

# THE AIR FORCE LAW REVIEW



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REDEFINING “RELIGIOUS BELIEFS” UNDER TITLE VII: THE CONSCIENCE AS THE GATEWAY TO PROTECTION

*MAJOR CHRISTOPHER D. JONES*

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THE HISTORY AND DEVELOPMENT OF 10 U.S.C. § 2667 AND ITS USE IN MANAGING AIR FORCE REAL PROPERTY

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OLD WINE INTO NEW BOTTLES: THE ARTICLE 32 PROCESS AFTER THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2014

*MAJOR CHRISTOPHER J. GOEWERT AND CAPTAIN NICHOLE M. TORRES*

# THE AIR FORCE LAW REVIEW

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REDEFINING “RELIGIOUS BELIEFS” UNDER TITLE VII:  
THE CONSCIENCE AS THE GATEWAY TO PROTECTION

*MAJOR CHRISTOPHER D. JONES\**

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## I. INTRODUCTION

A Christian, a Jew, and an Atheist walk into a bar. Each applies for one available bartender position. All applicants meet the required qualifications, but two of them have caveats to employment. The Christian is evangelical, and as part of his faith must proselytize to customers and coworkers and educate people about Jesus Christ. The Jewish applicant observes the Sabbath from sundown Friday to sundown Saturday, limiting his ability to work Friday evenings, the most popular night of the week. The Atheist has no employment stipulations and merely informs the manager he does not believe in God. Whom does the manager hire, and what are the legal consequences of this decision?

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against an employee (or potential employee) on the basis of religion and requires employers to reasonably accommodate religious practices where doing so would not cause an undue hardship.<sup>1</sup> Thus, if the manager chose not to hire any of the individuals above based on their respective religious requirements or complete lack thereof, his decision might be unlawful under Title VII and subject to a religious discrimination claim.<sup>2</sup> Furthermore, if he chose to hire either of the self-proclaimed religious applicants, he would be required under Title VII to reasonably accommodate the new employee by allowing the religious practice of proselytizing or making scheduling exceptions, unless he could prove doing so would cause undue hardship on his establishment.<sup>3</sup>

The unique problems posed by religion—unlike the other protected classes of Title VII—are that it is subjective, can change over time, and is not readily apparent at a glance.<sup>4</sup> When an employer is faced with hiring a religious applicant, it is vital he understands the law and requirement to accommodate religious beliefs. For example, at what point does hiring an employee who cannot work a specific day of the week become an undue hardship? If that line is not clear to employers or employees, such conflicts between the employer and employee can only be resolved by litigation to clear up the confusion. In light of these costs, many employers will likely avoid the situation entirely by hiring the Atheist, who requires no accommodation. Does the need to accommodate religious beliefs further the purpose of Title VII, or does it motivate employers to discriminate?

This uncertainty can be seen in the statistics. On March 6, 2014, the Equal Employment Opportunity Commission (EEOC) released a report stating that reli-

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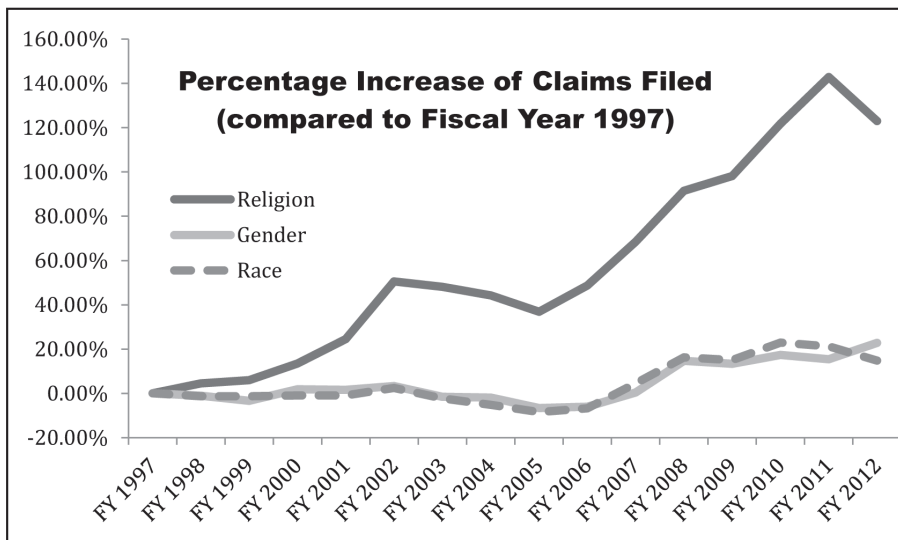
<sup>1</sup> See 42 U.S.C. § 2000e (1991).

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> *Reed v. Great Lakes Cos.*, 330 F.3d 931, 935-36 (7th Cir. 2003) (“A person’s religion is not like his sex or race—something obvious at a glance.”).

gious claims had more than doubled from 1997 to 2013.<sup>5</sup> The chart below shows that the increase of religious discrimination claims dwarfs the increase of race and gender claims over the same period:<sup>6</sup>



The number of religious discrimination claims filed with the EEOC has increased 123% in the past 20 years; in the same period, gender discrimination claims increased by 23% and race discrimination claims increased by 15%.<sup>7</sup>

More litigation means greater inefficiencies for everyone: public taxes fund the EEOC’s investigations, employers increase the prices of goods and services to cover litigation expenses and damages, and individuals must suffer through the financial cost and emotional toll of a lawsuit where they may or may not be vindicated. “Predictability promote[s] liberty, by allowing the citizen to know the legal consequences of his or her actions and to plan accordingly.”<sup>8</sup> If Congress or the courts developed clear boundaries and guidelines on what beliefs are protected (i.e., by clearly distinguishing between “religious” and “non-religious” beliefs) and explained the balance between reasonable accommodation and undue hardship,

<sup>5</sup> Press Release, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 6, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm>.

<sup>6</sup> See *Enforcement & Litigation Statistics*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm> (last visited March 8, 2014). The graph of these statistics was created by the author.

<sup>7</sup> *Id.* One might suppose the explanation lies in increased discrimination against Muslims after the terrorist attacks of September 11, 2001. For the four years following fiscal year 2002 (which began on 1 October 2001, approximately 3 weeks after the attack), however, all three types of discrimination claims decreased. Similarly, fiscal years 2007 and 2008 saw drastic increases in EEOC claims, and they have significantly risen ever since. *Id.*

<sup>8</sup> JOHN H. LANGBEIN, RENEE LETTOW LERNER, & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW* 498 (2009).

employees and employers would understand the differences between legal and illegal conduct and there would be fewer EEOC claims and lawsuits. Isn't the reduction or elimination of religious discrimination the most important goal?

Reasonable people may disagree about what the law *should* be. The intent of this article therefore is not to persuade anyone of a particular legal, ideological, or political belief. On the contrary, the purpose is to further Congress' intent in passing Title VII's prohibition of religious discrimination, regardless of one's opinion of whether that intent is right or wrong. The subsequent analysis focuses on whether the courts' application and subsequent development of these laws in light of Congress' purpose has been proper, and if not, how to rectify it. Unfortunately, the current state of Title VII's prohibition of religious discrimination is a Monet of jurisprudence. From afar, it appears a rational portrait of the present day values of religious protection. Look too closely, and the canvas of logic devolves into individual specks by which no man can deduce reason or understanding, nor predict the color of the next decision in a sequence.

Fifty years after the Civil Rights Act of 1964, litigants still have little guidance from the courts regarding how their cases will be analyzed. The failure of the courts to set forth an effective and understandable legal test creates uncertainty in litigation and leads to more trials because the parties have no idea how judges will review their cases. As one will see in the following analysis, the *prima facie* elements of religious discrimination are clear, but the method by which courts analyze each element appear to be nothing more than voodoo and chicken bones.

Identifying these issues is nothing new. Other legal scholars have discussed the unpredictability and inconsistency by the courts.<sup>9</sup> Some have complained of the misapplication of Title VII in certain cases, without proposing a solution.<sup>10</sup> Others have recommended balancing tests to give the courts more direction, but these multi-factor tests and the like only serve to grant judges greater discretion,<sup>11</sup> enabling

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<sup>9</sup> See, e.g., Polly Hayes, *Note: Thou Shalt Not Discriminate: The Application of Title VII's Undue Hardship Standard in Balint v. Carson City*, 45 VILL. L. REV. 289, 312 (2000) ("[T]he majority opinion is inconsistent.... [and] also contravenes the holding in [*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)]").

<sup>10</sup> See, e.g., Donna D. Page, *Comment: Veganism and Sincerely Held "Religious" Beliefs in the Workplace: No Protection Without Definition*, 7 U. PA. J. LAB. & EMP. L. 363, 408 (2005) (arguing veganism and vegetarianism could be religious beliefs under Title VII in response to a California case which decided the opposite); Kent Greenawalt, *Article: Title VII and Religious Liberty*, 33 LOY. U. CHI. L.J. 1 (2001) (asserting multiple opinions regarding how Title VII cases should be analyzed and decided, none of which constitute legal tests); Russell S. Post, *Note: The Serpentine Wall and the Serpent's Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177 (1997) (complaining about the conflicting principles of Title VII and the Free Exercise Clause of the First Amendment).

<sup>11</sup> See, e.g., Steve D. Jamar, *Article: Accommodating Religion at Work: A Principled Approach to Title VII and Religious Freedom*, 40 N.Y.L. SCH. L. REV. 719, 763 (1996) (proposing a "principle-based" analysis for religious accommodation claims by focusing on "accommodation, tolerance, inclusion, neutrality and equality"); Theresa M. Beiner and John M. A. DiPippa, *Article: Hostile*

them to justify their conflicting opinions because of factual distinctions rather than legal principles. The solution must be a legal test that limits judicial discretion and provides litigants with clear guidelines by which their case will be resolved.

This article will identify Congress' intent in distinguishing between protected and unprotected beliefs under the Civil Rights Act of 1964, the extent to which employers are expected to accommodate these beliefs and practices, analyze the evolution/devolution of this intent by the subsequent case law, and develop a clear, legal test to ensure courts properly apply the protections of Title VII in religious discrimination cases.<sup>12</sup> Part II analyzes the first element of any religious discrimination claim; are the beliefs at issue "religious"? Part III examines the employer's duty to reasonably accommodate protected beliefs. Part IV analyzes claims of religious harassment and the odd relationship between that and proselytizing. Finally, Part V identifies the problem common to each of these claims and proposes an analytical solution in accordance with Supreme Court precedence, which, by following Congress' original intent, will ultimately strengthen the law's protection of religion and reduce the incidents of discrimination.

## II. "RELIGIOUS" BELIEFS

### A. Title VII Discrimination

In the early 1960s, the Civil Rights movement slowly gained traction as racism in the South received media attention.<sup>13</sup> When Martin Luther King, Jr. and his followers marched in Birmingham, Alabama and were met by an outspoken racist police commissioner, firehoses, and attack dogs, the clash sparked national debate.<sup>14</sup> Legislators pushed to end this racism by prohibiting race from serving as a

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*Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 577 (1997) (arguing for a "true" application of the totality of the circumstances test).

<sup>12</sup> I intentionally exclude disparate impact cases from my analysis. Disparate impact cases impose liability on employers for facially neutral employment practices that result in a disparate impact upon a protected class. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding high school equivalence requirement—diploma or written test—for promotion or transfer within company had a disparate impact on African Americans). Inherent in such a claim is evidence that the practices affected a group of similar individuals (e.g., Hispanics, women, or Catholics). The problems discussed and analyzed in this thesis, however, stem from individual beliefs and practices and the difficulty in determining the extent Title VII protects these "religious beliefs." As such, disparate impact religious claims do not raise these same concerns. Therefore, this thesis will only address individual claims arising out of Title VII's protection of religious beliefs: disparate treatment, reasonable accommodation, and harassment.

<sup>13</sup> LEGACIES OF THE 1964 CIVIL RIGHTS ACT 20-22 (Bernard Grofman ed. 2000).

<sup>14</sup> *Id.* at 11-12 ("precipitating event was the confrontation in Birmingham, AL in the spring of 1963 between the forces of Reverend Martin Luther King, Jr., and those of Eugene "Bull" Connor, the city's police commissioner. . . . Pictures of peaceful marchers, many of them schoolchildren, being met with fire hoses and attack dogs were spread across front pages throughout the country and shown each evening on national television."); see PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION 199 (1997) ("The civil rights movement gained irresistible momentum. . . [in]

factor in employment decisions.<sup>15</sup> The original text of the Civil Rights Act prohibited employment discrimination based on race, color or national origin; religion was added without any meaningful comment or discussion.<sup>16</sup>

A plaintiff whose employer unlawfully discriminated against him or her based on race, sex, color, national origin, or religion is a victim of disparate treatment.<sup>17</sup> To prove such a claim, the plaintiff must show that he 1) is a member of a protected class,<sup>18</sup> 2) is qualified for the position, 3) suffered an adverse action, 4) under circumstances that rise to the level of discrimination.<sup>19</sup> Since religion is the only subjective class protected under Title VII, a plaintiff must prove he is a member of the class by showing he 1) sincerely holds 2) a religious belief.<sup>20</sup>

The confusion arises with this element: what constitutes a “religious” belief? The example in the introduction simplified this important aspect of Title VII cases. In today’s modern society, however, sincerely held beliefs do not always fit squarely within the confines of mainstream “religion.” The question thus revolves around whether a specific belief, perhaps arising out of religion, is protected by Title VII. Unfortunately, after one major amendment to Title VII and 50 years of jurisprudence,<sup>21</sup> courts are no closer to developing a line between protected and unprotected religious beliefs.

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1963 when the crisis of direct-action protest in Birmingham, Alabama, made civil rights a national political issue”); *see generally* GARY ORFIELD & HOLLY J. LEBOWITZ, *RELIGION, RACE, AND JUSTICE IN A CHANGING AMERICA* (1999).

<sup>15</sup> MORENO, *supra* note 14, at 199-230 (identifying the racial conflict as the impetus behind Title VII).

<sup>16</sup> *See* LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 13, at 13-26 (outlining the history of the drafts, hearings, and passing of the Civil Rights Act without any mention of how “religion” was added); *see also* MORENO, *supra* note 14, at 199-230 (after a full discussion of the racial conflict and motivation behind Title VII, religion is mentioned only when quoting the language of the statute); LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra* note 13, at 22 (“Sex” was added as a protected class by Congressman Howard Smith, presumably to “overload” the bill and create more opposition); MORENO, *supra* note 14, at 213 (purpose was to “expand the scope of the act enough to make its enactment unpalatable to moderates” by raising fears “employers would grant preferential treatment to black women and discriminate against white Christian women.”).

<sup>17</sup> 42 U.S.C. § 2000e (1991); *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (Outlining prima facie elements for disparate treatment claims).

<sup>18</sup> For a detailed analysis of the subtle shift in Title VII from anti-discrimination to “protected classes,” and the negative consequences of market interference (with respect to private employers), *see* RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS* 176 (1992). *But see* MORENO, *supra* note 14, 201 (discussing arguments for the need for preferential treatment for minorities in order to “overcome the effects of past discrimination”).

<sup>19</sup> *See McDonnell Douglas Corp.*, 411 U.S. at 802.

<sup>20</sup> *United States v. Seeger*, 380 U.S. 163, 185 (1965).

<sup>21</sup> *See* 42 U.S.C. § 2000e (1972).

## B. Legislative History of “Religion”

### 1. Conscientious Objectors

One of the first unique distinctions granted to religious believers was conscientious objector status. In 1656, Quakers, a sect of Christianity whose beliefs prohibited use of arms in warfare, were the first conscientious objectors in pre-revolutionary America.<sup>22</sup> Since then, Americans have recognized the need to balance individuals’ religious beliefs with the need of government to protect itself by force, a “heavy burden... for all citizens to share.”<sup>23</sup>

More recently (and still long before the Civil Rights Act of 1964) Congress defined “religious beliefs” in the Selective Training and Service Act.<sup>24</sup> This act, signed into law by President Franklin Roosevelt in 1940, required men between the ages of 21 and 36 to register for the draft.<sup>25</sup> It outlined an exception for conscientious objectors, those people who “by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form.”<sup>26</sup> Religion was defined as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relations, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>27</sup> The House debate of the 1940 act—which used the word “God”—identified the law’s purpose as protecting those people who had conscientious scruples against handling lethal weapons or against participating in the war effort.<sup>28</sup> In other words, people who had a “moral or ethical consideration or standard that acts as a restraining force”<sup>29</sup> against war were protected.

Only the Second and Ninth Circuit Courts of Appeals have addressed this law, and neither case was complex.<sup>30</sup> In *United States v. Kauten*, the defendant requested excusal from the United States Army by claiming he was a conscientious objector.<sup>31</sup> His belief system was not based on a duty to God, however, but rather based on his political views (objecting to the policy of the draft), philosophical views (war is not a solution to problems), and his personal moral code (belief in

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<sup>22</sup> CONSCIENCE IN AMERICA 17 (Lillian Schlissel ed. 1968).

<sup>23</sup> *Id.* at 15.

<sup>24</sup> Selective Training and Service Act, 54 Stat. 885, 889 (1940).

<sup>25</sup> *Id.* at 885.

<sup>26</sup> *Id.* at 889.

<sup>27</sup> *United States v. Seeger*, 380 U.S. 163, 165 (1965) (alteration in original).

<sup>28</sup> *Id.* at 177-78 (quoting 86 CONG. REC. 11418 (1940)).

<sup>29</sup> *Scruple Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/scruple> (last visited May 26, 2014).

<sup>30</sup> See *United States v. Kauten*, 133 F.2d 703 (2d Cir. 1943); *Berman v. United States*, 156 F.2d 377 (9th Cir. 1946).

