliers, and other . . . contractors who will have to coordinate and work with the . . . contractors caused by the switching back and forth.” *Id.* at 112.



probability of a sustained protest and the risks and costs (termination, recompetition, transition, etc.) associated with a sustained protest.<sup>88</sup>

#### D. Likelihood and Costs of a Court Overturning the Override

The override decision-making process cannot disregard the court's analysis of the factors upon which injunctive relief is based. As mentioned before, there is debate among COFC judges as to whether declaratory relief is sufficient or proper.<sup>89</sup> Given that the remedy granted (*i.e.*, injunction or declaratory judgment) may be left to "the luck of the draw" as to which judge gets the case, the agency – probably more appropriately agency counsel – should consider and discuss with the decision-maker the elements of injunctive relief, especially the likelihood of the protester prevailing on the override and not just the underlying protest. The question is "whether it is likely that [the court] would overturn the override decision as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>90</sup> Agency counsel should also consider the other factors to obtain injunctive relief: the relative harm to the protester, government and any intervenor;<sup>91</sup> whether the public interest is served by enjoining award or performance;<sup>92</sup> and irreparable injury to the protester.<sup>93</sup> The protester has the burden of establishing all of these factors to obtain injunctive relief,<sup>94</sup> but it helps if the agency has gone through this analysis and documented its conclusions prior to litigation.

#### E. Competition in Contracting and Congressional Policy

There are two additional key considerations in the case law that Air Force guidance fails to address but which the COFC expects agencies to expressly consider. This section addresses the first –

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<sup>88</sup> The agency cannot "ignor[e] the possibility that the protest may have merit." *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 32 (2006).

<sup>89</sup> *See supra* note 32.

<sup>90</sup> *Reilly's Wholesale Produce, Inc. v. United States*, 73 Fed. Cl. 705, 709 (2006).

<sup>91</sup> "[T]he court must consider whether the balance of hardships leans in the plaintiff's favor. This requires a consideration of the harm to the government and to the intervening defendant." *Id.* at 715.

<sup>92</sup> "Clearly, the public interest in honest, open, and fair competition in the procurement process is compromised whenever an agency abuses its discretion in evaluating a contractor's bid." *Id.* at 716 (quoting *PGBA v. United States*, 57 Fed. Cl. 655, 663 (2003)).

<sup>93</sup> "When assessing irreparable injury, '[t]he relevant inquiry in weighing this factor is whether plaintiff has an adequate remedy in the absence of an injunction.'" *Id.* at 716-17 (quoting *Magellan Corp. v. United States*, 27 Fed. Cl. 446, 447 (1993)).

<sup>94</sup> However, "[n]o one factor is dispositive to the court's inquiry as 'the weakness of the showing regarding one factor may be overborne by the strength of the others.'" *Id.* at 709 (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)).

competition in contracting and Congressional policy – while subsection F, below, addresses the second – advance planning and building in time for a protest.

In considering whether to override a CICA stay, agencies must confront an often intangible, difficult to quantify, but weighty factor: “the impact of an override on competition in contracting and bid protest processes, as well as respect for the GAO.”<sup>95</sup> The COFC finds in CICA a Congressional mandate to protect the procurement system’s values of integrity and competition and Congress’s express intent that a stay of award or performance should be the rule, not the exception.

The more tangible and specific the harm that may occur to competition in the procurement at issue, the more vulnerable the override decision. In *Reilly’s*, the court found that the agency “seem[ed] to have turned a blind eye to the impact of its decision on the integrity of the Federal procurement system,” and that the CICA stay override was one of a number of indicators within the procurement that the agency had run roughshod over bedrock principles of our procurement system.<sup>96</sup> In *Cigna*, the court found that the “override decision failed to consider whether overriding the stay would serve or undermine the Congressional goal of competition embodied in [a particular statute] the contract awards purported to serve.”<sup>97</sup> In addition, the court noted that the awardees would have a competitive advantage in a recompetition that the other bidders, including the incumbent, would not have: “[d]oing the work under the Solicitation may enable [the awardees] to gain insights which could aid them in amending their proposals should GAO order such a remedy.”<sup>98</sup> Thus, the agency should consider not only the impact on the integrity of the Federal procurement system (albeit a somewhat abstract concept) but, even more importantly, the impact on competition in the affected procurement.

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<sup>95</sup> *Automation Tech., Inc. v. United States*, 72 Fed. Cl. 723, 730 (2006).

<sup>96</sup> 73 Fed. Cl. at 714-15. The court observes that “there are indications that this lack of focus did not begin with the override decision. The record reveals, for example, that after performance of the initial contract was stayed, [the agency] continued to conduct training sessions with [the awardee], an action that appears to violate the CICA stay.” *Id.* at 715. Additionally, the agency’s “insensitivity to competition concerns is also reflected in the way that it conducted the interim procurement.” *Id.*

<sup>97</sup> *Cigna Gov’t Servs., LLC v. United States*, 70 Fed. Cl. 100, 112 (2006). The Medicare Prescription Drug Improvement Modernization Act (MMA) requires competitive contracting procedures and compliance with the FAR to replace existing contracts that had not been subject to full and open competition. *Id.* at 100.

<sup>98</sup> *Id.* at 113. This is especially important given that understanding of the requirements was a heavily weighted technical factor under Section M of the Request for Proposals. *Id.*

## F. Lack of Advance Planning and Building in Time for Protest

Acquisition personnel should build into the procurement process time for potential bid protests. Generally, bid protests are processed swiftly. The CICA requires GAO to rule on bid protests within 100 days of filing.<sup>99</sup> Even when supplemental protests are filed, GAO generally decides them within the original 100 day period. It is axiomatic that reasonable and realistic planning may obviate the need for overriding a stay. But sometimes agencies may believe overrides are necessary notwithstanding its planning efforts. It appears the COFC would like to see, and may even demand, that agencies account for possible protests in their acquisition planning.

In *Reilly's*, the court alluded to the importance of acquisition planning in the CICA stay context. In response to the agency's argument that alternative means of providing goods and services in the interim could entail delay, the court found that "many of the circumstances that [the agency] now faces are the result of a 'lack of advance planning.' . . . [S]ome of the problems encountered here are, at least in part, of defendant's own making, resulting from its (apparent) failure to factor into its transition schedule any time for the bid protests."<sup>100</sup> The message is clear: an agency's finding that an alternative is not reasonable will be analyzed in light of its lack of advance planning and the source of the problems encountered, including the failure to factor in time for a potential protest.<sup>101</sup>

As with *Reilly's* apparent hard-line on "irrelevant" factors, it remains to be seen how these emerging considerations of advance planning, source of problems encountered, and scheduling time for protests in the procurement will be addressed or applied in future cases. For now, agency officials must be mindful of their existence and that they may affect a court's conclusions regarding the override decision. It is not beyond reason that a court could find that there were reasonable alternatives that were rendered "unavailable" due to the agency's lack of

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<sup>99</sup> 31 U.S.C. § 3554(a) (2007); 48 C.F.R. (FAR) § 33.104(f) (2007); 4 C.F.R. § 21.9(a) (2007). Additionally, "[a]t the request of a party or on its own initiative, GAO may decide a protest using an express option," pursuant to which the decision will be made within 65 days. 4 C.F.R. § 21.10 (2007); see 31 U.S.C. § 3554(b) (2007).

<sup>100</sup> *Reilly's*, 73 Fed. Cl. at 715-16 (quoting *Filtration Dev. Co., LLC v. United States*, 60 Fed. Cl. 371, 381 (2004)).

<sup>101</sup> One wonders whether Judge Allegra is borrowing from other provisions of the CICA. Title 10, Section 2304(f)(5) of the United States Code and FAR 6.301 state that "[c]ontracting without providing for full and open competition shall not be justified on the basis of . . . a lack of advance planning by the requiring activity." The court treated this bridge contract as "tantamount to overriding the automatic stay on the initial contract" and found problems with the competition elements of the bridge contract. *Reilly's*, 73 Fed. Cl. at 715. The automatic stay provisions do not include this prohibition.

advance planning (including failure to build time into the procurement for potential bid protests), which could undermine any argument that the agency's override was based on justifiable urgent and compelling circumstances.

#### G. The Administrative Record

The D&F must be supported by documentation prior to and contemporaneous with the override decision. "Because we test the decision under the arbitrary and capricious standard, our review should be necessarily confined to the administrative record already in existence, not some new record made initially in the reviewing court."<sup>102</sup>

The courts are not sympathetic to an agency's after-the-fact justification for its override decision. Thus, in *Advanced Systems*, the court found "no authority for the proposition that the override determination can be an evolving document."<sup>103</sup> In that case, the agency "executed the override two weeks before it issued its 'perfected' Determination and Findings."<sup>104</sup> The COFC noted: "The text of the statute does not support a reading that the override can precede the statutory justification. . . . [T]he validity of the . . . override decision must 'stand or fall on the propriety of that finding.'"<sup>105</sup> The court added:

As this Court has observed, however, the parties should be permitted, in appropriate cases, to supplement the administrative record, since "in most bid protests, the 'administrative record' is something of a fiction, and certainly cannot be viewed as rigidly as if the agency had made an adjudicative decision on a formal record that is then certified for court review." *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 350 (Fed. Cl. 1997) (reviews factors which may support limited discovery or supplementation of the administrative record). This is true in the "contract award context," perhaps. *Id.* However, *in the narrow context of statutory compliance with the automatic stay provisions of CICA, it is unnecessary to search beyond the four corners of the override decision – the agency*

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<sup>102</sup> See *Advanced Sys. Dev., Inc. v. United States*, 72 Fed. Cl. 25, 33 (2006) (citing *Comprehensive Health Servs. v. United States*, 70 Fed. Cl. 700, 719 (2006) (citations omitted)).

<sup>103</sup> *Id.* at 34.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)).

*either complied with the requirements of Section 3553(d)(3) of CICA, or it did not.*<sup>106</sup>

The court found that the agency, by filing supplemental submissions, was “now masquerading a post hoc rationalization as a then-existing ‘interpretation’ of its basis for overriding the stay.”<sup>107</sup>

Courts will review the administrative record as it existed when the override decision was made.<sup>108</sup> Courts will review documents prepared after the commencement of litigation only in very limited circumstances. This is especially important when a protester alleges that other options are reasonable, and the agency might be unable to refute such challenge without resorting to documents or other evidence that are not a part of the administrative record. The record must include documentation of the facts, conclusions, and reasoning upon which the agency based its override decision. Failure to document is tantamount to failure to consider. The bottom line is that there must be documentation and the documentation must support the decision made.

## VII. CONCLUSION

There are numerous factors agencies must carefully and reasonably consider in determining whether to override a CICA stay. Agencies must anticipate and plan for bid protests early in the procurement process. Failure to do so may itself weigh heavily in a court’s consideration of a CICA stay override. While the FAR and Air Force MPs are somewhat helpful in understanding the process and relevant factors, unless and until there is further statutory or regulatory guidance, agencies must look beyond their current procedures to the standards imposed or applied by the courts and respond proactively in their override determinations. Agencies should not try to “beat the system” to secure an override as a matter of convenience or mere preference. Rather, they must consider how they can sustain an override

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<sup>106</sup> *Id.* at 33 (emphasis added).

<sup>107</sup> *Id.* at 35 (quoting *Gose v. USPS*, 451 F.3d 831, 839 (Fed. Cir. 2006) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962))).

<sup>108</sup> As part of the standard for reviewing stay overrides, the court looks to whether the agency’s explanation is reasonably supported by the evidence. In *Cigna*, the court found the record fatally deficient. *Cigna Gov’t Servs., LLC v. United States*, 70 Fed. Cl. 100, 111 (2006). First, it noted that the “rationale for overriding the statutory stay in this complex, costly procurement for Medicare claims processing was contained in a three and one-half page memorandum with little explanation and generalized conclusions.” *Id.* at 110. The court also found that the agency made “‘naked’ assertion[s], that standing alone, will not support an agency’s override decision.” *Id.* at 112; *see also* *PGBA, LLC, v. United States*, 57 Fed. Cl. 655, 660-61 (2003) (finding “nakedness of . . . assumption undercut other critical findings”). The “agency’s reliance on erroneous, overstated assumptions undercuts the agency’s conclusion.” *Cigna*, 70 Fed. Cl. at 113.

decision in those circumstances where an override is truly urgent and compelling or in the best interests of the United States. A careful, rational, and reasoned analysis, based on principles enunciated in recent cases, and properly documented in contemporaneous records will go a long way towards protecting the agency's true interests and those of the procurement system.



INCOMPLETE JUSTICE: UNINTENDED CONSEQUENCES  
OF MILITARY NONJUDICIAL PUNISHMENT

MAJOR MARSHALL L. WILDE

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## I. INTRODUCTION

Commanders and judge advocates have long preferred resolution of misdemeanor-level misconduct<sup>1</sup> cases through the use of nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ)<sup>2</sup> over the more formal procedures of a court-martial or civilian criminal trial. However, since the passage of the UCMJ in 1950, Congress and state legislatures have created significant collateral consequences for convictions for misdemeanor offenses to better protect victims, the treasury, and society from the offender.<sup>3</sup> A military commander's decision to dispose of misconduct in an Article 15, rather than a formal proceeding, undermines the effectiveness of these consequences. Family violence assault, driving while intoxicated, and minor drug use or possession convictions in a civilian or military court all carry important collateral consequences for victims and society, reflecting the legislative interest in a more complete form of justice.

This article first considers the nature of nonjudicial punishment as an appropriate forum and the problems attending disposition of particular offenses through Article 15.<sup>4</sup> We next explore the balance Congress struck in allowing nonjudicial punishment in the UCMJ, how that balance has changed over time, why commanders choose nonjudicial punishment over courts-martial, and why civilian, federal, and military courts do not generally prosecute members who have received nonjudicial punishment.<sup>5</sup> Finally, the article discusses commanders' considerations in deciding to offer nonjudicial punishment, including the authority for considering third parties and the nature of the misconduct, as well as steps commanders may take to ensure more complete justice in Article 15 proceedings.

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<sup>1</sup> 10 U.S.C. § 815(b) (2007) refers to "minor offenses."

<sup>2</sup> 10 U.S.C. § 815 (2007). The Army, Air Force, and Marines generally refer to proceedings under this article as an "Article 15," while Navy personnel usually call the proceedings a "Captain's Mast." Military members "attached to or embarked in a vessel" do not have the right to decline nonjudicial punishment and demand trial by court-martial. 10 U.S.C. § 815(a) (2007). This article considers this exception below in Section VI.

<sup>3</sup> *See, e.g.*, 18 U.S.C. § 922(g) (2007).

<sup>4</sup> In particular, disposing of domestic violence offenses, drunk and intoxicated driving cases, and drug offenses through nonjudicial punishment creates different consequences compared to disposal of these charges in a civilian court or military court-martial. *See infra* notes 33–172 and accompanying text.

<sup>5</sup> Civilian courts often lack jurisdiction or information regarding military offenses. Federal prosecutors defer to military authorities as a matter of policy. Military commanders generally defer to the decisions of subordinate commanders to use nonjudicial punishment, although they may prefer charges for offenses not deemed "minor."

## II. ARTICLE 15 AS AN ALTERNATIVE FORUM TO COURT-MARTIAL

Article 15 provides military commanders an alternative to court-martial for addressing “minor offenses.”<sup>6</sup> Military legal scholars usually refer to the decision to proceed under Article 15 as a forum choice by the commander, but the subject of the Article 15 may object and demand trial by court-martial.<sup>7</sup> In essence, the decision by the commander and accused to proceed under Article 15 represents a form of alternative dispute resolution. The commander agrees to lower limits on punishment, and the accused agrees to summary proceedings in which the commander will ultimately decide his responsibility for the misconduct and punishment.

While Article 15 proceedings dispose of the charges entirely in the overwhelming majority of cases,<sup>8</sup> the forum choice does not equally bind the commander and accused. In most cases, the initiating commander or a superior commander may set aside Article 15 proceedings in favor of court-martial proceedings or proceed to court-martial after completing the Article 15,<sup>9</sup> while the accused must accept the result of the proceedings, but for a limited right of appeal to the next higher commander.<sup>10</sup> The hearing itself occurs between the commander and the accused, sometimes in person and sometimes through the exchange of paperwork.<sup>11</sup> The accused may request, and the commander may opt, to make the proceedings semi-public by opening the Article 15 hearing to other individuals.<sup>12</sup> While the UCMJ does not specify a burden of proof in the Article 15 hearing, a broad consensus exists in the military legal community that the commander should apply the criminal “beyond a reasonable doubt” standard when reviewing the

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<sup>6</sup> 10 U.S.C. § 815(b) (2007).

<sup>7</sup> 10 U.S.C. § 815(a) (2007).

<sup>8</sup> Congress anticipated that trial demands would be rare in nonjudicial punishment proceedings. S. REP. NO. 87-1911 at 3 (1962). In the author’s experience in the Air Force and Army, the author has found that Congress was correct – most airmen and soldiers accept nonjudicial punishment.

<sup>9</sup> 10 U.S.C. § 815(f) (2007). However, if the conduct addressed in the Article 15 qualifies as “minor,” a completed Article 15 may prevent commanders from later referring the member for trial by court-martial for the conduct addressed in the Article 15. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 907(b)(2)(D)(iv) (2005) [hereinafter MCM].

<sup>10</sup> 10 U.S.C. § 815(e) (2007).

<sup>11</sup> The accused generally may request a personal appearance, which the commander must grant under normal circumstances. *See, e.g.*, U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE ¶ 3-18(g) (10 Nov. 2005) [hereinafter AR 27-10]; U.S. DEP’T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT, ¶ 3.13 (7 Nov. 2003) [hereinafter AFI 51-202].

<sup>12</sup> AR 27-10, *supra* note 11, ¶ 3-18(g); AFI 51-202, *supra* note 12, ¶ 3.13.3. However, Air Force commanders may not conduct such proceedings at a commander’s call or other public gathering against the member’s wishes. AFI 51-202, *supra* note 12, ¶ 3.13.3.

evidence to determine responsibility for the alleged conduct, since, in most cases, the accused could request a trial by court-martial where this standard would apply.<sup>13</sup>

Nonjudicial punishment under Article 15 does not result in a conviction for the accused.<sup>14</sup> The Article 15 remains in the member's personnel file and later commanders or courts-martial may consider it.<sup>15</sup> For the purposes of civil consequences of a conviction, none of the military, federal, or state authorities consider an Article 15 equivalent to a criminal conviction.<sup>16</sup>

Nonjudicial punishment came to exist as an alternative to formal court proceedings, with some safeguards analogous to those in court proceedings to ensure fairness.<sup>17</sup> Military practitioners and legal scholars have extensively debated the constitutionality of Article 15 and largely concluded that it represents a permissible balancing of the interests between the commander and the accused.<sup>18</sup> However, these decisions do not address whether nonjudicial punishment deprives the public and third parties of substantial justice, since legislatures had yet to enact most of the collateral consequences of convictions in the early years of the UCMJ. Critics of alternative dispute resolution fairly point out that the overuse of ADR can result in social injustice, since ADR focuses on private justice over public.<sup>19</sup> In particular, Article 15, as a compromise between commander and accused, can ignore the substantial interests of victims and the public in facilitating a negotiated settlement of the case.

Commanders often have substantial interests in competition with those of justice and crime victims. Military members accepting nonjudicial punishment often remain in the military, giving commanders an interest in preserving their utility to the military. What happens when this interest conflicts with the interests of justice or the victim?

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<sup>13</sup> Captain Shane Reeves, *The Burden of Proof in Nonjudicial Punishment: Why Beyond a Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28.

<sup>14</sup> *United States v. Johnson*, 42 C.M.R. 66, 69 (C.M.A. 1970); *State v. Myers*, 58 P3d 643 (Haw. 2002).

<sup>15</sup> *United States v. Mack*, 9 M.J. 300, 316-19 (C.M.A. 1980); *United States v. McLemore*, 9 M.J. 695, 696 (N.M.C.M.R. 1980).

<sup>16</sup> Note, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers From Possessing Military Weapons*, ARMY LAW., Aug. 1997, at 25.

<sup>17</sup> See, e.g., AR. 27-10, *supra* note 11, ¶ 3-18 (example of the protections and conduct of proceedings).

<sup>18</sup> *Bennett v. Tarquin* 466 F. Supp. 257, 261-62 (D. Haw. 1979); *United States v. Mackie*, 36 C.M.R. 170, 174 (C.M.A. 1966); *State v. Myers*, 58 P.3d 643, 648 (Haw. 2002).

<sup>19</sup> Note & Comment, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?* 14 OHIO ST. J. ON DISP. RESOL. 855 (1999).

Victims do not have a seat at the table in Article 15 proceedings.<sup>20</sup> Military policy does require that law enforcement personnel provide victims with certain information about the prosecution of a military member, but those rights do not extend to the right to provide input regarding the imposition of nonjudicial punishment nor notification of the results of a nonjudicial punishment proceeding.<sup>21</sup> In fact, as a non-public personnel matter, the Freedom of Information Act exempts records of nonjudicial punishment from public disclosure and the Privacy Act affirmatively prevents disclosure of certain information.<sup>22</sup> Current Department of Justice policy, espoused in the “Ashcroft Memo,” discourages discretionary disclosures.<sup>23</sup> This policy overturned earlier Clinton Administration policy that promoted open government.<sup>24</sup> Further, Article 15 does not provide for restitution.<sup>25</sup> While victims enjoy substantial rights in court-martial proceedings, they have virtually no rights when a commander and accused have agreed to nonjudicial punishment proceedings.<sup>26</sup>

Crime victims and society as a whole often gain substantial justice from the collateral effects of a conviction.<sup>27</sup> Most obviously, they may recover restitution or civil damages directly or indirectly from

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<sup>20</sup> See, e.g., AR 27-10, *supra* note 11, ¶ 3-18(g)(2) (allowing the commander to close proceedings).

<sup>21</sup> See U.S. DEP’T OF DEFENSE, INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES § 6 (4 June 2004) [hereinafter DODI 1030.2].

<sup>22</sup> See Privacy Act of 1974, 5 U.S.C. § 552a (2007) (documents “related solely to the internal personnel rules and practices of an agency”); 5 U.S.C. § 552(b)(2) (2007) (“personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”); 5 U.S.C. § 552(b)(6) (2007).

<sup>23</sup> Memorandum for Heads of All Federal Departments and Agencies from U.S. Attorney General John Ashcroft regarding the Freedom of Information Act (Oct. 21, 2001) [hereinafter Ashcroft Memorandum], *available at* <http://www.doi.gov/foia/foia.pdf> (last visited Sept. 23, 2006). *But see* Dep’t of the Air Force v. Rose, 425 U.S. 352, 361 (1976) (requiring that federal agencies construe FOIA exemptions narrowly).

<sup>24</sup> See Ashcroft Memorandum, *supra* note 23.

<sup>25</sup> 10 U.S.C. § 815 (2007). Note, however, that a commander could theoretically require the payment of restitution as a precondition to offering an Article 15.

<sup>26</sup> See 18 U.S.C. § 3771 (2007) for a recitation of rights afforded to victims in federal and military courts. These include: the right to be treated with fairness and with respect for the victim’s dignity and privacy; the right to be reasonably protected from the accused offender; the right to be notified of court proceedings; the right to be present at all public court proceedings related to the offense, unless the court determines by clear and convincing evidence that testimony by the victim would be materially affected if the victim heard other testimony at trial; the right to confer with the attorney for the Government in the case; the right to restitution (not applicable in courts-martial); the right to be reasonably heard in public court proceedings regarding release, plea, sentencing, or parole; and the right to proceedings free from unreasonable delay. *Id.*

<sup>27</sup> Ashcroft Memorandum, *supra* note 23.

the criminal judgment.<sup>28</sup> In a domestic violence case, this judgment may serve as an important factor in determining child custody, and the judgment will prevent the assailant from possessing firearms.<sup>29</sup> In a drunk driving case, society may gain security from having a license suspension adjudged, or, in the case of an injury accident, the victim may obtain restitution through the criminal case.<sup>30</sup> Society as a whole may also benefit from these, as well as from the denial of certain civil rights and privileges to convicts. In particular, recipients of a bad conduct discharge, dismissal or dishonorable discharge will not receive substantial financial benefits from the Department of Veterans Affairs, preserving these funds in the Treasury.<sup>31</sup> Further, some drug convictions prevent the collection of financial assistance from the Department of Education and the receipt of certain other benefits administered by the federal government.<sup>32</sup> This article seeks to explore the ways the interests of victims and society suffer from the resolution of domestic violence, driving while intoxicated, and drug charges through nonjudicial punishment, as well as possible ways to remedy or mitigate these damages.

### III. SPECIFIC OFFENSES

The decision to dispose of misconduct through nonjudicial punishment has greater practical effects in certain categories of cases. Few people would argue that society suffers greatly from resolving chronic lateness or an AWOL incident through nonjudicial punishment, nor is a rational commander likely to attempt to dispose of a rape or murder case through nonjudicial punishment. However, in domestic violence, driving while intoxicated, and drug cases, nonjudicial

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<sup>28</sup> Note that courts-martial may not adjudge restitution or civil forfeitures, although restitution is a permissible condition in a pretrial agreement or condition of parole. MCM, *supra* note 9, R.C.M. 201(a)(1), discussion, at II-9. State and federal courts may do so. 18 U.S.C. § 3771 (2007) confers a right to restitution in federal cases, and Department of Defense Instruction 1030.2, Victim and Witness Assistance Procedures, June 4, 2004, paragraph 6.1.2, requires victims to be informed of restitution and other relief to which they may be entitled by law. *See also* United States v. Rorie, 58 M.J. 399, 404-05 (2003) (recognizing a victim's interest in restitution as a consequence of a court-martial conviction).

<sup>29</sup> *See, e.g.*, 18 U.S.C. § 922(a)(2) (2007); CAL. FAM. CODE § 3044 (2007); OR. REV. STAT. 107.137 (2005); TEX. FAM. CODE § 153.004 (2007).

<sup>30</sup> *See, e.g.*, CAL. VEH. CODE § 13352 (2007); TEX. TRANSP. CODE § 524.023 (2007).

<sup>31</sup> *See* Gerald Williams, *A Primer on Veterans' Benefits for Legal Assistance Attorneys*, 47 A.F. L. REV. 163 (1999).