<sup>31</sup> *Kauten*, 133 F.2d at 705.

Ghandi's policy of passive resistance).<sup>32</sup> The court concluded that "a compelling voice of conscience" lies within the definition of "religious belief," but not within philosophical or political beliefs which were expressly excluded by Congress and thereby earn no unique protection.<sup>33</sup> Since Kauten's sincere opposition to war was due to his "personal philosophical conceptions," such beliefs were not "religious" under the statute.<sup>34</sup>

Similarly, in *Berman v. United States*, the defendant believed "[w]ar as a method [was] totally wrong.... [and therefore] refuse[d] to participate in [its] futility."<sup>35</sup> The Ninth Circuit found the defendant was sincere in his beliefs.<sup>36</sup> The anti-war philosophy (war's lack of effectiveness), however, was squarely within Congress' exclusion from the definition of a "religion," and the court affirmed the defendant's conviction.<sup>37</sup>

At this point in history, the exclusions from what was deemed "religious" were clear: the definition in the statute excluded political, sociological, or philosophical views, or those stemming from a merely personal moral code. The Court of Appeals' prior decisions of *Kauten* and *Berman* solidified this distinction. The difficulty for future cases was in determining what would be *included* in "religious beliefs."

## 2. "Religion" in Title VII of the Civil Rights Act

Congress included religion as one of the five protected classes in Title VII without defining it.<sup>38</sup> In 1964, the law appeared clear; employment decisions and benefits should not be determined on the basis of one's race, color, religion, gender, or national origin.<sup>39</sup> Such factors are—and should be—irrelevant in an employer's decision-making process. Therefore, refusing to hire a person because he is Jewish is as unlawful as not hiring someone because the person is black or female.<sup>40</sup>

Congress amended Title VII specifically in regards to religious discrimination only once, in 1972.<sup>41</sup> This amendment, *inter alia*, defined religion. The newly created section 701(j) states:

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<sup>32</sup> *Id.* at n.2.

<sup>33</sup> *Id.* at 708.

<sup>34</sup> *Id.* at n.2.

<sup>35</sup> *Berman*, 156 F.2d at 379.

<sup>36</sup> *Id.* at 382.

<sup>37</sup> *Id.*

<sup>38</sup> 42 U.S.C. § 2000e (1964).

<sup>39</sup> *Id.* at § 2000e-2.

<sup>40</sup> *See id.*

<sup>41</sup> *See* 42 U.S.C. § 2000e (1972).

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.<sup>42</sup>

This amendment accomplished three things. First, it defined religion circularly—religion includes religious beliefs—without providing any further insight as to what constitutes religion or religious beliefs.<sup>43</sup> Second, it incorporated the protection of religious beliefs to include *practices* of such beliefs.<sup>44</sup> Finally, it created a responsibility on employers to reasonably accommodate these beliefs and practices unless the accommodations created an undue hardship for the employer.<sup>45</sup>

This important legislation was poorly written. First, an affirmative requirement by employers (to reasonably accommodate an employee’s religious beliefs) properly belongs in the language of the substantive text, not in its definition section. Second, the need to reasonably accommodate employees has no practical bearing on the actual meaning of the word “religion.” Based on current language, one might conclude that a seemingly religious practice—for example, going to church services on Sundays—is not a religious practice if one’s employer cannot reasonably accommodate the work schedule to allow for attendance. Certainly, attending church is a religious practice regardless of where you work, and regardless of the ability of your employer to accommodate it. Thus, while this amendment created the duty to reasonably accommodate religious beliefs and practices, it gave no further clarification regarding the meaning of “religion.”

### 3. “Religion” has One Meaning

The word “religion” applies equally to Title VII as it does in the First Amendment of the Constitution (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”)<sup>46</sup> and the laws concerning conscientious objectors.<sup>47</sup> The Civil Rights Act protects these same beliefs by

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<sup>42</sup> *Id.* at § 2000e(j).

<sup>43</sup> *See, e.g.,* *Brown v. Pena*, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977) (“The statutory definition is unenlightening”).

<sup>44</sup> *See infra* Part III. It is important to note that this change appears to be intended to better explain the protections rather than broaden them. Senator Jennings Randolph from West Virginia stated: “The term ‘religion’ as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely beliefs, but also conduct: the freedom to believe, and also the freedom to act.” 118 CONG. REC. 705 (1972).

<sup>45</sup> *See infra* Part III.

<sup>46</sup> U.S. CONST. amend. I.

<sup>47</sup> *See Rivera v. Choice Courier Sys.*, 2004 U.S. Dist. LEXIS 11758, at \*15 (S.D.N.Y. 2004) (“A Court’s limited role in determining whether a belief is ‘religious’ is the same under Title VII as it is under the Free Exercise Clause of the First Amendment”); *see also* Guidelines on Discrimination



prohibiting discrimination in the workplace. Political, sociological, or philosophical beliefs, or beliefs stemming from a personal moral code<sup>48</sup> are therefore unprotected under the Civil Rights Act.<sup>49</sup>

### C. Supreme Court Interpretation

The difficulty of analyzing religious claims is more problematic when an individual's belief system is not based on a traditional, or well-accepted, organized religion. In *United States v. Seeger*, the Supreme Court reviewed three conscientious objector cases in which the lower courts had determined the defendants' beliefs did not meet the definition of "religious training and belief."<sup>50</sup> The Court analyzed Congress' definition of religion, reviewed the legislative history and purpose behind the language, and the earlier cases of *Kauten* and *Berman*.<sup>51</sup> The narrow issue was whether the requirement of a "belief in a Supreme Being" was limited to beliefs based—literally—on the existence of a deity, or whether it referred to a broader concept of "a faith, 'to which all else is subordinate.'"<sup>52</sup> In affirming the latter view, the Supreme Court created a simple test to delineate between religious and non-religious beliefs.

Seeger claimed he was a conscientious objector based on his "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."<sup>53</sup> "[H]is 'skepticism or disbelief in the existence of God' did 'not necessarily mean lack of faith in anything whatsoever,'" and he compared his ethical belief in intellectual and moral integrity to that of Plato, Aristotle, and

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Because of Religion, 29 C.F.R. § 1605.1 (1980) ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970)"). Both *Seeger* and *Welsh* were conscientious objector cases.

<sup>48</sup> The distinction between a "conscientious objection" to war and a personal moral code against war is often a difficult line to draw, but can be clearly seen with the following example. If the two categories were the same, anyone who was against killing another human being would be exempt from military service. As an Air Force officer, I would hope my fellow brothers and sisters in arms all have the personal moral code against killing other humans. Is that not the purpose and goal of a civilized society, to avoid violence and killing, and limit suffering? Furthermore, we want our generals to have a personal moral code against violence, but to also understand that violating that personal code may be necessary for the protection of our country. Therefore, if one's conscience and personal moral code could be used interchangeably, the only people who *could* enlist in our military would be those who have no scruples against killing. Does this describe the military personnel our citizens want?

<sup>49</sup> 29 C.F.R. § 1605.1.

<sup>50</sup> 380 U.S. 163 (1965).

<sup>51</sup> *Id.* at 173-78.

<sup>52</sup> *Id.* at 174 (citation omitted).

<sup>53</sup> *Id.* at 166.

Spinoza.<sup>54</sup> Reading the language of the statute literally, the lower court determined his disbelief in God failed to meet the requirement of “religious beliefs” because he did not believe in a “Supreme Being.”<sup>55</sup>

Similarly, a companion case (discussed in *Seeger*) involving a defendant named Forest Britt Peter reached the same result.<sup>56</sup> Peter claimed it was “a violation of his moral code to take human life and that he considered this belief superior to his obligation to the state.”<sup>57</sup> These values, he stated, were “derived from the western religious and philosophical tradition.”<sup>58</sup> These magic legal words—“moral code” and “philosophical”—led the lower court to find Peter’s belief was squarely excluded by the plain language of the statute.<sup>59</sup>

The Supreme Court found otherwise and concluded there is a “broad spectrum of religious beliefs found among us... [that] demonstrate very clearly the diverse manners in which beliefs, *equally paramount in the lives of their possessors*, may be articulated.”<sup>60</sup> Based on this, the Supreme Court created the following test: a belief is “religious” when it holds a “place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”<sup>61</sup> Of course, this test requires an understanding of who is “clearly qualified for exemption,” which has the familiar ring of Justice Stewart’s test for obscenity, “I know it when I see it.”<sup>62</sup> As previously discussed, there appeared to be three main categories of people entitled to the exemption as holding religious beliefs—those who follow an organized religion; those who hold beliefs based on faith in a supreme power or being; and those who hold beliefs based on their conscience, i.e., those who hold beliefs in the same place in their lives as followers of organized religion hold their beliefs.<sup>63</sup>

Some have characterized the Supreme Court’s holding in *Welsh v. United States*<sup>64</sup> as “a remarkable feat of linguistic transmutation.”<sup>65</sup> On his application for draft exemption, Welsh specifically redacted the words “my religious training” from “I am, by reason of my religious training and belief, conscientiously opposed to

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

<sup>55</sup> *Id.* at 167.

<sup>56</sup> *Id.* at 169.

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

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

<sup>59</sup> *See id.*

<sup>60</sup> *Id.* at 183 (emphasis added).

<sup>61</sup> *Id.* at 184.

<sup>62</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>63</sup> *Seeger*, 380 U.S. at 184.

<sup>64</sup> 398 U.S. 333 (1970).

<sup>65</sup> *See, e.g., Note, Toward a Constitutional Definition of Religion*, 91 Harv.L.Rev. 1056, 1065 n.60 (1978).

participation in war in any form.” Further, he could neither affirm nor deny a belief in a “Supreme Being.”<sup>66</sup> In his application, Welsh stated:

[T]he military complex wastes both human and material resources, that it fosters disregard for (what I consider a paramount concern) human needs and ends; I see that the means we employ to ‘defend’ our ‘way of life’ profoundly change that way of life. I see that in our failure to recognize the political, social, and economic realities of the world, we, *as a nation*, fail our responsibility *as a nation*.<sup>67</sup>

It may be difficult to determine whether this statement reveals Welsh’s political views, philosophical views, moral views, or religious views. If it is a combination of any of these categories of beliefs, it is impossible to determine the proportion of any given category to determine whether to remove it from the protection of conscientious objector status. Certainly, many people may feel as though their political or philosophical beliefs are held so strongly that they consider such ideologies to be held in the same regard as others may hold religion, but such testimony doesn’t blindly deserve protection.

Many people claim the Supreme Court’s decision in *Welsh*—granting conscientious objector status to the defendant who specifically declared his beliefs were *not* religious, but rather philosophical—substantially broadened the definition of religion by expressly ignoring the statute’s language to exclude philosophical beliefs.<sup>68</sup> The three dissenting Justices viewed the holding as a drastic departure from the Court’s obligation to enforce the will of Congress, clearly expressed through the statute.<sup>69</sup> Even more telling was Justice Harlan’s concurrence:

Candor requires me to say that I joined the Court’s opinion in [*Seeger*] only with the gravest misgivings as to whether it was a legitimate exercise in statutory construction, and today’s decision convinces me that in doing so I made a mistake which I should now acknowledge.... Thus I am prepared to accept the prevailing opinion’s conscientious objector test, not as a reflection of congressional statutory intent but as a patchwork of judicial making....<sup>70</sup>

Undoubtedly, even the majority in *Welsh* knew its holding was a stretch, relying on poetic imagery and emotion in an effort to overshadow their own concerns the decision went too far. In referring to the defendant and *Seeger*, the court

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<sup>66</sup> *Welsh*, 398 U.S. at 336-37.

<sup>67</sup> *Id.* at 342 (alterations in original).

<sup>68</sup> See, e.g., *Malnak v. Yogi*, 592 F.2d 197, 204 (3d Cir. 1979) (Adams, J., concurring) (“It can hardly be denied that the Supreme Court’s reading of the statutory language was strained at best.”).

<sup>69</sup> *Welsh*, 398 U.S. at 367-68 (White, J., dissenting).

<sup>70</sup> *Id.* at 344, 366-67 (Harlan, J., concurring).

proclaimed “[t]heir objection to participating in war in any form could not be said to come from a ‘still, small voice of conscience’; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces.”<sup>71</sup> The beauty of this sentiment is marred only by the common-sense realization that all conscientious objector cases—whether based on protected religious beliefs or unprotected beliefs—arise when the claimant has suffered criminal punishment; without it, there would be nothing to appeal.

This illustrates the problem with the *Seeger* test; if the Supreme Court cannot explain its holding in *Welsh*, concluding he deserves protection but without being able to sufficiently distinguish these philosophical beliefs from those excluded by Congress, there is little hope for lower courts.

#### D. Title VII Application

Courts continue to struggle to determine whether non-traditional beliefs are religious, and thereby protected under Title VII. The first hurdle is deciding whether a plaintiff’s beliefs are sincerely held.<sup>72</sup> Sincerity refers to the plaintiff’s credibility, whether the plaintiff is being truthful in expressing his beliefs.<sup>73</sup> Judges do not determine the validity of the beliefs,<sup>74</sup> but must determine whether the plaintiff truly believes them.<sup>75</sup> Once the judge determines the plaintiff is truthful, then he must determine whether the relevant set of beliefs are protected as “religious” under Title VII.<sup>76</sup>

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<sup>71</sup> *Id.* at 337.

<sup>72</sup> *Seeger*, 380 U.S. at 185.

<sup>73</sup> *Id.*

<sup>74</sup> *See* *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) (“Courts are not arbiters of scriptural interpretation.”).

<sup>75</sup> *Seeger*, 380 U.S. at 184-85.

<sup>76</sup> *Rivera v. Choice Courier Sys.*, 2004 U.S. Dist. LEXIS 11758, at \*15 (S.D.N.Y. 2004) (alteration in original) (“The inquiry is twofold; ‘whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious.’”). If the plaintiff is not sincere, it is irrelevant whether the beliefs are religious—the plaintiff cannot meet his prima facie case. *See Sidelinger v. Harbor Creek Sch. Dist.*, 2006 WL 3455073, at \*23 (W.D. Pa. 2006). In *Sidelinger*, a teacher claimed that his religious beliefs forbade him from “self-adornment” and photographs; therefore, he refused to wear an ID badge as required for school safety. *Id.* at \*2-5. The court did not believe his religious belief was “sincerely held” based on numerous inconsistencies in his testimony about his beliefs, direct contradiction of other evidence in the case regarding the statements of the defendant, and the teacher’s use of an internet dating service in which he uploaded pictures of himself in direct violation of the religious beliefs he claimed prevented him from having an ID badge. *Id.* at \*33-41. Similarly, a banquet waiter claimed religious discrimination by his employer when he was fired for being unshaven at work. *Hussein v. Waldorf Astoria*, 134 F. Supp. 2d 591, 594 (S.D.N.Y. 2001). Although he claimed shaving his face would violate his Islamic religious beliefs, he had worked at the company for approximately fourteen years—clean-shaven—and had received multiple demerits for violating the company’s rules. *Id.* at 596-97. After he was discharged, the plaintiff went back to regularly shaving his face and was even clean-shaven for his deposition prior to trial. *Id.* at 594.

In *Wilson v. U.S. W. Communications*,<sup>77</sup> an employee was discharged for wearing a graphic anti-abortion pin displaying a fetus, despite requests for her to remove it or cover it in the workplace.<sup>78</sup> The employee, a Roman Catholic, made a religious vow that she would wear the pin “until there was an end to abortion or until [she] could no longer fight the fight.”<sup>79</sup> When employees complained, her supervisor offered her three options: “(1) wear the button only in her work cubicle . . . ; (2) cover the button while at work; or (3) wear a different button with the same message but without the photograph.”<sup>80</sup> Wilson refused, claiming she could not cover nor remove the button “because it would break her promise to God to wear the button and be a ‘living witness.’”<sup>81</sup> She defined a “living witness” as “someone who, by their actions, more than their words, is a ‘witness to the truth’”; wearing the button, therefore, was a substitute for preaching about anti-abortion.<sup>82</sup>

The district court determined Wilson’s vow was a protected religious practice, but did not believe Wilson’s testimony that she served as a living witness.<sup>83</sup> The living witness requirement only arose after her employer offered her accommodations such as covering it up, her prior interrogatory mentioned nothing about being a living witness, her supervisor testified that she explained her vow as “wear[ing] the button until abortions were ended,” and she never mentioned the need to be a living witness in an interview with a newspaper.<sup>84</sup> Thus, the court concluded (and the appellate court affirmed) the finding that Wilson’s religious vow merely required she *wear* the button, not that she *display* it, thereby exonerating the employer from wrongdoing because it had offered reasonable accommodations by allowing her to wear the button covered up.<sup>85</sup>

Both the Eighth Circuit Court of Appeals and district court clearly struggled with this case. The holding turned on a single fact: Wilson did not notify her employer that her vow to wear the pin necessarily meant displaying it for others to see until *after* the employer suggested she cover it up.<sup>86</sup> The court believed displaying the pin was not part of the vow and that she could have worn the pin on her underclothing, hidden from sight.<sup>87</sup> Thus, when offered a reasonable accommodation, the court found her claim that the pin needed to be on display was neither credible nor

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<sup>77</sup> 58 F.3d 1337 (8th Cir. 1995).

<sup>78</sup> *Id.* at 1338.

<sup>79</sup> *Id.* at 1339 (alteration in original)

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1340 n.2. Proselytizing in the workplace is addressed further in Part IV. See *infra* Part IV.

<sup>83</sup> *Wilson*, 58 F.3d at 1341.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1342.

<sup>86</sup> See *id.* at 1341.

<sup>87</sup> *Id.*

believable.<sup>88</sup> Of course, this holding ignores the fact this would have absolutely no effect on the “abortion war” which she identified as her purpose of wearing the pin in the first place.<sup>89</sup> Based on the court’s analysis, had she expressly stated to her employer her religious vow was to “wear an anti-abortion button until there was an end to abortion or until she could no longer fight the fight... *so I need people to see the pin for my fight to be effective*,” the court would have determined her vow included displaying the pin, and the analysis would be focused on whether allowing her to do so constituted an undue hardship.

However, this highlights the problem with the court’s analysis. If the court determined she was being insincere, it was not necessary to address the display of the pin as a religious belief. The lesson learned from this case is similarly unclear—is the holding that plaintiffs need to be extremely descriptive in their religious beliefs upon their initial notification to their employer? In other words, does Title VII protect religious vows only when the vows are spelled out so descriptively as to avoid a clever attorney’s ability to split hairs on the words and definitions used by the employee, ironically based on the word “religion” that has been otherwise undefinable?<sup>90</sup> This case arose approximately 20 years after Congress amended Title VII to “define” religion, yet it grants no solace or clarity to employees or employers on how Title VII applies to people who make religious vows.

The confusion is present not only in cases involving religious vows, but also in cases involving commandments from God. Consider the case of a Roman Catholic woman, Mary Tiano, who received a “calling from God” to attend a pilgrimage to a church in Yugoslavia during mid-October where visions of the Virgin Mary had appeared.<sup>91</sup> The problem caused by Tiano’s religious calling was that she was a salesperson for Dillard’s Department Store, and the pilgrimage in mid-October conflicted with Dillard’s rule that no employee is allowed to take leave during the holiday shopping season.<sup>92</sup> After listening to all the testimony and evidence, the trial judge believed the requirement for the plaintiff to go on this pilgrimage in mid-October was a sincerely held religious belief.<sup>93</sup>

The appellate court, oddly enough, reversed and found the judge’s factual decision “clearly erroneous.”<sup>94</sup> It may have been reasonable for the appellate court to determine the balance between a reasonable accommodation versus an undue hardship was in error. Such an assumption would be logical, perhaps even predict-

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943) (noting the definition of religion is “incapable of compression into a few words.”).

<sup>91</sup> *Tiano v. Dillard Dep’t Stores*, 139 F.3d 679, 680 (9th Cir. 1998).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 682.

able. Of course, if this were the case, it would belong in the latter part of this thesis. Rather than analyze the legal application of the employer's duty to reasonably accommodate an employee, or potentially find an undue hardship for Dillard's thereby absolving it of the need to accommodate, the appellate court attacked the source of the duty. The court determined that Tiano's religious belief was limited to a pilgrimage to the church, but not necessarily during the month of October.<sup>95</sup> In other words, it substituted its own credibility determination for that of the trial court judge who personally witnessed the testimony as it was given. This is precisely why trial courts are granted deference for factual findings; they are in the best position to evaluate the believability of the witnesses.<sup>96</sup>

After reviewing the record, the appellate court determined Tiano's religious belief was to go on the pilgrimage, but without the temporal mandate.<sup>97</sup> Tiano testified she received the calling and "had to be there at that time."<sup>98</sup> Her pilgrimage companion's testimony, however, "strongly suggest[ed] that the timing of the trip was a personal preference."<sup>99</sup> The companion testified that she didn't remember a "definite reason" for going on the trip; rather, "[b]oth women 'talked about it' and 'thought it would be interesting to go on.'"<sup>100</sup> Thus, the appellate court believed the plaintiff's testimony and discredited the companion, finding she had been called by God. The appellate court then contradicted itself by believing the companion's testimony that the timing of the trip was personal, and not directed by God. To support this holding, the appellate court determined there was a lack of evidence because Tiano "offered no corroborating evidence to support the claim that she had to attend the pilgrimage between October 17 and 26.... She did not testify that the visions of the Virgin Mary were expected to be more intense during that period. Nor did she suggest that the Catholic Church advocated her attendance at that particular pilgrimage."<sup>101</sup> The Ninth Circuit essentially reviewed the facts *de novo*, substituting its judgment for that of the trial judge.

In choosing to split hairs regarding the plaintiff's testimony to limit the religious belief at hand, the appellate court failed to provide any meaningful analysis to help future litigants and lawyers better understand the bounds between legal and illegal conduct. The Ninth Circuit effectively placed an additional element on religious discrimination cases—unlike any others—requiring plaintiffs to not only

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<sup>95</sup> *Id.* at 683.

<sup>96</sup> *See id.* (Fletcher, J., dissenting) (citations omitted) ("We have long held that questions of credibility 'are generally immune from appellate review.'...because the trier of fact is uniquely positioned to observe the demeanor of a live witness on the stand.").

<sup>97</sup> *Id.* at 682.

<sup>98</sup> *Id.* at 682-83.

<sup>99</sup> *Id.* at 682.

<sup>100</sup> *Id.* at 682-83.

<sup>101</sup> *Id.* at 682.

testify but also provide corroborating evidence to support their beliefs.<sup>102</sup> Hence, in requiring plaintiffs to explain their religious beliefs, the Ninth Circuit in effect expects plaintiffs to cross-examine their Gods for evidence to enforce Title VII. And God, apparently, had better be prepared to explain Himself.

In both *Wilson* and *Tiano*, the courts chose to believe some aspects of religious practice but refused to believe others. In *Wilson*, the court believed the plaintiff made a vow to God to wear the abortion pin; common-sense demands the conclusion that wearing the pin requires it be displayed, yet the court claimed the “visible” aspect of this belief was insincere. In *Tiano*, the court believed the plaintiff had a calling from God but not during a specific week in October; yet to reach this conclusion, the court relied on testimony from her travelling companion that they merely planned on the trip and that week merely because it would be “interesting.” Such testimony, if believed, would make her entire claim of a calling from God insincere, not merely the timing of the calling. It appears the judges, while claiming not to be in the business of judging the validity of beliefs, used the sincerity prong to carve out aspects they either failed to understand or believed should not be accommodated. A proper legal test to determine whether a set of beliefs is “religious” would require specificity and objectivity to prevent this type of shaky and unpredictable application.

The subjectivity by the courts is even more apparent when addressing non-traditional religions. No matter how they define “religious,” courts appear to rule based on their instinct rather than thoughtful, objective analysis. A plaintiff in Florida claimed he was discriminated against due to his “personal religious creed” that ingesting Kozy Kitten People/Cat Food contributed to his well-being and improved his work performance.<sup>103</sup> The district court, without any analysis, held the plaintiff’s creed “can only be described as such a mere personal preference.”<sup>104</sup> While the decision that the plaintiff was not protected under Title VII may have been correct,<sup>105</sup> the court cannot explain *why*.

Contrast that holding with *Toronka v. Cont’l Airlines, Inc.*<sup>106</sup> Toronka claimed to have a sincere religious belief that dreams caused future events, thereby excusing him from negligence in a car accident when his wife previously had a dream of him being in such an accident.<sup>107</sup> The court found Toronka’s claim of religious

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<sup>102</sup> *See id.* (“The only evidence offered by Tiano to prove that the temporal mandate was part of her calling was her testimony...She offered no corroborating evidence to support the claim that she had to attend the pilgrimage between October 17 and 26.”).

<sup>103</sup> *Brown v. Pena*, 441 F. Supp. 1382, 1384 (S.D. Fla. 1977).

<sup>104</sup> *Id.* at 1385.

<sup>105</sup> Of course, there is no way for anyone to determine whether this holding was correct or not because the opinion is so devoid of facts and analysis.

<sup>106</sup> 649 F. Supp. 2d 608 (S.D. Tex. 2009).

<sup>107</sup> *Id.* at 609-10.



discrimination “plausible” and stated “sincerely held personal convictions, which others find nonsensical, may still fit within the framework of a religious belief. There is, however, a rational limit to what courts are willing to accept as religious beliefs. See, e.g., [Kozy Kitten People/Cat Food case].”<sup>108</sup> Where the bright line exists between rationality and irrationality, e.g., between eating cat food and believing a dream could cause brakes to fail on a car, remains a mystery. The court made no attempt to provide any guidance for future cases.<sup>109</sup>

Their inability to distinguish between the legitimacy of religious beliefs has not deterred the courts from continuing to issue rulings. They have determined, for example, that the Wiccan religion is a belief system that preaches a “peaceful, harmonious and balanced way of life which promotes oneness with the divine and all which exists,” and recognizes the Mother Earth as a divinity.<sup>110</sup> Hence, Wicca is a protected religion under Title VII.<sup>111</sup> Atheism, the belief in the non-existence of God, can also be entitled to protection,<sup>112</sup> as seen in *Seeger and Welsh*.

Yet courts are split as to whether beliefs they regard as hateful—such as the white supremacy and anti-Semitism advanced by the Ku Klux Klan (KKK)— can be protected under Title VII.<sup>113</sup> In cases involving employees who were discharged based on their membership in the KKK, courts in the Fourth and Tenth Circuits originally held the KKK was a political group rather than a religion.<sup>114</sup> One problem with these holdings was they were conclusory; “the proclaimed racist and anti-Semitic ideology of the [KKK] takes on... a narrow, temporal and political character inconsistent with the meaning of ‘religion.’”<sup>115</sup> Neither of the courts attempted to

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<sup>108</sup> *Id.* at 612.

<sup>109</sup> Presumably, the belief that bread and wine somehow transforms into flesh and blood of a man who died almost 2,000 years ago (directly contrary to physical evidence) may be seen as similarly nonsensical; but the Catholic belief of transubstantiation is an accepted religious belief. See Francis J. Beckwith, *Transubstantiation: From Stumbling Block to Cornerstone*, THE CATHOLIC THING (Jan. 21, 2011) <http://www.thecatholicthing.org/2011/01/21/transubstantiation-from-stumbling-block-to-cornerstone/>. Certainly, the extent to which a belief is “popular” cannot be the legal test.

<sup>110</sup> *What is Wicca*, THE CELTIC CONNECTION, <http://wicca.com/celtic/wicca/wicca.htm> (last visited May 26, 2014).

<sup>111</sup> See *Van Koten v. Family Health Mgmt.*, 955 F. Supp. 898, 902 (N.D. Ill. 1997).

<sup>112</sup> *Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003).

<sup>113</sup> EEOC Dec. No. 79-06 (Oct. 6, 1978). The EEOC analyzed the KKK’s history and concluded it was a political rather than religious organization. *Cf. Bellamy v. Mason’s Stores, Inc.*, 368 F. Supp. 1025 (E.D. Va. 1973); *Slater v. King Soopers*, 809 F. Supp. 809 (D. Colo. 1992); *but cf. Peterson v. Wilmur Communs., Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002). Although this may be true, the EEOC also defines religious beliefs as “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980). Therefore, determining the organization is not “religious” does not end the analysis in any given case; a KKK member who holds the organization’s beliefs with the strength of traditional religious views highlights an inherent conflict with EEOC guidance.

<sup>114</sup> See *Bellamy*, 368 F. Supp. 1025; *Slater*, 809 F. Supp. 809.

<sup>115</sup> *Bellamy*, 368 F. Supp. at 1026. See *Slater*, 809 F. Supp. at 810.

explain how it determined such beliefs were not religious.<sup>116</sup> This appears to be yet another example of the courts ruling on their gut feelings rather than on any legal analysis.

Perhaps more important is the failure by the courts and the EEOC to recognize that religious beliefs are subjective.<sup>117</sup> The issue is not whether a claimed “religion” qualifies for protection, but rather whether the believer holds the set of beliefs as “religious” in the believer’s own scheme of things.<sup>118</sup> Thus, even if the KKK described itself as a political organization, a member could hold such beliefs as part of their fundamental morality, thereby making them “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views”<sup>119</sup> consistent with the EEOC’s definition of religion and the Supreme Court’s holding in *Seeger* and *Welsh*.

Contrast these holdings with *Peterson v. Wilmur Communications, Inc.*,<sup>120</sup> in which the plaintiff was demoted due to his membership in the World Church of the Creator, a “religious organization” sharing some of the white supremacist beliefs of the KKK.<sup>121</sup> Specifically quoting *Bellamy* and *Slater*,<sup>122</sup> the district court determined the plaintiff’s belief was religious:

“Religion” under Title VII includes belief systems which espouse notions of morality and ethics and supply a means from distinguishing right from wrong. Creativity has these characteristics. Creativity teaches that followers should live their lives according to what will best foster the advancement of white people and the denigration of all others. This precept, although simplistic and repugnant to the notions of equality that undergird the very non-discrimination statute at issue, is a means for determining right from wrong.<sup>123</sup>

Today, the KKK identifies itself as a religious organization.<sup>124</sup>

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<sup>116</sup> See *Bellamy*, 368 F. Supp. 1025; *Slater*, 809 F. Supp. 809; see also *Peterson*, 205 F. Supp. 2d at 1022 (Both courts “reached the same result without further discussion.”).

<sup>117</sup> *Peterson*, 205 F. Supp. 2d at 1022 (emphasis added) (“[T]he fact that certain white supremacist organizations have been found not to be religions does not logically mean that Creativity also is not a religion for plaintiff, given that the test for what is a religion turns in part on subjective factors.”).

<sup>118</sup> *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978); *United States v. Seeger*, 380 U.S. 163, 185 (1969).

<sup>119</sup> Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.1 (1980).

<sup>120</sup> 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

<sup>121</sup> *Id.* at 1023. The organization “preaches a system of beliefs called Creativity, the central tenet of which is white supremacy.” *Id.* at 1015.

<sup>122</sup> *Id.* at 1022 (internal citation omitted) (Both courts “reached the same result without further discussion. Thus, these cases do not assist me in determining how the World Church of the Creator might be similar to or different from the KKK.”).

<sup>123</sup> *Id.* at 1023.

<sup>124</sup> *Welcome to the Ku Klux Klan: Knights Party*, <http://www.kkk.com> (last visited May 26, 2014)

## E. Conclusion

As these cases show, courts merely have a sense of what “religion” is, and rely on its indefinability as a means to reach the result the courts *feel* is justifiable. But religion is inherently subjective, which is precisely why an objective test is required; without it, the analysis devolves into merely a question of sincerity, and any thought or belief could be “religious” if the believer holds it in high enough regard. Yet Congress intended to protect a certain category of beliefs, not merely entrust judges to determine protection on a case-by-case basis. It is that intent which requires a clear and workable analysis for determining whether a set of beliefs are protected as “religious.” Inclusion in the protected class of religion—whether a sincerely-held belief is “religious”—is the first element in any Title VII claim. As we see in Part III (religious accommodation) and Part IV (harassment), the failure to have an effective legal test to determine whether a given belief is protected pervades all religious claims.

## III. REASONABLE ACCOMMODATION / UNDUE HARDSHIP

Sincerely-held religious beliefs earn the same protection from adverse employment action as does one’s race or sex.<sup>125</sup> Unique to religion, however, is the right to be reasonably accommodated when employer policies conflict with such beliefs.<sup>126</sup>

As previously discussed, the original text of Title VII provided no requirement to reasonably accommodate religious practices.<sup>127</sup> In *Dewey v. Reynolds Metals Co.*,<sup>128</sup> the Supreme Court affirmed a Sixth Circuit holding that religious discrimination and failure to accommodate religious practices are “entirely different.”<sup>129</sup> The employer’s refusal to accommodate the plaintiff’s observance of the Sabbath was not discrimination since the employer followed the terms of the collective bargaining agreement that applied equally to all, and discriminated against none.<sup>130</sup> “The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.”<sup>131</sup>

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(“Bringing a Message of Hope and Deliverance to White Christian America! ... Pray that our people see the error of their ways and regain a sense of loyalty. Repent America! Be faithful my fellow believers. [signed] National Director of The Knights, Pastor Thomas Robb”).

<sup>125</sup> See 42 U.S.C. § 2000e-2 (1991).

<sup>126</sup> *Id.* at § 2000e(j).

<sup>127</sup> See *supra* Part II.A.2; see also 42 U.S.C. § 2000e (1964).

<sup>128</sup> 429 F.2d 324 (6th Cir. 1970), *aff’d*, 402 U.S. 689 (1971), *superseded by statute*, 42 U.S.C. § 2000e(j) (1972), *as recognized in* *Peterson v. Wilmur Comm, Inc.*, 205 F. Supp. 2d 1014 (E.D. Wis. 2002).

<sup>129</sup> *Id.* at 335.

<sup>130</sup> *Id.* at 334.

<sup>131</sup> *Id.* at 335.

Congress disagreed, and the very next year amended the Civil Rights Act to require employers to reasonably accommodate the religious practices and beliefs of employees unless doing so would be an undue hardship.<sup>132</sup> When an accommodation can be made without an undue hardship on the employer, the employee is able to avoid choosing between his faith and his job.<sup>133</sup> This is the essence of the duty to accommodate—to resolve conflict between one’s religion and one’s livelihood.

To prove a claim of an employer’s failure to accommodate, a plaintiff must show “(1) he or she has a bona fide religious belief that conflicts with an employment requirement; 2) he or she informed the employer of the belief; and 3) he or she was disciplined for failing to comply with the conflicting employment requirement.”<sup>134</sup> If the plaintiff proves this *prima facie* case, the burden shifts to the employer to prove either he provided a reasonable accommodation that the plaintiff refused, or could not accommodate the plaintiff without incurring an undue hardship.<sup>135</sup>

As seen in Part II, courts have a difficult time with whether the belief that conflicts with the employment policy is “religious” and protected, or unprotected like a merely personal preference? Failure to address this appropriately pollutes the remainder of a court’s analysis. Although previously discussed, we will see this issue is necessarily intertwined in the determination of whether a plaintiff is entitled to a reasonable accommodation. Will the case law show an effective legal test to analyze these issues, or, as discussed in the previous section, are the courts unable to formulate a construct to apply this balancing test, ruling from the hip rather than taking careful aim with their decisions?