<sup>32</sup> *See, e.g.*, 20 U.S.C. § 1091(r) (2007) (educational benefits); GENERAL ACCOUNTING OFFICE, VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR THE DENIAL OF SELECTED BENEFITS, GAO-05-238 (Sept. 2005) (general discussion of effects of a conviction on federal benefits).

punishment results in significantly different outcomes for victims, society and the Treasury than civilian prosecution or court-martial.

#### A. Domestic Violence

Resolution of domestic violence assaults through nonjudicial punishment fails to protect military family members from the future use of firearms by the offender and deprives them of the substantial advantages that a criminal judgment gives them in family court proceedings. While the military has made substantial progress in granting military protective orders (MPOs), MPOs depend heavily on the discretion of the commander and do not always include a prohibition on the possession of firearms.<sup>33</sup> Disposing of the offense through an Article 15 does not trigger the prohibition on the possession of firearms that a similar disposition in a misdemeanor civilian court would.<sup>34</sup> While the military has recently made progress towards improving the protection of military family members from firearms in the possession of the offender,<sup>35</sup> the handling of domestic violence offenses by military authorities lacks many of the protections inherent in the civilian courts.<sup>36</sup>

##### 1. *Protective Orders and Gun Possession*

The most dangerous time for victims of domestic violence often occurs immediately after the apprehension and release of the offender.<sup>37</sup> Recognizing this, the federal Violence Against Women Act provided for protective orders to prevent further violence and criminalized the possession of firearms by persons subject to such an order.<sup>38</sup> Unfortunately, the discretion given commanders to forgo a firearms

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<sup>33</sup> Memo, Under Secretary of Defense for Personnel and Readiness (Nov. 10, 2003), "Implementation of the Armed Forces Domestic Security Act" [hereinafter USD, P&R Memo]. Military Protective Orders use Department of Defense (DD) Form 2873 (July 2004), available at <http://www.dtic.mil/whs/directives/corres/memos/domsecact.pdf> (last visited July 10, 2007), which has an optional box to check for prohibiting the possession of firearms. By contrast, 18 U.S.C. § 922(g)(8) (2007) prohibits the possession of firearms for all persons subject to a qualifying protective order.

<sup>34</sup> See 18 U.S.C. § 922(g) (2007). Only convictions qualify for the prohibition. *Id.*

<sup>35</sup> See USD, P&R Memo, *supra* note 33.

<sup>36</sup> See 18 U.S.C. § 922(g) (2007). The firearms prohibition applies to convictions and qualifying restraining or protective orders. *Id.* Nonjudicial punishment proceedings do not result in a conviction. MPOs, lacking a judicial foundation and the right to a hearing, do not trigger the firearms prohibition under the Gun Control Act. *See id.*

<sup>37</sup> Overall, the most dangerous time for a victim is immediately after separation. In a criminal case, the first opportunity to re-offend occurs after initial release from custody.

<sup>38</sup> Pub. L. No. 103-322, 108 Stat. 1796, Violent Crime Control and Law Enforcement Act of 1994 Title IV, §§ 40001-40703.

prohibition undermines the protections military family members would enjoy in civil court.

The Lautenberg Amendment, a federal statute at 18 U.S.C. § 922(g)(8), prohibits persons subject to a qualifying order from possessing a firearm or ammunition that has been transported in interstate commerce.<sup>39</sup> The statute does not apply to *ex parte* orders, but only to hearings at which the respondent received actual notice and had an opportunity to participate.<sup>40</sup> The order itself must restrain the respondent from “harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child” and must include a finding that the respondent represents a credible threat to an intimate partner or child or prohibit the use, attempted use, or threatened use of force sufficient to cause bodily injury.<sup>41</sup> Essentially, the statute prohibits gun ownership by persons who are subject to a protective order, but not a temporary *ex parte* protective order.<sup>42</sup> A federal court may punish a violation of § 922(g) with a sentence of ten years in prison.<sup>43</sup> Civilian protective orders generally range from six months to two years in duration.<sup>44</sup>

Until recently, the military had no standardized protective order system. Commanders issued a variety of no contact orders with differing provisions. The Defense Task Force on Domestic Violence recommended the adoption of a standard form Military Protective Order (MPO) and provided a standard form they recommended in their 2002 report.<sup>45</sup> In July 2004, the Department of Defense (DoD) promulgated DD Form 2873, a standard form that tracks the Task Force’s recommended language, including an *optional* section for a prohibition on possessing firearms.<sup>46</sup> The form does not set a recommended duration for the order.<sup>47</sup> Given the limits on military authority, the order could not be effective beyond the member’s date of separation from the military.<sup>48</sup>

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<sup>39</sup> 18 U.S.C. § 922(g)(8) (2007).

<sup>40</sup> 18 U.S.C. § 922(g)(8)(A) (2007).

<sup>41</sup> 18 U.S.C. § 922(g)(8)(B) (2007).

<sup>42</sup> 18 U.S.C. § 922(g)(8) (2007).

<sup>43</sup> 18 U.S.C. § 922(a)(2) (2007).

<sup>44</sup> See, e.g., TEX. FAM. CODE § 85.025 (judge may set duration up to two years).

<sup>45</sup> U.S. DEP’T OF DEFENSE, DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, SECOND ANNUAL REPORT 2002, 31-32, available at <http://www.ncdsv.org/images/Year2Report2002.pdf> (last visited July 10, 2007).

<sup>46</sup> U.S. Dep’t of Defense, DD Form 2873, Military Protective Order (MPO) (July 2004), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2873.pdf> (last visited June 28, 2007).

<sup>47</sup> *Id.*

<sup>48</sup> See MCM, *supra* note 9, R.C.M. 202, discussion (2)(B), at II-13-14 (delivery of a valid discharge from military service terminates jurisdiction in most cases).



The issue of exclusive jurisdiction on military bases also presented major issues for the enforcement of civilian protective orders. Even if the victim had the ability to seek a protective order off-base (presumably at a stateside base), the military could, until recently, refuse to enforce the order on base, citing a state's inability to enforce its laws in certain federal enclaves.<sup>49</sup> In 2002, Congress forced the military to recognize civilian protective orders in the Armed Forces Domestic Security Act.<sup>50</sup> Undersecretary of Defense for Personnel and Readiness Dale Chu issued a memorandum requiring compliance with civilian orders of protection on military installations and authorizing commanders to issue parallel MPOs to protect victims.<sup>51</sup> Undersecretary Chu ordered the promulgation of a Department of Defense Directive implementing the guidance within 180 days,<sup>52</sup> but the deadline has passed with no action by the services. Ironically, the Department had a duty to enforce the prohibition on firearms possession by subjects of a protective order, since that provision falls under the federal Gun Control Act, before it had an obligation to enforce the other provisions of the state orders of protection.<sup>53</sup>

In sum, the protections afforded the victim pending resolution of the case in the military setting depend heavily on the commander's analysis of the case, rather than the victim's safety concerns. In the United States, a victim may seek a civilian order of protection and have its provisions enforced by military personnel under the Armed Forces Domestic Security Act.<sup>54</sup> However, such an order of protection may or may not be available overseas,<sup>55</sup> leaving the matter entirely in the commander's hands. Further, if the incident actually occurred on an exclusive federal enclave, additional issues arise. While a civilian order of protection requires a surrender of firearms by the offender and prohibits the issuance of weapons by the military to the offender, a

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<sup>49</sup> Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 114 (1997); but see *Cobb v. Cobb*, 545 N.E.2d 1161, 1164 (Mass. 1989) (finding, contrary to older case law, state court restraining order effective on federal military base absent showing interference with a federal function).

<sup>50</sup> 10 U.S.C. § 1561a (2007).

<sup>51</sup> USD, P&R Memo, *supra* note 33.

<sup>52</sup> *Id.*

<sup>53</sup> 18 U.S.C. § 922(g)(8) (2007).

<sup>54</sup> 10 U.S.C. § 1561a (2007).

<sup>55</sup> Criminal jurisdiction over military members deployed overseas is governed by the applicable Status of Forces Agreement (SOFA) or Defense Cooperation Agreement (DCA). SOFAs are generally formal treaties. Perhaps the most familiar are the North Atlantic Treaty Organization (NATO) SOFA and the Partnership for Peace (PFP) SOFA. DCAs are often less formal and may be classified, depending on the country and circumstances. See AIR FORCE JUDGE ADVOCATE GENERAL'S SCHOOL, MILITARY COMMANDER AND THE LAW, Chapter 15, Foreign Criminal Jurisdiction 631-33 (2006) available at <http://milcom.jag.af.mil/ch15/fej.doc> (last visited July 3, 2007).

military order only includes such language at the discretion of the commander. In today's high operations tempo environment, the commander has a substantial incentive not to include a firearms prohibition in any MPO, as such a prohibition interferes with the training and deployment of the military member. This employer/prosecutor conflict arises frequently in the military setting.

## 2. *Lautenberg Amendment: Military Disposition versus Civilian Disposition*

The Gun Control Act of 1968 prohibited felons from possessing firearms.<sup>56</sup> However, it contained a public interest exception, which waived the prohibition for certain types of public service.<sup>57</sup> In 1996, with the "Lautenberg Amendment" Congress added misdemeanor crimes of domestic violence to felonies on the list of offenses disqualifying an individual from possessing firearms.<sup>58</sup> Congress defined "misdemeanor crime of domestic violence" at 18 U.S.C. § 921(a)(33)(A) as an offense that:

(i) is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.<sup>59</sup>

The amendments to the Gun Control Act specifically revoked the public interest exception for domestic violence convicts.<sup>60</sup> In the absence of this exception, the law applies to military members.<sup>61</sup> As with violation of the prohibition on possession of firearms for people under a protective order, violation of the Lautenberg Amendment subjects the defendant to a potential ten-year prison sentence.<sup>62</sup> However, the Lautenberg Amendment did not eliminate the public service exception

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<sup>56</sup> See 18 U.S.C. § 922 (2007).

<sup>57</sup> 18 U.S.C. § 925(a)(1) (2007).

<sup>58</sup> 18 U.S.C. § 922(g)(9) (2007).

<sup>59</sup> Despite the "element" language, a number of courts have found that the offense need only have been an assault, without a specific finding of family violence, provided that the victim of the assault met the requirements of 18 U.S.C. § 921(a)(33)(A). *E.g.*, *United States v. Smith*, 56 M.J. 711, 714 (A.F. Ct. Crim. App. 2001).

<sup>60</sup> See 18 U.S.C. § 925(a)(1) (2007).

<sup>61</sup> See *id.*

<sup>62</sup> 18 U.S.C. § 944(a)(2) (2007).

for protective orders, although apparently the Armed Forces Domestic Security Act later did eliminate the exception.<sup>63</sup>

The Department of Defense did not rush to implement the Congressional mandate. In late 1997, the Department of Defense issued interim guidance requiring commanders to retrieve firearms from personnel with qualifying convictions.<sup>64</sup> On February 28, 2001, a Congressionally-authorized Defense Task Force on Domestic Violence found awareness of the restrictions of the Lautenberg Amendment and enforcement of the interim guidance was poor.<sup>65</sup> The Task Force, which included the Deputy Judge Advocate General of the Air Force, made a number of recommendations, including promulgating final guidance on the Lautenberg Amendment, providing better education about domestic violence and the Lautenberg Amendment, and improving tracking of civilian convictions.<sup>66</sup> Particularly damning, the Task Force found, “it is apparent that relatively few military personnel are prosecuted or administratively sanctioned on charges stemming from domestic violence” despite 12,043 substantiated reports of domestic violence in a single year.<sup>67</sup> The Task Force also found evidence that recruiting commanders had even approved moral waivers for applicants with misdemeanor convictions for domestic violence, effectively arming them through the military services contrary to Federal law.<sup>68</sup>

Only in 2002 did the Department of Defense issue final guidance. In a Department of Defense Policy Memorandum dated 27 November 2002, Undersecretary Chu provided guidance for military and civilian personnel actions based on convictions for domestic violence offenses.<sup>69</sup> The guidance adopted a narrow definition of a “conviction,” specifically exempting actions under Article 15 and summary courts-martial.<sup>70</sup> Notably, the policy includes convictions by

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<sup>63</sup> See 10 U.S.C. § 1561a (2007). That the Act eliminated this exception is not absolutely clear from the language of the Act. See *id.* Ironically, the Army, facing recruiting shortfalls, has apparently been recruiting felons. Barbara Barret, *Army Recruits Join in Doves*, THE CHARLOTTE OBSERVER, October 12, 2006, at 4B; see also GENERAL ACCOUNTING OFFICE, MILITARY RECRUITING: NEW INITIATIVES COULD IMPROVE CRIMINAL HISTORY SCREENING, GAO-99-53 (Feb. 1999).

<sup>64</sup> See Memo, Under Secretary of Defense for Personnel and Readiness (Nov. 27, 2002), “DoD Policy for Implementation of Domestic Violence Misdemeanor Amendment to Gun Control Act for Military Members” [hereinafter USD, P&R Implementation Memo], available at <http://handle.dtic.mil/100.2/ADA389984> (last visited July 11, 2007).

<sup>65</sup> DEP’T OF DEFENSE, DEFENSE TASK FORCE ON DOMESTIC VIOLENCE, FIRST ANNUAL REPORT 2001 [hereinafter Task Force], available at <http://handle.dtic.mil/100.2/ADA389984> (last visited July 11, 2007).

<sup>66</sup> *Id.* at 93-95.

<sup>67</sup> *Id.* at 52.

<sup>68</sup> *Id.* at 53.

<sup>69</sup> USD, P&R Implementation Memo, *supra* note 64.

<sup>70</sup> *Id.*

special court-martial as qualifying convictions, an important decision given that special court-martial convictions are not explicitly defined as misdemeanor convictions under the Uniform Code of Military Justice (UCMJ).<sup>71</sup>

Military prosecutions for domestic violence typically fall under Article 128 of the Uniform Code of Military Justice. Usually, these offenses fall under the “assault consummated by a battery” section and are punishable by a maximum of six months in confinement and a bad conduct discharge (or a dismissal for an officer).<sup>72</sup> Overwhelmingly, commanders do not prefer court-martial charges, but instead use nonjudicial punishment under Article 15, at least in part because it does not implicate the Lautenberg Amendment.<sup>73</sup>

Prosecution of the offense in federal court is possible, but rare. Congress has specifically enumerated certain crimes related to domestic violence, including traveling in interstate commerce to physically injure an “intimate partner,”<sup>74</sup> stalking or harassing on federal lands,<sup>75</sup> and interstate travel to violate a qualifying protection order on federal lands.<sup>76</sup> The Federal Assimilative Crimes Act, 18 U.S.C. § 13, also provides that state law crimes not otherwise specifically addressed by Congress may be prosecuted in federal courts when occurring on a military installation.<sup>77</sup> As a practical matter, the federal District Courts are ill-equipped to handle routine domestic violence matters, often being geographically separated from the homes of victims and accuseds and having limited resources. Thus, United States Attorneys do not generally prosecute military offenders in District Court without a compelling reason. To formalize this agreement, the United States Department of Justice and the Department of Defense entered into a Memorandum of Agreement in 1984 that specifically gave the Department of Defense primary jurisdiction over offenses committed by offenders subject to the Uniform Code of Military Justice.<sup>78</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> 10 U.S.C. § 928 (2007).

<sup>73</sup> JUDITH BEALS, THE BATTERED WOMEN’S JUSTICE PROJECT, THE MILITARY RESPONSE TO VICTIMS OF DOMESTIC VIOLENCE - TOOLS FOR CIVILIAN ADVOCATES 22 (June 2003), available at <http://www.bwjp.org/military/BWJPMIL-081803.pdf> (last visited July 11, 2007).

<sup>74</sup> 18 U.S.C. § 2261(a)(1) (2007).

<sup>75</sup> 18 U.S.C. § 2261a(1) (2007).

<sup>76</sup> 18 U.S.C. § 2262 (2007).

<sup>77</sup> 18 U.S.C. § 13 (2007); see, e.g., *United States v. Johnson*, 967 F.2d 1431 (10th Cir. 1992) (aggravated assault); *United States v. Griffith*, 864 F.2d 421 (6th Cir. 1988) (reckless assault); *United States v. Kaufman*, 862 F.2d 236 (9th Cir. 1988) (assault).

<sup>78</sup> U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL, Title 9, *Criminal Resource Manual*, § 938 [hereinafter USA MANUAL], available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00938.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00938.htm) (last visited July 3, 2007).

In summary, disposition of a family violence case by military authorities in any forum below a special court-martial will not trigger the firearms prohibition. Since commanders resolve the vast majority of non-aggravated family violence assault cases in Article 15 and summary court-martial proceedings, the essential purpose of the Lautenberg Amendment – keeping firearms out of the hands of domestic violence offenders – is frustrated. Indeed, the availability of these alternative forums with their lack of collateral consequences creates an incentive for commanders to resolve these cases informally. Without the firearms prohibition, the commander may retain the member for continued service in the armed forces, rather than discharging the member.

### 3. Repeat Offender Statutes

Domestic violence offenders often repeat their crimes. A study for the Montana Crime Control Board established that 21% of male domestic violence offenders and 9.5% of female offenders committed another domestic violence offense within twenty-four months.<sup>79</sup> Another study, conducted over fifty-seven months, showed that 17% of domestic violence subjects remaining in the study areas were re-arrested for domestic violence during the study period.<sup>80</sup> In recognition of the high recidivism rates for domestic abusers, many states passed repeat offender statutes. For instance, Texas elevates family violence assault from a class A misdemeanor to a third degree felony for an offender with a prior family violence conviction,<sup>81</sup> and Oregon raises the penalty for assault from that for a class A misdemeanor to that for a C felony for conviction for a second assault on the same victim or a fourth conviction for domestic violence assault.<sup>82</sup> Texas even permits the prosecution to introduce evidence that the defendant committed a prior assault against a family member (and was convicted) if the conviction lacks an explicit finding that the victim was a family member.<sup>83</sup> Combined with treatment programs, sentence enhancements are a primary method used by the states to prevent recidivism in domestic violence.

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<sup>79</sup> GARY LEONARDSON, MONTANA BOARD OF CRIME CONTROL, SEXUAL AND DOMESTIC VIOLENCE STUDY 4 (June 30, 1998), *available at* [http://www.hawaii.edu/hivandaids/Montana\\_Sexual\\_and\\_Domestic\\_Violence\\_Study\\_1998.pdf](http://www.hawaii.edu/hivandaids/Montana_Sexual_and_Domestic_Violence_Study_1998.pdf) (last visited July 11, 2007).

<sup>80</sup> JOHN WOOLDREDGE & AMY THISTLETHWAITE, NATIONAL INSTITUTE OF JUSTICE, RECONSIDERING DOMESTIC VIOLENCE RECIDIVISM: INDIVIDUAL AND CONTEXTUAL EFFECTS OF COURT DISPOSITIONS AND STAKE IN CONFORMITY 5-6 (Oct. 3, 1999), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/188509.pdf> (last visited July 11, 2007).

<sup>81</sup> TEX. PENAL CODE § 22.01(b)(2) (2007).

<sup>82</sup> ORE. REV. STAT. § 163.160 (2007).

<sup>83</sup> *State v. Eakins*, 71 S.W.3d 443, 444 (Tex. Ct. App. 2002).

Unfortunately, disposition of domestic violence cases through nonjudicial punishment defeats the purpose of these statutes. While the military does have strong treatment programs for family violence through the Family Advocacy Program, it has little interest in adjudicating its members for family violence when this would effectively end their utility to the military. Further, the Manual for Courts-Martial invests broad discretion in commanders to dispose of charges: “Each commander has discretion to dispose of offenses by members of that command.”<sup>84</sup> The Manual does not require commanders to consider the effects of disposition on the victim or society.<sup>85</sup> However, preserving the member’s utility to the military unit is a much more present concern to a military commander than the abstract need for a formal determination to deter future conduct.

#### 4. *Domestic Violence Convictions in Civil Court*

States increasingly consider abuse of one parent by another as a relevant factor in determining child custody.<sup>86</sup> For instance, Oregon lists “abuse of one parent by another” as a relevant factor,<sup>87</sup> California creates a rebuttable presumption that a parent who has committed domestic violence will not receive custody,<sup>88</sup> and Texas law provides that a history of family violence prevents the appointment of joint conservators and creates a presumption that the non-offending parent will have the right to determine the primary residence of the child.<sup>89</sup> A criminal conviction for domestic violence generally establishes that the defendant committed domestic violence in civil court.<sup>90</sup> This puts the victim well on the way to obtaining custody of the children of the relationship.

When the commander and accused elect to dispose of domestic violence through nonjudicial punishment, a court may or may not even

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<sup>84</sup> MCM, *supra* note 9, R.C.M. 306(a).

<sup>85</sup> The Army guidance allows the consideration of the victim’s preferences, while the Air Force policy provides only bland admonishments to consider good order and discipline. AR 27-10, *supra* note 11, § 18-10; AFI 51-202, *supra* note 11, ¶ 3.1; *see* U.S. DEP’T OF NAVY, OPNAV INSTRUCTION 5700.8, VICTIM AND WITNESS ASSISTANCE PROGRAM ¶ 4 (30 Apr. 1996).

<sup>86</sup> Peter Jaffe et al., *Courts Responding to Domestic Violence: Parenting Arrangements after Domestic Violence: Safety as a Priority in Judging Children’s Best Interest*, 6 J. CENTER FOR FAM. CHILD. & CTS. 81 (2005); *see* Tonia Ettinger, *Domestic Violence and Joint Custody: New York is Not Measuring Up*, 11 BUFF. WOMEN’S L.J. 89 (2002); Marlene Rapkin, *The Impact of Domestic Violence on Child Custody Decisions*, 19 J. JUV. L. 404, 405 (1998).

<sup>87</sup> OR. REV. STAT. § 107.137(d) (2007).

<sup>88</sup> CAL. FAM. CODE § 3044(a) (2007).

<sup>89</sup> TEX. FAM. CODE § 153.004(b) (2007).

<sup>90</sup> *See, e.g., State ex rel. Juvenile Dep’t v. Parshall (In re Carter)*, 34 P.3d 713, 715 (Or. Ct. App. 2001)

consider the record of the Article 15 as evidence of guilt. If the victim can get a copy through a subpoena,<sup>91</sup> an Article 15 may or may not contain statements by the accused under Federal Rules of Evidence 801 and 804(3) and analogous state rule provisions.<sup>92</sup> Further, a record of nonjudicial punishment does not constitute a conviction for the purposes of Federal Rule of Evidence 609 and similar state rules.<sup>93</sup> Adding insult to injury, the Article 15 process does not provide for restitution to the victim of a crime, and the fines adjudged by the commander may actually diminish the assets available for division by the family court.<sup>94</sup> Finally, because of the absence of a conviction and the possibility of future prosecution, however remote, the accused retains his rights against self-incrimination, defeating even the possibility of calling the accused as a hostile witness.<sup>95</sup> In short, the resolution of a domestic violence complaint through the nonjudicial punishment process denies the victim substantially all benefits she would receive in civil court from a conviction.

### 5. *Two Practical Examples*

The disparate treatment of on-base and off-base offenses exhibits the gross inequities of the protection of victims inside and outside of the military. Goodfellow Air Force Base provides a useful example. Goodfellow AFB, like many bases, has exclusive federal jurisdiction,<sup>96</sup> effectively precluding the state from prosecuting an on-base assault and therefore putting prosecution into the hands of the United States Attorney, or, more practically in the case of a military offender, the military.

In the Goodfellow AFB example, off base, the Tom Green County Attorney prosecutes simple assaults and batteries of a family member. Prior to any plea, the victim could seek a protective order prohibiting the batterer from having any contact with her with the assistance of the County Attorney's Office.<sup>97</sup> Under state law, the offender may be prohibited to possess firearms while subject to the order.<sup>98</sup> While the options of a military protective order or a civilian

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<sup>91</sup> The Privacy Act has an exception for subpoenas, 5 U.S.C. § 552a(b)(11) (2007).

<sup>92</sup> FED. R. EVID. 801(d) (non-hearsay); FED. R. EVID. 804(b)(3) (statements against interest).

<sup>93</sup> FED. R. EVID. 609 (impeachment by evidence of conviction of a crime).

<sup>94</sup> 10 U.S.C. § 815 (2007).

<sup>95</sup> *See, e.g.*, United States v. Jones, 52 M.J. 60, 62-63 (1999).

<sup>96</sup> The privatized housing proposal for Goodfellow Air Force Base, available at [http://www.jllpsc.com/AETC\\_Group\\_II/Combined\\_Group/Industry\\_Forum/AETC\\_Group\\_II\\_-\\_Project\\_Overview\\_-\\_Goodfellow\\_AFB\\_2005.09.02\\_.pdf](http://www.jllpsc.com/AETC_Group_II/Combined_Group/Industry_Forum/AETC_Group_II_-_Project_Overview_-_Goodfellow_AFB_2005.09.02_.pdf) (last visited July 3, 2007), shows the housing areas in exclusive federal jurisdiction at Goodfellow AFB.

<sup>97</sup> TEX. FAM. CODE § 82.002 (2007).

<sup>98</sup> TEX. FAM. CODE § 85.022(b)(6) (2007).

protective order exist for the on-base victim, the latter is not likely to be issued by the military chain of command. If the victim seeks a protective order downtown, it is not clear that the District Court would have jurisdiction to hear a protective order arising from conduct arising purely in a federal enclave.

The prosecution and defense would typically resolve the case with a plea bargain for a short period in the county jail, suspended for six months to two years, with attendance at a class for batterers, special conditions of probation, and a small fine.<sup>99</sup> The probation could, at the victim's option and subject to the court's approval, contain a provision prohibiting the member from having any contact with the victim.<sup>100</sup> As a suspended sentence still counts as a conviction for the purposes of the Lautenberg Amendment,<sup>101</sup> a military member entering this plea bargain would lose the right to carry firearms and would be forced to retrain or be discharged from the service.<sup>102</sup>

On base, the member's commander is likely to offer an Article 15. The member could accept or insist on trial by court-martial.<sup>103</sup> The batterer's commander could, but would not be required to, order the batterer not to have any contact with the victim during the pendency of the matter, or, potentially, for a set period of time afterwards.<sup>104</sup> Even if granted, this order would probably not prohibit the member from possessing firearms. A typical "sentence" under an Article 15 might be a reduction in rank of one grade and a forfeiture of pay and allowances.<sup>105</sup> On some bases, the commander could require up to thirty days of participation in the "remotivational program" (formerly correctional custody), but most bases, including Goodfellow AFB, do not have this program.<sup>106</sup> The commander might suspend the reduction in rank or forfeitures for up to six months, effectively giving the member a period of probation.<sup>107</sup> Generally speaking, the member would receive batterer's education through the Family Advocacy Office as a collateral matter. The member would have no restriction on his ability to possess firearms. Arguably, a military spouse could seek a

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<sup>99</sup> See TEX. PEN. CODE § 12.21 (2007) (punishment for a class A misdemeanor).

<sup>100</sup> TEX. CODE CRIM. PRO. art. 42.12 § 11(a) (2007).

<sup>101</sup> See, e.g., *United States v. Barnes*, 295 F.3d 1354, 1356-57 (D.C. Cir. 2002); *Carew v. Centracchio*, 17 F. Supp.2d 56, 57 (D. R.I. 1998). In both cases, probated sentences triggered the provisions of the Lautenberg Amendment. *Barnes*, 295 F.3d at 1356-57; *Carew*, 17 F. Supp.2d at 57.

<sup>102</sup> USD, P&R Implementation Memo, *supra* note 64.

<sup>103</sup> 10 U.S.C. § 815(a) (2007).

<sup>104</sup> See U.S. Dep't of Defense, DD Form 2873, Military Protective Order (MPO) (July 1, 2004), available at <http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfo3210.html> (last visited July 11, 2007).

<sup>105</sup> See 10 U.S.C. § 815 (2007); AFI 51-202, *supra* note 11, tables 3.1, 3.2.

<sup>106</sup> See 10 U.S.C. § 815 (2007); AFI 51-202, *supra* note 11, tables 3.1, 3.2.

<sup>107</sup> 10 U.S.C. § 815(d) (2007).



protective order from a civilian court, but a strong argument exists that the state courts have no jurisdiction to issue a protective order for conduct occurring in an area of exclusive federal jurisdiction.<sup>108</sup>

Examining a hypothetical offense committed at Ramstein AB in Germany illustrates the problems that arise in overseas locations. At Ramstein AB, no credible alternative exists to military prosecution, with all its attendant limitations. While a victim could seek the prosecution of the offender under German law, the NATO Status of Forces Agreement (SOFA) gives the primary right of prosecution to the U.S. military when the victim is from the United States.<sup>109</sup> Department of Defense policy also mandates the maximum protection of servicemembers in foreign courts.<sup>110</sup> To give a famous example, in a 1998 incident where a United States aircraft piloted by Marines killed twenty people when it cut a cable on an Italian cable car near Aviano AB, the Italian government asked the United States to waive jurisdiction over the offenders.<sup>111</sup> The United States refused to do so, and the Italian government proceeded to attempt to prosecute the servicemembers without the consent of the United States Government.<sup>112</sup> The Italian court upheld the treaty giving the United States primary jurisdiction.<sup>113</sup> Even setting aside the practical difficulties in accessing a foreign legal system, treaty obligations often foreclose that avenue.

In the absence of an alternative, the victim is left to seek redress in the military justice system. The result is likely to be, at most, a military protective order (MPO) and an Article 15. The MPO may or may not have a firearms prohibition, and the disposition of the offense through Article 15 will have no consequences for the military member's future right to bear arms outside of the military. Effectively, the disposition of the charges in the military system thwarts the purpose of the Lautenberg Amendment entirely and denies the victim of all advantages of a conviction of the batterer.

## B. Driving While Intoxicated (DWI)

Legislatures have mandated a number of collateral consequences for a DWI conviction. Most states impose some form of driver's license suspension for a conviction for driving while

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<sup>108</sup> See *United States v. Unzeuta*, 281 U.S. 138, 142 (1930).

<sup>109</sup> North Atlantic Treaty art. 7, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

<sup>110</sup> U.S. DEP'T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICIES AND INFORMATION ¶ 3 (Aug. 7, 1979).

<sup>111</sup> Steve Lubet, *The Accused v. International Law*, CHI. TRIB., Mar. 18, 1999, at 27.

<sup>112</sup> *Public Prosecutor v. Ashby*, Judgment No. 161/98. Court of Trento, Italy, July 13, 1998, 93 A.J.I.L. 219 (1999).

<sup>113</sup> *Id.* at 223.

intoxicated.<sup>114</sup> Punishment under Article 15 for driving while intoxicated usually results only in a suspension of *on-base* driving privileges.<sup>115</sup> The non-uniformity of state laws makes specific comparisons difficult, but the vast majority of states establish minimum license suspension terms and impose reciprocal license action for convictions in other states.<sup>116</sup> As an Article 15 is not a conviction and administrative provisions generally prohibit the disclosure of personnel and law enforcement records, civilian licensing action is often foreclosed by the handling of the case in the military justice system.<sup>117</sup>

### 1. *Background: Driving While Intoxicated*

Generally speaking, the offense of driving while intoxicated or driving under the influence involves the operation of a motor vehicle on a public way while impaired by the consumption of drugs or alcohol. The federally-mandated adoption of the .08 standard provided a degree of uniformity in state laws.<sup>118</sup> States generally categorize driving while intoxicated as a misdemeanor, absent aggravating circumstances.<sup>119</sup> In the military, UCMJ Article 111 prohibits driving while under the influence.<sup>120</sup> Article 111 sets the relevant breath alcohol level at the lower of .10 or the relevant standard for the state in which the incident occurred.<sup>121</sup> The Manual for Courts-Martial sets the punishment for driving under the influence not resulting in personal injury at six months and a bad-conduct discharge (or dismissal).<sup>122</sup> While prosecution in federal District Court under the Assimilative Crimes Act is theoretically possible, it is unlikely, for the reasons given above with regard to

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<sup>114</sup> Forty states and the District of Columbia had administrative license revocation and suspension procedures as of 2000. NAT'L HIGHWAY TRANSP. SAFETY ADMIN., LEGISLATIVE FACT SHEET (Jan. 2000), available at [http://www.nhtsa.dot.gov/people/outreach/safesobr/21qp/html/fact\\_sheets/Admin\\_License.html](http://www.nhtsa.dot.gov/people/outreach/safesobr/21qp/html/fact_sheets/Admin_License.html) (last visited July 12, 2007) [hereinafter NHTSA Materials].

<sup>115</sup> See U.S. DEP'T OF AIR FORCE, INSTR. 31-204, AIR FORCE MOTOR VEHICLE TRAFFIC SUPERVISION ¶ 2.12 (14 Jul. 2000) [hereinafter AFI 31-204] (requiring referral to the civilian licensing agency only after final adjudication of a license suspension on base). It is unclear how widespread compliance with this instruction is.

<sup>116</sup> NHTSA Materials, *supra* note 114.

<sup>117</sup> 5 U.S.C. § 552a (2007) (Privacy Act); 5 U.S.C. § 552 (2007) (FOIA). An Article 15 does not necessarily qualify as a final adjudication. MCM, *supra* note 9, part V, V-1; U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT ¶ 1.1 (7 Nov. 2003).

<sup>118</sup> U.S. GEN. ACCOUNTING OFFICE, HIGHWAY SAFETY – EFFECTIVENESS OF STATE .08 BLOOD ALCOHOL LEVELS 2 (1999), available at <http://www.gao.gov/archive/1999/rc99179.pdf> (last visited July 12, 2007).

<sup>119</sup> For instance, driving while intoxicated with a child under fifteen years of age as a passenger is a state jail felony in Texas. TEX. PENAL CODE § 49.045 (2007). (A state jail felony is a provision unique to Texas and is equivalent to a felony for most purposes).

<sup>120</sup> 10 U.S.C. § 911 (2007).

<sup>121</sup> *Id.*

<sup>122</sup> MCM, *supra* note 9, at IV-53.

domestic violence cases.<sup>123</sup> In addition to license suspensions, many states provide enhanced penalties for repeat DWI offenders, and victims injured in DWI cases often benefit from a formal conviction.<sup>124</sup>

## 2. License Suspensions

Most states impose a driver's license suspension through an administrative process,<sup>125</sup> or as a consequence of a criminal DWI sanction,<sup>126</sup> or both. Courts have generally found these sanctions to be permissible deterrents to future DWI.<sup>127</sup> While the effectiveness of this sanction is certainly open to debate, given the high tolerance and low sanctions for driving without a license, states began imposing the suspensions as a means of addressing the high recidivism rates for DWI.<sup>128</sup> The administration of an Article 15 and accompanying suspension of on-base driving privileges does not accomplish the same purposes and fails to protect civil society from drunk drivers.

Driving while intoxicated incidents on base often result in an Article 15 and suspension of on-base driving privileges. Department of Defense Instruction 6055.4 mandates the suspension of driving privileges after an impaired driving incident.<sup>129</sup> However, the Instruction limits the suspension to areas under military control and allows substantial "tailoring" of the suspension to comport with the needs of the military, perhaps the clearest and most obvious demonstration of the conflict between the military's duties to society and its interest in preserving the utility of its personnel.<sup>130</sup> Despite a requirement in the Instruction that Department of Defense authorities cooperate with civilian law enforcement personnel, military law enforcement personnel may or may not refer reports of drunk driving on

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<sup>123</sup> See USA Manual, supra note 78, Title 9, § 938 (stating crimes committed by military members on military installations will be investigated and prosecuted by the military Department concerned).

<sup>124</sup> See Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979 (May 1986).

<sup>125</sup> See, e.g., TEX. TRANSP. CODE § 724.035 (2007); CAL. VEH. CODE § 13353 (2007) (breathalyzer refusal).

<sup>126</sup> See, e.g., TEX. TRANSP. CODE § 524.023 (2007); CAL. VEH. CODE § 13352 (2007).

<sup>127</sup> See Jennifer Dayok, *Administrative Driver's License Suspension: A Remedial Tool That Is Not in Jeopardy*, 45 AM. U. L. REV. 1151, 1158 (1996).

<sup>128</sup> See Lewis Katz & Robert Sweeney, *Ohio's New Drunk Driving Law: A Half-Hearted Experiment in Deterrence*, 34 CASE W. RES. L. REV. 239 (1984); Edward Kelley, *The Maryland Survey: 1994-1995: Recent Decision: The Maryland Court of Appeals: Constitutional Law*, 55 Md. L. Rev. 549 (1996); James Nichols & H. Lawrence Ross, *The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers*, 6(2) ALCOHOL, DRUGS AND DRIVING 33-55 (1990) (relating estimates that 25%-75% of drivers with suspensions continue to drive).

<sup>129</sup> U.S. DEP'T OF DEFENSE, INSTR. 6055.4, DOD TRAFFIC SAFETY PROGRAM ¶ 6.5 (20 July 1999) [hereinafter DODI 6055.4].

<sup>130</sup> *Id.* at ¶ E4.22.

base to state licensing authorities, depending on the on-base disposition.<sup>131</sup> Further, the Department of Defense can refuse to disclose these reports upon request, relying on the Privacy Act and the Law Enforcement Exemption to the Freedom of Information Act.<sup>132</sup> Ironically, the prevalence of administrative suspension regimes in states means that the referral of offense reports to the licensing agencies could substantially mitigate the detrimental effects of not pursuing a criminal judgment. In effect, on-base drunk drivers may have no off-base sanctions.

### 3. *Recidivism Statutes*

In recognition of the high recidivism of drunk drivers, many states have enacted increased punishment for repeat offenders.<sup>133</sup> The exact nature of the enhanced sanction varies from state to state. The Texas Penal Code provides that a first DWI merits punishment as a class B misdemeanor, while a second leads to a class A misdemeanor sentence, and a court may punish a third or subsequent offense as a third degree felony.<sup>134</sup> New York increases the mandatory license suspension from six months to one year for a second or subsequent offense.<sup>135</sup> Many states have impoundment or seizure statutes, which have proven to be effective in deterring repeat DWI offenders.<sup>136</sup> Taken as a whole, these represent an attempt by the states to reduce recidivism through the criminal justice system and administrative sanctions. Using nonjudicial punishment to address driving while intoxicated offenses undermines these efforts by eliminating the prior conviction necessary to use these sanctions.

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<sup>131</sup> *Id.* at ¶ E4.1.3; *see also* AFI 31-204, *supra* note 115, at ¶ 2.12 (requiring referral of a DWI incident to civilian licensing authorities only after a “final disposition” in the military).

<sup>132</sup> 5 U.S.C. § 552a(b) (2006); 5 U.S.C. § 552(b)(7) (2007).

<sup>133</sup> *See, e.g.*, TEX. PENAL CODE § 49.09 (2007); *Note: The Use of Uncounseled Misdemeanor Convictions to Enhance a Penalty for a Subsequent Offense after Nichols v. United States*, 39 ST. LOUIS U. L.J. 669 (1995); MADD, *Repeat Offender Laws – Issue Brief*, [http://www.madd.org/madd\\_programs/7612](http://www.madd.org/madd_programs/7612) (last visited July 12, 2007).

<sup>134</sup> TEX. PENAL CODE § 49.04, 49.09 (2007). The author once successfully prosecuted a defendant who faced a mandatory sentence of twenty-five years to life under the Texas three strikes law, based solely on repeated drunk driving offenses.

<sup>135</sup> N.Y. VEH. & TRAF. LAW § 510 (2007).

<sup>136</sup> Robert Voas, A. Scott Tippetts & Eileen Taylor, *Temporary Vehicle Impoundment in Ohio: A Replication and Confirmation*, 30(5) ACCIDENT ANALYSIS AND PREVENTION 651-55 (Sept. 1998). States with confiscation statutes include Alaska, Alabama, Arizona, Arkansas, California, Georgia, Maine, Minnesota, Missouri, Montana, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, and Wisconsin. NAT’L HIGHWAY TRANSP. SAFETY ADMIN., VEHICLE AND LICENSE PLATE SANCTIONS, *available at* <http://www.nhtsa.dot.gov/people/outreach/safesobr/19qp/factsheets/vehicle.html>, (last visited July 12, 2007).

Unlike the administrative alternatives available for a license suspension, no viable procedure exists in the civilian criminal justice system to enhance penalties for offenders who previously received an Article 15, instead of a conviction. The Texas Penal Code repeat offender statute represents a typical phrasing, stating that an enhanced penalty applies “if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated,”<sup>137</sup> including conviction of “an offense under the laws of another state that prohibit the operation of a motor vehicle while intoxicated.”<sup>138</sup> Texas criminal courts do not consider an Article 15 equivalent to a criminal conviction.<sup>139</sup> While the court may consider an Article 15 as evidence in punishment, it would not constitute a sufficient basis to enhance the range of punishment.<sup>140</sup> Simply put, an Article 15 does not constitute a “strike” for the purposes of enhanced punishment under “three strikes” and other enhancement laws, eliminating the deterrent effects of the statutes.<sup>141</sup>

#### 4. *Civil Court Consequences*

In addition to the aforementioned problems with obtaining restitution, law enforcement reports, and information regarding disposition of the offender, the failure to adjudge a conviction also deprives an injured party of admissible evidence of the offender’s misconduct.<sup>142</sup> Of course, the majority of DWI cases do not involve an accident involving a third party, but accidents involving DWIs tend to be more severe.<sup>143</sup> In DWI cases, this deprives the victim of a conviction that could serve as the basis of liability for injuries or damage sustained in an accident caused by the accused.<sup>144</sup> While a DWI conviction may

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<sup>137</sup> TEX. PENAL CODE § 49.09(a) (2007).

<sup>138</sup> TEX. PENAL CODE § 49.09(c)(1)(F) (2007).

<sup>139</sup> See *Wallace v. State*, 618 S.W.2d 67 (Tex. Crim. App. 1981).

<sup>140</sup> See *id.*; see also *Zellers v. United States*, 682 A.2d 1118, 1125 (D.C. 1996) (finding summary court-martial conviction is not a “conviction” for impeachment purposes); *State v. Myers*, 58 P.3d 643, 647 (Haw. 2002) (finding Article 15 punishment is not a “criminal prosecution” that would bar subsequent civilian prosecution for the same offense).

<sup>141</sup> For comparison, see *Florance v. Donovan*, 126 N.Y.S.2d 642, 644-45 (N.Y. App. Div. 1953) (finding a court-martial conviction equivalent to a felony conviction for purposes of parole eligibility calculation).

<sup>142</sup> See *People v. Renno*, 219 N.W.2d 422, 427-28 (Mich. 1974) (finding evidence of an Article 15 not proper impeachment).

<sup>143</sup> See, e.g., Lewis Margolis, Jonathan Kotch, & John Lacey, *Children in Alcohol-Related Motor Vehicle Crashes*, 77 PEDIATRICS 870-72 (1986).

<sup>144</sup> See *Leader v. State of California*, 182 Cal. App.3d 1079, 1092 (Cal. Ct. App. 1986) (finding criminal conviction prevents later claim in civil case contrary to facts established by conviction); *State by New Bern Child Support Agency v. Lewis*, 319 S.E.2d 145, 150 (N.C. 1984) (finding father collaterally estopped from relitigating issue).

not establish all the facts necessary to ensure civil liability for an accident, it would narrow the issues considered by the civil court. Further, evidence that a tortfeasor caused the injury while driving drunk can serve as the basis for extraordinary or punitive damages.<sup>145</sup> In sum, the decision to forgo a formal adjudication by the military commander can substantially impair a civil court victim plaintiff.

### C. Drug Offenses

An Article 15 or summary court-martial conviction for drug use or possession generally results in an administrative discharge from the military,<sup>146</sup> but does not trigger the same collateral consequences as a parallel misdemeanor or felony drug conviction in the civilian court system. Many of these consequences involve the denial of certain financial benefits from the federal government.<sup>147</sup> While not technically part of the criminal sentence, these collateral consequences serve as an increasingly large part of the full picture of the just resolution of a drug case. Conviction for a drug offense can preclude a person from receiving several kinds of benefits administered by the government.<sup>148</sup> The military services have widely differing interpretations of whether drug offenses fit under the definition of a “minor offense.”<sup>149</sup> Of particular interest to separating military members, a conviction for a controlled substances crime can result in a driver’s license suspension, may preclude eligibility for non-Veteran’s Affairs financial aid for higher education for a period of time, and may result in ineligibility for federal housing benefits.<sup>150</sup>

#### 1. *Suspension of Driver’s License*<sup>151</sup>

As in DWI cases, some states mandate a driver’s license suspension for possession of illegal drugs, including marijuana, sometimes irrespective of whether the accused possessed the drugs in a

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of paternity in child support action where state previously convicted him of willful neglect and refusal to support minor children).

<sup>145</sup> *Mosing v. Domas*, 830 So. 2d 967 (La. 2002).

<sup>146</sup> *See, e.g.*, U.S. DEP’T OF AIR FORCE, INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN ¶ 5.54 (9 July 2004) [hereinafter AFI 36-3208] (requiring administrative discharge of airmen who abuse drugs unless seven retention criteria are met).

<sup>147</sup> *See infra* notes 152-72 and accompanying text.

<sup>148</sup> *Id.*

<sup>149</sup> 10 U.S.C. § 815(b) (2007).

<sup>150</sup> *See, e.g.*, 20 U.S.C. § 1091(r) (2007) (making students convicted of drug offenses ineligible for certain federal student benefits for specified periods of time); 42 U.S.C. § 1437 (2007) (governing federal housing benefits); TEX. TRANSP. CODE § 521.372 (2007) (requiring automatic suspension of driver’s license following conviction of drug offense).

<sup>151</sup> *See, e.g.*, TEX. TRANSP. CODE § 521.372 (2007).

vehicle.<sup>152</sup> However, while they may not require that the offense have any relation to a vehicle, the state laws usually condition the suspension on the receipt of a criminal conviction.<sup>153</sup> Even if the state has authority to suspend the license in the absence of a conviction, it cannot do so without the information included in the law enforcement reports and Article 15.<sup>154</sup> As discussed above, the military does not automatically release this information to civilian law enforcement authorities.<sup>155</sup>

## 2. *Federal Educational Financial Aid*

The receipt of an Article 15 instead of a conviction for a drug offense permits a former military student to collect federal educational financial aid not available to a student convicted in civilian or military court. While getting a college education correlates strongly with employment and decreased recidivism,<sup>156</sup> the concern over drugs on college campuses has led Congress to prohibit the receipt of federal educational financial aid for individuals convicted of drug offenses for a certain period of time.<sup>157</sup> Addressing drug possession with an Article 15 instead of court-martial proceedings undermines the purposes of this decision, although it probably does eliminate post-military educational benefits from the Veteran's Administration.

### a. Benefits Administered by the United States Department of Education

In 1998, Congress passed, and the President signed, the Higher Education Act, which included a provision regarding aid elimination for students with drug-related convictions.<sup>158</sup> The provision prohibits the receipt of financial aid for one year after a first conviction of possession of a controlled substance (including marijuana), two years after a second conviction, and indefinitely after a third conviction.<sup>159</sup> Many

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<sup>152</sup> See CAL. VEH. CODE § 23222(b) (2007); TEX. TRANSP. CODE § 521.372 (2007); VA. CODE ANN. § 18.2-259.1 (2007); *Walton v. Commonwealth*, 497 S.E.2d 869, 873 (Va. 1998) (finding state law mandating suspension of driver's license following marijuana possession conviction unrelated to accused's vehicle satisfies rational basis test).

<sup>153</sup> See CAL. VEH. CODE § 23222(b) (2006); TEX. TRANSP. CODE § 521.372 (2006); VA. CODE ANN. § 18.2-259.1 (2006); *Walton v. Commonwealth*, 497 S.E.2d 869, 873 (Va. 1998).

<sup>154</sup> TEX. TRANSP. CODE § 521.292 (2007).

<sup>155</sup> 5 U.S.C. § 552a (2007) (Privacy Act); 5 U.S.C. 552 (2007) (FOIA).

<sup>156</sup> James Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 vol. 4 J. CORRECTIONAL ED. (Dec. 2004).

<sup>157</sup> 20 U.S.C. § 1091(r) (2007); see also Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Apr. 17, 2006, pg. 3A (reporting 189,065 applicants were turned down for federal financial aid because of drug convictions since the 2000-2001 academic year).

<sup>158</sup> 20 U.S.C. § 1091(r) (2007).

<sup>159</sup> *Id.*

servicemembers join the military to earn money for college, and many attend college while enlisted. When discharged, many choose to return to school, making this section particularly relevant to military members. The provision contains two important limitations: the prohibition does not apply unless the student received the conviction while receiving federal student aid, and it may be lifted if the student completes a drug rehabilitation program.<sup>160</sup> The prohibition applies only to convictions, not administrative determinations, so an Article 15 would not limit a student from collecting federal financial aid.<sup>161</sup>

b. Benefits Administered by the Department of Veteran's Affairs

In the absence of a court-martial, the military uses the administrative discharge process to “fire” military members who use drugs.<sup>162</sup> The usual process results in the imposition of nonjudicial punishment and an administrative discharge with a “general (under honorable conditions)” service characterization.<sup>163</sup> A discharge with a general service characterization permits the servicemember to retain most of his VA benefits, but an honorable service characterization is required in order to receive benefits under the GI Bill.<sup>164</sup> This is the rare instance where an Article 15 and administrative discharge does not defeat the collateral consequences intended to follow a drug conviction.

3. *Federal Housing Benefits*

The use of nonjudicial punishment in drug cases may or may not affect a former military member's eligibility for public housing or housing subsidies. Under 42 U.S.C. § 1437, a public housing agency may decline to provide housing or subsidy to someone currently using or previously using controlled substances.<sup>165</sup> Federal regulation at 24 C.F.R. § 5.855 implements this legislation by allowing public housing authorities to prohibit the admission of people who they know to have

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (21 Dec. 1993); AFI 36-3208, *supra* note 146, ¶ 5.54.

<sup>163</sup> See U.S. DEP'T OF DEFENSE, DIR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ E3.A2.1.3.2.2.3 (21 Dec. 1993). In practice, usually a pattern of misconduct, abuse of military position, or serious injury is required for an under other than honorable service characterization.

<sup>164</sup> 38 U.S.C. § 3011(a)(3) (2007).

<sup>165</sup> 42 U.S.C. § 1437n (2007).



engaged in drug-related criminal activity within a reasonable time before the admission decision.<sup>166</sup>

Unlike other sanctions, the Housing and Urban Development sanctions do not require a criminal conviction to trigger them. The Government Accountability Office estimated that public housing agencies turn down between 0.4% and 6.9% of applicants for drug-related criminal activity.<sup>167</sup> However, without a criminal conviction, it remains unclear how the agencies would learn of the prior drug use. Rather than an outright elimination of the collateral sanction, the resolution of drug use charges through an Article 15 diminishes the chance that the sanction will be imposed.

#### 4. *Temporary Assistance for Needy Families (TANF) and Food Stamps*

As part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter the “Welfare Reform Act”),<sup>168</sup> Congress permitted federal and state judges to impose a one-year period of ineligibility for federal benefits, including TANF and Food Stamps,<sup>169</sup> for a conviction for possession of a controlled substance.<sup>170</sup> The Act provided an “opt out” provision for the states, which a number of states have adopted.<sup>171</sup> Unlike the housing provisions, however, the TANF and Food Stamps provisions do require a conviction and anticipate the direct involvement of the sentencing judge.<sup>172</sup> By addressing drug misconduct through the nonjudicial punishment process, commanders supplant the judge and effectively permit otherwise eligible former servicemembers to collect TANF and Food Stamps.

#### 5. *Conclusion*

In sum, the federal government has adopted a number of collateral consequences for drug abuse. However, most of these sanctions are tied to criminal court convictions for drug offenses.

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<sup>166</sup> 24 C.F.R. § 5.855(a)(1) (2007); *see also* 24 C.F.R. § 5.854 (2007) (requiring denial of benefits if a member of the household has previously been evicted for drug activity within the preceding three years).

<sup>167</sup> GOVERNMENT ACCOUNTABILITY OFFICE, VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR THE DENIAL OF SELECTED BENEFITS, GAO-05-238 14 (Sept. 2005) [hereinafter GAO-05-238].

<sup>168</sup> Codified at 21 U.S.C. § 862 (2007).

<sup>169</sup> But not including retirement pay, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefits. 21 U.S.C. § 862(d) (2007).

<sup>170</sup> 21 U.S.C. § 862(b) (2007).

<sup>171</sup> *See* GAO-05-238 for a breakdown of which states have modified the ban, and how. GAO-05-238, *supra* note 167, at 32-34.