## A. Legislative History

In the 1972 amendment to Title VII defining “religion,” Congress adopted the EEOC’s guidelines<sup>136</sup> that required employers to reasonably accommodate religious practices and beliefs unless doing so would cause an undue hardship on the business.<sup>137</sup> Senator Jennings Randolph from West Virginia<sup>138</sup> explained the need for this sweeping change, focusing entirely on the need to accommodate employees’ Sabbath observances:

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<sup>132</sup> 42 U.S.C. § 2000e(j) (1972).

<sup>133</sup> *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 136 (3d Cir. 1986), *superseded by statute*, 42 U.S.C. § 1981a (1991).

<sup>134</sup> *Id.* at 133.

<sup>135</sup> *Id.* at 134.

<sup>136</sup> Although the EEOC promulgates guidelines and examples regarding religious accommodations, such guidance is only as strong as the case law that enforces them. Thus, for the purpose of this thesis, I will focus solely on the legislative history and intent, and the judicial branch’s interpretation of it.

<sup>137</sup> 42 U.S.C. § 2000e(j) (1972).

<sup>138</sup> *Sen. Jennings Randolph*, [https://www.govtrack.us/congress/members/jennings\\_randolph/409027](https://www.govtrack.us/congress/members/jennings_randolph/409027) (last visited May 26, 2014).

There are several religious bodies...with certain strong convictions that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday...[For my denomination], we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, "From eve unto eve shall you celebrate your Sabbath." [However,] [t]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days.<sup>139</sup>

Senator Randolph continued with a few examples of balancing the need to accommodate such practices with the employers' interests. On one hand, the employer of a man who works 15 days on followed by 15 days off may be required to change the work schedule to a customary five- or six-day work week; without additional specifics, this would not be an undue hardship on an employer.<sup>140</sup> On the other hand, "[t]here are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the 2 days of the employment;"<sup>141</sup> Senator Randolph agreed such a requirement would constitute an undue hardship.<sup>142</sup> In the Senate, the amendment passed 55-0.<sup>143</sup>

As we know by experience and as we have seen up to this point, both traditional and non-traditional religions have a number of beliefs that, at times, conflict with employment policies. To understand the balancing test between the employee's beliefs and the needs of the employer, we must first identify its bounds: what beliefs "deserve" reasonable accommodation? The purpose of the duty to accommodate is "plainly intended to relieve individuals of the burden of choosing between their job and their religious convictions, where such relief will not unduly burden others. This is...a secular purpose, part of our 'happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'"<sup>144</sup> Certainly there are some religious practices that require more protection than others. For example, religions place different levels of importance on visible displays of faith; on one end of the pendulum are religious *requirements* to wear religious symbols or clothing, while on the opposite end are methods to express one's beliefs (e.g., wearing a Christian

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<sup>139</sup> 118 CONG. REC. 705 (1972).

<sup>140</sup> *Id.* at 706.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 731.

<sup>144</sup> *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 136 (3d Cir. 1986), *superceded by statute*, 42 U.S.C. § 1981a (1991) (quoting *Nottelson v. Smith Steele Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir. 1981)).

cross). Yet the courts do not identify the distinguishing characteristics to separate these two polar opposites.<sup>145</sup>

As identified in Part II, by expanding the definition of “religious” beliefs to any belief that is sufficiently held, courts dilute the meaning of beliefs that are religious. Likewise, by failing to distinguish between required religious practices and practices that are loosely based on religion, the courts have similarly diluted the meaning of *religious* practices.

#### B. Is the Plaintiff Entitled to a Reasonable Accommodation?

To be entitled to a religious accommodation, one must have a bona fide religious belief that conflicts with the employer’s policy.<sup>146</sup> In *Reed v. Great Lakes Cos.*,<sup>147</sup> the plaintiff was an executive housekeeper for a hotel.<sup>148</sup> One of his duties was to ensure a free copy of the Bible—provided by the Gideons—was placed in each room.<sup>149</sup> When Reed met with his supervisor and the Gideons, the Gideons provided the Bibles, read passages from the Bible, and prayed.<sup>150</sup> Reed left in the middle of this meeting, offended by its religious character.<sup>151</sup> After a heated meeting with his supervisor, Reed was fired for insubordination.<sup>152</sup> The Seventh Circuit Court of Appeals identified that religion may be seen as taking a position on divinity, in which case Atheism is therefore a religion (the belief that there is no divinity).<sup>153</sup> However, Reed didn’t claim to be an Atheist, rather he put forward no evidence as to his religious beliefs.<sup>154</sup> “[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief.”<sup>155</sup> Thus, Reed “utterly failed to make a prima facie case.”<sup>156</sup>

The *Reed* case is clearly an exception to the rule, setting forth a very low bar for plaintiffs to overcome. The dilution of “religious practices” occurs when the court

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<sup>145</sup> Cf. *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, [http://www.eeoc.gov/eeoc/publications/qa\\_religious\\_garb\\_grooming.cfm](http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm) (“Examples of religious dress and grooming practices include wearing religious clothing or articles (e.g., a Muslim hijab (headscarf), a Sikh turban, or a Christian cross).”).

<sup>146</sup> *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1120 (10th Cir. 2013).

<sup>147</sup> 330 F.3d 931 (7th Cir. 2003).

<sup>148</sup> *Id.* at 933.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* Although not addressed by the court, the timing of the discharge is highly relevant. Reed was not fired after walking out of the meeting; rather, he was fired after the heated discussion with the manager, which suggests Reed’s conduct during the meeting was the cause of his discharge. *Id.*

<sup>153</sup> *Id.* at 934.

<sup>154</sup> *Id.* at 933.

<sup>155</sup> *Id.* at 935.

<sup>156</sup> *Id.* at 934.

skips the analysis of whether the apparent conflict is actually a religious practice. In *Redmond v. GAF Corp.*,<sup>157</sup> the plaintiff led a Bible study class on Tuesday evenings; this class did not conflict with his employment.<sup>158</sup> However, when the church elders rescheduled the Bible study class to Saturdays, the plaintiff notified his employer and refused to work Saturdays in order to lead the class.<sup>159</sup> The court made short shrift of whether an accommodation was necessary, and held the defendant's failure to attempt to accommodate this new schedule resulted in liability for the wrongful discharge.<sup>160</sup> The more important question, and the analysis that is more important for future litigants, is whether this Bible study class was truly a "religious practice" intended for protection.

Certainly, there is a difference between a requirement from God that a believer not work on a given day of the week, and the scheduling preferences of a church. Perhaps borrowing from the teachings of Jesus Christ that one should not let the left hand know what the right hand is doing,<sup>161</sup> the Court of Appeals wrote its opinion using quotes without regard to the context from which they were extracted.<sup>162</sup> It quickly dispatched any claim that Title VII was limited to practices specifically "mandated or prohibited by a tenet of the plaintiff's religion" in two short paragraphs.<sup>163</sup>

First, the court determined the "very words of the statute ('*all aspects* of religious observance and practice....') leave little room for such a limited interpretation."<sup>164</sup> It is interesting the court decided to emphasize the words "all aspects" rather than the one word that actually grants protection: "religious." The court feigned difficulty in an interpretation of the statute requiring the judge to determine the tenets of a particular religion.<sup>165</sup> The conflict in the actual case is limited to whether the church's schedule trumps the employer's schedule; Saturday was not a holy day, rather just a more convenient day for the church. No significant research is required into the religion of Jehovah's Witnesses to determine its tenets,<sup>166</sup> and the judge could easily have asked the plaintiff during his testimony.

Nonetheless, the court determined such an analysis would be contrary to a mandate of the Supreme Court that "[i]t is no business of courts to say... what is a

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<sup>157</sup> 574 F.2d 897 (7th Cir. 1978).

<sup>158</sup> *Id.* at 899.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 903-04.

<sup>161</sup> *Matthew* 6:3.

<sup>162</sup> *See Redmond*, 574 F.2d at 900.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (alteration in original).

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

<sup>166</sup> *See, e.g., Kentucky Com. On Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361, 363 (Ky. Ct. App. 1987).

religious practice or activity.”<sup>167</sup> If courts were precluded from determining whether a belief was religious and instead had to rely on the testimony of the plaintiff, Title VII would protect all “sincerely held beliefs,” rather than sincerely held *religious* beliefs. Of course, such a mandate from the Supreme Court does not exist.

The issue quoted above from *Fowler v. Rhode Island*<sup>168</sup> was whether a gathering of Jehovah’s Witnesses in a public park involving a sermon was precluded under a state law that allowed religious gatherings but prohibited public addresses.<sup>169</sup> Other religious sects were allowed to gather in the park and hold their own services, thereby resulting in unequal treatment to the method by which Jehovah’s Witnesses held services.<sup>170</sup> Rhode Island conceded the plaintiff was engaged in religious activity; it argued, however, that this religious activity was not protected by the First Amendment.<sup>171</sup> The Supreme Court held:

*[I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. Nor is it in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings. Sermons are as much a part of a religious service as prayers.... To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.*<sup>172</sup>

As is clear from the context, the issue for the Supreme Court was not whether the activity was religious or not, but rather the subjective application of the law in Rhode Island. Yet, with selective editing and judicial creativity, the Court of Appeals for the Seventh Circuit used the emphasized language to reach their final conclusion in *Redmond*, again, with no basis in the law.<sup>173</sup>

Because “*all aspects* of religious observance and practice” are protected, and the court is precluded from determining “what is religious,” the Seventh Circuit concluded: “conduct which is ‘religiously motivated’...is protected [by Title VII].”<sup>174</sup> Therefore, since Redmond was religiously-motivated to lead Bible study, he was

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<sup>167</sup> *Redmond*, 574 F.2d at 900 (quoting *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953)).

<sup>168</sup> 345 U.S. 67 (1953).

<sup>169</sup> *Id.* at 67.

<sup>170</sup> *Id.* at 69.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 70 (emphasis added).

<sup>173</sup> *See Redmond*, 574 F.2d at 900.

<sup>174</sup> *Id.*



entitled to an accommodation.<sup>175</sup> Such a broad legal test—whether the conduct is motivated by religion or not—doesn’t simply dilute the meaning of religious beliefs, it destroys it.<sup>176</sup>

This drastic expansion of protected beliefs is not limited to the Seventh Circuit; the Eleventh Circuit, although not expressly adopting the “religiously-motivated” test, appears to support it nonetheless. In *Dixon v. Hallmark Cos.*,<sup>177</sup> the employer had a policy prohibiting religious artwork in the management office, and informed the plaintiffs of this policy.<sup>178</sup> The supervisor believed displaying such artwork would violate the Fair Housing Act since the company received federal funds in the form of rental assistance and is subject to periodic inspections.<sup>179</sup> Ignoring this, the plaintiffs hung a picture with a Bible quotation on it.<sup>180</sup> After being told to remove it, re-hanging it, and then arguing with the supervisor about it, the Dixons were fired for insubordination.<sup>181</sup> The Eleventh Circuit chastised the district court judge for granting summary judgment to the employer.<sup>182</sup> “The Dixons have presented evidence that they are sincere, committed Christians who oppose efforts to remove God from public places” and therefore may have a legitimate reasonable accommodation claim.<sup>183</sup> Apparently, it is enough to request an accommodation if, because of an employee’s religious beliefs, he merely dislikes a policy of his employer.

A Second Circuit district court also committed similar missteps in *Rivera v. Choice Courier Svs.*<sup>184</sup> Rivera’s employer required its couriers to “dress neat and in good taste.”<sup>185</sup> Rivera, an evangelical Christian, attached lettering to his jackets displaying the message “Jesus is Lord.”<sup>186</sup> The company requested he not display the message because a customer may incorrectly believe the company endorsed the message, and “as respectful as [the company was] of his personal beliefs, [it] needed to be equally respectful of our other employees[’] beliefs, our clients, and

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<sup>175</sup> *Id.* at 901.

<sup>176</sup> Surprisingly, this same court stated 25 years later “an employee is not permitted to redefine a purely personal preference...as a religious belief.” *Reed v. Great Lakes*, 330 F.3d 931, 935 (7th Cir. 2003). Yet this is exactly what the “religiously-motivated” test permits. Regardless, the court ignores its previous “religiously-motivated” language but doesn’t correct it; rather, the court cites *Redmond* for the limited holding that an employee must notify the employer of the conflict. *Id.*

<sup>177</sup> 627 F.3d 849 (11th Cir. 2010).

<sup>178</sup> *Id.* at 853.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 855.

<sup>183</sup> *Id.*

<sup>184</sup> 2004 U.S. Dist. LEXIS 11758 (S.D.N.Y. 2004).

<sup>185</sup> *Id.* at \*3.

<sup>186</sup> *Id.* at \*4.

company policy.”<sup>187</sup> Rivera filed a religious discrimination claim under Title VII upon his discharge.<sup>188</sup>

The EEOC determined there was no basis to his claim since wearing this message was not an essential practice of the plaintiff’s religion, and the company was not required to accommodate the plaintiff’s discretionary request.<sup>189</sup> Unlike the Seventh Circuit in *Redmond*, the EEOC seemingly encountered no difficulties in determining whether this clothing preference was a tenet or requirement of the plaintiff’s beliefs. Because the plaintiff testified he “need[ed] to express the name of the Lord Jesus to as many people as possible,”<sup>190</sup> the district court determined the plaintiff’s wearing of “Jesus is Lord” on his vest was a religious practice and he satisfied his prima facie case.<sup>191</sup> Similar to the Seventh Circuit, the court determined Title VII “protects more than...practices specifically mandated by an employee’s religion.”<sup>192</sup>

Likewise, the same court held a plaintiff enrolled in a three-year Lay Pastor Program with classes on Saturdays was entitled to religious accommodation, analogizing the program to religious ceremonies and bible study, as in *Redmond*, rather than arguably comparing the course to educational enrollment in a secular subject matter.<sup>193</sup> One does not have to ponder long to see the problematic results of such a holding. An employee seeking a college degree in Theology would be entitled to scheduling accommodation based solely on his major, while his peer working on an Economics degree would not. The greater conflict occurs when the Economics major needs to leave work early to attend a Theology class....

Not all circuits have accepted this broadening of religious protection into discretionary practices. In *Cloutier v. Costco Wholesale*,<sup>194</sup> a district court case in the First Circuit, the plaintiff was a member of the Church of Body Modification and believed in “spiritual growth through body modification.”<sup>195</sup> One of the Church’s tenets is that members should “seek to be confident models in learning, teaching

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<sup>187</sup> *Id.* at \*8.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at \*9. The EEOC has subsequently changed their position on this issue and discretionary practices are now included. See *Religious Garb and Grooming in the Workplace: Rights and Responsibilities*, *supra* note 145 (“Examples of religious dress and grooming practices include wearing religious clothing or articles (e.g., a Muslim hijab (headscarf), a Sikh turban, or a Christian cross)”).

<sup>190</sup> *Rivera*, 2004 U.S. Dist. LEXIS 11758, at \*20.

<sup>191</sup> *Id.* at \*22-23.

<sup>192</sup> *Id.* at \*22 (quoting *Reyes v. N.Y. State Office of Children & Family Servs.*, 2003 U.S. Dist. LEXIS 12644, at \*15 (S.D.N.Y. 2003)).

<sup>193</sup> See *Reyes*, 2003 U.S. Dist. LEXIS 12644, at \*15-16.

<sup>194</sup> 311 F. Supp. 2d 190 (D. Mass.), *aff’d*, 390 F.3d 126 (1st Cir. 2004).

<sup>195</sup> *Id.* at 191.

and displaying body modification.”<sup>196</sup> Over a substantial length of time, Cloutier received tattoos and piercings, to include getting an eyebrow ring.<sup>197</sup> Later, Cloutier’s employer implemented a new dress code policy prohibiting facial jewelry, and asked her to remove the eyebrow ring.<sup>198</sup> Cloutier offered to wear a band-aid over her piercing, but Costco refused to allow it.<sup>199</sup> After several discussions between Cloutier and Costco, Costco agreed to accommodate her by allowing her to wear a retainer—a plastic spacer less noticeable than jewelry that prevents the piercing from healing and closing.<sup>200</sup> Cloutier refused, claiming the retainer would violate her religious beliefs to *display* her eyebrow piercing at *all* times.<sup>201</sup>

The main issue for the court was whether wearing and/or displaying facial jewelry was a sincerely held religious belief therefore entitling the plaintiff to an accommodation.<sup>202</sup> The court began its hobbled analysis by assuming the Church of Body Modification was a bona fide religion, and reviewed the tenets of its “faith,” noting it has no requirement to *display* piercings or tattoos at all times; it then immediately discounted this analysis, correctly stating “[o]f course, the fact that the [Church of Body Modification] does not mandate the practice that the plaintiff insists on is not, by itself, fatal to Cloutier’s claim. If Cloutier’s belief that she must constantly display her body modifications is her religious belief. . . she is entitled to accommodation.”<sup>203</sup> Relying on the fact that Cloutier originally offered to wear a band-aid over her facial piercing and did not claim that concealment of her piercings would violate her religious scruples until the lawsuit began, the court determined she had a “strong personal preference” to display her piercing, but her beliefs were not “religious.”<sup>204</sup>

Yet, the court is effectively expressing its disbelief in her claim. Fundamental beliefs regarding “spiritual growth” through body modification—such as whether the modifications must be visible or concealed—do not change with the winds. Theoretically, one person may have religious beliefs that require the modifications are always displayed while another person may believe in growth through body modification, without a requirement that one be a walking canvas. Cloutier’s flip-flopping on this apparently fundamental issue goes not to her personal preference as the court claims, but to her *sincerity* in the beliefs. The court didn’t believe her claim the piercing must be displayed because she had previously been content

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<sup>196</sup> *Id.* at 193.