<sup>172</sup> 21 U.S.C. § 862(b) (2007).

Commanders largely stymie the purposes of these measures by administering an Article 15 in lieu of court-martial proceedings.

#### IV. RELUCTANCE TO PURSUE COURT-MARTIAL

Why do commanders choose Article 15 over court-martial proceedings? Commanders prefer the informality and expedience of punishment under Article 15 to the formality and substantial logistical burden of a court-martial. Article 15 developed out of Article 104 of the earlier Articles of War, which allowed punishment at the company level.<sup>173</sup> In considering the UCMJ in 1950, Congress wanted to balance the need for protection of individual rights with the desire of commanders to retain authority for the discipline of their men.<sup>174</sup> In World War II, commanders used courts-martial primarily as a disciplinary tool, and less as a forum for justice.<sup>175</sup> Over sixteen million Americans served in the military during World War II.<sup>176</sup> The military conducted over two million courts-martial, often under circumstances that we may charitably describe as less than completely fair.<sup>177</sup> Abuses included the denial of counsel, trial by non-legally trained officers, and summary punishment without the benefit of due process.<sup>178</sup> After the war, veterans exerted significant pressure on Congress to enact significant protections of their rights.<sup>179</sup> A common adage went “military justice is to justice as military music is to music.”<sup>180</sup>

The new UCMJ gave substantial protections to servicemembers, while continuing to permit commanders to punish minor offenses through Article 15.<sup>181</sup> Navy commanders had objected most stridently to the diminishment of their right to summarily punish sailors, so they received an exemption from the sailor’s right to demand trial in lieu of

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<sup>173</sup> *Uniform Code of Military Justice: Hearings on H. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 569-70 (1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/hearings\\_01.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf) (last visited July 13, 2007).

<sup>174</sup> Brigadier General (ret.) John Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1 (Sept. 2000).

<sup>175</sup> *Id.* at 6-7.

<sup>176</sup> See CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS: AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2 (July 13, 2005), available at <http://www.fas.org/sgp/crs/natsec/RL32492.pdf> (2005) (last visited July 13, 2007).

<sup>177</sup> See Cooke, *supra* note 174, at 6-7.

<sup>178</sup> See *id.* at 7.

<sup>179</sup> See *id.*

<sup>180</sup> Commonly attributed to Groucho Marx, unknown date. See <http://www.quotationspage.com/quote/848.html> (last visited July 13, 2007).

<sup>181</sup> 10 U.S.C. § 815 (2007).

Article 15 for ships underway.<sup>182</sup> Higher headquarters commanders also retained the authority to decrease court-martial sentences or set them aside (but not to increase them), as well as the decision authority on whether or not to dispose of charges through court-martial or other means.<sup>183</sup> The larger issue of the balance between the power of the commander and the rights of the accused dominated debate, especially in the previously unknown practice of plea bargaining through the use of a pretrial agreement that the commander would not approve a sentence that exceeded a certain limit in exchange for a guilty plea and the waiver of certain legal rights.<sup>184</sup>

Of course, at the time that Congress passed the UCMJ, most of the collateral consequences of a criminal conviction did not exist. License suspensions, protective orders, and benefits restrictions evolved in the 1980s and 1990s,<sup>185</sup> and thus were not part of the balancing act Congress considered in authorizing nonjudicial punishment. The further evolution of military court-martial procedures diverged from those in civil court. As procedures in civil court became more streamlined to handle increasing case loads, procedures in courts-martial become more formal and logistically onerous. As a result, court-martial rates generally declined as commanders came to prefer nonjudicial punishment.<sup>186</sup> However, this generated disparate results for society, as civilian convictions triggered increasing collateral consequences, while the consequences of nonjudicial punishment remained limited to the member's time in the military.

A primary factor in raising the logistical burden of convening a court-martial arose from judicial decisions limiting pretrial agreements. Many military appellate judges viewed pretrial agreements as undermining the balance of power Congress had struck between commanders and military members accused of criminal activity.<sup>187</sup> The expression of this conflict manifested in military appellate court decisions approving some waivers of legal rights and disapproving others.<sup>188</sup> In 1984, the President codified these decisions in Rule for

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<sup>182</sup> *Id.*; see also *United States v. Penn*, 4 M.J. 879, 883 (N.M.C.M.R. 1978) (finding denial of right to refuse nonjudicial punishment proceedings to sailors on vessels underway is not a violation of the Equal Protection Clause).

<sup>183</sup> 10 U.S.C. § 860 (2007).

<sup>184</sup> See, e.g., *United States v. Darring*, 26 C.M.R. 431 (C.M.A. 1958) (invalidating accused's pretrial agreement to waive representation by appellate counsel).

<sup>185</sup> See *supra* notes 37-172 and accompanying text.

<sup>186</sup> See H.F. Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 258-59 (2005).

<sup>187</sup> See, e.g., *United States v. Callahan*, 22 C.M.R. 443, 447-48 (A.B.R. 1956).

<sup>188</sup> *Id.*; see also *United States v. Dusenbury*, 49 C.M.R. 536, 541 (C.M.A. 1975) (finding accused intelligently waived motions by pleading guilty pursuant to pretrial agreement); *United States v. Troglin*, 44 C.M.R. 237, 244 (C.M.A. 1972) (finding unwritten "gentleman's agreement" between defense and prosecution that defense would not

Courts-Martial 705, which spelled out the permissible and impermissible waivers in a pretrial agreement.<sup>189</sup> Of particular interest, Rule 705 (c)(1)(B) codified a restriction from *United States v. Callahan* in which the Army Board of Review<sup>190</sup> ruled that limitations on the member's right to submit matters in mitigation did not comport with "military due process."<sup>191</sup>

In the *Callahan* case, an Army sergeant convicted of desertion claimed that the pretrial agreement that implicitly prohibited him from submitting matters in mitigation to the trial judge in the sentencing phase of his trial violated his due process rights.<sup>192</sup> While civilian courts generally abide by the "you get what you bargain for" rule, the Board of Review found that the military should abide by a higher standard.<sup>193</sup> The Board ruled, on unusual facts, that Callahan had not properly waived his right to submit matters in mitigation.<sup>194</sup> Of particular interest, the Board did not expressly find that he could not waive his right to submit matters in mitigation, but merely that the Manual for Courts-Martial, and in particular paragraphs 137 and 146b of the 1951 Manual,<sup>195</sup> gave him the right to submit matters in mitigation.<sup>196</sup> Despite the unique facts of the case, it came to stand for the proposition that a commander could not require an accused to waive the right to submit matters in mitigation.<sup>197</sup> The case did not address the separate process for the accused to seek post-trial relief from the convening authority (a higher commander), often referred to as "clemency."<sup>198</sup> In essence, after *Callahan*, the accused gets two chances for a reduced sentence – one with the trial judge (or court members) and one with the convening authority.

After *Callahan* and the codification of the practices it engendered in Rule for Courts-Martial 705(c)(1)(B) of the 1984 Manual for Courts-Martial, military criminal practice began to diverge substantially from civilian practice when it came to sentencing. The military courts, with their continuing sensitivity to allegations of the unfair treatment of military personnel, became increasingly formal. R.C.M. 705 prohibits pretrial agreements that waive jurisdictional

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pursue double jeopardy or speedy trial issues invalidated guilty plea pursuant to pretrial agreement).

<sup>189</sup> MCM, *supra* note 9, R.C.M. 705.

<sup>190</sup> The predecessor to the Army Court of Criminal Appeals, a first level appellate court.

<sup>191</sup> *Callahan*, 22 C.M.R. at 446-47.

<sup>192</sup> *Id.* at 445-46.

<sup>193</sup> *Id.* at 448.

<sup>194</sup> *Id.*

<sup>195</sup> The analogous provisions are in the current Manual for Courts-Martial in Rule for Courts-Martial 1001.

<sup>196</sup> *Callahan*, 22 C.M.R. at 448.

<sup>197</sup> *See, e.g.*, *United States v. Libecap*, 57 M.J. 611, 615 (C.G. Ct. Crim. App. 2002).

<sup>198</sup> MCM, *supra* note 9, R.C.M. 1105.

requirements, speedy trial, or “complete sentencing proceedings,” in virtually any fashion.<sup>199</sup> In most civilian courts, an accused could bargain to waive speedy trial to participate in a pretrial diversion, waive sentencing proceedings entirely, and even waive appeal entirely in some cases.<sup>200</sup> While civilian courts generally allow waivers of sentencing proceedings, they retain the authority to decline to accept any plea bargain they feel does not achieve justice.<sup>201</sup> Civilian plea bargain proceedings, without full sentencing proceedings, consume far less court time than fully litigated sentencing proceedings in courts-martial.<sup>202</sup>

For good or ill, the practical effect of Rule 705(c)(1)(B) has been to substantially increase the logistical burdens of a court-martial. Instead of a “cattle call” plea session where dozens of defendants enter pleas in a single day, military judges generally will not schedule or hear more than one plea in a single day. Scheduling defense counsel and a judge can take several months, given the frequent need for both to travel to the base conducting the court-martial. Given these substantial concerns and expenses, commanders often elect for less formal dispositions of cases. In a sense, the military courts have “priced themselves out of the business” of conducting courts-martial in so-called minor offense cases.

#### V. ARTICLE 15 AND CIVILIAN PROSECUTION: MUTUALLY EXCLUSIVE?

From a legal standpoint, “prosecution” under Article 15 does not constitute trial for the purposes of double jeopardy in either state or federal legal systems. Article 15 itself states that handling of a case under its provisions does not bar future court-martial (except in the case of minor offenses), although the sentencing judge or panel may consider the punishment imposed in the Article 15 in deciding the court-martial sentence.<sup>203</sup> As discussed above, in the few cases where a state has elected to prosecute in civilian criminal court a servicemember who

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<sup>199</sup> MCM, *supra* note 9, R.C.M. 705(c)(1)(B); *see* United States v. Sunzeri, 59 M.J. 758 (A.F. Ct. Crim. App. 2004); United States v. Libecap, 57 M.J. 611 (C.G. Ct. Crim. App. 2002); United States v. Cassity, 36 M.J. 759 (N.M.C.M.R. 1992); Major Marty M. Foreman, *Let's Make a Deal! The Development of Pretrial Agreements in Military Criminal Justice Practice*, 170 MIL. L. REV. 53, 72 (Dec. 2001).

<sup>200</sup> Rule for Courts-Martial 705(c)(1)(B) prohibits waivers of appeal as a condition of a pretrial agreement in courts-martial. *See* United States v. Jones, 381 F.3d 615, 619 (7th Cir. 2004), for an example of an effective appellate waiver in federal civilian court, which federal courts only require to be clear and unambiguous to be binding.

<sup>201</sup> *See, e.g.,* Ellis v. United States Dist. Court (*In re* Ellis), 356 F.3d 1198, 1207-08 (9th Cir. 2004) (discussing the options a court has in rejecting a proposed plea).

<sup>202</sup> In the author's personal experience in the state trial courts in Texas and Oregon, sentencing time slots generally run fifteen minutes. In court-martial practice, plea and sentencing proceedings are routinely scheduled for a half-day.

<sup>203</sup> 10 U.S.C. § 815(f) (2007).

received an Article 15 for the same conduct, the courts have not generally found equivalence to a conviction or a double jeopardy bar.<sup>204</sup> Technically, even if the state courts considered an Article 15 a federal conviction, the state could prosecute without violating the double jeopardy bar under the “separate sovereigns” doctrine.<sup>205</sup> Also, the federal courts do not preclude prosecution in federal criminal courts of offenses previously punished under Article 15.<sup>206</sup>

However, as a policy matter, the federal government and states tend not to prosecute criminal conduct “handled” by the other system. Department of the Air Force policy, while encouraging the vigorous assertion of jurisdiction over servicemember misconduct, generally prohibits the imposition of court-martial on a servicemember prosecuted by the civilian authorities,<sup>207</sup> as does Department of Justice policy.<sup>208</sup> While less formal in their approach, states generally reciprocate, with some exceptions.<sup>209</sup> In short, with no shortage of criminal cases, state prosecutors who initially defer to the military on the issue of jurisdiction rarely reexamine their decision in the face of a decision by the military to use nonjudicial punishment to address the misconduct.<sup>210</sup>

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<sup>204</sup> *State v. Myers*, 58 P.3d 643, 646 (Haw. 2002); *cf.* *Wallace v. State*, 618 S.W.2d 67 (Tex. Crim. App. 1981) (finding nonjudicial punishment is not a “conviction” for impeachment purposes); *Zellers v. United States*, 682 A.2d 1118 (D.C. 1996) (finding summary court-martial conviction is not a “conviction” for impeachment purposes). *But see* *State v. Ivie*, 961 P.2d 941, 948 (Wash. 1998), *superseded by* WASH. REV. CODE § 10.43.040 (2007) (finding Article 15 proceeding barred civilian prosecution for the same misconduct). In the *Ivie* case, the Supreme Court of Washington (state) found that a prior Article 15 proceeding barred subsequent prosecution in state court. *Ivie*, 961 P.2d at 948. The Washington Legislature promptly rewrote the double jeopardy provision to eliminate the bar. WASH. REV. CODE § 10.43.040 (2007).

<sup>205</sup> *United States v. Vinson*, 414 F.3d 924, 928 (8th Cir. 2005).

<sup>206</sup> *United States v. McAllister*, 119 F.3d 198, 207 (2d Cir. 1997); *United States v. Burns*, 29 F. Supp.2d 318, 324 (D. Va. 1998).

<sup>207</sup> AFI 51-201, *supra* note 11, ¶ 2.5.1.; *see* U.S. DEP’T OF DEFENSE, DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985) (spelling out the specific investigative and prosecutorial duties between the Department of Defense and the Department of Justice).

<sup>208</sup> USA MANUAL, *supra* note 78, § 9-2.031.

<sup>209</sup> *See, e.g., State v. Myers*, 58 P.3d 643, 646 (Haw. 2002) (finding prior Article 15 punishment no bar to subsequent state court prosecution for the same misconduct).

<sup>210</sup> *But see State v. Stivason*, 142 P.3d 189, 191-92 (Wash. Ct. App. 2006) (finding that nonjudicial punishment did not preclude later state prosecution, as had been the interpretation under an earlier version of Washington’s double jeopardy statute).

## VI. CONSIDERATION OF THE IMPACT OF DISPOSITION ON VICTIMS AND SOCIETY

Commanders are not immediately affected by the impact of disposition of an offense on the victim or society. Military law and policy give commanders wide discretion in the disposition of offenders, but very little guidance. As discussed above, the Manual for Courts-Martial invests all commanders with full authority to address disciplinary matters involving troops under their command.<sup>211</sup> The prohibition of illegal command influence prohibits higher-level commanders from mandating or overturning the decisions of subordinates,<sup>212</sup> although superior commanders may withhold jurisdiction over certain offenses or act independently to prefer charges.<sup>213</sup> Military policy provides equivocal guidance to commanders on consideration of the victim's interests in the disposition decision<sup>214</sup> and provides none on whether a commander should consider the needs of society in the decision.

The consultation rights afforded a victim in the military justice system do not reach the commander deciding disposition of the case. Department of Defense Instruction 1030.2 provides that the trial counsel shall provide "consultation concerning the decision not to prefer charges against the suspected offender."<sup>215</sup> This direction overlooks the reality that the "trial counsel" may not receive the case before the commander decides to prefer charges. In essence, the Air Force implementing guidance states the same, telling the victim she has the right to "confer with trial counsel in the case."<sup>216</sup> Army Regulation 27-10 provides that the victim has the "right to confer with the attorney for the Government in the case," again without recognizing that the Government may not assign an attorney to the case if the commander opts for nonjudicial punishment.<sup>217</sup> The Navy requires the same very limited consultation right.<sup>218</sup> In addition to ignoring the possibility that the Staff Judge Advocate may not appoint a trial counsel for charges resulting in an Article 15, the implementing instructions provide no right to consult

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<sup>211</sup> MCM, *supra* note 9, R.C.M. 306.

<sup>212</sup> MCM, *supra* note 9, R.C.M. 104.

<sup>213</sup> MCM, *supra* note 9, R.C.M. 306(a).

<sup>214</sup> U.S. DEP'T OF DEFENSE, INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES ¶ 6.3.1. (4 June 2004).

<sup>215</sup> *Id.* at ¶ 6.3.1.1.

<sup>216</sup> AFI 51-201, *supra* note 11, ¶ 7.9.5.

<sup>217</sup> AR 27-10, *supra* note 11, ¶ 18-10(5).

<sup>218</sup> U.S. DEP'T OF THE NAVY, SEC'Y OF THE NAVY INSTR. 5800.11B, VICTIM AND WITNESS ASSISTANCE PROGRAM (VWAP) ¶ 6 (5 Jan. 2006); U.S. DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5800.7, VICTIM AND WITNESS ASSISTANCE PROGRAM Encls. 1, 2 (30 Apr. 1996).

directly with the commander deciding the case.<sup>219</sup> Further, the victim's rights do not include the option to consult with the servicing Staff Judge Advocate, who advises the commander on disposition.<sup>220</sup>

This problem of the victim having no right to consult or confront the officer deciding disposition of the case apparently relates to the requirements of 18 U.S.C. § 3771(a)(5), which provides the victim the right to consult with the Government's attorney in the case.<sup>221</sup> In civilian cases, the attorney for the Government has prosecutorial discretion whether to proceed with charges or drop them. However, in military cases, the commander, not the trial counsel, decides disposition of the case.<sup>222</sup> This represents a significant dilution of the victim's rights.

Some military policy guidance seems to encourage the commander to use nonjudicial punishment over the victim's objections. Army Regulation 27-10 admonishes commanders to use nonjudicial punishment to "[p]reserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction" and "[f]urther military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial."<sup>223</sup> Fortunately, it also requires commanders to consider the ends of justice: "If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken."<sup>224</sup> In the same "giving with one hand and taking away with the other" manner, the Regulation continues: "Although the victim's views should be considered, nothing in this regulation limits the responsibility and authority of appropriate officials to take such action as they deem appropriate in the interest of good order and discipline and to prevent service-discrediting conduct."<sup>225</sup> The Air Force Instruction provides even less specific guidance, stating "[t]he commander's action must be temperate, just, and conducive to good order and discipline."<sup>226</sup> OPNAV Instruction 5700.8 starts off by noting that victims should have the same rights in

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<sup>219</sup> U.S. DEP'T OF THE NAVY, SEC'Y OF THE NAVY INSTR. 5800.11B, VICTIM AND WITNESS ASSISTANCE PROGRAM (VWAP) ¶ 6 (5 Jan. 2006); U.S. DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5800.7, VICTIM AND WITNESS ASSISTANCE PROGRAM Encls. 1, 2 (30 Apr. 1996).

<sup>220</sup> U.S. DEP'T OF THE NAVY, SEC'Y OF THE NAVY INSTR. 5800.11B, VICTIM AND WITNESS ASSISTANCE PROGRAM (VWAP) ¶ 6 (5 Jan. 2006); U.S. DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5800.7, VICTIM AND WITNESS ASSISTANCE PROGRAM Encls. 1, 2 (30 Apr. 1996).

<sup>221</sup> 18 U.S.C. § 3771(a)(5).

<sup>222</sup> MCM, *supra* note 9, R.C.M. 306.

<sup>223</sup> AR 27-10, *supra* note 11, ¶ 3-2.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at ¶ 18-15(b).

<sup>226</sup> AFI 51-202, *supra* note 11, ¶ 3.1.



nonjudicial punishment proceedings as they do in courts-martial, but provides only the same consultation rights as the Army and Air Force.<sup>227</sup>

The cumulative effect of the vague guidance given commanders is to subordinate the needs of the victim and society to the more immediate concerns of the commander. A commander may or may not consider domestic violence a threat to the good order and discipline of his unit. However, the loss of a servicemember to the Lautenberg Amendment's prohibition on possession of firearms may present a real and immediate threat to the unit's readiness.<sup>228</sup> While the victim does have the right to consult with the Government's attorney and while commanders generally consult with legal officers in these cases, the conflict of interest between military readiness, the needs of the victim, and the more elusive needs of society can result in a commander deciding in favor of military readiness over substantial justice.

## VII. LIMITATION OF ARTICLE 15 TO MINOR OFFENSES

The Manual for Courts-Martial provides some guidance on what commanders may consider "minor offenses," none of which explicitly includes impact on the victim.<sup>229</sup> Considerations include "the nature of the offense and circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial."<sup>230</sup> The Manual goes on to say that commanders should not generally impose nonjudicial punishment in cases where the maximum punishment at court-martial would exceed one year of confinement or where a dishonorable discharge would be authorized.<sup>231</sup> However, the Manual conditions this by stating that whether or not an offense is minor "is a matter of discretion for the commander imposing nonjudicial punishment."<sup>232</sup> Of the implementing regulations, Army Regulation 27-10 discusses the issue most completely. It defines minor offenses as "not includ[ing] misconduct of a type that, if tried by [general court-martial], could be punished by dishonorable discharge or confinement for more than 1 year."<sup>233</sup> However, it conditions that definition by stating "[t]his is not a hard and fast rule; the circumstances of the offense might indicate that action under Article 15 would be appropriate even in a case falling outside these categories."<sup>234</sup> Given the procedural

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<sup>227</sup> U.S. DEP'T OF THE NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS INSTR. 5800.7, VICTIM AND WITNESS ASSISTANCE PROGRAM ¶ 4 (30 Apr. 1996).

<sup>228</sup> 18 U.S.C. § 922(g)(9) (2007).

<sup>229</sup> MCM, *supra* note 9, at V-1.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> AR 27-10, *supra* note 11, ¶ 3-7.

<sup>234</sup> *Id.*

posture of cases disposed of by nonjudicial punishment, few courts have had the chance to review this standard.

One exception to the right to refuse nonjudicial punishment and insist on trial by court-martial is specified in 10 U.S.C. § 815(a), which provides that members attached to or embarked in a vessel cannot refuse nonjudicial punishment.<sup>235</sup> The military appellate courts have found this exception constitutional.<sup>236</sup> While victims lack the right to challenge the imposition of nonjudicial punishment,<sup>237</sup> a few sailors have sought judicial review of cases where they received an Article 15 while underway and would have preferred a court-martial, or where they received an Article 15 and later received a court-martial in addition to the nonjudicial punishment.<sup>238</sup>

In the case where the accused would have preferred court-martial, the courts have reached inconsistent conclusions. In one case, *Hagarty v. United States*,<sup>239</sup> the Court of Claims found for a steward punished under Article 15 and denied the right to trial by court-martial for larceny.<sup>240</sup> The court noted that larceny of \$600 from the military, the crime the ship's commanding officer charged, carried a maximum punishment of five years confinement at hard labor and a dishonorable discharge.<sup>241</sup> Further, the Congressional record contained no discussion of the types of offenses that Congress deemed minor.<sup>242</sup> The court concluded that the facts and circumstances of each case determined whether the offense was minor and that, in that case, based on the record the offense could not be considered as minor.<sup>243</sup>

The federal courts quickly backed away from this conclusion. In *Capella v. United States*,<sup>244</sup> the Court of Claims agreed that a commander could consider the wrongful use of heroin a minor offense, despite the Manual for Court-Martial's authorization of two years in confinement and a dishonorable discharge for the offense.<sup>245</sup> In *Turner v. Dep't of Navy*,<sup>246</sup> a former petty officer alleged that indecent assault and attempt to commit homosexual sodomy charges, punishable by five and ten years of confinement, respectively, and a dishonorable discharge

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<sup>235</sup> 10 U.S.C. § 815(a) (2007).

<sup>236</sup> *United States v. Penn*, 4 M.J. 879, 883 (N.M.C.M.R. 1978); *United States v. Lecolst*, 4 M.J. 800, 802 (N.M.C.M.R. 1978).

<sup>237</sup> *See* 18 U.S.C. § 3771 (2007).

<sup>238</sup> *See* 10 U.S.C § 815(a), (f).

<sup>239</sup> 449 F.2d 976 (Ct. Cl. 1980).

<sup>240</sup> *Id.* at 362.

<sup>241</sup> *Id.* at 76.

<sup>242</sup> *Id.* at 77.

<sup>243</sup> *Id.* at 78.

<sup>244</sup> 624 F.2d 976 (Ct. Cl. 1980).

<sup>245</sup> *Id.* at 979.

<sup>246</sup> 325 F.3d 310 (D.C. Cir. 2003).

for either offense, should not be considered minor.<sup>247</sup> However, the Court of Appeals for the District of Columbia ruled in favor of the Navy, finding that treatment of these offenses as minor did not constitute a violation of the “abuse of discretion” standard it considered applicable to the case.<sup>248</sup>

Members facing court-martial for the same “minor” conduct for which they received Article 15 punishment have been similarly unsuccessful in the military courts. Article 15 does not require disposition of all offenses arising from the same transaction,<sup>249</sup> nor does it prohibit later court-martial for the same conduct underlying the Article 15, although it does permit the sentencing judge or panel to consider the Article 15 punishment in sentencing. The Manual further requires that the misconduct be “serious,” or the Article 15 will serve as a bar to prosecution.<sup>250</sup> Generally speaking, this situation arises when a superior commander avoids influencing his subordinate’s decision to offer nonjudicial punishment, despite the superior’s disagreement, and subsequently prefers charges against the member.<sup>251</sup> Essentially, the subordinate considers the conduct a minor offense, and his superior considers it serious misconduct. In a case with these facts, the Court of Military Appeals found that being drunk on duty, punishable with confinement for nine months, and conduct unbecoming an officer, punishable with nine months or a year in confinement<sup>252</sup> and a dismissal, were serious offenses.<sup>253</sup> Other offenses considered both minor and serious include use of marijuana (punishable by two years and a dishonorable discharge),<sup>254</sup> indecent language (punishable by six months confinement and a bad-conduct discharge),<sup>255</sup> unauthorized absence (AWOL) (punishable (in this instance) by six months confinement),<sup>256</sup> and writing bad checks (punishable by a dishonorable discharge and five years confinement (in this instance)).<sup>257</sup> As is clear from the widely varying maximum punishments for these offenses, the appellate courts defer very strongly to the commander’s discretion to determine what constitutes a “minor offense.”

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<sup>247</sup> *Id.* at 314-16.

<sup>248</sup> *Id.* at 316.