<sup>197</sup> *Id.* at 192.

<sup>198</sup> *Id.* at 193.

<sup>199</sup> *Id.* at 194.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 195.

<sup>202</sup> *Id.* at 199-200.

<sup>203</sup> *Id.* at 199 (internal citations omitted).

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

with concealing it.<sup>205</sup> Thus, based on the court’s factual findings, the claim should have been denied because the beliefs were not sincerely held. Instead, the court determined the belief was a personal preference rather than a religious belief, and, rather than explaining itself, concluded, “[i]t is not necessary for the court to wrestle with this troubling question, however, since Costco’s offer of accommodation was manifestly reasonable as a matter of law.”<sup>206</sup> Unfortunately, this unmerited air of confidence failed to hide the court’s lack of analysis. By determining the plaintiff was not entitled to reasonable accommodation, the court confused and combined the analyses of sincerity, religion, and reasonable accommodation. This provides no standard or foreseeability for future plaintiffs and defendants.

Another distinction courts fail to recognize is between religious prohibitions and affirmative expressions of faith. A Jehovah’s Witness refused to greet customers on the telephone with “Merry Christmas”; because her religion precluded the observance of Christmas, making this statement would violate her religious beliefs.<sup>207</sup> The court determined she was entitled to a reasonable accommodation, such as either not answering the phone or greeting customers with “good morning.”<sup>208</sup> To force her to say “Merry Christmas” would be to force her to disobey a tenet of her faith—precisely the situation Congress intended to avoid.

In *Banks v. Service Am. Corp.*,<sup>209</sup> however, the plaintiffs affirmatively expressed their Christian beliefs by greeting customers—against company policy—with phrases such as “God bless you” and “Praise the Lord.”<sup>210</sup> These plaintiffs claimed “[h]onoring God through their speech, through such greetings, was a deep seated sincerely held religious belief and [they] could not stop the practice without violating their beliefs.”<sup>211</sup> No analysis was required in this case, as the defendant conceded these were sincerely held religious beliefs and thus entitled to accommodation.<sup>212</sup> Is the religiously-motivated practice of saying “Praise the Lord” and the religious prohibition against saying “Merry Christmas” deserving of the same

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Kentucky Com. On Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W.2d 361, 363 (Ky. Ct. App. 1987). Unlike a member of another religion that does not celebrate Christmas, Jehovah’s Witnesses believe it is improper to celebrate the birth of Jesus Christ. *See Why Don’t Jehovah’s Witnesses Celebrate Christmas?* JEHOVAH’S WITNESSES, <http://www.jw.org/en/jehovahs-witnesses/faq/why-not-celebrate-christmas/> (last visited May 25, 2014) (“We believe that Christmas is not approved by God because it is rooted in pagan customs and rites.”). Thus, to wish someone “Merry Christmas” would violate a tenet of the Jehovah’s Witness’ faith, as opposed to someone who may be Jewish and not believe in such an event or celebration, and therefore may prefer not to make such a statement.

<sup>208</sup> *Lesco Mfg. & Design Co.*, 736 S.W.2d at 364.

<sup>209</sup> *Banks v. Service Am. Corp.*, 952 F. Supp. 703 (D. Kan. 1996).

<sup>210</sup> *Id.* at 707.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 708.

protection? If so, should an employer be required to make the same effort to accommodate these two practices equally, or is there a difference between avoiding a violation of one's faith and expressing one's faith?

### C. Notice Requirement

The second element in a failure to accommodate claim is that the employee notified the employer of the conflict.<sup>213</sup> The employer is not required to know or understand the religious requirements of his employees; as previously discussed, beliefs are subjective and an individual's beliefs are not required to conform to the traditional views of the organized religion of which they may be a member. The notice requirement is simple when—as in most cases—the employee directly informs the employer of the conflict, but this element is again used by the courts as an excuse to rule based on their visceral reactions rather than objective standards.

The employee must prove the employer was aware of the *conflict*, not just aware of the employee's religious beliefs.<sup>214</sup> The Eighth Circuit, for example, has determined the employer needs “only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.”<sup>215</sup> A district court in the Eleventh Circuit agreed with this analysis in *Hellinger v. Eckerd Corp.*<sup>216</sup> In *Hellinger*, the plaintiff was an Orthodox Jew who applied for an opening as a pharmacist.<sup>217</sup> Hellinger neither mentioned religious restrictions on his application nor did he make any requests for accommodation.<sup>218</sup> The defendant contacted the plaintiff's previous employer as a reference, and learned that the plaintiff refused to sell condoms due to his religious beliefs.<sup>219</sup> The defendant did not hire the plaintiff.<sup>220</sup> In determining the plaintiff met his prima facie case, and specifically met the notice requirement, the court determined the defendant was aware of the need for an accommodation, and to require the notification come from the plaintiff himself would be “hyper-technical.”<sup>221</sup>

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<sup>213</sup> *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019 (4th Cir. 1996).

<sup>214</sup> *See id.* at 1020 (“Knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any religious activity.”); *see also* *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319 (3d Cir. 2008) (noting courts do not require employers to understand particularized beliefs and observances of various religious sects).

<sup>215</sup> *Brown v. Polk County*, 61 F.3d 650, 654 (8th Cir. 1995).

<sup>216</sup> 67 F. Supp. 2d 1359, 1363 (S.D. Fla. 1999).

<sup>217</sup> *Id.* at 1361.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 1363.

Yet compare those holdings with a recent decision from the United States Court of Appeals for the Tenth Circuit. Abercrombie and Fitch, a clothing store specializing in “East Coast collegiate” fashion, has a “look policy” requiring its clerks and salespeople to wear clothes similar to the store’s clothing as a work uniform.<sup>222</sup> A Muslim woman interviewed for a job while wearing a black hijab, or headscarf.<sup>223</sup> No questions were asked about the plaintiff applicant’s religion, nor did the applicant request any accommodation<sup>224</sup> from the “look policy” which prohibited black clothing and caps.<sup>225</sup> Based on the interview, the manager ranked her well in each interview category, concluding her evaluation with a recommendation to hire her.<sup>226</sup> Unsure of whether the headscarf conflicted with the company’s dress policy, the interviewing manager consulted with a senior manager.<sup>227</sup> She “‘assumed [the applicant] was Muslim’ . . . and ‘figured that was the religious reason why she wore her head scarf.’”<sup>228</sup> The senior manager, however, determined the headscarf was incompatible with the dress code, and instructed his subordinate to reaccomplish the evaluation by giving her a lower score, thereby changing the recommendation to hire her.<sup>229</sup>

The Tenth Circuit laid out two bright line rules that, unlike the previously-discussed cases, provide guidance to plaintiffs in its region. First, the court held only religiously-*required* beliefs or practices are entitled to accommodation.<sup>230</sup> The court reminded the parties that the intent of the duty to accommodate is to protect plaintiffs from “the spot where they must choose between their religious convictions and their job.”<sup>231</sup> Therefore,

even if applicants or employees engage in a practice for religious reasons, so long as they do not feel obliged to adhere to the practice (that is, do not consider the practice to be inflexible), then there is no actual conflict, nor a consequent need for the employer to provide a reasonable accommodation.<sup>232</sup>

This bright-line rule—accommodation is only required when the religious practice or belief is *required*—directly conflicts with the other circuits who follow the

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<sup>222</sup> EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1111 (10th Cir. 2013).

<sup>223</sup> *Id.* at 1113.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1111.

<sup>226</sup> *Id.* at 1113.

<sup>227</sup> *Id.* at 1114.

<sup>228</sup> *Id.* at 1113.

<sup>229</sup> *Id.* at 1114.

<sup>230</sup> *Id.* at 1120.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 1121.

amorphous “religiously-motivated” test used in *Redmond*. The drastic gap between these two legal tests must be resolved.

The second bright-line rule set forth by the Tenth Circuit was the employer must have *actual* knowledge of the conflict between the employee’s/applicant’s belief and the employer’s policies.<sup>233</sup> In the case at hand, the manager assumed the plaintiff wore her headscarf for religious reasons, but didn’t have *actual* knowledge; therefore, Abercrombie & Fitch was entitled to summary judgment since the plaintiff could not prove the notice requirement in her failure to accommodate claim.<sup>234</sup> It appears as though the Tenth Circuit is attempting to craft a new test in order to rule in Abercrombie’s favor; a test that suggests employers may feign ignorance and stick their head in the sand to avoid their legal obligations.

Although different from the enough-information-to-know-about-the-conflict test of the Third, Fourth, Eighth, and presumably Eleventh Circuits, the results and application seem to be the same. If an employer has enough information *to know* there is a conflict between the employee’s beliefs and the employer’s policies—as in *Hellinger*—he has actual knowledge of the conflict. Similarly, where the employer knows generally of the plaintiff’s religious beliefs, but doesn’t know how it may conflict with the employer’s policies, the employer has neither enough information to know about the conflict nor actual knowledge of such conflict.<sup>235</sup>

There is no predictability as to when courts will determine whether a plaintiff is entitled to a reasonable accommodation for the religious beliefs. Judges confuse religious beliefs for the sincerity of such beliefs. The Fifth and Seventh Circuits go so far as to argue that any practice that is “religiously motivated” is entitled to protection and accommodation, without any distinction between required and discretionary preferences of the believer. On the other hand, the Tenth Circuit protects only required religious practices; discretionary practices are entitled no accommodation whatsoever.<sup>236</sup>

Once the court has determined that a given practice is entitled to accommodation, the next problem arises when determining whether there is an undue

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<sup>233</sup> *Id.* at 1125.

<sup>234</sup> Although not at issue in the court’s reversal of the summary judgment decision, it appears the plaintiff could continue to trial on her claim of disparate treatment: Abercrombie & Fitch appears to have refused to hire her due to the perception of her sincerely held religious practice of wearing the headscarf. *Id.* at 1143 (Ebel, J., dissenting).

<sup>235</sup> See, e.g., *Wilkerson v. New Media Tech. Charter Sch., Inc.*, 522 F.3d 315, 319-20 (3d Cir. 2008).

<sup>236</sup> See *Abercrombie & Fitch Stores, Inc.*, 731 F.3d at 1120 (“For there actually to be a conflict, logic dictates that an applicant or employee must consider the religious practice to be an inflexible one—that is, a practice that is required by his or her religious belief system.”); but see *Redmond v. GAF Corp.*, 574 F.2d 897, 900 (7th Cir. 1978); *Cooper v. General Dynamics, Convair Aerospace Div., Ft. Worth Operation*, 533 F.2d 163, 168 (5th Cir. 1976) (“If the employee’s conduct is religiously motivated, his employer must tolerate it unless doing so would cause undue hardship to the conduct of his business.”).

hardship for an employer. Unfortunately, as is the standard when dealing with religious discrimination cases, the courts have provided little guidance as to what analysis litigants should expect in any given scenario.

#### D. Undue Hardship

In *TWA v. Hardison*,<sup>237</sup> the Supreme Court interpreted and defined the balancing test between employees requiring religious accommodation and employers. Hardison worked at a TWA maintenance base operating 24 hours a day, 365 days a year.<sup>238</sup> During his employment, Hardison joined the Worldwide Church of God, a tenet of which required observance of the Sabbath from Friday evening to Saturday evening.<sup>239</sup> Initially, this didn't cause any problems for either TWA or Hardison; he had enough seniority to change his work schedule to avoid a conflict with his Sabbath, and if one arose, he could swap shifts with other qualified employees.<sup>240</sup> This arrangement satisfied TWA's employment policies, Hardison's religious beliefs, and the Union's staffing and seniority rules.<sup>241</sup>

The foundation of the litigation in this case arose when Hardison voluntarily bid for and received a transfer to another building site.<sup>242</sup> The two locations had separate seniority lists; due to the transfer, Hardison's seniority dropped to the near bottom of the list. Although TWA agreed to allow Hardison to receive a schedule that did not conflict with his Sabbath, the union was unwilling to violate their seniority system and Hardison did not rank high enough to avoid Saturday duty.<sup>243</sup> Hardison requested a four-day workweek, but to allow this, TWA would suffer some form of hardship.<sup>244</sup> TWA could 1) leave Hardison's position empty on Saturdays, impairing the function of his section, 2) replace Hardison with another qualified employee or supervisor, which would leave the replacement's section undermanned, or 3) pay premium wages to an employee not scheduled to work on Saturdays to replace Hardison.<sup>245</sup> TWA rejected these options.<sup>246</sup> Hardison refused to report to work on Saturdays, and he was discharged for insubordination.<sup>247</sup>

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<sup>237</sup> 432 U.S. 63 (1977).

<sup>238</sup> *Id.* at 66.

<sup>239</sup> *Id.* at 67.

<sup>240</sup> *Id.* at 68.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 68-69.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 68.

<sup>247</sup> *Id.* at 69.



The Supreme Court held TWA would have suffered an undue hardship to grant Hardison the accommodation he requested.<sup>248</sup> Title VII doesn't require the employer to forgo the valid collective bargaining agreement, which represents and protects the employment rights of all its employees, for the sake of an accommodation for one; to support such a holding would deprive the other employees of their contractual rights because they don't have religious beliefs similar to that of Hardison.<sup>249</sup> "Title VII does not contemplate such unequal treatment."<sup>250</sup> In fact, Title VII affords special treatment to bona fide seniority and merit systems, determining that such practices—absent a discriminatory intent—are not unlawful employment practices even if they have a discriminatory effect.<sup>251</sup> Requiring TWA to pay another employee to cover Hardison's shift, or bear the cost of being undermanned in a section would have constituted an undue burden on TWA and is not required under Title VII.<sup>252</sup> The Supreme Court drew its line; "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship."<sup>253</sup>

The Supreme Court's holding in *Hardison* appears consistent with Senator Randolph's explanation during the discussion of reasonable accommodation in the Senate.<sup>254</sup> Where an employer can reschedule its employees without difficulty to accommodate the Sabbath, the employer is obligated to do so; employers who have 24-hour operations or require weekend work, however, may not have the same ability to accommodate Sabbath observance.<sup>255</sup> Thus, in the case of a firefighter who observed the same Saturday Sabbath as Hardison, the Tenth Circuit Court of Appeals found—prior to the *Hardison* decision—it was an undue hardship to accommodate the employee where to do so would require either providing less favorable working conditions for all other employees, or leaving the fire station critically undermanned.<sup>256</sup> Thus, it seems both Congress and the Supreme Court agree; if an employer can accommodate a religious belief or practice, he is obligated to do so as long as it doesn't impose a cost to the employer (beyond trivial/*de minimis* costs).

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<sup>248</sup> *Id.* at 84.

<sup>249</sup> *Id.* at 80.

<sup>250</sup> *Id.* at 81

<sup>251</sup> *Id.* at 82; see 42 U.S.C. § 2000e-2(h) (1972) ("Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.").

<sup>252</sup> *Hardison*, 432 U.S. at 84.

<sup>253</sup> *Id.*

<sup>254</sup> 118 CONG. REC. 705-06 (1972).

<sup>255</sup> *Id.* at 706.

<sup>256</sup> *United States v. Albuquerque*, 545 F.2d 110, 115 (10th Cir. 1976).

The duty to accommodate is a two-way street;<sup>257</sup> the EEOC describes it as an “interactive process” between the employee and the employer.<sup>258</sup> “[T]he employee has a duty to cooperate with the employer’s good faith efforts to accommodate,”<sup>259</sup> and cannot impose liability on its employer by demanding an unreasonable accommodation.<sup>260</sup> Similarly, an employer must attempt to accommodate the employee’s religious beliefs<sup>261</sup>—mere hypothetical or potential hardships are not sufficient to avoid this obligation.<sup>262</sup>

This cost is not limited to only financial effects. In *Hardison*, the hardship included the financial cost of premium pay or hiring an additional worker, and other courts have loosely followed suit, determining that less than \$20 of monthly incurred costs associated with an accommodation is not an undue hardship.<sup>263</sup> But *Hardison* also identified an intangible cost: lowered effectiveness in *Hardison*’s section if he didn’t work on Saturdays and was not replaced by another supervisor.<sup>264</sup> The Fifth Circuit further examined undue hardship in a similar case where the plaintiff refused

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<sup>257</sup> See *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986) (“bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee’s religion and the exigencies of the employer’s business”) (quoting *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 145-46 (5th Cir. 1982)).

<sup>258</sup> *Religious Discrimination*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/religion.cfm> (last visited Jan. 16, 2015).

<sup>259</sup> *Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190, 198 (D. Mass.), *aff’d*, 390 F.3d 126 (1st Cir. 2004).

<sup>260</sup> See *Jordan v. North Carolina Nat’l Bank*, 565 F.2d 72 (4th Cir. 1977), *overruled by* *EEOC v. Ithaca Indus.*, 849 F.2d 116, 119 n.3 (4th Cir. 1988). In *Jordan*, the plaintiff applied for a job with the defendant, but notified the bank she celebrated the Sabbath on Saturday and would be unable to work on any Saturday. *Id.* at 74. The bank manager informed her they would “try to accommodate her” but could give her no guarantee. *Id.* at 75. The plaintiff stated she could not accept the position without such a guarantee and filed her lawsuit claiming the bank failed to accommodate her. *Id.* at 73. This requirement of the plaintiff’s was “so unlimited and absolute in scope—*never* to work on Saturday—that it speaks to its own unreasonableness and thus beyond accommodation.” *Id.* at 76.