<sup>249</sup> *United States v. Bracey*, 56 M.J. 387, 389 (2002).

<sup>250</sup> 10 U.S.C. § 815(f) (2007); *United States v. Williams*, 28 C.M.R. 181, 184 (C.M.A. 1959).

<sup>251</sup> This practice is permitted by Rule for Courts-Martial 306.

<sup>252</sup> UCMJ Article 133, Conduct Unbecoming an Officer and a Gentleman, permits confinement for a period equivalent to that permitted for the most closely analogous offense in the remainder of the UCMJ, or for one year if the Manual for Courts-Martial does not prescribe such an analogous offense. MCM, *supra* note 9, pt. IV, ¶ 59e.

<sup>253</sup> *United States v. Fretwell*, 29 C.M.R. 193, 196 (C.M.A. 1960).

<sup>254</sup> *See United States v. Fuson*, 54 M.J. 523, 524 (A.F. Ct. Crim. App. 2000).

<sup>255</sup> *United States v. Hudson*, 39 M.J. 958, 960 (N.M.C.M.R. 1994).

<sup>256</sup> *United States v. Sorby*, 39 M.J. 914, 916 (N.M.C.M.R. 1994).

<sup>257</sup> *United States v. Hollingsworth*, 1992 CMR LEXIS 108 (N.M.C.M.R. 1992).

The offenses discussed in this article, specifically domestic violence, driving while intoxicated, and drug abuse, fall in the middle of the range of offenses that a commander may consider minor or serious, depending on other factors. Military prosecutors can charge simple domestic violence cases as assaults consummated by a battery under Article 128, UCMJ,<sup>258</sup> punishable by six months confinement and a bad-conduct discharge.<sup>259</sup> The UCMJ proscribes drunk driving under Article 111, UCMJ,<sup>260</sup> and the Manual permits a sentence of up to six months confinement and a bad-conduct discharge in cases without an injury.<sup>261</sup> Drug use nets a maximum penalty of two to five years confinement, depending on the drug, and a dishonorable discharge<sup>262</sup> under Article 112a, UCMJ.<sup>263</sup> Absent extraordinary circumstances, the appellate courts would likely respect a commander's discretion in determining whether the offense qualified as minor or serious.

#### VIII. MITIGATION OF THE COLLATERAL EFFECTS OF NONJUDICIAL PUNISHMENT

While military practice will probably not change substantially regarding nonjudicial punishment, commanders can mitigate the unintended consequences of offering nonjudicial punishment. Commanders should seek greater input from victims about disposition of offenses and provide better information about investigations. Higher commanders can ensure appropriate disposition by withholding Article 15 authority from subordinate commanders and requiring them to refer information about such offenses up the chain of command.<sup>264</sup> Members not discharged after being punished under Article 15 remain under military authority and may have their actions restricted in a number of ways to protect victims and society. A combination of direct communication, disposition of offenses at an appropriate level, and appropriate restriction can mitigate the negative consequences of nonjudicial punishment on third parties and ensure more complete, if still imperfect, justice.

Consulting directly with the victim and providing appropriate information ensures a better outcome. The intent of 18 U.S.C. § 3771 could not be clearer: to encourage free and open communication between the Government and the victim.<sup>265</sup> Yet, by requiring

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<sup>258</sup> 10 U.S.C. § 928 (2007).

<sup>259</sup> MCM, *supra* note 9, pt. IV, ¶ 54(e).

<sup>260</sup> 10 U.S.C. § 911 (2007).

<sup>261</sup> MCM, *supra* note 9, pt. IV, ¶ 35(e).

<sup>262</sup> MCM, *supra* note 9, pt. IV, ¶ 37(e).

<sup>263</sup> 10 U.S.C. § 912a (2007).

<sup>264</sup> MCM, *supra* note 9, at V-2.

<sup>265</sup> *See* 18 U.S.C. § 3771(a) (2007).

consultation with the trial counsel, rather than the commander, the implementing regulations dilute the victim's access to the decision-maker. The impact on the victim, while not directly addressed in the Manual, falls clearly under the facts and circumstances of the case the commander should consider in disposing of the misconduct. In the other direction, the Government should not immediately hide behind the Freedom of Information Act exemptions.<sup>266</sup> While the Privacy Act may limit the disclosure of certain information, litigants can usually use the releasable redacted copies to obtain a subpoena. The intent of the Ashcroft memo<sup>267</sup> could not have been to keep children with abusive fathers and to protect car insurance companies from judgments, but that has been the practical effect of denying the release of statements from incidents leading to an Article 15.<sup>268</sup> The release of these records does not give the victim as strong a hand as she would have with a judgment, but they do mitigate the damage. In later civilian criminal actions, they may serve as good sentencing evidence, even without the enhancing value of a conviction.

Senior commanders should be willing to withhold dispositional authority from subordinate commanders in these cases. Rule for Courts-Martial 306 permits superior commanders to withhold the authority to dispose of "offenses in individual cases, types of cases, or generally."<sup>269</sup> For instance, a commander may decide to withhold the authority to dispose of a given DWI incident from a given subordinate commander, withhold the authority to dispose of DWI offenses from a given subordinate commander or commanders, or withhold the authority to dispose of all misconduct from a subordinate commander or commanders.<sup>270</sup> As a practical matter, rather than telling subordinates that they must recommend at least a special court-martial for all DWI incidents – an exercise of illegal command influence – a superior commander can, instead, lawfully withhold authority to dispose of all DWI incidents from subordinate commanders and prefer special court-martial charges in every case.<sup>271</sup> The improved consistency fulfills the superior commander's obligation to mete out discipline fairly in her command. A group, post, or battalion commander may have less concern over the loss of a single soldier than a squadron, flight, or company commander, as well as greater resources to shift to cover any loss.

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<sup>266</sup> *E.g.*, 5 U.S.C. § 552(b)(7) (2007) (law enforcement exemption).

<sup>267</sup> See Ashcroft Memorandum, *supra* note 23.

<sup>268</sup> See Erin Daly, *Let the Sun Shine In: The First Amendment and The War on Terrorism*, 21 DELAWARE LAWYER 14 (2003).

<sup>269</sup> MCM, *supra* note 9, R.C.M. 306(a).

<sup>270</sup> *Id.*

<sup>271</sup> As permitted by Rule for Courts-Martial 306.

Even if a superior commander chooses not to withhold dispositional authority, she should require subordinate commanders to provide full information regarding the disposition of these types of offenses. As discussed above, a superior commander may prefer court-martial charges if she considers the incident more serious than the immediate commander who disposed of the incident with an Article 15. Poor communication up the chain of command contributes to poor unit discipline.

Finally, commanders should use the authority they retain over members not discharged after nonjudicial punishment to ensure public safety. Commanders often respond to a DWI with an Article 15 and a restriction on driving on-base for one to two years. However, an off-base DWI results in the suspension of all driving privileges. A commander can and should prohibit a member who commits DWI from driving off base as well.<sup>272</sup> The same logic applies to the possession of firearms. The Lautenberg Amendment clearly espouses a public policy to prevent violent offenders from possessing firearms, yet the military services subvert it by allowing military members to continue to carry after a finding that they committed an act of domestic violence.<sup>273</sup> MPOs allow prohibition of possessing firearms and should be used for the remainder of the member's service in the military.<sup>274</sup> While these measures have no effect after a member's discharge, they do protect society and the victim for the critical time following the incident.

In sum, the decision to dispose of certain misconduct through nonjudicial punishment does not absolve the commander of responsibility for the collateral consequences of that decision. Restriction, review by superior commanders, and ongoing communication can mitigate the negative consequences of the informality of Article 15 proceedings. While justice under an Article 15 may be incomplete, it can be improved.

## IX. CONCLUSION

We often say that military service is not "just a job." Similarly, military commanders should not consider themselves "just employers"

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<sup>272</sup> See *United States v. New*, 55 M.J. 95, 107-08 (2001) (discussing determinations of the legality of military orders); *United States v. McDaniels*, 50 M.J. 407, 408 (1999) (finding commander's order to narcoleptic not to drive was lawful); *United States v. Clark*, 1989 CMR LEXIS 470 (A.F.C.M.R. 1989) (commander's order not to drive after a DWI was lawful).

<sup>273</sup> Granted, the finding is made in an administrative, rather than judicial forum, but this choice is clearly the commander's to offer, rather than the soldier's to demand. 10 U.S.C. § 815(a) (2007).

<sup>274</sup> U.S. Dep't of Defense, DD Form 2873, Military Protective Order (MPO) (July 2004), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2873.pdf> (last visited July 12, 2007).

when they impose discipline on the members under their command. While they lack full judicial authority, they have an obligation to consider the impact of their decisions on society. Commanders swear an oath to protect and defend the Constitution, as judges swear to perform their duties in accordance with the Constitution.<sup>275</sup> Commanders share with judges the obligation to consider the implications of their decisions on others beyond the accused.

These obligations include the duty to protect third parties, including the member's family, the Treasury, and the general public. Too often, practical considerations of the member's workplace utility override the broader considerations of individual and public safety and a more just result. While these additional considerations do not always outweigh the ease and utility of nonjudicial punishment, they should be taken into consideration. If the commander does decide to proceed with nonjudicial punishment, higher commanders should review the case *de novo* to consider the imposition of charges, and the initiating commander should take affirmative steps to preserve the rights and safety of third parties. When the military takes jurisdiction of a case, it takes on an affirmative duty to consider the broader consequences of disposition. Justice should not end at the installation gate.

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<sup>275</sup> 5 U.S.C. § 3331 (2007); 28 U.S.C. § 453 (2007).

EXPANDING THE “CHILD OF EITHER” EXCEPTION TO THE  
HUSBAND-WIFE PRIVILEGE UNDER THE NEW M.R.E. 504(D)

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## I. INTRODUCTION

*The 2007 Manual for Courts-Martial will feature an amended husband-wife privilege allowing spousal testimony in cases involving crimes against almost any child. By expanding the “child of either” definition, the rule will no longer prevent spousal testimony in cases where the minor victim may not be a child of either spouse. This article examines the history behind the rule change and the likely impact it will have on future courts-martial.*

When someone has knowledge of facts relevant to a court proceeding, the common law has long recognized their obligation to testify.<sup>1</sup> Yet specific types of communications, for example those between husband and wife, have been considered privileged, and immune from the compulsion to testify.<sup>2</sup> These privileges are premised on the idea that it is good public policy to promote certain confidential relationships, such as marriage, and encourage candid communications between spouses. The privilege exists today because the public interest protected by the privilege has outweighed the value of the testimony to the truth-seeking function of the judicial system.<sup>3</sup> The President and the drafters of the Manual for Courts-Martial (Manual) have now resolved that when the abuse of children is at issue, the need for truth in criminal proceedings far outweighs any interest in candid communications between spouses, and have modified the rule of privilege accordingly.<sup>4</sup>

In order to more effectively prosecute child sex offenders, many jurisdictions have lifted evidentiary restrictions and thereby allowed testimony ordinarily barred by the common law husband-wife privilege.<sup>5</sup> The 2006 proposed amendments to the Manual continue this

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<sup>1</sup> See 8 JOHN HENRY WIGMORE, EVIDENCE § 2232, at 227-28 (McNaughton rev. 1961).

<sup>2</sup> See 3 BERGMAN AND HOLLANDER, WHARTON'S CRIMINAL EVIDENCE (15th ed.) §§ 11:41 to 11:45.

<sup>3</sup> *But see* United States v. Taylor, 64 M.J. 416, 420 (2007) (holding that adultery is a crime against the spouse and therefore falls within the exception to the husband-wife privilege). The holding in *Taylor* coupled with the new M.R.E. 504(d) suggests a shift in policy away from applying the privileges in favor of more spousal testimony through the broadened exceptions.

<sup>4</sup> Article 36 of the Uniform Code of Military Justice [hereinafter UCMJ] provides the President of the United States with the authority to prescribe “rules of evidence” so long as they comport with those rules “generally recognized in the trial of criminal cases in the United States district courts . . .” 10 U.S.C. § 836; *see* Manual for Courts-Martial; Proposed Amendments, 71 Fed. Reg. 45780, 45782 (proposed Aug. 10, 2006).

<sup>5</sup> *See infra* note 40 (citing the majority of states that have broadened the child of the marriage exception to the spousal communications privilege); *see also* People v. Eveans, 660 N.E.2d 240, 246-47 (Ill. 1996) (explaining how the Illinois legislature “broadened

trend by including a new subsection to the husband-wife privilege, Military Rule of Evidence (M.R.E.) 504(d), which greatly broadens an exception to the privilege in cases involving child abuse.<sup>6</sup> This new change will help to ensure that within military communities, all evidence is brought to bear on individuals who prey upon children.

## II. BACKGROUND OF THE PRIVILEGE

Unlike the Federal Rules of Evidence, the Military Rules of Evidence codify the common law evidentiary privileges.<sup>7</sup> Currently, the military justice system recognizes two evidentiary privileges which preclude one spouse from being compelled to testify against the other. Although grouped together under the title “Husband-wife privilege,” M.R.E. 504 actually provides for two distinct privileges: first, husband-wife disqualification (which the Rule refers to as “Spousal incapacity”); and second, the privilege for confidential marital communications.<sup>8</sup> Both privileges derived from common law where one spouse was not competent to testify against the other.<sup>9</sup> Modern law now recognizes that

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the scope of the child interest exception to include the interests not only of the children of the testifying and accused spouses, but also the interests of *any* children in their care, custody or control” and that the “State has a compelling interest in child welfare . . . so the child interest exception should be construed broadly to afford the greatest protection to children rather than to the abusive or murderous spouse”) (citation omitted) (emphasis in original).

<sup>6</sup> Manual for Courts-Martial; Proposed Amendments, 71 Fed. Reg. 45780, 45782 (proposed Aug. 10, 2006).

<sup>7</sup> Compare FED. R. EVID. 501 with MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501-13 (2005) [hereinafter MCM].

<sup>8</sup> See MCM, *supra* note 6, MIL. R. EVID. 504. The party asserting the privilege has the burden of establishing that a marital communication is privileged in order for the testimony to be excluded. *United States v. McCarty*, 45 M.J. 334, 336 (1996).

<sup>9</sup> Evidence scholars have offered four historical bases for the common law view that spouses were not competent witnesses for or against each other:

- (1) *The common law unity of husband and wife.* Upon marriage, the wife lost her separate identity, and the husband and wife became a legal unity, represented by the husband. Only he could sue or be sued. If the wife had an action, it had to be brought in the husband’s name. Since parties were incompetent as witnesses, the husband could not testify. Therefore neither could his alter ego, his wife.
- (2) *The marital identity of interest.* Even apart from the spouses’ legal identity, their interest in the outcome of any lawsuit would be the same. Hence, the rationale for the party’s incompetency applied equally to the party’s spouse.
- (3) *The assumed bias of affection.* Because of the spouses’ intimate relationship and strong feelings for each other, their testimony was deemed incredible.
- (4) *Public policy.* There might be interference with marital harmony if the wife could be called to give unfavorable testimony against her husband. Even if the wife gave favorable testimony on

spouses are competent to testify against one another; however, the social policies concerned with preserving marital harmony and promoting the privacy of the marital relationship had left relatively intact the privilege to not testify against one's spouse.

#### A. Spousal Incapacity

At common law, each spouse was disqualified from testifying for or against the other.<sup>10</sup> In 1933, the United States Supreme Court abolished spousal disqualification in federal courts, but only to allow an accused's spouse to be able to testify on the accused's behalf.<sup>11</sup> The rule evolved from one of absolute disqualification to one of privilege, and the privilege was vested in the accused.<sup>12</sup> Thus, under the 1969 Manual, an accused could still prevent a spouse from testifying as an adverse witness.<sup>13</sup> This was known as the privilege against adverse spousal testimony.

In *Trammel v. United States*, the Supreme Court further modified the rule, vesting the privilege in the witness spouse, rather than the accused.<sup>14</sup> The Court held:

“Reason and experience” no longer justify so sweeping a rule . . . . Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification – vesting the privilege in the witness spouse – furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.<sup>15</sup>

The modified rule from *Trammel* is the rule currently recognized under the 2005 Manual. Entitled *spousal incapacity*, M.R.E.

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direct examination, on cross-examination she may be required to give damaging testimony.

RONALD CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 168 (4th ed. 1997) (citing 2 J. WIGMORE, EVIDENCE § 600 (3d ed. 1940)); 8 J. WIGMORE, EVIDENCE § 2227 (McNaughton rev. 1961).

<sup>10</sup> See *Trammel v. United States*, 445 U.S. 40, 43-44 (1980). There was no English common law privilege protecting marital communications. See MCCORMICK ON EVIDENCE § 78 (3d ed. 1984).

<sup>11</sup> See *Funk v. United States*, 290 U.S. 371 (1933).

<sup>12</sup> See *Trammel*, 445 U.S. at 44.

<sup>13</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 148e (1969).

<sup>14</sup> *Trammel*, 445 U.S. at 53.

<sup>15</sup> *Id.*

504(a) provides the witness spouse with the option to testify against the accused or not.<sup>16</sup> However, this “spousal incapacity” rule does not apply if, at the time of trial, the parties are divorced or their marriage has been annulled.<sup>17</sup>

#### B. Confidential Communication Made during the Marriage

The confidential marital communication privilege evolved from the privilege against adverse testimony. Leading scholars realized that the privilege against adverse spousal testimony was inappropriately broad and suggested an alternative privilege patterned after the attorney-client privilege.<sup>18</sup> The Supreme Court, in *Wolfe v. United States*,<sup>19</sup> recognized that confidential communications between husband and wife are privileged.<sup>20</sup> Moreover, the Court later set forth “the rule that marital communications are presumptively confidential.”<sup>21</sup>

Unlike the privilege of spousal incapacity under M.R.E. 504(a), the confidential communications privilege of M.R.E. 504(b) remains vested in the person who uttered the communication.<sup>22</sup> Therefore, the

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<sup>16</sup> MCM, *supra* note 7, MIL. R. EVID. 504 analysis, at A22-39.

Under the new rule, the *witness*’ spouse is the holder of the privilege and may choose to testify or not to testify as the witness’ spouse sees fit. *But see* Rule 504(c) (exceptions to the privilege). Implicit in the rule is the presumption that when a spouse chooses to testify against the other spouse the marriage no longer needs the protection of the privilege.

*Id.* (emphasis in original).

<sup>17</sup> MCM, *supra* note 7, MIL. R. EVID. 504(c)(1).

<sup>18</sup> *Trammel*, 445 U.S. at 44-45 (citing 8 WIGMORE §§ 2228, 2332).

<sup>19</sup> 291 U.S. 7 (1934).

<sup>20</sup> *Id.* at 14.

<sup>21</sup> *Blau v. United States*, 340 U.S. 332, 333 (1951). Scholars have suggested that there are five categories of confidential communications between husband and wife:

- (1) verbal exchanges whether oral or written,
- (2) acts performed with manifest intent to convey information,
- (3) acts performed with intent to convey information, the intent implied from the propinquity of the marital relation,
- (4) acts performed with knowledge that they might convey information, but apparently lacking in intent to so convey, and
- (5) any act or effect observed by the actor’s spouse accidentally, but consequent upon the marital relation.

Comment, *The Husband-Wife Privilege of Testimonial Non-disclosure*, 56 NW. U. L. REV. 208, 220-22 (1961).

<sup>22</sup> *See, e.g.*, MCM, *supra* note 7, MIL. R. EVID. 504(b)(3) (“The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf.”)

accused may prevent the disclosure of any confidential spousal communication the accused made during the marriage. Confidential communication between spouses is defined as “any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law,”<sup>23</sup> and “not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.”<sup>24</sup>

The Court of Appeals for the Armed Forces (CAAF) has set forth a three-part test for determining whether the proffered testimony is a confidential communication and therefore inadmissible.<sup>25</sup> To be deemed inadmissible, the testimony of the spouse must relate to (1) a communication, (2) which was intended to be confidential, and (3) between married persons not separated at the time of the communication.<sup>26</sup> The party claiming the privilege has the burden of establishing that the communication is privileged.<sup>27</sup>

### C. Exceptions Common to Both Privileges under M.R.E. 504

The spousal incapacity and confidential communication privileges often prevent significant amounts of testimony from being presented at trial and constitute obstacles in the truth-finding process. The spousal incapacity, or “adverse testimonial privilege[,] is the broader of the two privileges because it prohibits the testimony of any facts by a spouse, even if those facts are not learned through confidential marital communications.”<sup>28</sup> However, this privilege will not apply if the couple is no longer married.<sup>29</sup> Jurisdictions have further circumscribed the broad reach of both these privileges by creating three general exceptions.<sup>30</sup> Therefore, even if the witness spouse refuses to testify against the accused, or if the testimony is related to confidential communications, the testimony in both circumstances will nevertheless

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<sup>23</sup> MCM, *supra* note 7, MIL. R. EVID. 504(b)(1).

<sup>24</sup> MCM, *supra* note 7, MIL. R. EVID. 504(b)(2).

<sup>25</sup> United States v. McElhaney, 54 M.J. 120 (2000).

<sup>26</sup> *Id.* at 131; United States v. Peterson, 48 M.J. 81, 82 (1998). Military Rule of Evidence 504(b)(2) broadly defines “confidential” to include statements to third persons who are “reasonably necessary for transmission of the communication.” MCM, *supra* note 7, MIL. R. EVID. 504(b)(2). “This recognizes that circumstances may arise, especially in military life, where spouses may be separated by great distances or by operational activities, in which transmission of a communication via third parties may be reasonably necessary.” MCM, *supra* note 7, MIL. R. EVID. 504 analysis, at A22-39.

<sup>27</sup> MCM, *supra* note 7, MIL. R. EVID. 504(b)(3); United States v. McCarty, 334, 336 (1996).

<sup>28</sup> Kimberly Ann Connor, *A Critique of the Marital Privileges: An Examination of the Marital Privileges in the United States Military Through the State and Federal Approaches to the Marital Privileges*, 36 VAL. U. L. REV. 119, 130 (Fall 2001).

<sup>29</sup> MCM, *supra* note 7, MIL. R. EVID. 504(c)(1).

<sup>30</sup> See, e.g., MCM, *supra* note 7, MIL. R. EVID. 504(c)(2).

be presented in the following three situations: (A) “In proceedings in which one spouse is charged with a crime against the person or property of the other spouse *or a child of either*, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse”;<sup>31</sup> (B) if the marriage was a sham; or (C) if the marriage involved prostitution or the immoral exploitation of the other spouse.<sup>32</sup>

D. The “Child of Either” Exception to the Husband-Wife Privilege under M.R.E. 504

The leading military case concerning the child of the marriage exception to the husband-wife privilege is *United States v. McCullom*.<sup>33</sup> In *McCullom*, the accused admitted to his wife that he raped her 14-year-old, mentally-retarded sister who lived in the marital home for one month. The military judge strictly construed the exception, and because the victim was not a child of either spouse, the wife’s testimony concerning his admission was excluded.<sup>34</sup>

Under the 2005 Manual, the child of the marriage exception to the husband-wife privilege under M.R.E. 504 will only be applied if the proceeding involves a crime against a child of either spouse.<sup>35</sup> Therefore, if the accused’s spouse had information relating to a crime against a child that was not the child of either spouse, the privilege would take effect and bar that testimony. In proceedings where one spouse is accused of sexually assaulting or otherwise abusing a child not of the marriage, the testimony of the other spouse is invaluable and may be critical to the determination of guilt or innocence.

In *McCullom*, the Court of Appeals for the Armed Forces (CAAF) was asked to broaden the exception to include a “de facto” child, “or a child who is under the care or custody of one of the spouses, regardless of the existence of a formal legal parent-child relationship.”<sup>36</sup> The court strictly construed the phrase “child of either” and declined to

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<sup>31</sup> MCM, *supra* note 7, MIL. R. EVID. 504(c)(2)(A) (emphasis added). The CAAF has recently broadened the crime against the spouse component of Rule 504(c)(2)(A) as well. In *United States v. Taylor*, 64 M.J. 416 (2007), the CAAF held that adultery is a crime against the spouse and therefore falls within the exception to the husband-wife privilege. As a result of *Taylor*, in crimes involving adultery, spousal testimony will be available despite the common law privilege.

<sup>32</sup> MCM, *supra* note 7, MIL. R. EVID. 504(c)(2)(B) & (C).

<sup>33</sup> *United States v. McCullom*, 58 M.J. 323 (2003).

<sup>34</sup> *United States v. McCullom*, 56 M.J. 837, 841 (A.F. Ct. Crim. App. 2002). Later communications by the accused to his wife concerning the potential pregnancy of the victim were admissible because the military judge found them to be within another exception to the marital communications privilege dealing with communications meant to be heard by third parties. *Id.* at 841-43.

<sup>35</sup> *McCullom*, 58 M.J. 323, 340 (2003).

<sup>36</sup> *Id.*

extend the exception to any child other than the biological or legal child of the communicating spouses.<sup>37</sup> Specifically, the court held that an “expansive interpretation of the phrase ‘child of either’ finds little support in the federal civilian system or common law.”<sup>38</sup> The court suggested that a decision to depart from the exception, as written, would be better suited for the “political and policy-making elements of the government.”<sup>39</sup>

### III. ANALYSIS

#### A. Growing Trend among Jurisdictions Expanded the Child of the Marriage Exception

Around the time of the *McCullom* decision there was a growing trend among both federal and state jurisdictions to expand the child of the marriage exception in child abuse cases.<sup>40</sup> Along with one federal

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<sup>37</sup> *Id.* at 340-42. The court relied on Military Rule of Evidence 101(b) in declining to read more into the language of Military Rule of Evidence 504(c)(2). *Id.* Military Rule of Evidence 101(b) provides:

*If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the Uniform Code of Military Justice or this Manual, courts-martial shall apply:*

- (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts; and
- (2) Second, when not inconsistent with subdivision (b)(1), the rules of evidence at common law.

(c) Rule of construction. Except as otherwise provided in these rules, the term ‘military judge’ includes the president of a special court-martial without a military judge and a summary court-martial officer.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(b) (2002) (emphasis added).

<sup>38</sup> *McCullom*, 58 M.J. at 341.

<sup>39</sup> *Id.* at 342.