<sup>261</sup> See *EEOC v. Aldi, Inc.*, 2008 U.S. Dist. LEXIS 25206 (W.D. Pa. 2008). Once notified the plaintiff’s religious beliefs forbade working on Sundays, the employer merely responded that Sunday work was an essential function of the job and the plaintiff needed to report to work as scheduled. *Id.* at 33. The employer failed to attempt to accommodate, failed to facilitate shift-swapping, and didn’t “even engage in a discussion with [the plaintiff] as to the existing rotation system and voluntary shift swap policy.” *Id.* See also *Balint v. Carson City*, 180 F.3d 1047, 1056 (9th Cir. 1999) (“The mere existence of the City’s seniority system does not relieve it from the duty to attempt reasonable accommodation of its employees’ religious practices”).

<sup>262</sup> See, e.g., *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975) (“We are somewhat skeptical of hypothetical hardships that an employer thinks might be caused by an accommodation that never has been put into practice.”); *Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 402 (9th Cir. 1978) (noting undue hardship requires more than proof of some co-worker’s grumbling or unhappiness with a particular accommodation).

<sup>263</sup> See, e.g., *Anderson*, 589 F.2d at 402; *Burns v. Southern Pacific Transp. Co.*, 589 F.2d 403, 407 (9th Cir. 1978) (holding that plaintiffs with religious beliefs forbidding union membership, thereby depriving union of less than \$20 in monthly income, was not undue hardship).

<sup>264</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

to work on his Sabbath, and offered to pay the difference in wages for his employer to pay another worker overtime.<sup>265</sup> The district court found the costs associated with “hir[ing] an overtime employee and bill[ing the plaintiff] for the additional wages” were still more than *de minimis*.<sup>266</sup> This holding appears consistent with *Hardison*; unfortunately, intangible costs by their very nature are difficult to prove, granting judges yet another element on which to hang their proverbial hats with neither rhyme nor reason.<sup>267</sup>

A case in the Sixth Circuit highlights the confusion among judges.<sup>268</sup> The plaintiff, a mechanic, regularly attended church services on Wednesday evenings, and had requested—and received—an accommodation to ensure he was able to leave work in time to attend.<sup>269</sup> During this period of accommodation over approximately two years, the employer instituted a new policy that one mechanic could never work alone for reasons of safety and availability for road service.<sup>270</sup> The plaintiff was discharged when he left a mechanic alone one evening by leaving work at 5:52 p.m. to attend his 7:00 p.m. church service.<sup>271</sup> The trial court held this violation of the employer’s policy constituted an undue hardship, and thus the plaintiff’s discharge was lawful.<sup>272</sup> However, the second mechanic arrived at 6:01 p.m., a mere nine minutes after the plaintiff left.<sup>273</sup> No road service requests were received in this nine-minute window, nor was anyone injured.<sup>274</sup> Thus, the trial court’s logic was that undue hardship was not incurred by this incident, but rather at the *speculation* of harms that could be caused at a future incident, *if* the plaintiff were to violate the policy again. Yet the Sixth Circuit overturned this decision, and—even though it accepted the factual findings of the lower court—came to the opposite determination holding the company provided no accommodation and therefore it was unnecessary to even analyze *Hardison*.<sup>275</sup>

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<sup>265</sup> Turpen v. Missouri-Kansas-Texas R.R. Co., 736 F.2d 1022, 1028 (5th Cir. 1984).

<sup>266</sup> *Id.*

<sup>267</sup> See, e.g., *Burns*, 589 F.2d at 407 (Undue hardship requires more than proof of a coworker’s “grumbling”).

<sup>268</sup> EEOC v. Arlington Transit Mix, Inc, 734 F. Supp. 804 (E.D. Mich. 1990), *rev’d*, EEOC v. Arlington Transit Mix, Inc., 957 F.2d 219 (6th Cir. 1991).

<sup>269</sup> *Arlington Transit Mix, Inc.*, 734 F. Supp. at 805.

<sup>270</sup> *Id.* at 808.

<sup>271</sup> *Id.* at 807.

<sup>272</sup> *Id.* at 810.

<sup>273</sup> *Id.* at 809.

<sup>274</sup> See *id.* at 809-10.

<sup>275</sup> *Arlington Transit Mix, Inc.*, 957 F.2d at 222. The trial court defined the accommodation “required” by the plaintiff as “[r]equiring Arlington to allow all mechanics to work the same shift [forcing] it to increase the amount of overtime paid.” *Arlington Transit Mix, Inc.*, 734 F. Supp. at 809. Yet, as is clear from the facts, the plaintiff only wanted the accommodation to leave in time for his church service, even if doing so would, at times, temporarily conflict with the employer’s “one-mechanic” policy. *Id.* The trial court, in essence, held that the employer’s duty to accommodate ceased once it conflicted with the employer’s “one-mechanic” policy: “Arlington clearly could

Compare these holdings with the decision in *Banks* (involving cashiers stating “God Bless You” in violation of company policy) where the employer received 20-25 complaints regarding this conduct in a three-month period and feared a boycott, losing customers, or potentially losing its service contract.<sup>276</sup> The district court within the Tenth Circuit determined this was “more hypothetical than real” and “speculative at best.”<sup>277</sup> Under such an analysis, employers would rarely be able to use intangible costs as a basis for undue hardship. If approximately one complaint every three days isn’t enough, what is? If an employer has a decline in sales over this period, would the court change its decision or find the evidence inadequate due to the multitude of reasons that may exist for declining sales? Should judges be tasked with second-guessing whether an employer *needs* at least one employee present at work at all times, be it a doctor at an urgent care clinic or a mechanic like in *Arlington Transit*?

## E. Conclusion

Court analyses of failure to accommodate claims continue to cause bewilderment among litigants. The scope of protected beliefs and practices range from the broad “religiously motivated” to the more narrow “religiously required.” Reasonable accommodation and undue hardship remain a loose balancing test of interests for courts to use as an ends-justifying-the-means form of analysis (or more accurately, analysis avoidance). Worse still, none of these cases identify any cogent analysis by which parties can predict the outcome of their litigation.

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not have reasonably accommodated his religious beliefs on that evening.” *Id.* But the duty to accommodate only arises *after* there is a conflict with an employment policy. Thus, the court holds that conflict between the employee’s beliefs and the employer’s policy constitutes undue hardship, thereby eliminating the duty to accommodate. How could the court have reached such a conclusion? The reason for the court’s decision is based on the court’s inability to distinguish between reasonable accommodation and undue hardship. Coincidentally, the trial court’s confusion and premature reliance on the theory of undue hardship is bested only by the Sixth Circuit’s polar opposite position to refuse to recognize that any accommodation had been offered. *Arlington Transit Mix, Inc.*, 957 F.2d at 222.

The issue in this case was not one of undue hardship or failure to accommodate. The employer offered the plaintiff a reasonable accommodation—to leave work *early* once a second mechanic arrived. By doing so, the employer fulfilled its duty under Title VII to reasonably accommodate the plaintiff’s religious beliefs. Rather than engage in an interactive dialogue, the plaintiff rejected this accommodation. *Wilson v. U.S. W. Comm.*, 58 F.3d 1337, 1342 (8th Cir. 1995) (“When the employer reasonably accommodates the employee’s religious beliefs, the statutory inquiry ends. . . . Undue hardship is at issue ‘only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.’”) (quoting *Ansonia Bd. Of Educ. v. Philbrook*, 479 U.S. 60, 68-69 (1986)).

<sup>276</sup> *Banks v. Service Am. Corp.*, 952 F. Supp. 703, 710 (D. Kan. 1996).

<sup>277</sup> *Id.*

#### IV. HARASSMENT AND PROSELYTIZING

Up to this point, we have discussed two types of religious discrimination claims: disparate treatment<sup>278</sup> and failure to reasonably accommodate religious practices.<sup>279</sup> A third basis for a discrimination complaint is harassment based on the plaintiff's protected class (e.g., racial or sexual harassment).<sup>280</sup> If supervisors or coworkers harass the plaintiff based on his or her religion or religious practices to such an extent that it alters "the terms or conditions of employment," the employer may be liable for damages.<sup>281</sup> There are two types of harassment claims. *Quid pro quo* applies when the harassment results in a tangible employment action (promotion, demotion, etc.); for example, when a plaintiff proves she was not promoted due to her refusal to submit to a supervisor's sexual demands, she has established "the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII."<sup>282</sup> When a supervisor takes such an action to demote or fire an individual, he does so under the employer's authority; such an injury could not have occurred if not for the agency relationship between the supervisor and the employer.<sup>283</sup>

Even if there is no tangible employment action, the plaintiff may be able to prove a claim of a hostile work environment. For example, an employee subjected to pervasive racial or religious slurs in the workplace may serve as a basis for a hostile work environment lawsuit, even without a specific adverse employment action,<sup>284</sup> this type of harassment claim requires a high evidentiary standard showing the plaintiff's "workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"<sup>285</sup>

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<sup>278</sup> See *supra* Part II.

<sup>279</sup> See *supra* Part III.

<sup>280</sup> JOEL WM. FRIEDMAN, *THE LAW OF EMPLOYMENT DISCRIMINATION* 183 (9th ed., 2013); see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (outlining prima facie elements for harassment claims).

<sup>281</sup> 42 U.S.C. § 2000e-2 (1991); FRIEDMAN, *supra* note 281, at 183.

<sup>282</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998).

<sup>283</sup> *Id.* at 761-62. The decision to demote, fail to promote, or discharge an employee is inherently imputed to the employer: "The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. The supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Id.* at 762.

<sup>284</sup> *Meritor Sav. Bank, FSB*, 477 U.S. at 66 (internal citations omitted) ("Courts [have properly] applied this principle to harassment based on race religion and national origin"); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) ("When a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment.").

<sup>285</sup> *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

Harassment claims require 1) severe or pervasive conduct,<sup>286</sup> 2) that created a hostile environment (both objective and subjective),<sup>287</sup> 3) that was unwelcome, and 4) based on the plaintiff's protected class.<sup>288</sup> In the case of a hostile work environment claim, however, an employer may not have knowledge of the abusive acts of its employees or managers. Therefore, employers may assert an affirmative defense in hostile work environment claims and avoid liability by showing 1) "the employer exercised reasonable care to prevent and correct promptly any...harassing behavior," and 2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."<sup>289</sup>

## A. Religious Harassment

Harassment by a supervisor requiring subordinate employees to be a certain religion in order to be promoted or avoid discharge is equally illegal and reprehensible.

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<sup>286</sup> The "mere utterance of an...epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII." *Id.* at 21; *see, e.g.*, *Bourini v. Bridgestone/Firestone N. Am. Tire, L.L.C.*, 136 Fed. Appx. 747, 751 (6th Cir. 2005) (eight alleged incidents over five years, none of which were severe, were not pervasive enough to alter the terms and conditions of employment); *Powell v. Yellow Book USA, Inc.*, 445 F.3d 1074, 1078 (8th Cir. 2006) (religious postings in employee's cubicle did not constitute severe or pervasive religious harassment); *Tyson v. Clarian Health Partners, Inc.*, 2004 U.S. Dist. LEXIS 13973, at \*32-33 (S.D. Ind. 2004) (inappropriate teasing does not rise to the level of harassment even when motivated by religious animus); *Khan v. Prison Health Servs., Inc.*, 2005 U.S. Dist. LEXIS 16954 (S.D. Ind. 2005) (comments expressing peculiarities of the Islamic religion and showing a lack of tact or sensitivity for a person's beliefs are not "hostile" under Title VII); *Keplin v. Maryland Stadium Auth.*, 2008 U.S. Dist. LEXIS 105545, at \*8 (D. Md. 2008) (citation omitted) (alteration in original) ("callous behavior by [one's] superiors" is not sufficiently severe or pervasive to create a hostile or abusive environment); *Favors v. Ala. Power Co.*, 2010 U.S. Dist. LEXIS 69268, at \*28-30 (S.D. Ala. 2010) ("Offhand references...to [plaintiff's] religion from time to time" are "far too innocuous and benign to satisfy the 'severe or pervasive' prerequisite for a hostile work environment claim.").

<sup>287</sup> Proof of actual injury, such as psychological harm, is not required. *See Harris*, 510 U.S. at 22.

<sup>288</sup> *Scott v. Montgomery County Sch. Bd.*, 963 F. Supp. 2d 544, 558 (W.D. Va. 2013) (citations omitted) ("[T]he challenged conduct must be 'motivated by religious animosity'...it is not 'sufficient that the alleged harassment only relate to religion.'"); *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d 183, 190 (1st Cir. 2003) ("[T]he question is not whether a religious person could find the [conduct] offensive; it is whether religious animus prompted [it]."); *see Meritor Sav. Bank, FSB*, 477 U.S. at 67-68; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (The plaintiff "must always prove that the conduct at issue was not merely tinged with offensive... connotations, but actually constituted 'discrimination...because of...[the plaintiff's] protected class.'"). Thus, where male co-workers harass the male plaintiff *because* he is male, the plaintiff's claim can survive; the fact that the harassers and the plaintiff are of the same gender is not fatal to his claim. *Oncale*, 523 U.S. at 82. Similarly, even if the harasser and plaintiff are both Christians, the claim of religious harassment can equally survive when the plaintiff can show the harassment was *because* of her religion. *Leslie v. Johnson*, 2006 U.S. Dist. LEXIS 24064, at \*45 (S.D. Ohio 2006) (arguing that he could not have subjected the victim to religious harassment since she claimed to be Christian too had "no caselaw to support [it];" the harassment was still unwelcome).

<sup>289</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

sible as a supervisor who demands sexual favors as a condition for employment. In *Venters v. City of Delphi*,<sup>290</sup> the police chief continuously subjected the plaintiff, a dispatcher, to religious harassment.<sup>291</sup> The police chief was a “born-again Christian” who regularly discussed his religious beliefs to the plaintiff. He stated that one had to be “saved” to be a good employee; the plaintiff was running out of time to be saved; the police station was “God’s house;” he criticized her personal decisions (such as living with another single woman and spending time with married police officers); and he provided a Bible and religious matters to the plaintiff with the police department’s training materials.<sup>292</sup> “Interspersed with these religious lectures were numerous references to Venters’ status as an at-will employee who, as [the police chief] reminded her, could be dismissed at any time.”<sup>293</sup> Over time, the police chief’s harassment became even more egregious, telling her she “had a choice to follow God’s way or Satan’s way,” and that the latter choice would leave her unemployed.<sup>294</sup> He then suggested she was a victim of child abuse, she had sex with family members and animals, she was sacrificing animals in Satan’s name, and suicide would be preferable to her continuing this life of sin.<sup>295</sup> Within a matter of days, the police chief fired Venters for reasons that could reasonably appear as a pretext for failing to conform her religious beliefs to his.<sup>296</sup> The Seventh Circuit concluded the claim “fits neatly within the *quid pro quo* framework” because the police chief improperly “made adherence to his set of religious values a requirement of continued employment in the police department.”<sup>297</sup>

Although harassment claims are legally distinct from disparate treatment claims (discussed in Part II), the protections are factually similar. Just as the police chief of the City of Delphi was prohibited from hiring or firing employees based on their religious beliefs, he was likewise prohibited from using an individual’s religious beliefs (or lack thereof) as a condition of continued employment. For the employee, the effect is the same; his or her religious beliefs are a barrier to equal employment treatment. What stands out in harassment cases—unlike the disparate treatment cases discussed previously—is that the defendant often uses his or her religious beliefs as both a legal sword and shield; the defendant is religiously motivated to harass the employee and then seeks shelter from liability because of the supervisor’s own “protected” religious beliefs.

Such arguments, when made by supervisors, often fall upon deaf ears in the courtroom. In *Venters*, the police chief claimed a First Amendment right to free

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<sup>290</sup> 123 F.3d 956 (7th Cir. 1997).

<sup>291</sup> *See id.*

<sup>292</sup> *Id.* at 962-63.

<sup>293</sup> *Id.* at 963.

<sup>294</sup> *Id.* at 964.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 977.

<sup>297</sup> *Id.*

speech and religious exercise and “the Bible requires him to witness those [beliefs] to people who want to hear it.”<sup>298</sup> Although he identified an apparent conflict—his religious beliefs and right to free speech as compared to the plaintiff’s right to be free from hearing his religious beliefs and speech—the court quickly dispatched this issue.<sup>299</sup> The case was not about the police chief’s religious views, but rather using his office to impose these views on his subordinate, adding these views as a condition of employment, and to create an abusive environment for an employee because of her own religious views.<sup>300</sup>

This is one area of religious discrimination cases (perhaps the only area) in which the courts clearly agree and effectively contend with religious beliefs. A court in the Eleventh Circuit denied an employer’s motion for summary judgment when a supervisor made remarks such as “[t]his is a Christian company and there is no place in it for anyone who is not Christian,”<sup>301</sup> and treated the plaintiff—a Hindu who refused to convert to Christianity—differently than other employees who accepted Bibles from the supervisor and were re-baptized, and was eventually discharged.<sup>302</sup> The court determined “a reasonable jury [could] conclude that once it became apparent [the plaintiff] had no intention of actually converting to Christianity or ‘saving’ himself through baptism, [his supervisor] turned on him and started looking for reasons to dismiss him.”<sup>303</sup> The fact that the supervisor’s motivation was religiously motivated based on his own beliefs, as opposed to merely discriminating against Hindus for some secular reason, properly played no part in the court’s analysis.<sup>304</sup>

Similarly, in a case within the Ninth Circuit, the court denied a summary judgment motion by a supervisor who repeatedly required the plaintiff to attend daily prayer meetings, informed plaintiff that homosexuality was immoral and he was going to hell if he did not become a Mormon, and required the plaintiff to “out himself” to his co-workers and assure them he was in a monogamous relationship so as to assure the other employees he was not promiscuous and did not want to have sex with any of them.<sup>305</sup> Again, the supervisor’s religious beliefs were immaterial to the court’s opinion.<sup>306</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Panchoosingh v. Gen. Labor Staffing Servs.*, 2009 U.S. Dist. LEXIS 29109, at \*3-4 (S.D. Fla. 2009). The employer was a not a bona fide religious organization exempt from Title VII. *See* 42 U.S.C. § 2000e-1(a) (1991).