<sup>40</sup> *See id.* at 341 (citing FED. R. EVID. 501, *United States v. Bahe*, 128 F.3d 1440, 1445-46 (10th Cir. 1997), *Huddleston v. State*, 997 S.W.2d 319, 321 (Tex. Ct. App. 1999), *Dunn v. Superior Court*, 26 Cal. Rptr. 2d 365, 367-68 (Cal. Ct. App. 1993), *State v. Michels*, 414 N.W.2d 311, 315-16 (Wis. Ct. App. 1987), and *Daniels v. State*, 681 P.2d 341, 345 (Alaska Ct. App. 1984)). *But see* *United States v. Jarvison*, 409 F.3d 1221, 1232 (10th Cir. 2005) (declining to establish a spousal privilege exception which would *compel* spousal testimony in child abuse cases, rather than just allow it). Indeed, within the military justice system, there is a recent trend to further chisel away from the common law husband-wife privileges by broadening the exceptions. *See United States v. Taylor*, 64 M.J. 416, 420 (2007) (broadening the crime against spouse exception to the husband-wife privilege under M.R.E. 504(c)(2)(A) by holding that “adultery is a crime against the person of the other spouse.”)

circuit, thirty-three state jurisdictions and the District of Columbia<sup>41</sup> have expanded the child of the marriage exception beyond the limited language found in M.R.E. 504(c)(2). These jurisdictions have broadened the exception, by statute or case law, to cover crimes against any child or person residing in the home.<sup>42</sup> The recent trend of states

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<sup>41</sup> See D.C. Code § 22-3024 (2007) (“Laws attaching a privilege against disclosure of communications between spouses or domestic partners are inapplicable in prosecutions under Title II where the defendant is or was married to the victim, or is or was a domestic partner of the victim, or where the victim is a child.”)

<sup>42</sup> ALA. R. EVID. 504(d)(3) (no privilege “[i]n a criminal action or proceeding in which one spouse is charged with a crime against . . . a person residing in the household of either”); ARK. R. EVID. 504(d)(3) (no privilege “in a criminal action or proceeding in which one spouse is charged with a crime against . . . a person residing in the household of either”); COLO. REV. STAT. § 18-3-411(5) (2006) (eliminating privilege in cases involving sexual offenses, including sexual offenses against children); CONN. GEN. STAT. § 46b-129a (2007) (eliminating the privilege in all child abuse cases); DEL. R. EVID. 504(d)(3) (“no privilege . . . in a proceeding in which 1 spouse is charged with a wrong against . . . a person residing in the household”); GA. CODE ANN. § 24-9-23 (2007) (no privilege in crimes against any minor child); HAW. R. EVID. 505(c)(1)(C) (“no privilege . . . in proceedings in which one spouse is charged with a crime against . . . a third person residing in the household”); ID. R. EVID. 504(d)(1) (eliminating privilege in all child abuse cases); KY. R. EVID. 504(c)(2)(C) (no privilege in “any proceeding in which one spouse is charged with wrongful conduct against . . . [a]n individual residing in the household”); LA. REV. STAT. ANN. § 14:403(B) (2007) (eliminating privilege in child abuse cases); ME. R. EVID. 504(d) (“no privilege . . . in a proceeding in which one spouse is charged with a crime against . . . any person residing in the household”); MD. CODE ANN., CTS. & JUD. PROC. § 9-106(a)(1) (2007) (eliminating the privilege in all child abuse cases); MICH. COMP. LAWS ANN. § 600.2162(c) (2007) (providing an exception to the marital privilege for offenses committed against any person under 18); MINN. STAT. § 595.02(1)(a) (2006) (eliminating the privilege in cases involving crimes against any child under the care of either spouse); MISS. R. EVID. 504(d)(1) (“no privilege . . . in a proceeding in which one spouse is charged with a crime against . . . any minor child”); MO. REV. STAT. § 546.260(2) (2007) (eliminating privilege in crimes against any minor); NEV. REV. STAT. § 49.295(2)(e)(2) (2007) (eliminating the privilege if the crime is against “a child in the custody or control of either spouse”); N.J. STAT. ANN. 2A:84A-17 (2007) (eliminating the privilege in cases where the crime is against a “child to whom the accused or the spouse stands in the place of a parent”); N.Y. FAM. CT. ACT. § 1046(a)(vii) (2007) (eliminating the privilege in proceedings for child abuse or neglect); N.D. R. EVID. 504 (“no privilege . . . in a proceeding in which one spouse is charged with a crime against . . . a person residing in the household”); OKLA. STAT. ANN. tit. 12, § 2504 (2007) (“no privilege . . . in a proceeding in which one spouse is charged with a crime against . . . a person residing in the household”); 42 PA. CONS. STAT. ANN. § 5913 (2006) (providing exception to privilege “in any criminal proceeding against either [spouse] for bodily injury or violence attempted, done or threatened upon . . . any minor child in [the] care or custody [of either spouse]”); 23 PA. CONS. STAT. ANN. § 6381 (2006) (eliminating privilege in child abuse cases); TENN. CODE ANN. § 24-1-201 (2007) (“privilege shall not apply to proceedings concerning abuse of . . . a minor in the custody of or under the dominion and control of either spouse”); UTAH R. EVID. 502(b)(4)(C)(iii) (no privilege “[i]n a proceeding in which one spouse is charged with a crime . . . against . . . a person residing in the household”); VT. R. EVID. 504(d)(3) (“no privilege . . . in a proceeding in which one spouse is charged with a crime . . . against . . . a person residing in the household”); VA. CODE ANN. § 19.2-271.2 (2007) (providing exception to the privilege in crimes where a minor is the victim); WASH. REV.



expanding the common-law exception to cover cases where *any* child is abused is based on the common understanding that the welfare of a child should take precedence over marital privilege. In *Ludwig v. State*,<sup>43</sup> for example, the Texas Court of Criminal Appeals interpreted the child of the marriage exception to marital privilege to apply in *any* crime against *any* child.<sup>44</sup>

In 1975, in *United States v. Allery*,<sup>45</sup> the Eighth Circuit created an exception to the marital communication privilege for crimes committed against “a child of either spouse” because “reason and experience” demanded such a result.<sup>46</sup> Citing *Allery*, as well as the

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CODE. § 5.60.060(1) (2007) (providing exception to privilege where either spouse is considered guardian of victim); WYO. STAT. ANN. § 14-3-210 (2007) (eliminating privilege in child abuse cases); *Bahe*, 128 F.3d at 1445 (expanding the child of the marriage exception to the marital communications privilege to cover any minor child within the household); *State v. Salzman*, 679 P.2d 544, 546 (Ariz. Ct. App. 1984) (explaining how ARIZ. REV. STAT. § 13-3620 eliminates the privilege in all child abuse cases); *People v. Eveans*, 660 N.E.2d 240, 246-47 (Ill. Ct. App. 1996) (explaining how the Illinois legislature “broadened the scope of the child interest exception to include the interests not only of the children of the testifying and accused spouses, but also the interests of *any* children in their care, custody or control” and that the “State has a compelling interest in child welfare . . . so the child interest exception should be construed broadly to afford the greatest protection to children rather than to the abusive or murderous spouse”) (citation omitted) (emphasis in original); *State v. Johnson*, 318 N.W.2d 417, 439 (Iowa 1982) (explaining how IOWA CODE § 232.74 eliminates the privilege in all cases involving child abuse); *Villalta v. Commonwealth*, 702 N.E.2d 1148, 1152 (Mass. 1998) (explaining how MASS. GEN. LAWS. ANN. ch. 233, § 20 eliminates the privilege in proceedings involving abuse of any child because there is “no logical reason . . . to deny the spousal privilege when a young victim of abuse is a child of one or both spouses (or other child closely related by consanguinity) but to perpetuate the privilege when the young victim is related to neither spouse. The abuse is the same. Society’s interest in convicting and punishing one who commits child abuse is the same.”); *Huddleston*, 997 S.W.2d at 321 (holding that TEX. CRIM. PROC. CODE ANN. art. 38.10 provides an exception to the privilege where a person is charged with a crime against any minor child, regardless of whether the child is a child of one of the spouses); *State v. Modest*, 944 P.2d 417, 421 (Wash. Ct. App. 1997) (holding that the guardianship exception to the marital privilege applies “when any spouse acts in loco parentis, meaning when he or she assumes the parental character or discharges parental duties, even if for a very short time”) (citation omitted); *State v. Wood*, 758 P.2d 530, 533 (Wash. Ct. App. 1988) (interpreting liberally the term “guardian” from marital privilege exception in order to punish child abusers and protect children from further mistreatment); *State v. McKinney*, 747 P.2d 1113, 1118 (Wash. Ct. App. 1987) (allowing wife to testify against her husband under the guardian exception to the marital privilege where victim was molested during sleepover); *State v. Waleczek*, 585 P.2d 797, 800 (Wash. 1978) (finding requisite guardianship for purposes of exception to marital privilege where couple invited child to sleepover and voluntarily undertook duties normally characterized as parental).

<sup>43</sup> 931 S.W.2d 239 (Tex. Crim. App. 1996).

<sup>44</sup> *Id.* at 244.

<sup>45</sup> 526 F.2d 1362 (8<sup>th</sup> Cir. 1975).

<sup>46</sup> *Id.* at 1366-67 (“Federal courts [have] the right and the responsibility to examine the policies behind the federal common law privileges and to alter or amend them when

growing number of states that had broadened the exception, the Tenth Circuit in *United States v. Bahe*<sup>47</sup> exercised the “reason and experience” granted to them by Federal Rule of Evidence 501 and created an “exception to the marital communications privilege for spousal testimony relating to the abuse of a minor child within the household.”<sup>48</sup> The court stated:

We see no significant difference, as a policy matter, between a crime against a child of the married couple, against a stepchild living in the home or, as here, against an eleven-year-old relative visiting in the home. Child abuse is a horrendous crime. It generally occurs in the home . . . and is often covered up by the innocence of small children and by threats against disclosure. It would be unconscionable to permit a privilege grounded on promoting communications of trust and love between marriage partners to prevent a properly outraged spouse with knowledge from testifying against the perpetrator of such a crime.<sup>49</sup>

#### B. The Call to Expand the “Child of Either” Exception in the Military Courts

Military courts in the past have also created exceptions to the spousal privileges under the Military Rules of Evidence where such exceptions were not expressly provided within the text of the rules. In *United States v. Smith*,<sup>50</sup> the Air Force Court of Military Review held

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‘reason and experience’ so demand.”) *Allery* provided five reasons for expanding the common-law exception to cover child abuse cases:

- (1) a serious crime against a child is an offense against the family harmony, which the privilege purportedly protects;
- (2) parental testimony is necessary in prosecutions for child abuse;
- (3) any rule that impedes the discovery of truth impedes as well the doing of justice;
- (4) several state courts had recognized such an exception; and
- (5) eleven states had recently passed statutes making the privilege inapplicable in cases of child abuse and neglect.

*Id.*; see Damon A. King, *Competency of One Spouse to Testify Against Other in Prosecution for Offense Against Child of Both or Either or Neither*, 119 A.L.R. 5th 275 (2007). “‘Reason and experience’ dictate that the marital communications privilege should not apply to statements relating to a crime where the victim is a minor child.” *United States v. Martinez*, 44 F. Supp.2d 835, 837 (W.D. Tex. 1999).

<sup>47</sup> 128 F.3d 1440 (10th Cir. 1997).

<sup>48</sup> *Id.* at 1446.

<sup>49</sup> *Id.* (citations omitted).

<sup>50</sup> 30 M.J. 1022 (A.F.C.M.R. 1990).

that the Federal common-law exception to the marital communications privilege for communications between spouses voluntarily participating in a joint criminal venture could be applied to trials by court-martial.<sup>51</sup> The court found that under M.R.E. 501(a)(4), that federal exception to the privilege was “generally recognized in the trial of criminal cases in federal courts under Federal Rule of Evidence 501” and that the application of the exception “in trials by courts-martial is practicable and not contrary to or inconsistent” with the Manual.<sup>52</sup>

Military courts are permitted to recognize privileges, and their exceptions, if they are provided within the “principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence.”<sup>53</sup> Federal Rule of Evidence 501 specifically states that “the privilege of a . . . person . . . shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.”<sup>54</sup>

In enacting Federal Rule of Evidence 501, “Congress manifested an affirmative intention not to freeze the law of privilege[, but] . . . rather . . . to ‘provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.’”<sup>55</sup> Therefore, the intent of Federal Rule of Evidence 501 was not to limit the number and type of privileges;<sup>56</sup> rather, the Rule dictates that common law, through reason and experience, will determine the law of privilege in criminal cases.<sup>57</sup> The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges.<sup>58</sup> Likewise, the drafters of the Military Rules of Evidence intended for the rules to be changed and developed “as society and law change” to ensure that the military justice system remains “at the forefront of criminal justice in the United States.”<sup>59</sup>

The first time a military appellate court was asked to address the issue of the “child of the marriage” exception to the husband-wife privilege was in *United States v. McElhaney*.<sup>60</sup> The Air Force Court of Criminal Appeals recognized a gap in the exception to the privilege in

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<sup>51</sup> *Id.* at 1025.

<sup>52</sup> *Id.* at 1025-26.

<sup>53</sup> MCM, *supra* note 7, MIL. R. EVID. 501(a)(4).

<sup>54</sup> FED. R. EVID. 501.

<sup>55</sup> *Trammel v. United States*, 445 U.S. 40, 47 (1980) (citation omitted).

<sup>56</sup> MCCORMICK ON EVIDENCE § 76.1 (3rd ed. 1984).

<sup>57</sup> *United States v. Mackey*, 405 F. Supp. 854 (E.D.N.Y. 1975).

<sup>58</sup> *See* FED. R. EVID. 501 (stating federal criminal trials shall be “governed by the principles of the common law as they may be interpreted . . . in the light of reason and experience”).

<sup>59</sup> Lieutenant Colonel Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 39 (Fall 1990).

<sup>60</sup> *United States v. McElhaney*, 50 M.J. 819 (A.F. Ct. Crim. App. 1999).

that it failed to cover children for whom the parents were only guardians or otherwise stood *in loco parentis*.<sup>61</sup> On appeal to the CAAF, Judge Sullivan proposed creating a *de facto* child exception under M.R.E. 504(c)(2)(A), but to no avail.<sup>62</sup> Judge Sullivan opined that “[i]t is a crime against the marriage for one spouse to molest the other spouse’s child, even though the alleged victim was neither a marital nor adopted child of either spouse.”<sup>63</sup> Unfortunately, the majority of the court was not persuaded and did not create the additional exception to the privilege Judge Sullivan advocated.

Almost three years later, the CAAF again addressed the issue in *McCullom*.<sup>64</sup> Not persuaded by the growing trend among the states, the *McCullom* court declined to adopt a broad interpretation of the child of the marriage exception to the marital communications privilege. The court determined that the language “child of either [spouse]” suggested a “formal legal parent-child relationship,” and would not extend the exception in crimes against *any* child.<sup>65</sup> In interpreting the language of M.R.E. 504(c)(2)(A), Judge Baker found

It is possible to read the phrase “child of either” to suggest a custodial relationship, in addition to a legal or biological relationship where, for example, a child is placed under the long-term care of another without legal ratification. A child placed under the long-term care of a grandparent or other relative during an extended deployment might establish a sufficient sense of “belonging” to qualify as a *de facto* child of the guardian.<sup>66</sup>

However, the court went on to strictly interpret the language under the rule and declined the opportunity to expand the privilege beyond the biological or legal children of either spouse.<sup>67</sup> In doing so, the court appealed to the President and the drafters of the Manual to confront the issue by broadening the language:

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<sup>61</sup> *Id.* at 830 n.6.

<sup>62</sup> *United States v. McElhaney*, 54 M.J. 120, 137 (2000) (Sullivan, J., concurring in part and dissenting in part).

<sup>63</sup> *Id.* In *McElhaney*, the accused had an ongoing sexual relationship with a child who was his wife’s niece. *Id.* at 123. The accused sought to preclude his wife’s testimony concerning statements he made about the illicit relationship. *Id.* at 131. The Air Force Court of Criminal Appeals held that the testimony was admissible based on an alternative exception dealing with disclosure of marital communications to third parties. *Id.*

<sup>64</sup> *United States v. McCollum*, 58 M.J. 323 (2003)

<sup>65</sup> *Id.* at 340.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

[T]he President could have drafted a fuller, more expansive definition to connote a custodial as well as legal or biological relationship. Given the significant social and legal policy implications of extending the privilege with respect to custodial relationships with children, we would expect such an intent to be represented in express language, rather than pressed or squeezed from the present text.

...

Whether a de facto child exception to the marital communications privilege should apply to courts-martial is a legal policy question best addressed by the political and policy-making elements of the government.<sup>68</sup>

### C. Expanding the Exception through Presidential Executive Order

The Supreme Court has recognized that “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim.”<sup>69</sup> Although premised on the desire to preserve marital harmony, the marital communications privilege often serves as an impediment to the prosecution of child abusers when it precludes one spouse from testifying against the other concerning such abuse.<sup>70</sup>

The recent trend in the area of privileges is to narrow existing privileges, especially by expanding any exceptions to those privileges. When making a decision whether to recognize an exception to a particular privilege, the courts generally balance the value of the privilege with the societal cost of recognizing the privilege.<sup>71</sup>

The general policy behind the marital communications privilege is to promote family peace and harmony by not having one spouse testify against another; however, the privilege must yield to the policy of

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<sup>68</sup> *Id.* at 340-42.

<sup>69</sup> *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

<sup>70</sup> *See, e.g., United States v. Allery*, 526 F.2d 1362 (8th Cir. 1975) (describing the policy behind privilege is necessary to foster family peace, not only for the benefit of the family, but for the benefit of the public as well).

<sup>71</sup> Connor, *supra* note 28, at 146.

preventing child abuse.<sup>72</sup> The CAAF has held that the “martial privilege has no constitutional source and is merely a rule of public policy, particular attempted applications of which should succumb to greater public policy operating in the opposite direction.”<sup>73</sup>

There is an immense need to admit all possible evidence in child abuse cases because typically these types of crimes have few witnesses. Often the testimony of the accused’s spouse is all that exists in order to corroborate a child victim’s testimony or other evidence in the case, such as an accused’s confession. Without such corroborating evidence, child victims often do not come forward; and there is grave danger to the public if these offenders are permitted to remain at large.

In *McCullom*, the majority opinion acknowledged the following:

[T]here are good policy justifications for expanding the exception to the privilege to include a de facto child, particularly in the military. Due to deployments and single parenthood, children of military personnel are often cared for by grandparents, siblings, aunts or uncles, or friends. We also recognize that many children are abused in homes that are not their own. Moreover, we are aware that there are a myriad of child-raising scenarios in today’s society, often necessitating daycare or less formal means of supervising children. Children in these situations should receive no less protection from abuse than they receive in their own homes. One could also argue that the marital communications privilege – a privilege intended to promote marital harmony – should not prevent “a properly outraged spouse with knowledge from testifying against the perpetrator” of child abuse within the home, regardless of whether the child is part of that family. . . . In any event, *it is the responsibility of the political elements of government to balance these competing considerations in law.*<sup>74</sup>

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<sup>72</sup> See *United States v. McElhaney*, 54 M.J. 120, 137 (2000) (Sullivan J., concurring in part and dissenting in part) (“It is a crime against the marriage for one spouse to molest the other spouse’s child, even though the alleged victim was neither a marital nor adopted child of either spouse.”) See also *United States v. Taylor*, 64 M.J. 416, 420 (2007) (holding that adultery falls within the crime against spouse exception under M.R.E. 504(c)(2)(A)).

<sup>73</sup> *United States v. Menchaca*, 48 C.M.R. 538, 540 (C.M.A. 1974).

<sup>74</sup> *United States v. McCollum*, 58 M.J. 323, 342 n.6 (quoting *United States v. Bahe*, 128 F.3d 1440, 1446 (10th Cir. 1997)) (emphasis added).

Legal scholars had suggested it was time to further broaden the child of the marriage exception to include crimes against *any* child in the custody or control of either spouse, even if for only a short period of time.<sup>75</sup>

The Military Justice System, though substantially similar to the civilian criminal justice system, does not allow a spouse to testify to confidential communications unless the communication is about an offense committed against the spouse or “a child of either spouse.” This limited exception does not meet the purpose of such an exception: the protection of children from abuse in the home. The current trend in the area of privileges is to broadly expand the exceptions to the marital privileges. An exception to the marital privileges covering minor children over whom a spouse is guardian or in *loco parentis* would meet this goal and would help servicemembers effectively perform their military duties while deployed because they would have an increased belief in the security of their children.<sup>76</sup>

The child of the marriage exception to the marital communications privilege, as it was construed in *McCollum*, was no longer “compatible with the needs of the military service, in which, especially overseas, large groups of military personnel and their dependents live in closely knit communities. In these communities and generally in military life, child beating and child molestation . . . cannot be tolerated and certainly should not be facilitated by a rule of evidence . . . .”<sup>77</sup> The need for valuable evidence in child abuse cases outweighs any need to bolster marital harmony, and therefore the new M.R.E. 504(d) expands the exception to the marital privilege to crimes against any child.<sup>78</sup>

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<sup>75</sup> See *id.* at 344 (Crawford, J., concurring) (calling for de facto child status for child rape victim so that the exception to the marital communications privilege, MIL. R. EVID. 504(c)(2)(A), would apply); *McElhane*, 54 M.J. at 136 (Sullivan, J., concurring in part and dissenting in part) (calling for a broader exception under MIL. R. EVID. 504(c)(2)(A) to include a de facto child); *United States v. McCarty*, 45 M.J. 334, 336 (1996) (Sullivan, J., concurring) (stating that child victim of sex abuse was a de facto child, triggering the child of the marriage exception to the marital communications privilege, MIL. R. EVID. 504(c)(2)(A)).

<sup>76</sup> Connor, *supra* note 28, at 179-80 (emphasis in original).

<sup>77</sup> *Menchaca*, 48 C.M.R. at 540.

<sup>78</sup> Four fundamental conditions are necessary to establish a privilege over the disclosure of communications:

- (1) The communications must originate in a confidence that they will not be disclosed;

The new subsection broadly defines the term “a child of either” as “a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship.”<sup>79</sup> Further, the proposed amendment broadly defines “child” and “temporary physical custody.” For purposes of the privilege, a child is 1) “an individual under the age of eighteen,” or 2) “an individual with a mental handicap who functions under the age of eighteen.”<sup>80</sup> Temporary physical custody includes any situation where a parent “entrusts his or her child with another.”<sup>81</sup> The new Rule explains:

There is no minimum amount of time necessary to establish temporary physical custody nor must there be a written agreement. Rather, the focus is on the parent’s agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.<sup>82</sup>

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- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
  - (3) The relation must be one which in the opinion of the community ought to be sedulously fostered;
  - (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

CARLSON ET AL., *supra* note 9, at 168 (citing 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961)).

<sup>79</sup> Manual for Courts-Martial; Proposed Amendments, 71 Fed. Reg. 45780, 45782 (proposed Aug. 10, 2006).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* The full text of the proposed subsection (d) to Military Rule of Evidence 504 reads as follows:

M.R.E. 504 is amended by inserting new subsection (d) after M.R.E. 504(c):

[(d) Definitions. As used in this rule:

(1) The term “a child of either” includes not only a biological child, adopted child, or ward of one of the spouses but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is: (i) an



The proposed Analysis to the rule change plainly states the purpose of the new subsection: “to afford additional protection to children.”<sup>83</sup> The Analysis further acknowledges, as various courts and commentators had previously observed, that the “distinction between legal and ‘de facto’ children resulted in unwarranted discrimination among child victims and ran counter to the public policy of protecting children.”<sup>84</sup>

Thus the new Rule implicitly recognizes the social objective furthered by effectively prosecuting child abusers and child molesters is greater than the antiquated notions that the privilege is needed to

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individual under the age of eighteen; or (ii) an individual with a mental handicap who functions under the age of eighteen.

(2) The term “temporary physical custody” includes instances where a parent entrusts his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody nor must there be a written agreement. Rather, the focus is on the parent’s agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.

*Id.*

<sup>83</sup> *Id.* at 45795.

<sup>84</sup> *Id.* The full text of the proposed Analysis reads:

Rule 504(d) modifies the rule and is intended to afford additional protection to children. Previously, the term “a child of either,” referenced in Rule 504(c)(2)(A), did not include a “de facto” child or a child who is under the physical custody of one of the spouses but lacks a formal legal parent-child relationship with at least one of the spouses . . . . Prior to this amendment, an accused could not invoke the spousal privilege to prevent disclosure of communications regarding crimes committed against a child with whom he or his spouse had a formal, legal parent-child relationship; however, the accused could invoke the privilege to prevent disclosure of communications where there was not a formal, legal parent-child relationship. This distinction between legal and “de facto” children resulted in unwarranted discrimination among child victims and ran counter to the public policy of protecting children. Rule 504(d) recognizes the public policy of protecting children by addressing disparate treatment among child victims entrusted to another. The “marital communications privilege \* \* \* should not prevent ‘a properly outraged spouse with knowledge from testifying against a perpetrator’ of child abuse within the home regardless of whether the child is part of that family.”

*Id.* (citations omitted).

promote marital confidences and harmony.<sup>85</sup> The importance of such confidences and harmony pales in comparison to the importance of protecting a child – whether a child of either spouse or not.<sup>86</sup> In such cases, there is a far greater need in our society today for the otherwise unobtainable spousal testimony which is critical to the prosecution of child abusers.

#### IV. CONCLUSION.

The majority of states, some military judges,<sup>87</sup> and other legal scholars have called for the President to broaden this exception in order to provide children, and not the abusive spouse, the greatest amount of protection possible. This is especially paramount in the military considering the unique interdependence among military families.<sup>88</sup> The

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<sup>85</sup> MCCORMICK ON EVIDENCE § 86 (3<sup>rd</sup> ed. 1984) (“[T]he argument traditionally advanced in support of the marital communications privilege is that the privilege is needed to encourage martial confidences, which confidences in turn promote harmony between husband and wife.”)

<sup>86</sup> *Id.* (“Accordingly, we must conclude that, while the danger of injustice from suppression of relevant proof is clear and certain, the probable benefits of the rule of privilege in encouraging marital confidences and wedded harmony is at best doubtful and marginal.”)

<sup>87</sup> *United States v. Bridges*, 58 M.J. 540, 547-48 (C.G. Ct. Crim. App. 2003) (citing *United States v. McCarty*, 45 M.J. 334, 336 (1996)). In a concurring opinion in *McCarty*, Judge Sullivan called for a broader interpretation of Military Rule of Evidence 504(c)(2)(A) to cover a niece who lived with the accused. *McCarty*, 45 M.J. at 336; see *United States v. McCollum*, 58 M.J. 323, 344 (2003) (Crawford, J., concurring) (calling for de facto child status for child rape victim so that the exception to the marital communications privilege, MIL. R. EVID. 504(c)(2)(A), would apply); *United States v. McElhaney*, 54 M.J. 120, 136 (2000) (Sullivan, J., concurring in part and dissenting in part) (calling for a broader exception under MIL. R. EVID. 504(c)(2)(A) to include a de facto child).

<sup>88</sup> The military justice system in general has a compelling interest in child welfare, and therefore the child of the marriage exception to the marital communications privilege should be construed broadly in order to afford the greatest protection to children rather than the abusive spouse.

Perhaps the most persuasive argument for [broadening the exception] is the nature of military life. The military requires single parents and dual military families, those families with both parents in the military, to establish Family Care Plans on an annual basis. A Family Care Plan is the means by which a servicemember arranges for the care of his or her dependents, so that the servicemember is available for duty wherever and whenever military needs dictate, without the interference of family responsibilities. In essence, this means that the military requires, as part of military readiness, that servicemembers name someone they trust as a guardian for their child or children, so the servicemember can leave on a moment's notice. As a result, the military has created a special community of children who are residing in homes where the child is no longer “a child of either spouse.” Because this requirement is based on the

drafters of the Manual have answered the call with the new M.R.E. 504(d).

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military's need for servicemembers to be able to entirely devote themselves to their military responsibilities, the military should extend the exception to the marital privilege to protect such children. This additional protection for children would help reduce any fears of servicemembers that their child could be subject to abuse without the perpetrator being prosecuted simply because a spouse is ineligible to testify. Ideally, servicemembers are able to trust that whomever they have entrusted with their children would treat the children as if they were family. However, given the current statistics of child abuse and neglect, a servicemember can still reasonably fear for the safety of his or her children.

Connor, *supra* note 28, at 169; *see also* Troxel v. Granville, 530 U.S. 57, 63-64 (2000) (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household . . . [u]nderstandably, in . . . single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing.”)

PUTATIVE FATHER REGISTRY DEADLINES AND THE  
SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

ERIK L. SMITH

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## I. INTRODUCTION

Your client is an unwed military servicemember stationed overseas. A month after deployment, the service member's ex-girlfriend told him she was pregnant and needed money for pre-natal bills. For a few months, the servicemember complied. The servicemember then realized he did not actually know a pregnancy existed or how his support money was being spent. He demanded proof of the pregnancy or of the pre-birth expenses and, until he received these, he would send no money. The ex-girlfriend refused to send him information and told him that if he did not send support, she would place the child for adoption. The servicemember told her he opposed adoption and wanted to see the bills. The ex-girlfriend did not comply. For the next few months the servicemember sent no support, but repeatedly asked for evidence. Later, the mother called the servicemember and told him the child had been adopted.

Under your state's adoption act, an unwed father has a right to notice of, and to veto, the adoption of his child only if he paid for pre-birth expenses to the best of his ability and filed with the state's putative father registry (PFR) before the mother surrendered the child. The adoption petitioner responds to your client's intervention by arguing the following: Your client had no right to notice because he did not file with the PFR. That the mother did not keep your client informed is irrelevant because she had no duty even to tell him she was pregnant, much less to send him information. Moreover, your client could have ameliorated any deception by filing with the PFR. He could easily have registered during the pregnancy despite being in the service. The support your client sent to the mother did not waive the requirement to register. Nor was his failure to register excused by military service because he never had a vested right. Your client shirked his obligation, and he has no recourse because the adoption is complete. Is the petitioner's argument correct?

This article analyzes how courts may apply the Servicemembers' Civil Relief Act (SCRA) to PFR deadlines when servicemembers contest adoptions of their children born out of wedlock. Section II discusses adoption law in the context of unwed fathers and the general application of PFRs. Section III discusses the applicable portion of the SCRA and predicts how the Act will apply to servicemembers given the lack of direct precedent so far, including the applicability of the common law doctrines of laches, constructive notice, and developed relationship.

## II. ADOPTION LAW

### A. Presumed and Putative Fathers

Adoption law recognizes two general classes of fathers: presumed and putative. Presumed fathers are men married to the mother when the child was conceived or born, named as the father by the mother, or otherwise given presumptive status as fathers under the law.<sup>1</sup> All other fathers are putative.<sup>2</sup>

Presumed fathers have a constitutional right to notice of adoption proceedings affecting their child.<sup>3</sup> Putative fathers, in contrast, must preserve their notice right by taking action under state statutes. That might include establishing paternity, developing a personal and financial relationship with the child, or appearing on the birth certificate.<sup>4</sup> Until then, the putative father's notice right remains only an "opportunity."<sup>5</sup> Constitutional principles require that the state's methods for grasping that opportunity be within the putative father's control.<sup>6</sup>

### B. Putative Father Registries

Because achieving presumed status may not, in fact, be within a father's control, most states have enacted some form of putative father registry. A PFR is a registry of men who want to be notified of an adoption proceeding involving a child they have, or may have, fathered.<sup>7</sup> Thus, PFRs list men who (1) file a document with a state agency (2) by a certain time (3) to establish a recognizable interest in (4) a particular child. PFRs vary in what the father claims by filing, the period of time during which he may register, and the interest that filing establishes.<sup>8</sup> Depending on the

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<sup>1</sup> See Adoption.com, Adoption Glossary, <http://glossary.adoption.com/presumed-father.html> (last visited June 18, 2007).

<sup>2</sup> See Adoption.com, Adoption Glossary, <http://glossary.adoption.com/putative-father.html> (last visited June 18, 2007).

<sup>3</sup> *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

<sup>4</sup> See, e.g., N.Y. DOM. REL. LAW § 111-a.2.(a-h) (2007); OHIO REV. CODE ANN. § 3107.01(H) (LexisNexis 2007).

<sup>5</sup> *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

<sup>6</sup> See *id.* at 264.

<sup>7</sup> See Adoption.com, Adoption Glossary, <http://glossary.adoption.com/putative-father-registry.html> (last visited June 18, 2007).

<sup>8</sup> See, e.g., FLA STAT. § 63.054 (the putative father must file a paternity claim with the PFR no later than the date a petition for termination of parental rights is filed); OHIO REV. CODE ANN. §§ 3107.062, 3107.064(B) (2007) (the putative father must register no later than thirty days after the child's birth, and the PFR need not be searched where, *inter alia*, the mother was married when the child was born or the child's paternity has been determined).

state, filing can be a notice of *possible* paternity, *intent to claim* paternity, or *claim* of paternity.<sup>9</sup> Filing deadlines can be a set number of days after the child's birth, or the date of certain actions by third parties, such as the date of the consent, surrender, placement, petition, or adoption order. The interest established by timely registration can range from the right to notice of any adoption proceeding in the state involving the child<sup>10</sup> to the right to notice of an adoption proceeding where no presumed father exists.<sup>11</sup> A determination of non-paternity eliminates the registrant's standing. To secure the early permanence required in adoptions, PFR filing deadlines are strict. Most states make no exceptions, and failure to register is usually fatal to the father.<sup>12</sup> No federal registry yet exists.<sup>13</sup>

Registration gives a putative father the right only to receive notice of the petition, not to veto the adoption. Absent obvious unfitness, the need for a registered putative father's *consent* typically depends on whether he sufficiently supported or cared for the mother before the child was surrendered or placed.<sup>14</sup>

The main criticism of PFRs is that men remain unaware of them absent specific research, or adequate promotion, of the law. Still, PFRs are facially constitutional and, so far, constitutional as applied unless unfair time constraints or the mother's interstate travel thwarted the father's effort to assert parental rights.<sup>15</sup> Also, due process under the United States Constitution does not appear to require a mother to tell a putative father about a pregnancy or birth,

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<sup>9</sup> Compare Ohio Dep't of Job and Family Services, JFS 01694, Application for Search of Ohio Putative Father Registry (Sept. 2003), *available at* <http://www.odjfs.state.oh.us/forms/results1.asp> (last visited July 3, 2007) (enabling a man to be notified of an adoption proceeding involving a child of whom he may be the father) with Florida Dep't of Health, DH 1964, Florida Putative Father Registry Claim of Paternity (Oct. 2003), *available at* [http://www.doh.state.fl.us/planning\\_eval/vital\\_statistics/DH\\_1965\\_Putative\\_Father\\_Claim\\_of\\_Paternity\\_App\\_interactive.pdf](http://www.doh.state.fl.us/planning_eval/vital_statistics/DH_1965_Putative_Father_Claim_of_Paternity_App_interactive.pdf) (last visited July 3, 2007) (requiring the registrant to assert a binding claim of parentage, unless revoked later).

<sup>10</sup> See *Lehr v. Robertson*, 463 U.S. 248, 250-51 (1983) (citing New York law).

<sup>11</sup> See, e.g., OHIO REV. CODE ANN. § 3107.064 (2007).

<sup>12</sup> See, e.g., *Heidbreder v. Carton*, 645 N.W.2d 355, 377 (Minn. 2002).

<sup>13</sup> As of June 18, 2007.

<sup>14</sup> See, e.g., OHIO REV. CODE ANN. § 3107.07(b) (2007).

<sup>15</sup> See, e.g., *In re Adoption of Baby Boy Doe*, 717 P.2d 686, 690-91 (Utah 1986) (finding putative father, an out-of-state resident, could not realistically comply with the paternity claim deadline because the baby was born early, the father was traveling out of state when the surrender occurred, and the mother misled the father about her plan to surrender the child in Utah); *In re K.B.E.*, 740 P.2d 292, 296 (Utah Ct. App. 1987) (excluding the already present and identified putative father simply because he filed a few hours after the adoption petition was filed opposed fundamental fairness).

or to reveal a putative father to the court.<sup>16</sup> Some state schemes leave the mother implicitly free to lie to the father, the agency, or the court.<sup>17</sup> PFRs purportedly cure that problem.<sup>18</sup>

### C. The Servicemember's Vulnerability

Deployed servicemembers are especially vulnerable to PFR laws. Given their circumstances, including relatively frequent reassignment and possible deployment overseas, they are more likely than civilian fathers to lack awareness of their paternity. Even when aware of the child, the servicemember may not know about the state's PFR or have ready access to the law. His location and circumstances may logistically keep him from determining paternity or developing a relationship with the child that might override the PFR requirement. Even where the servicemember establishes a financial relationship by sending money to the mother, he risks not getting notice, and therefore defaulting, should he not register.<sup>19</sup> By the time the servicemember discovers the proceeding, the registration deadline will likely have passed. The servicemember will then need to contest or overturn the adoption without having registered timely. Assuming biological fatherhood, his standing will depend initially on whether the SCRA<sup>20</sup> suspended the PFR filing deadline.

## III. THE SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

### A. Section 526(a)

No precedent exists on the SCRA's application to PFR deadlines.<sup>21</sup> The controlling portion of the SCRA is Section

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<sup>16</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Matter of Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992).

<sup>17</sup> See FLA. STAT. § 63.063(2) (2007) (stating fraudulent representation is not a defense to compliance with the adoption act); see also UTAH CODE ANN. § 78-30-4.15(2) (finding that in weighing the competing interests of all those affected by fraud, the unmarried biological father should bear the burden of possible fraud).

<sup>18</sup> See FLA. STAT. § 63.063(3) (2004) ("The Legislature finds no practical way to remove all risk of fraud or misrepresentation in adoption proceedings, and has provided a method for absolute protection of an unmarried biological father's rights by compliance with the provisions of this chapter."); UTAH CODE ANN. § 78-30-4.15(3) (same).

<sup>19</sup> Failure to register may keep the putative father and the adoption petitioner permanently unknown to each other due to the putative father not getting notice of an adoption.

<sup>20</sup> 50 U.S.C. Appx. §§ 501-96 (2007).

<sup>21</sup> As of June 20, 2007.



526(a),<sup>22</sup> which suspends the time for bringing an “action” or “proceeding” in a court, state agency, or governmental department:

The period of a servicemember’s military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember’s heirs, executors, administrators, or assigns.<sup>23</sup>

Like its predecessor the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), the SCRA is “unambiguous, unequivocal, and unlimited,”<sup>24</sup> and always liberally construed to protect the servicemember.<sup>25</sup> The Act aims to “relieve the soldier of the consequences of his handicap in meeting his civil obligations so he can devote his energies to military duties.”<sup>26</sup> No national emergency need exist.<sup>27</sup> All members of the armed forces, including career personnel, receive the Act’s protections.<sup>28</sup> The servicemember qualifies for the time suspension even though he could pursue his rights while serving.<sup>29</sup> Once military service is shown, the limitation period is automatically suspended for the duration of service.<sup>30</sup> Even where the state has a clear policy interest in prompt judicial resolution, the policy must yield to Section 526(a).<sup>31</sup> Being mandatory, Section 526(a) may also be

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<sup>22</sup> Before December 19, 2003, that statute was Section 525 of the Soldiers’ and Sailors’ Civil Relief Act (SSCRA), and substantively equivalent to Section 526(a) of the new Act, Servicemembers Civil Relief Act (SCRA). Thus, cases before that date refer to Section 525 of the SSCRA, Pub. L. No. 76-861, 54 Stat. 1178 (1940).

<sup>23</sup> 50 U.S.C. Appx. § 526(a) (2007).

<sup>24</sup> *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993) (referring to the SSCRA).

<sup>25</sup> *Missouri ex rel. Perry v. Roper*, 168 S.W.3d 577, 585 (Mo. Ct. App. 2005); *see Boone v. Lightner*, 319 U.S. 561, 575 (1943) (referring to the SSCRA).

<sup>26</sup> *Omega Indus., Inc. v. Raffaele*, 894 F. Supp. 1425, 1434 (D. Nev. 1995) (quoting *Patrikes v. J.C.H. Service Stations, Inc.*, 41 N.Y.S.2d 158, 165 (N.Y. Misc. 1943)); *see* 50 U.S.C. Appx. § 502(1) (2007).

<sup>27</sup> *Conroy*, 507 U.S. at 515.

<sup>28</sup> *Id.*

<sup>29</sup> *Ricard v. Birch*, 529 F.2d 214, 217 (4th Cir. 1975) (while there is no immunity from suit, the tolling statute is unconditional); *Trew v. Standard*, 33 So. 2d 426, 429 (La. Ct. App. 1947).

<sup>30</sup> *Ricard*, 529 F.2d at 217. For the definitions of “servicemember,” “military service,” and “period of military service,” *see* 50 U.S.C. Appx. § 511.

<sup>31</sup> *Missouri ex rel. Perry v. Roper*, 168 S.W.3d 577, 586 (Mo. Ct. App. 2005) (citing *Ludwig v. Anspaugh*, 785 S.W.2d 269, 270 (Mo. 1990) (en banc)) (“While Missouri clearly had a policy interest in furthering the prompt settling of estates

raised for the first time on appeal.<sup>32</sup> However, courts will not remand where invoking Section 526(a) would not change the result on the merits.<sup>33</sup>

## B. Application to PFRs

To fall under Section 526(a)'s suspension, then, the PFR requirement must be (1) an action or proceeding (2) brought in a court or governmental department or agency (3) within a time period limited by law.<sup>34</sup> The time period and governmental department elements of Section 526(a) apply to PFRs, which require filing a document with a government agency or court by a certain time. But no court has determined whether a PFR filing requirement is an "action" or "proceeding" under Section 526(a)'s framework. Section 502(2) of the SCRA makes the Act applicable to administrative "transactions" that may adversely affect the servicemember's civil rights during his military service.<sup>35</sup> The SCRA does not define "transaction," but legal dictionaries define transaction as "any activity involving two or more persons."<sup>36</sup>

PFR registration qualifies as an administrative transaction in that it is an activity involving the registrant and the governmental agency, and not engaging in that transaction would adversely affect the servicemember's civil rights. Registration establishes a condition necessary for asserting or protecting a right. That the filing does not affect the servicemember's rights "adversely" is irrelevant because Section 526(a) applies equally to filings that create rights.

For example, the issue in *Calderon v. City of New York*<sup>37</sup> was whether the servicemember, who was suing the City of New York while in military service, complied with the statute requiring one file a "notice of claim" with the City within six months.<sup>38</sup> Untimely filing barred a plaintiff from a remedy for personal injury against the City.<sup>39</sup> In its holding that the SSCRA suspended the

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and in expediting prosecution of will contests, "this salutary policy must give way . . . to the mandatory tolling provisions made by Congress.")

<sup>32</sup> *Ricard*, 529 F.2d at 216; *In re Baby Girl*, 615 N.Y.S.2d 800, 801-02 (N.Y. App. Div. 1994).

<sup>33</sup> *See* *Campbell v. Rockefeller*, 59 A.2d 524, 526 (Conn. 1948) (returning the case to the trial court to invoke the federal statute would have been useless because the final result would not change).

<sup>34</sup> *See* 50 U.S.C. Appx. § 526(a) (2007).

<sup>35</sup> 50 U.S.C. Appx. § 502(2) (2007).

<sup>36</sup> BLACK'S LAW DICTIONARY 632 (new pocket ed. 1996).

<sup>37</sup> 55 N.Y.S.2d 674 (N.Y. Misc. 1945).

<sup>38</sup> *Id.* at 675.

<sup>39</sup> *Id.*

time for filing the claim notice, the court reasoned: “It is entirely immaterial what label or legal designation be applied to the notice of claim, whether it be called a statute of limitation, a condition precedent, or even a ‘circumstance necessary to the creation of such right.’”<sup>40</sup>

In *Murray v. Rogers*,<sup>41</sup> a New Jersey County Court followed *Calderon* in applying Section 526(a) to a notice of intent to claim unsatisfied judgment funds.<sup>42</sup> There, the servicemember was in a car accident while in military service, filed suit, and won a judgment.<sup>43</sup> The servicemember filed a notice of claim for compensation from New Jersey’s Unsatisfied Claim and Judgment Fund Board.<sup>44</sup> The notice constituted an “intention to make a claim” for damages not otherwise collectible, but the law required the applicant to file within ninety days of the accident, a deadline the servicemember missed.<sup>45</sup> Persuaded by *Calderon*, the court ruled that the servicemember’s tardiness in filing did not foreclose his right to apply because the SCRA suspended “any time limitation or barrier of any type” during the servicemember’s military service.<sup>46</sup>

The notice of claim in *Murray* parallels PFR registration. The Judgment Fund statute required prospective claimants to file a notice of intent with a government agency by a certain time to preserve a right to be heard in a speculative proceeding.<sup>47</sup> Similarly, PFRs require one to file a notice of intent or interest with a government agency by a certain time to preserve the right to be heard in a speculative adoption proceeding.<sup>48</sup> Like the situations in *Calderon* and *Murray*, untimely filing waives the putative father’s interest in being heard in that proceeding, should it occur. That the registrant father would be the respondent, and not the petitioner, in the adoption should be irrelevant because Section 526(a) applies to actions brought “by or against” the servicemember.<sup>49</sup> Thus, as Section 526(a) applies to the deadlines for other notices of claims, it should apply to PFR deadlines and excuse servicemembers who fail

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<sup>40</sup> *Id.*

<sup>41</sup> 188 A.2d 47 (N.J. Super. Ct. Law Div. 1962).

<sup>42</sup> *Id.* at 48.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 49; *see also* *Hamp v. City of New York*, 178 N.Y.S.2d 345, 346 (N.Y. Sup. Ct. 1957) (following *Calderon* in concluding that a notice of claim did not differ from a statute of limitation).

<sup>47</sup> *See Murray*, 188 A.2d at 48. The ninety-day deadline would likely run before a plaintiff would actually know that he needed to use the Judgment Fund. *See id.*

<sup>48</sup> Similarly, a putative father often must register before knowing that an adoption petition will be filed.

<sup>49</sup> 50 U.S.C. Appx. § 526(a) (2007).

to file within such deadlines during their military service.

Another case, however, *In re Baby Girl*,<sup>50</sup> might lead one to conclude differently. In *Baby Girl*, the unwed father, a servicemember, received no notice of the adoption petition.<sup>51</sup> When he later appeared, the court found his consent to the adoption unnecessary because he had not done all he could do to establish a parental relationship in the six months before the child's placement.<sup>52</sup> The servicemember claimed he had not known about the child during the six-month period.<sup>53</sup> The trial court found otherwise and ruled that because the father's actions were not prompt enough, his consent to the adoption was unnecessary.<sup>54</sup> The father appealed, claiming he had preserved his notice rights by acting promptly once he knew of the child, and that the SCRA extended the time to do that.<sup>55</sup>

The appellate court agreed with the trial court that the servicemember had reason to know of the child and that he did not take timely action.<sup>56</sup> The SCRA did not save the servicemember's request because the six-month time period did not limit a claim. Rather, it measured and defined the ripening of an interest, the grasping of which did not require commencing an action or proceeding during the critical time period.<sup>57</sup>

Thus, *Baby Girl* ostensibly supports the proposition that Section 526(a) does not protect the servicemember *until* he has vested his right by registering. But the court in *Baby Girl* did not mention a PFR.<sup>58</sup> The court merely concluded that establishing a parental relationship did not require commencing an action or proceeding.<sup>59</sup> The court found Section 526(a) inapplicable to requirements regarding the father-child relationship that did not involve claims or notice filings.<sup>60</sup>

Thus, case law still lacks a direct precedent applying Section 526(a)'s application to PFRs. Because registration fits the liberal definition of a proceeding and requires filing a notice or claim to preserve or create a right, Section 526(a) should, consistent with the rule of federal preemption, suspend servicemembers' time

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<sup>50</sup> 615 N.Y.S.2d 800 (N.Y. App. Div. 1994).

<sup>51</sup> *Id.* at 801.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 802.

<sup>58</sup> *See id.* at 801-02.

<sup>59</sup> *Id.* at 802.

<sup>60</sup> *Id.*

for filing with the PFR while in military service.<sup>61</sup> But Section 526(a) likely will not suspend the time in which the servicemember must meet other requirements not involving filings or commenced proceedings that preserve his right to withhold consent to the adoption, such as providing financial support.

### C. Laches

Theoretically, some servicemembers may not be totally immune from PFR requirements during military service, because the doctrine of laches can apply to Section 526(a).<sup>62</sup> Laches is an inexcusable delay in bringing a claim resulting in material prejudice to the adverse party.<sup>63</sup> Courts have applied laches in contested adoptions.<sup>64</sup> Delay is measured from the time the plaintiff had reason to know about the potential claim or legal right but inexcusably delayed in asserting it.<sup>65</sup> Inquiry is the key. The Supreme Court stated: “[W]here the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known to him were such as to put upon a man of ordinary intelligence the duty of inquiry.”<sup>66</sup>

To find laches in the PFR context, then, the father must have failed to register after knowing something that should have led him to inquire further, where that inquiry would have given him the actual knowledge needed to register. The father’s delay must then have resulted in prejudice to the adoption petitioner. In the PFR context, the actual knowledge the servicemember needs before he can be expected to register is his probable paternity. To be prejudicial to the other parties, the relationship between the father and that adverse party must have changed to the adverse party’s detriment.<sup>67</sup>

Courts may consider whether factual or statutory constructive notice satisfies the right of a putative father to

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<sup>61</sup> See U.S. CONST. ART. VI cl. 2; 50 U.S.C. Appx. § 526(a) (2007).

<sup>62</sup> See *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994); *Deering v. United States*, 620 F.2d 242, 243-44 (Ct. Cl. 1980) (en banc); *Taylor v. North Carolina Dep’t of Transp.*, 357 S.E.2d 439, 440-43 (N.C. App. 1987).

<sup>63</sup> *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993); *Deering*, 620 F.2d at 244-45.

<sup>64</sup> *In re Adoption of Frantz*, 515 P.2d 333, 334 (Ariz. Ct. App. 1973); *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925, 942 (N.J. 1988); *State ex rel. Smith v. Abbott*, 418 S.E.2d 575, 578-79 (W.Va. 1992).

<sup>65</sup> *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000).

<sup>66</sup> *Johnston v. Standard Mining Co.*, 148 U.S. 360, 370 (1893).

<sup>67</sup> See, e.g., *Taylor v. North Carolina Dept. of Transp.*, 357 S.E.2d 439 (N.C. App. 1987) (citing *Taylor v. City of Raleigh*, 227 S.E.2d 576 (N.C. 1976)).

otherwise receive notice of a pending adoption. Because constructive notice theory applies to the merits of the petition, which is separate from the PFR filing, finding that the father had constructive notice of his paternity resolves the issues of notice and consent without needing to consider laches, application of Section 526(a), or the PFR.

### 1. *Constructive Notice Theory*

Constructive notice occurs where one knows facts that would lead a prudent man to inquire further, the ordinary doing of which would have resulted in him having actual notice.<sup>68</sup> In adoptions, courts apply constructive notice theory when the putative father claims ignorance of the pregnancy or child as an excuse for not following the consent statutes.<sup>69</sup> Where the father lacked actual knowledge of the pregnancy or child, courts analyze whether the father could or did inquire about his probable paternity (or a possible pregnancy) and the reasonableness and promptness of his actions based on the information he obtained after that inquiry.<sup>70</sup> Like laches, constructive notice is generally an issue for the trier of fact to find after considering the particular circumstances.<sup>71</sup>

The landmark case is *Matter of Robert O. v. Russell K.*<sup>72</sup> There, the unwed parents broke up without the father knowing of the pregnancy.<sup>73</sup> The father knew the mother's address, but neither contacted her nor filed with New York's PFR.<sup>74</sup> Seven months after the birth, the mother surrendered the child without identifying the father.<sup>75</sup> Ten months after the adoption was ordered, the mother told the father about the child.<sup>76</sup> The father filed with the PFR, reimbursed the mother's medical expenses, and moved to vacate the

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<sup>68</sup> See *Charash v. Oberlin College*, 14 F.3d 291, 300 (6th Cir. 1994).

<sup>69</sup> See, e.g., *In re Appeal in Juvenile Action No. J.S.-8490*, 876 P.2d 1137, 1141-42 (Ariz. 1994) ("If a man has reasonable grounds to know that he might have fathered a child, he must protect his parental rights by investigating the possibility and acting appropriately on the information he uncovers."); see also *Matter of Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992) (finding unwed father did not do all he could to protect parental interests).