<sup>302</sup> *Panchoosingh*, 2009 U.S. Dist. LEXIS 29109, at \*21-22.

<sup>303</sup> *Id.* at \*25.

<sup>304</sup> *See generally id.*

<sup>305</sup> *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1161 (N.D. Cal. 2001).

<sup>306</sup> *See generally id.*



The “conflict” between the supervisor’s religious beliefs and the plaintiff employee’s religious beliefs was most effectively explained and put to rest in *EEOC v. Preferred Mgmt. Corp.*,<sup>307</sup> a case within the Second Circuit. The EEOC alleged multiple disparate treatment and religious harassment claims against Preferred Management Corp. (“Preferred”), a home health care agency, for seven of its employees and former employees.<sup>308</sup> The co-owner and Chief Executive Officer of Preferred was a born-again Christian who believed in a religious directive to share her faith everywhere, including the workplace.<sup>309</sup> The mission statement of Preferred is “to be a Christian dedicated provider of quality health care,” and the CEO further defines Preferred’s mission as “presenting God and his Son, Jesus Christ, to all of Preferred’s employees.”<sup>310</sup> Employees are required to sign a document, as a condition of employment, stating they agree and actively support Preferred’s mission and values; managers and supervisors are instructed to use such values to discipline employees and rate their performance.<sup>311</sup> The allegations against the company included, *inter alia*, regular prayers during meetings;<sup>312</sup> terminating an interview because the interviewee belonged to a different sect of Christianity and telling her she would burn in hell;<sup>313</sup> informing managers that if they “were not where they should be spiritually, they should resign;”<sup>314</sup> quizzing employees during training entitled “Home Care 101” to which the correct answers “usually were ‘Jesus,’ ‘God,’ or ‘the Bible’”;<sup>315</sup> and—in response to an employee’s comment that “Christians did not have a corner on the ‘God market,’ and... ‘there is more than one way to get to God’”—the CEO stated: “[The comment] was new age thinking and it was not allowed at Preferred Home Health Care.”<sup>316</sup> Both the EEOC and Preferred generally agreed that the CEO’s religious beliefs permeated the workplace.<sup>317</sup>

At the outset of its analysis, the court addressed the “clash” of the religious rights of the plaintiffs with those of the defendants:<sup>318</sup>

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<sup>307</sup> 216 F. Supp. 2d 763 (S.D. Ind. 2002).

<sup>308</sup> *Id.* at 769-70. The lawsuit also included an allegation the defendants engaged in a pattern or practice of discrimination. *Id.* at 769.

<sup>309</sup> *Id.* at 772-73.

<sup>310</sup> *Id.* at 773. It is important to note that Preferred was not a religious organization exempt from Title VII. *See* 42 U.S.C. § 2000e-1(a).

<sup>311</sup> *Preferred Mgmt. Corp.*, 216 F. Supp. 2d at 773.

<sup>312</sup> *Id.* at 775.

<sup>313</sup> *Id.* at 776-77.

<sup>314</sup> *Id.* at 779.

<sup>315</sup> *Id.* at 783.

<sup>316</sup> *Id.* at 793.

<sup>317</sup> Many of the allegations against the company were supported by both the plaintiff’s and defendant’s statements of fact. *See id.* at 772-803.

<sup>318</sup> *Id.* at 805.

It is important to bear in mind that this case does *not* involve a “balancing” of the plaintiffs’ religious rights and Preferred’s religious rights as if their respective rights were asserted against each other. Instead, the issues here involve two different legal relationships: Title VII positions the plaintiffs against Preferred; the First Amendment and the [Religious Freedom Restoration Act] pit Preferred against the federal government (in its persona as the EEOC).<sup>319</sup>

Thus, Title VII is solely a shield against discrimination, not a sword to justify discrimination. To allow Preferred’s religious beliefs and freedom of speech to support its religious harassment of its employees would require the courts to allow an employer’s freedom of speech to defend against similar claims of sexual or racial harassment.<sup>320</sup> Such speech may be protected on the streets from criminal sanctions, but is regulated in the workplace by Title VII.<sup>321</sup> So long as Title VII remains a constitutional prohibition on employment discrimination, religious practices and speech may lawfully lead to liability for an employer. Anti-Semitic remarks directed at an employee because he is Jewish,<sup>322</sup> or harassment because an employee is Muslim is clearly prohibited by Title VII.<sup>323</sup> There is no “balancing test” between the religious beliefs of the harasser and the harassed... or is there?

## B. Proselytizing as a Reasonable Accommodation

Unique to religious harassment claims, unlike other protected classes, is the conflict created by the duty to accommodate employees’ religious beliefs and practices.<sup>324</sup> Some religions encourage proselytization, defined as the act of “induc[ing] someone to convert to one’s faith.”<sup>325</sup> Inherent in that definition is the determination that the listener’s faith (or lack thereof) is wrong, inferior, or damnable. Thus, the very act of proselytizing, as seen in both *Venters* and *Preferred*, may be sufficiently offensive or abusive (by judging another’s religious beliefs) to justify a claim of harassment. As the court identified in *Preferred*, there is no balancing between the beliefs of the harasser or the harassed—Title VII is not a sword to allow a religious observer to behave in a way that would constitute misconduct if conducted by a secular employee. Unfortunately, the problems identified in Parts II and III—a lack-

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<sup>319</sup> *Id.* at 805-06.

<sup>320</sup> *See id.* at 809.

<sup>321</sup> *Id.*

<sup>322</sup> *See Weiss v. United States*, 595 F. Supp. 1050, 1053 (E.D. Va. 1984) (Plaintiff was constant target of religious slurs and taunts such as “resident Jew,” “Jew faggot,” and “Christ killer”).

<sup>323</sup> *See EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311 (4th Cir. 2008) (Co-workers often called the plaintiff names such as “towel head” and “Taliban,” posted a cartoon depicting persons in Islamic attire as suicide bombers, hid his timecard, unplugged his computer equipment, mocked his appearance, and defaced his business cards, all because he was Muslim).

<sup>324</sup> *See supra* Part III.

<sup>325</sup> *Proselytize Definition*, <http://www.merriam-webster.com/dictionary/proselytize> (last visited May 25, 2014).

ing workable definition of “religion,” failure to identify what constitutes “protected” religious practices, and inconsistent application of reasonable accommodation versus undue hardship—arise in full force when courts are faced with similar fact patterns brought as reasonable accommodation claims rather than harassment claims.

Some courts, perhaps in an effort to avoid the issue headfirst, allow reasonable accommodation claims to survive, but are quick to limit an employee’s ability to proselytize to customers. In *Knight v. State Dep’t of Pub. Health*,<sup>326</sup> the plaintiffs were government employees who felt “called to proselytize while working with clients.”<sup>327</sup> Both plaintiffs were reprimanded for their proselytizing after the department received client complaints.<sup>328</sup> The Second Circuit determined both plaintiffs failed to meet their prima facie elements because neither plaintiff notified the employer of the religious need to proselytize prior to receiving the reprimands.<sup>329</sup> Even if the plaintiffs had met their prima facie case, the court further concluded that the employer reasonably accommodated them by only limiting the proselytizing to clients.<sup>330</sup>

In a similar case out of the Eighth Circuit, an ultrasound technician had a religious belief that “require[d] him to counsel women out of having abortions.”<sup>331</sup> The employer offered him the following accommodation: the plaintiff wouldn’t have to perform an exam on any patient contemplating an abortion and if a patient spontaneously disclosed she was considering an abortion, he could walk out and not perform the exam.<sup>332</sup> However, this accommodation does nothing to resolve the conflict between his religious beliefs and the employer policy. The plaintiff was “required” to convince women to avoid getting abortions, so merely being allowed to walk out of the examination room doesn’t accommodate his beliefs.<sup>333</sup> The court could have determined that allowing the plaintiff to proselytize to patients was an undue hardship, but in an effort to quickly resolve the case, the judge ignored the purpose of the duty to reasonably accommodate,<sup>334</sup> as well as the basic definition

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<sup>326</sup> 275 F.3d 156 (2d Cir. 2001).

<sup>327</sup> *Id.* at 160.

<sup>328</sup> *Id.* at 161-63.

<sup>329</sup> *Id.* at 167-68.

<sup>330</sup> *Id.* at 168.

<sup>331</sup> *Grant v. Fairview Hosp. & Healthcare Servs.*, 2004 U.S. Dist. LEXIS 2653, at \*2 (D. Minn. 2004).

<sup>332</sup> *Id.* at 9.

<sup>333</sup> When the plaintiff made this argument to the court, it erroneously responded that “[b]ecause neither the United States Supreme Court nor the Eighth Circuit has adopted such a test, this argument is unpersuasive.” *Id.* at 13.

<sup>334</sup> See *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 136 (3d Cir. 1986), *superseded by statute*, 42 U.S.C. § 1981a (1991) (quoting *United States v. McIntosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting) (The purpose of the duty to accommodate is “plainly intended to relieve individuals of the burden of choosing between their job and their religious convictions, where such relief will not unduly burden

of “accommodate,”<sup>335</sup> and resolved the case by merely holding the plaintiff was reasonably accommodated.<sup>336</sup>

Some courts have handled claims involving proselytizing to coworkers similarly, by identifying the inherent conflict between the religious freedom of the evangelizer and that of the listeners. In an Eleventh Circuit district court, the plaintiff was discharged for proselytizing to coworkers and subordinates by condemning two who were homosexual, continually trying to convert a Muslim, attempting to lay hands on employees, and giving unsolicited Bibles at work.<sup>337</sup> In firing him, the defendant had “not only the right, but a legal duty to keep its workplace free of religious harassment.”<sup>338</sup> In a comparable case within the Fourth Circuit, the court held the proselytizer put the employer “‘between a rock and a hard place,’ and thus any attempt to reasonably accommodate plaintiff’s proselytizing would have imposed an undue burden upon defendants.”<sup>339</sup>

A court in the Ninth Circuit summarily rejected a plaintiff’s claim requesting reasonable accommodation to proselytize to subordinates in the workplace by holding her religious beliefs did not “require” her to recruit subordinates to join her Bible study, and therefore the employer was not required to accommodate her.<sup>340</sup> Unlike the previous cases, this court continued with a sweeping holding regarding proselytizing, without any discussion of harassment, that “[e]ven if active recruitment was a tenet of [her] religious beliefs, defendant would not have been required to allow [her] to impose her beliefs on her coworkers.”<sup>341</sup>

Such cases make it appear as though proselytizing in the workplace would never be allowed. Courts ignore religious motivations when it comes to harassment claims, and in the cases above, judges are eager to find no reasonable accommodation to allow it (one way or another). By entertaining such cases, however, the courts are suggesting that proselytizing is entitled to reasonable accommodation in *some* situations. Yet none of the holdings identify the boundaries of those situations where an employer must allow the employee to evangelize and no undue hardship arises.

In fact, there are direct conflicts in logic. Recall *Rivera*, the case out of the Second Circuit that determined it was a reasonable accommodation to allow a courier

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others.”)).

<sup>335</sup> *Accommodate Definition*, <http://www.merriam-webster.com/dictionary/accommodate> (last visited May 26, 2014) (“to provide what is needed or wanted for”).

<sup>336</sup> *Grant*, 2004 U.S. Dist. LEXIS 2653, at \*16.

<sup>337</sup> *Weiss v. Ren Labs of Fla., Inc.*, 1999 U.S. Dist. LEXIS 23587, at \*25 (S.D. Fla. 1999).

<sup>338</sup> *Id.*

<sup>339</sup> *Whatley v. S.C. Dep’t of Pub. Safety*, 2007 U.S. Dist. LEXIS 2391, at \*17-18 (D.S.C. 2007).

<sup>340</sup> *EEOC v. Serrano’s Mexican Rests., LLC*, 2007 U.S. Dist. LEXIS 25693, at \*9-10 (D. Ariz. 2007).

<sup>341</sup> *Id.* at 10.

to wear a “Jesus is Lord” vest in violation of company policy. Isn’t this comparable to proselytizing? In *Rivera*, the employer was concerned customers would believe the company endorsed this Christian message; seemingly the same concern that arose in *Knight* where one of the plaintiffs evangelized to clients on two occasions. Similar cases in the same circuit, but with entirely opposite outcomes. And neither holding provides any analysis to differentiate itself from the other.

The Eleventh Circuit appears to experience similar schizophrenia. In *Weiss*, a Florida district court held that employers have both the right *and legal duty* to keep the workplace free of harassment.<sup>342</sup> Such a bold statement would surely support an employer who wants a secular workplace. Yet the Eleventh Circuit overruled another Florida district court in *Dixon*, determining there was evidence that the plaintiffs “are sincere, committed Christians who oppose efforts to remove God from public places,” thereby allowing trial to continue to determine whether the plaintiffs had the “right” to hang religious messages in the workplace against the employer’s policy.<sup>343</sup> Is the Eleventh Circuit drawing the line between oral proselytizing and written proselytizing? Perhaps *Weiss* would have come out differently had he merely worn a shirt to work every day that read, “My coworkers are homosexuals, sinners, and are going to hell.”

The Tenth Circuit is perhaps the most candid. It was a court within the Tenth Circuit that determined it was a reasonable accommodation to allow cashiers to say “God Bless You” in violation of company policy, warnings, and more than twenty complaints in a three month period by customers.<sup>344</sup> Such a holding directly conflicts with *Knight* and *Grant*, where one or two complaints were sufficient to satisfy the undue hardship requirement. One judge in the Tenth Circuit delicately explained the problem: “While Title VII rightly condemns acts of religious discrimination in the workplace, the line between permissible religious commentary in the workplace and a religiously hostile workplace quickly becomes fuzzy.”<sup>345</sup>

### C. Conclusion

It seems impossible for one to distinguish these holdings and predict the outcome in future cases involving proselytization. One could reasonably conclude the solution is to sue first; by asking for an accommodation to harass his customers and coworkers, the proselytizer seems to have a chance of success, compared to defending a harassment claim where his religious beliefs are disregarded in the legal analysis. Or perhaps the solution is to avoid the word “proselytize” and somehow

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<sup>342</sup> *Weiss*, 1999 U.S. Dist. LEXIS 23587, at \*25.

<sup>343</sup> *Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010).

<sup>344</sup> See *supra* text accompanying notes 209-212; *Banks v. Service Am. Corp.*, 952 F. Supp 703 (D. Kan. 1996).

<sup>345</sup> *Sprague v. Adventures Inc.*, 121 Fed. Appx. 813, 817 (10th Cir. 2005) (Tymkovich, J., concurring).

define the religious practice in a different way, like the plaintiffs in *Dixon* claimed the practice of “oppos[ing] efforts to remove God from public places.”<sup>346</sup> Should such semantics change the legal rights of employees and employers?

More importantly, is proselytizing truly a religious belief intended for protection under Title VII? The First Amendment doesn’t serve as a defense to sexual or racial harassment.<sup>347</sup> Is it logical to presume that the First Amendment may serve as a defense for religious harassment, or that Title VII could permit a violation of Title VII through a reasonable accommodation claim? Yet courts continue to treat religious claims with kid gloves. An employee was fired for sending an e-mail to his coworkers with a picture of a barbecue restaurant and a marquee that contained the words, “Safest Restaurant on Earth. No Muslims Inside” and the personalized message by the plaintiff Mr. Ogle, “I think this is wonderful.”<sup>348</sup> In bold letters, the court opinion reads: “The e-mail sent by Mr. Ogle was not an expression of his religious beliefs; therefore, Mr. Ogle failed to state a claim under which relief may be granted pursuant to Title VII.”<sup>349</sup> Had he prefaced his comment with “As a Christian...” would he have created the right to be offensive, and precluded his employer from reprimanding him?

Consider the case of *Peterson*, where the court held that the World Church of the Creator, a sect of Christianity with a heavy dose of white supremacy, was a religion.<sup>350</sup> If he claimed a reasonable accommodation to racially harass his black coworkers, most courts would not entertain the claim. In determining whether he was entitled to a reasonable accommodation, there would be no analysis of how many times he used the N-word, or to what extent his behavior was “severe or pervasive”—the court would merely hold that the employer *has the right* to keep the workplace free of harassment, and by extension, to have a “No racist commentary” policy. Whether the speech involves racism, sexism, or religionism—shouldn’t employers be free to limit it in the workplace?

## V. REDEFINING RELIGION

The source of the problems in religious discrimination cases is an unworkable definition of “religion.” Congress first defined religion as a belief in God, and later as a belief in a “Supreme Being.” The Supreme Court aptly noted this didn’t limit legal protection to beliefs based literally on the existence of a deity, but rather applied to a broader concept of “a faith ‘to which all else is subordinate.’”<sup>351</sup>

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<sup>346</sup> *Dixon*, 627 F.3d at 855.

<sup>347</sup> *See* *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1247 (10th Cir. 1999).

<sup>348</sup> *Ogle v. Ind. Dep’t of Workforce Dev.*, 2013 U.S. Dist. LEXIS 165325, at \*1-2 (S.D. Ind. 2013).