<sup>70</sup> *In re Appeal of Juvenile Action No. JS-8490*, 876 P.2d at 1141-42; *Matter of Robert O.*, 604 N.E.2d at 103-05.

<sup>71</sup> *Charash*, 14 F.3d at 300; *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993) (citing *Des Moines Terminal Co. v. Des Moines Union Ry. Co.*, 52 F.2d 616, 630 (8th Cir. 1931)) (laches is not determined by mere time lapse, but by what is just under the facts of each case.); *Imes v. Touma*, 784 F.2d 756, 759 (6th Cir. 1986).

<sup>72</sup> 604 N.E.2d 99 (N.Y. 1992).

<sup>73</sup> *Id.* at 101.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 100-01.

<sup>76</sup> *Id.* at 101.

adoption.<sup>77</sup> The father argued that because he acted promptly once he knew of the child, denying him a say in the adoption denied him due process.<sup>78</sup>

The court first analyzed the notice statute.<sup>79</sup> An unwed father could qualify for notice of an adoption petition in one of several ways: having been adjudicated as the father; filing a timely notice of intent to claim paternity; living openly with the mother and child; having been named as the father by the mother; having married the mother after the birth; or by filing an intent to claim paternity with the PFR.<sup>80</sup> The court declared that those requirements presumed the father in this case knew he had a child before the adoption was finalized, and that the father had lacked that knowledge.<sup>81</sup> The court therefore judged the case not strictly on the father's failure to follow the law, but on the facts leading to his ignorance.<sup>82</sup> The court upheld the adoption due to a combination of three factors: the father took no steps to discover the pregnancy; he was not prevented from discovering the pregnancy; and the adoption was final when he registered and appeared.<sup>83</sup> The father therefore had not acted promptly.<sup>84</sup>

The court also made a lesser-included analysis of laches. Sexual intercourse put the father in *Robert O.* on notice to inquire. The father did not inquire though able to do so.<sup>85</sup> Had the father inquired, he would have discovered the pregnancy or the child's existence in time to file with the PFR or develop a parent-child relationship.<sup>86</sup> Reopening the adoption would prejudice the petitioner and child.<sup>87</sup>

Had the father in *Robert O.* been a servicemember, Section 526(a) of the SCRA would have changed nothing. The court in *Robert O.* concluded initially that the PFR filing requirement presumed the father had actual notice of the child.<sup>88</sup> Thus, the court disregarded the PFR requirement and considered the circumstances of the case to see if, before the adoption order, the father had constructive notice of the pregnancy or child, thereby invoking the

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 103.

<sup>79</sup> *Id.* at 101.

<sup>80</sup> *Id.* (citing then N.Y. DOM. REL. LAW § 111-a(2)).

<sup>81</sup> *Id.* at 101.

<sup>82</sup> *Id.* at 100.

<sup>83</sup> *Id.* at 100, 103, 104.

<sup>84</sup> *Id.* at 105.

<sup>85</sup> *Id.* at 101.

<sup>86</sup> *Id.* Between the time the natural parents separated to the time the adoption was ordered, the father made no attempt to contact the mother, though she never relocated or concealed her whereabouts or her pregnancy. *Id.*

<sup>87</sup> *Id.* at 103-04.

<sup>88</sup> *Id.* at 101.

consent statute.<sup>89</sup> Because the father had that constructive notice, he could not retroactively acquire a vested parental right.<sup>90</sup> The *Baby Girl* court used the same reasoning where Section 526(a) did not apply to the servicemember father because vesting a constitutionally-protected interest did not require commencing an action or proceeding.<sup>91</sup> There, because the servicemember had known constructively of the need to perform parental duties, denying his late intervention did not deny him due process.<sup>92</sup>

Thus, courts would likely not apply laches when considering application of Section 526(a) to a PFR deadline where the lesser-included analysis of constructive notice resolves the consent question anyway.<sup>93</sup> Conversely, because constructive notice is a part of unreasonable delay, the servicemember's lack of constructive notice defeats laches. Practically, then, laches should apply only where the servicemember fulfilled the consent statute requirements, but did not register. Again, laches is (1) unreasonable delay (2) resulting in prejudice to the other party.<sup>94</sup> Because prejudice is usually the easier of the two elements to show, this article addresses it first.

#### a. Prejudice

Case law on the prejudice element has focused on the emotional ties that develop between the adoptive parent and the child during the delay.<sup>95</sup> Mere delay or complication of pending litigation does not satisfy the prejudice element.<sup>96</sup> Moreover, because the final judgment of adoption marks a turning point in the status of the natural and adoptive parents, only after the parents' rights are terminated can the adoptive parents fully expect permanence.<sup>97</sup> Thus, only after an adoption is ordered does the

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<sup>89</sup> *Id.* (citing N.Y. DOM. REL. LAW § 111(1)(e)).

<sup>90</sup> *Id.* at 104 (reasoning that because no private person or state actor prevented the father from finding out about the pregnancy and birth, the consequences of the father's inaction were solely attributable to him).

<sup>91</sup> *In re Baby Girl*, 615 N.Y.S.2d 800, 802 (N.Y. App. Div. 1994).

<sup>92</sup> *Id.* at 801.

<sup>93</sup> *See Campbell v. Rockefeller*, 59 A.2d 524, 526 (1948) (remanding to invoke the SSCRA would have been useless because the final result would not change).

<sup>94</sup> *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993); *Deering v. United States*, 620 F.2d 242, 245 (Ct. Cl. 1980) (en banc).

<sup>95</sup> *See, e.g., State ex rel. Smith v. Abbott*, 418 S.E.2d 575, 579 (W.Va. 1992); *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925, 942-43 (N.J. 1988).

<sup>96</sup> *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1163 (construing *Henderson v. Carbondale Coal and Coke Co.*, 140 U.S. 25, 33 (1891)).

<sup>97</sup> *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d at 939 (citation omitted).



relationship between the parties change to where the father's intervention causes detriment.<sup>98</sup> One might argue that the child's placement in the pre-adoptive home, resulting from the need for early permanence, leaves the child prejudiced by a father who appears even before the adoption order. But that alleged prejudice results partly from the petitioner's unilateral decision to place the child while paternity rights remained unresolved.

The prejudice element is similarly defeated where the adoption petitioner caused their own prejudice by keeping the father and the court ignorant of each other, such as through fraud or misrepresentation.<sup>99</sup> PFR registration ameliorates the effects of fraud or misrepresentation. But where the adoption petitioner knows the unregistered father's identity, hence of his presumed disability under Section 526(a), the petitioner may need to notify him to mitigate his own prejudice and eliminate ignorance and inability as excuses for the servicemember's delayed registration.<sup>100</sup> Thus, only after the adoption is ordered should the prejudice element be met. The adverse party would still need to show that the servicemember unreasonably delayed in registering.

#### b. Unreasonable Delay

Because constructive notice is not a substitute determination of unreasonable delay,<sup>101</sup> the delay starts after the claimant should have known a claim had arisen, rather than after the claimant should have known about an event that could have led to a claim. For example, recording a patent gives the world constructive notice of its existence.<sup>102</sup> But an unrecorded co-inventor suing for infringement does not "delay" in seeking a remedy before he knows about the infringement.<sup>103</sup> Otherwise, he could be barred from a remedy before knowing about the patent.<sup>104</sup> Similarly, the servicemember's delay in registering should be measured from when he knew about the mother's real intent to surrender, not from when he merely had constructive notice of a pregnancy or child. As

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<sup>98</sup> *Id.* (citation omitted).

<sup>99</sup> *Kozak v. Catholic Social Services*, 285 N.W.2d 378, 381 (Mich. Ct. App. 1979).

<sup>100</sup> *See, e.g., In re Adopt O.J.M.*, 687 N.E.2d 116, 118 (Ill. Ct. App. 1997). The statute did not require the putative father to be certain he was the biological father when he registered, as a putative father was a man who "may" be a child's father.

*Id.*

<sup>101</sup> *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1161-62 (Fed. Cir. 1993).

<sup>102</sup> *Id.* at 1162 (citing *Sontag Chain Stores Co. v. National Nut Co.*, 310 U.S. 281 (1940)).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

the New Jersey Supreme Court reasoned in finding laches, “[E]ven assuming [the putative father] did not receive notice of the adoption proceeding, this would not explain his failure to [file a paternity acknowledgment] during this time despite the fact that he knew the mother had placed the child for adoption.”<sup>105</sup> The father’s delay in filing was measured from the time he knew the mother no longer had custody.<sup>106</sup> A mother’s conditional remark about future adoption should not suffice for imputing that knowledge to the servicemember.

Whether the PFR requires a sworn claim of actual, rather than possible, paternity should also be relevant to unreasonable delay. Theoretically, had the servicemember in our original scenario filed an actual paternity claim in the PFR, he would have bound himself to the full support requirement and fallen short on the merits.<sup>107</sup> Conversely, had the mother sent the servicemember the information he demanded, the servicemember would have continued sending support and acquired the knowledge needed to make a sworn paternity claim about that particular child. Thus, a PFR requiring a paternity claim calls for more knowledge than that needed to assert only possible paternity. Accordingly, where the PFR requires a paternity claim or statement of intent to claim paternity, the servicemember must have a firm belief of paternity before he can be said to have delayed unduly. Whether or not the servicemember made any inquiries will factor into that decision. But if the PFR requires claiming only possible paternity, then registration is congruent with the servicemember’s knowledge and he cannot use ignorance alone as an excuse not to register. Remember, the court in *Robert O.* concluded that filing an intent to claim paternity with the PFR presumed the father had actual notice of the child before the adoption was ordered.<sup>108</sup>

In sum, the undue delay element of laches should require finding that the servicemember knew, at least constructively, that custody of the child had changed, and that the servicemember did not register though able to do so. The prejudice element should then require showing that the delay caused the adoption to be ordered before the servicemember appeared.<sup>109</sup> The question remains whether a servicemember’s financial support to the mother during the pregnancy would constitute a developed relationship and, in

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<sup>105</sup> *Matter of Adoption of a Child of Indian Heritage*, 543 A.2d 925, 942 (N.J. 1988).

<sup>106</sup> *Id.* at 936.

<sup>107</sup> A paternity claim implicitly admits knowledge of paternity, hence of a need to assume parental duties.

<sup>108</sup> *Robert O. v. Russell K.*, 604 N.E.2d 99, 101 (N.Y. 1992).

<sup>109</sup> See *Child of Indian Heritage*, 543 A.2d at 942.

itself, vest a right to notice.

## 2. Constructive Notice Statutes

Because fathers have sometimes prevailed in the constructive notice analysis, some states have enacted statutes eliminating factual inquiry. In effect, in those states, sexual intercourse itself requires the father to follow the adoption consent statutes. For example:

**Ohio:** “A man who has sexual intercourse with a woman is on notice that if a child is born as a result and the man is the putative father, the child may be adopted without his consent pursuant to division (B) of section 3107.07 of the Revised Code.”<sup>110</sup>

**Florida:** “An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur and that he has a duty to protect his own rights and interest.”<sup>111</sup>

**Arizona:** “Lack of knowledge of the pregnancy is not an acceptable reason for failure to file. . . . [S]exual intercourse with the mother is deemed to be notice to the putative father of the pregnancy.”<sup>112</sup>

The validity of these laws has not yet been tested in court. Thus, where the servicemember acted late due to lack of actual knowledge, and state law contained a constructive notice statute, the servicemember may need to challenge that statute’s constitutionality to prevail. One argument in support of such servicemembers is that notice, like laches, is a factual issue for courts to determine based on all the circumstances, not on the single fact of sexual relations. The constructive notice theory cases support that proposition. Specifically, legislatively charging a man with notice of paternity becomes a due process concern where the man’s circumstances make it impossible or unrealistic for him to confirm his paternity or

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<sup>110</sup> OHIO REV. CODE ANN. § 3107.061 (2007). The Ohio Revised Code further states that the father must file with the PFR no more than thirty days after the birth and not willfully abandon the mother before the child is placed or surrendered. OHIO REV. CODE ANN. § 3107.07(B) (2007).

<sup>111</sup> FLA. STAT. § 63.088(1) (2007).

<sup>112</sup> ARIZ. REV. STAT. § 8--106.01(F) (2007).

assume parental duties.

For example, in *Paternity of Baby Doe v. Maple*,<sup>113</sup> the putative father claimed his lack of knowledge of the pregnancy made it impossible for him to timely enter the Indiana PFR.<sup>114</sup> The court rejected the argument, not as a matter of law, but because the father had not acted early enough in the child's life.<sup>115</sup> As in *Robert O.*, the father's failure to file with the PFR in itself did not foreclose him.<sup>116</sup> Instead, the court considered all of the circumstances leading to the father's ignorance of the need to register.<sup>117</sup> Had the mothers in *Maple* and *Robert O.* concealed their pregnancies from an inquiring father, the courts may have ruled differently. Consider the following cases, which did not involve PFRs.

In *Matter of Adoption of Child by R.*,<sup>118</sup> the unwed father first learned of the pregnancy and birth when the child was nine months old.<sup>119</sup> New Jersey law presumed abandonment where the parent had not performed parental functions for six months.<sup>120</sup> The father had never inquired with the mother before the six-month deadline elapsed.<sup>121</sup> After weighing testimony from many witnesses, the trial court concluded that the father never had constructive knowledge of the pregnancy and therefore could not have abandoned the child.<sup>122</sup> The New Jersey Supreme Court agreed, concluding that the father's actions had to be judged from the point in time when he gained sufficient knowledge of the need to perform expected parental functions under the statute.<sup>123</sup> A key fact was that the father intervened while the adoption was still pending.<sup>124</sup>

In *In Interest of B.G.C.*,<sup>125</sup> the mother named her boyfriend as the father, when her ex-boyfriend was the true father.<sup>126</sup> After the child was placed, the ex-boyfriend appeared and moved to vacate the termination of rights.<sup>127</sup> The petitioners argued that the father should have protected his rights upon learning of the

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<sup>113</sup> 734 N.E.2d 281 (Ind. Ct. App. 2000).

<sup>114</sup> *Id.* at 285.

<sup>115</sup> *Id.* at 287.

<sup>116</sup> *See id.* at 285 (citing *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992)).

<sup>117</sup> *Id.* at 287.

<sup>118</sup> 705 A.2d 1233 (N.J. Super. Ct. App. Div. 1998).

<sup>119</sup> *Id.* at 1234.

<sup>120</sup> *Id.*

<sup>121</sup> *See id.* at 1238.

<sup>122</sup> *Id.* at 1239.

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> 496 N.W.2d 239 (Iowa 1992).

<sup>126</sup> *Id.* at 241.

<sup>127</sup> *Id.* at 246.

pregnancy earlier.<sup>128</sup> The court found that unrealistic because it would “require a potential father to become involved in the pregnancy on the mere speculation that he might be the father because he was one of the men having sexual relations with her at the time in question.”<sup>129</sup>

The court in *Matter of Baby Girl T* reached a similar conclusion.<sup>130</sup> There, the father and mother had a one-night stand after they had broken up and while the mother was living with another man.<sup>131</sup> The lovers had used birth control.<sup>132</sup> The father later heard a rumor of pregnancy, but assumed the live-in boyfriend was the father.<sup>133</sup> The mother surrendered the child for adoption, naming the live-in boyfriend as the father.<sup>134</sup> When DNA tests showed otherwise, the mother named the ex-boyfriend.<sup>135</sup> A social worker told the ex-boyfriend he might have a child surrendered for adoption, and the ex-boyfriend expressed his desire to parent and appeared in the proceeding.<sup>136</sup> The agency argued that the father should have inquired with the mother and protected his rights when he first heard the pregnancy rumor.<sup>137</sup> Citing *In Interest of B.G.C.*, the court found the agency’s argument unrealistic, given that another possible father was involved and the ex-boyfriend had used birth control in a one-time occurrence.<sup>138</sup>

Two conclusions emerge: First, courts have not independently found sexual relations alone to constitute notice of the need to perform expected parental functions. Second, whether a man shirked a duty to inquire with a woman, or to follow the statutes, has depended on several factors, including the status of the adoption and age of the child when the father filed his action, whether the mother concealed her location or pregnancy from the father, whether another potential father existed, whether birth control was used, or the father otherwise reasonably doubted his paternity.<sup>139</sup>

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<sup>128</sup> *Id.* at 241 n.1.

<sup>129</sup> *Id.*

<sup>130</sup> 715 A.2d 99 (Del. Fam. Ct. 1998).

<sup>131</sup> *Id.* at 101.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 100-01.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 101-02.

<sup>137</sup> *Id.* at 102.

<sup>138</sup> *Id.* at 104. (citing *In Interest of B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1993)).

<sup>139</sup> See, e.g., *In re S.J.B.*, 745 S.W.2d 606 (Ark. 1988) (court presumed that the putative father’s ignorance of paternity resulted from a lack of inquiry, given that no father appeared and no evidence showed a presumed father existing); *J.K. v. Dep’t of Children*, 925 So. 2d 1138 (Fla. Dist. Ct. App. 2006) (termination reversed because father, upon learning of his possible fatherhood, immediately appeared,

Still, no case to date has challenged the validity of a constructive notice statute. Thus, where one exists, and the servicemember did not support a child due to lack of actual knowledge, the servicemember will need to challenge the statute's validity, arguing that the link between sexual relations and knowledge of paternity is too indirect to constitute automatic notice. Instead, the court should consider all of the circumstances when deciding what notice the man realistically had and when he had it. Those circumstances include the father's attempts and ability to inquire about a pregnancy, the mother's efforts to keep information from the father, the father's actions based on the information he obtained, the promptness of those actions, the existence of other possible fathers, whether the adoption had been ordered when the father first asserted his rights, and the child's age at that time. Attorneys should be ready to explain the servicemember's efforts, or inability, to inquire with the mother, to which the servicemember's handicap under the SCRA may speak. One state court, for example, found failure to pay child support justified where lengthy deployments gave the servicemember little opportunity to inquire about whether the Navy was withholding support from his wages.<sup>140</sup>

In sum, constructive notice statutes should not defeat Section 526(a)'s suspension of the PFR deadline. But Section 526(a) likely will not suspend the time in which the servicemember must assume support and other parental responsibilities that do not require filing claims or commencing proceedings. Where the servicemember did not assume those duties due to ignorance of the pregnancy, or doubted paternity, and no constructive notice statute existed, courts will likely apply constructive notice theory. It remains to be seen whether a constructive notice statute can validly eliminate the entire circumstantial analysis. However, courts have not traditionally found intercourse itself to be notice of paternity. Instead, courts have focused on the fathers' efforts and ability to

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submitted to DNA testing, and opposed the pending dependency petition); *In re* A.S.B., 688 N.E.2d 1215 (Ill. Ct. App. 1997) (father was judged unfit for not timely pursuing the possibility of his paternity even though the mother and her relatives had told him that another man was the father); *Matter of Cassidy* YY. v. William A., 802 N.Y.S.2d 520 (N.Y. App. Div. 2005) (putative father's effort to reverse the adoption failed where he did not allege that the mother actively concealed her pregnancy from him, and he made no effort to contact the mother after their months of sexual relations to inquire whether a child had resulted); *In re* C.L., 878 A.2d 207 (Vt. 2005) (discovery of paternity was not unrealistic given that father had known mother for many years, had been previously involved with her romantically, and had met her on several occasions after their renewed sexual relationship).

<sup>140</sup> *In re* Adoption of Reed, No. 05CA3048, 2006 Ohio App. LEXIS 1932, at ¶ 31 (Ohio Ct. App. 2006).

inquire timely and get needed information.

#### D. *Developed Financial Relationship*

A separate, but related, factor that courts may consider when assessing the rights of putative fathers in proposed adoption proceedings is the amount, if any, of financial support the father has provided for the child. The concept of a “developed financial relationship” is a legal gray area; the threshold amount of financial support courts will require is unclear. However, some observations can be made. The key precedent is *Lehr v. Robertson*.<sup>141</sup> There, the unwed father knew of the child but never developed a personal or financial relationship with her.<sup>142</sup> The stepfather petitioned to adopt the child without giving the father notice.<sup>143</sup> The father sought paternity, but the claim was dismissed because the adoption had been granted.<sup>144</sup> The father appealed the adoption on due process and equal protection grounds.<sup>145</sup>

Under the statute, an unwed father qualified for notice by having lived with the mother, being named by her, having been adjudicated as the father, or by having been listed on the birth certificate.<sup>146</sup> A man not fitting one of those categories could file a notice of intent to claim paternity with the state PFR.<sup>147</sup> The PFR did not have a filing deadline.<sup>148</sup> The father did not fit any of the categories and never registered.<sup>149</sup> The Supreme Court affirmed the adoption because the putative father, who knew about the child, could have registered at any time, and thus received notice.<sup>150</sup> The father’s paternity action did not vest a notice right because adoption statutes had to be followed strictly and the statute did not make commencement of a paternity action a bar to adoption.<sup>151</sup>

The question, then, is whether a putative father’s assumption of some significant financial responsibility would override the need for him to register. On one hand, the *Lehr* Court followed *Caban v. Mohammed*<sup>152</sup> by holding that when “an unwed father demonstrates a *full commitment* to the responsibilities of

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<sup>141</sup> 463 U.S. 248 (1983).

<sup>142</sup> *Id.* at 251-52, 262.

<sup>143</sup> *Id.* at 251.

<sup>144</sup> *Id.* at 253.

<sup>145</sup> *Id.* at 253-55.

<sup>146</sup> *Id.* at 251.

<sup>147</sup> *Id.* at 250-51.

<sup>148</sup> *See id.* at 251 n.4.

<sup>149</sup> *Id.* at 251-52.

<sup>150</sup> *Id.* at 264.

<sup>151</sup> *See id.* at 265.

<sup>152</sup> 441 U.S. 380 (1979).

parenthood by ‘[coming] forward to participate in the raising of his child’ . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause.”<sup>153</sup> But the Court also reasoned that “[i]f [the father] grasps that opportunity and accepts *some measure* of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”<sup>154</sup> Because the father in *Lehr* had taken *no* measure of responsibility for the child’s future, the Court faced the following issue: “[W]hether New York has adequately protected his opportunity to form such a relationship.”<sup>155</sup>

The Court implied a two-pronged operational test for constitutionality: whether the statutory scheme would likely omit many responsible fathers, and whether the qualification for notice was beyond the putative father’s control.<sup>156</sup> The Court found the statutory provision in question would not likely omit many responsible fathers because the statute identified several categories of putative fathers who were “likely to have assumed some responsibility for the care of their natural children” and entitled them to notice.<sup>157</sup> In addition, the qualification for notice was not beyond the father’s control because filing with the PFR merely required “mailing a postcard to the putative father registry.”<sup>158</sup> Therefore, the putative father’s due process rights were not violated by any failure to notify him.

Unlike the father in *Lehr*, the servicemember in our scenario took some measure of responsibility for his child’s future by sending financial support while under the presumed handicap of military service. Determining whether he acted sufficiently and promptly under his circumstances should require a factual determination of his knowledge and ability to follow the state statute given that knowledge. A hearing should therefore be required. At least one state court has reasoned that, even where a statute does not require the mother to give the father notice of the medical expenses she wished him to share in paying during the pregnancy, the statute requiring a father pay pre-birth expenses would be inoperable without requiring that notice.<sup>159</sup> But whether the servicemember would be entitled to original notice simply for having supported the child for a few months remains in question.

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<sup>153</sup> *Lehr*, 463 U.S. at 261 (citing *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)) (internal quotations and citations omitted) (emphasis added).

<sup>154</sup> *Id.* at 262 (emphasis added).

<sup>155</sup> *Id.* at 262-63.

<sup>156</sup> *Id.* at 263-64.

<sup>157</sup> *Id.* at 263.

<sup>158</sup> *Id.* at 264.

<sup>159</sup> *In re B.V.*, 33 P.3d 1083, 1087 n.2 (Utah Ct. App. 2001).



On one hand, the servicemember assumed some responsibility for the care of his child.<sup>160</sup> On the other hand, he did not strictly follow the adoption statutes, and those statutes, like the statute in *Lehr*, did not specify “some financial support” as a qualification for notice.<sup>161</sup>

#### IV. CONCLUSION

Section 526(a) of the SCRA should suspend the time in which a putative father in military service must file with his state’s PFR. However, Section 526(a) likely will not suspend the time for performing parental duties that obviate the need to file a claim or commence a proceeding during military service, such as the duty to support the mother financially. Although laches may apply to Section 526(a), the lesser-included analysis of constructive notice courts apply to the merits of contested adoption petitions should often resolve the issue. That analysis includes whether the father should, did, or could inquire about his probable paternity, and the reasonableness and promptness of his actions based on the information he obtained.

Otherwise, laches should apply to the servicemember’s late PFR filing only where he knew that the mother no longer had custody of the child, could have registered timely after receiving the information he had, and the adoption was ordered before the servicemember appeared. Whether the PFR filing constituted a claim of paternity or merely of possible paternity should also be relevant. The former requires the servicemember have a firm belief of paternity before he can be expected to register. Conversely, registering without that firm belief may unfairly bind the servicemember to other parental duties when he is uncertain of his actual paternity. Also relevant should be whether the adoption petitioner knew of the father’s servicemember status and tried to notify him. A petitioner who did not notify the known, locatable servicemember will have more difficulty showing that the prejudice resulted solely from the servicemember’s delay.

The law grants no stay on the need for a father to assume parental duties. Accordingly, the SCRA, though accounting somewhat for the handicap of being in military service, treats unwed civilian and servicemember fathers the same regarding those duties. Although the SCRA probably extends the deadline for filing with a state PFR, the servicemember who files belatedly remains at an extreme disadvantage practically as compared to a servicemember who registers and receives timely notice. Any servicemember

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<sup>160</sup> *Lehr*, 463 U.S. at 262.

<sup>161</sup> *See id.* at 251 n.4.

believing he may have fathered a child out of wedlock should inquire with the mother and, upon receiving any indication of paternity, consult a lawyer about whether the applicable state law requires PFR registration. With timely registration, the servicemember who follows the state adoption statutes regarding the preservation of parental rights stands a very good chance of successfully contesting an adoption petition. Without timely registration, the servicemember will find a hidden enemy in the putative father registry, which must be eliminated by the SCRA before the servicemember can march on.

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