<sup>349</sup> *Id.* at 6.

<sup>350</sup> *See supra* text accompanying notes 120-123; *Peterson v. Wilmur Comm’n., Inc.*, 205 F. Supp. 2d 1014, 1023 (E.D. Wis. 2002).

<sup>351</sup> *United States v. Seeger*, 380 U.S. 163, 174 (1965).

Religion, under *Seeger*, was thus redefined as beliefs held in the same place as traditional religious views are held.<sup>352</sup> Yet this doesn't *define* religion, but instead directs courts to find the source of traditional religious beliefs and compare them to where the plaintiff holds his or her beliefs. Congress' definition in Title VII fails to add further guidance, defining religion—circularly—as “all aspects of religious observance and practice, as well as belief.”<sup>353</sup> None of these definitions adequately define “religion” from a legal perspective.

Finding a non-legal definition of religion is much easier. Religion is “a set of beliefs concerning the cause, nature, and purpose of the universe, especially when considered as the creation of a superhuman agency or agencies, usually involving devotional and ritual observances, and often containing a moral code governing the conduct of human affairs.”<sup>354</sup> While others may not use the same words, the sentiment is the same.<sup>355</sup> Religion outlines one's morality, values, and guides a person on how to live his or her life. As the Supreme Court correctly identified, one can hold these values without having a belief in God or a Supreme Being.<sup>356</sup> Such beliefs emanate from one's conscience, “the inner sense of what is right or wrong in one's conduct or motives.”<sup>357</sup>

The connection between conscience and religion is nothing new. As the Greek poet Menander described in approximately 300 B.C.,<sup>358</sup> “Conscience is a God to all mortals.”<sup>359</sup>

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<sup>352</sup> *Id.* at 184.

<sup>353</sup> 42 U.S.C. § 2000e(j) (1991).

<sup>354</sup> *Religion Definition*, <http://dictionary.reference.com/browse/religion> (last visited June 9, 2014).

<sup>355</sup> *See Religion Definition*, <http://www.merriam-webster.com/dictionary/religion> (last visited June 9, 2014) (“a cause, principle, or system of beliefs held to with ardor and faith”). Some courts have attempted to determine whether a belief is religious by asking whether the belief is based on “a theory of ‘man's...place in the universe.’” *See, e.g.,* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1117 (10th Cir. 2013); *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310, 324 (5th Cir. 1977) (Roney, J., dissenting) (internal citations omitted) (identifying “the ‘religious’ nature of a belief depends on (1) whether the belief is based on a theory ‘of man's nature or his place in the Universe,’ (2) which is not merely a personal preference but has an institutional quality about it, and (3) which is sincere.”); *Malnak v. Yogi*, 592 F.2d 197, 208 (3d Cir. 1979) (Adams, J., concurring) (“One's views...on the deeper and more imponderable questions the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong are those likely to be the most ‘intensely personal’ and important to the believer.”). Yet requiring judges to inquire into the purposes, logic, or background of one's beliefs to determine whether they are founded upon such a theory and therefore are legally “religious” directly conflicts with the Supreme Court's mandate for judges to not be “arbiters of scriptural interpretation.” *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

<sup>356</sup> *Seeger*, 380 U.S. at 174.

<sup>357</sup> *Conscience Definition*, <http://dictionary.reference.com/browse/conscience> (last visited June 9, 2014).

<sup>358</sup> MENANDER, <http://en.wikiquote.org/wiki/Menander> (last visited June 3, 2014).

<sup>359</sup> *Id.*

Furthermore, the word “conscience” pervades the history, legislation, and cases involving religious beliefs but has never been used as the legal test. As previously stated, Congress intended to protect those people who had *conscientious* scruples against handling lethal weapons or against any participation in the war effort - hence, “conscientious” objectors.<sup>360</sup> “Religious training and belief” was “intended to be an expression of a more liberal interpretation of claims of conscience.”<sup>361</sup> Similarly, the *Kauten* court concluded that within “religious belief” lies “a compelling voice of conscience.”<sup>362</sup> Conscientious beliefs, in other words, those beliefs emanating from one’s conscience, are protected.

Based on this, I propose redefining religion and religious beliefs as “a system of beliefs emanating from the conscience,” hereinafter, the Conscience test. Where the Supreme Court in *Seeger* set forth the legal test of protection where the beliefs are held in the same place as traditional religious views,<sup>363</sup> the Conscience test merely takes it to its necessary conclusion by identifying where religious beliefs are held: the conscience. Whether one follows the voice of God or one’s own conscience, both appear the same to a third-party and should be treated equally.<sup>364</sup> One’s conscience, therefore, is the gateway to protection.

The failure to set forth a clear definition of “religion” has led to a host of problems. As seen in Parts II and III, judges confuse religious beliefs with the sincerity of those beliefs.<sup>365</sup> Without clear boundaries, courts rely on the indefinability of religion as a means to reach a result based on the individual judge’s feelings rather than precedent, granting protection to some moral and ethical beliefs, but withholding protection from beliefs the judge deems immoral.<sup>366</sup> This breadth of discretion, camouflaged by the *Seeger* “definition” of religious beliefs, is further exacerbated by the unique duty to reasonably accommodate religious beliefs and practices. Circuit courts are split as to whether practices must be religiously required or “religiously

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<sup>360</sup> See *supra* Part II.B.1.

<sup>361</sup> CONSCIENCE IN AMERICA 17 (Lillian Schlissel ed. 1968).

<sup>362</sup> *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

<sup>363</sup> *United States v. Seeger*, 380 U.S. 163, 184 (1965).

<sup>364</sup> See CONSCIENCE IN AMERICA, *supra* note 22 (emphasis added) (“This book...is a record of the collisions of convictions—the individual’s belief that he must not *violate the voice of his conscience or the word of his God*, and the state’s assertion that it must preserve its own viability, by force of arms when need be...”).

<sup>365</sup> See *supra* Part III.C; *Wilson v. U.S. W. Comm’n*, 58 F.3d 1337, 1341 (8th Cir. 1995) (disbelieving plaintiff’s claim to display the abortion pin, but concluding it was therefore not a religious belief, rather than a sincere belief); *Tiano v. Dillard Dep’t Stores*, 139 F.3d 679, 683 (9th Cir. 1998) (disbelieving the temporal mandate of the plaintiff’s calling to God, therefore finding it not “religious”); *Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190, 199 (D. Mass.), *aff’d*, 390 F.3d 126 (1st Cir. 2004) (questioning the belief to always display her piercing when the plaintiff previously agreed to cover it up, but holding it was a religious accommodation to allow her to cover it up rather than merely holding she was insincere).

<sup>366</sup> See *supra* Part II.D; see also *supra* text accompanying notes 113-124 (discussing conflict between cases involving racist beliefs).



motivated” to earn an accommodation,<sup>367</sup> and the low burden set by the Supreme Court in *Hardison* to define an undue hardship as anything more than *de minimis* has been transformed by some courts to hold employers to a higher standard when dealing with intangible costs—again, based on the discretion of the judge rather than any analysis of legal precedent.<sup>368</sup> The misapplication of reasonable accommodation claims becomes readily apparent in cases involving proselytizing. Under the current legal scheme and definition, Title VII creates an inherent conflict by potentially allowing harassing behavior when motivated by one’s religious beliefs.<sup>369</sup>

The Conscience test solves these problems by redefining religion, by both defining it again, and differently.<sup>370</sup> As promised in the introduction, the purpose of this article is not to substitute the author’s judgment for that of Congress or the Supreme Court, but rather to further their intent.<sup>371</sup> The new definition for religion as “a system of beliefs emanating from the conscience” is based both on the legislative history and court precedence, and while it may be different from that used in *Seeger*, it holds the same meaning. With more careful construction, however, the redefinition of “religious beliefs” outlines clear boundaries to separate protected beliefs from unprotected beliefs.

#### A. “System of Beliefs”

Although religion is difficult to define, one commonality can be found in all definitions: religion is a system of beliefs.<sup>372</sup> Although a legal issue may arise about a specific practice or belief, the plaintiff must be able to show this stems from a greater set of beliefs and principles. In the cases previously discussed, this is an easy element to prove for most plaintiffs. But it also clearly culls out those plaintiffs who do not have a religious basis for their claim.

In *Reed*, for example, the plaintiff “refused to indicate what if any religious affiliation or beliefs (or nonbeliefs) he [had].”<sup>373</sup> While the court didn’t struggle with the outcome, it unnecessarily analyzed his religious discrimination and reasonable accommodation claims separately, later holding that his refusal to pray with the Gideons was a personal preference rather than a religious practice.<sup>374</sup> Under the Conscience test, the case would have been immediately dismissed. Since *Reed* failed

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<sup>367</sup> See *supra* Part III.D.

<sup>368</sup> See *supra* Part III.E.

<sup>369</sup> See *supra* Part IV.

<sup>370</sup> *Redefine Definition*, [http://www.oxforddictionaries.com/us/definition/american\\_english/redefine](http://www.oxforddictionaries.com/us/definition/american_english/redefine) (last visited May 29, 2014) (“Define again or differently”).

<sup>371</sup> See *supra* Part I.

<sup>372</sup> See, e.g., *Religion Definition*, <http://dictionary.reference.com/browse/religion> (last visited June 1, 2014) (“set of beliefs concerning the cause, nature, and purpose of the universe...”).

<sup>373</sup> *Reed v. Great Lakes Cos.*, 330 F.3d 931, 933 (7th Cir. 2003).

<sup>374</sup> *Id.* at 935.

to explain the moral principles or set of beliefs he held that rendered the meeting with the Gideons offensive, he wouldn't satisfy the first part of the Conscience test, the requirement of having a "system of beliefs." Likewise, having a system of beliefs is the distinguishing factor between *Brown*<sup>375</sup> (eating cat food) and *Toronka*<sup>376</sup> (believing in the power of dreams): Brown failed to identify how eating cat food was a religious practice because he didn't explain the religious beliefs from which it was derived,<sup>377</sup> while Toronka explained his unusual beliefs regarding fate and the power of dreams which allowed him to survive a motion to dismiss.<sup>378</sup>

Furthermore, by requiring plaintiffs to show they have a "system of beliefs," judges can better determine the plaintiff's sincerity and credibility without questioning the specific belief or practice at issue. Judges are not "arbiters of scriptural interpretation,"<sup>379</sup> but general questions regarding the underlying principles of one's religion may uncover a lack of sincerity by the plaintiff.<sup>380</sup> It also protects against the hypothetical plaintiff described in *Reed*, who "could announce without warning that white walls or venetian blinds offended his 'spirituality,' and the employer would have to scramble to see whether it was feasible to accommodate him by repainting the walls or substituting curtains...."<sup>381</sup> This bright-line element allows employers to avoid the costs of discovery and litigation from arguably frivolous claims, while continuing to protect plaintiffs with true religious beliefs.

#### B. "Emanating from the Conscience"

A belief emanating from one's conscience is protected, regardless of whether its original source lies with an organized religion or a religious text. Applying this to *Welsh* shows the Supreme Court didn't broaden the definition of religious beliefs, but instead stayed true to this principle.<sup>382</sup> Rather than ask whether Welsh's views were political or philosophical, the better question is whether his views emanated from his conscience. The mere fact that Welsh used the word philosophy in place of religion is irrelevant; just as one can falsely claim a religious belief that is untrue, a plaintiff's use of the word "philosophy" shouldn't result in a dismissal of his case. The question is not whether a view is philosophical, but rather whether it resides in the same place in his mind as religion occupies: his conscience. The Supreme Court could have avoided dissention—as they did in *Seeger*—by realizing the true

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<sup>375</sup> See *supra* text accompanying notes 103-105.

<sup>376</sup> See *supra* text accompanying notes 106-108.

<sup>377</sup> See *supra* text accompanying notes 103-105.

<sup>378</sup> See *supra* text accompanying notes 106-108.

<sup>379</sup> *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981).

<sup>380</sup> See, e.g., *Cloutier v. Costco Wholesale*, 311 F. Supp. 2d 190, 199 (D. Mass.), *aff'd*, 390 F.3d 126 (1st Cir. 2004) (identifying the changes in the plaintiff's "principles" regarding the necessity of displaying or covering up her piercing).

<sup>381</sup> See *supra* note 373.

<sup>382</sup> See *supra* text accompanying notes 64-71.

simplicity of its own holding. This new definition is not new at all—the language comes directly from Congress and the courts. This slight word change, however, drastically improves the determination of sincerity of the plaintiff and distinguishes religious beliefs from other unprotected beliefs.

The *Seeger* definition can easily be over-broadened and confused with the sincerity requirement; a problem not present in my recommended “Conscience” test. The Supreme Court’s *Seeger* test asks “whether the claimed belief holds a place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption.”<sup>383</sup> This language may suggest that all a plaintiff needs to show is that he is sincere; if he testifies that his belief is held “religiously” he could satisfy this definition without more. The *Seeger* test thus transforms the language “sincerely-held religious beliefs” into “sincerely-held beliefs.” Clearly, this is not what the Supreme Court intended. By redefining religious beliefs to specifically include the location of religious beliefs—one’s conscience—the definition gets to the heart of the matter: morality.

There is a fundamental aspect to conscientious beliefs that separates them from all other types of belief (political, philosophical, personal, etc). “A healthy Conscience is like a wall of bronze,”<sup>384</sup> separating morally right behavior from that which is morally wrong. It imparts a belief universally applied to everyone. Since 1940, Congress specifically delineated between “conscientious objectors” who were against war in general, and those who opposed war based on a personal moral code.<sup>385</sup> In other words, those whose conscience instructed them it was morally wrong for *people* to engage in war earned protection and exemption from the draft; a person who believed it was immoral for him *as an individual* to support the war effort or kill an enemy combatant was entitled no such protection.<sup>386</sup> The difference lies in whether the belief is to be universally applied to everyone, or is limited to the believer.

Abortion is a good example. Wilson’s belief that abortion was morally wrong clearly emanated from her conscience, and she believed abortion *by anyone* was immoral.<sup>387</sup> Contrast this with Vice President Joseph Biden, who, during the 2012 Vice Presidential Debate, responded with the following when asked how his religion affects his view on abortion:

My religion defines who I am, and I’ve been a practicing Catholic my whole life. And has particularly informed my social doctrine. The Catholic social doctrine talks about taking care of those who

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<sup>383</sup> United States v. Seeger, 380 U.S. 163, 184 (1965).

<sup>384</sup> SIMILES DICTIONARY 141 (2d ed. 2013) (quoting Erasmus).

<sup>385</sup> See *supra* Part II.B.1.

<sup>386</sup> See *supra* note 48.

<sup>387</sup> See *supra* text accompanying notes 77-89.

—who can't take care of themselves, people who need help. With regard to—with regard to abortion, I accept my church's position on abortion as a—what we call a (inaudible) doctrine. Life begins at conception in the church's judgment. I accept it in my personal life. But I refuse to impose it on equally devout Christians and Muslims and Jews....I—I do not believe that we have a right to tell other people that—women they can't control their body. It's a decision between them and their doctor.<sup>388</sup>

Unlike Wilson, Vice President Biden's personal moral code instructs *him* that abortion is immoral, but it is not a belief to be universally applied to everyone; rather, it's a decision he believes is immoral, but for others "it's a decision between them and their doctor."<sup>389</sup> The difference between a protected religious belief and a personal moral code is whether the morality is applied universally (e.g., Wilson's view of abortion) or individually (e.g., Vice President Biden's view).

By redefining religious beliefs as those emanating from the conscience, courts can easily analyze and delineate between those practices deserving of protection under Title VII, and those that do not. Veganism, for example, may be a protected belief, and one scholar has argued it can be a religion for some people.<sup>390</sup> The question is whether the person practices veganism because of the moral doctrine "that man should live without exploiting animals," or because of a personal preference for a non-dairy vegetarian diet?<sup>391</sup> If the former, it should be protected; if the latter, it is unprotected as merely individual preference. This new definition makes the analysis simple for appellate review purposes and also educates litigants and trial judges as to what evidence to present and the facts to elicit.

This proposed definition also sheds light on the real issue in these cases. For example, did Wilson's vow to wear *and display* the anti-abortion button emanate from her conscience? Undoubtedly, her faith in Catholicism and Jesus Christ, and her beliefs against abortion are all part of her "religion." However, Wilson was not fired for any of these beliefs—she was fired for her practice of wearing the pin.<sup>392</sup> The issue was not whether her belief that abortion is immoral stemmed from her conscience, but whether her vow to wear an anti-abortion pin emanated *from* her conscience.<sup>393</sup> She decided on her own volition to wear the pin. Thus, the belief

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<sup>388</sup> Vice President Joseph Biden, *Vice Presidential Debate* (Oct. 11, 2012), <http://www.politico.com/news/stories/1012/82310.html>.

<sup>389</sup> *Id.*

<sup>390</sup> See Page, *supra* note 10, 408. Unfortunately, this article proposes no solution to better define "religion." Rather, she argues that veganism or vegetarianism *could be* a religious belief for some people under the *Seeger* test. *Id.* She correctly identifies the problem with applying the test, but recommends a "broad and tolerant" definition of religion, without providing an actual definition. *Id.*

<sup>391</sup> Rynn Berry, *Veganism*, THE OXFORD COMPANION TO AMERICAN FOOD AND DRINK 604-05 (2007).

<sup>392</sup> *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1339 (8th Cir. 1995).

<sup>393</sup> Had God instructed her to wear the abortion pin, this would be a valid belief: she has a system

emanated from her own personal choice, not her conscience, and is therefore entitled to no protection.

This distinction—protecting an order *from* God, but not a promise *to* God—is important based on Congress’s mandate to not protect personal preferences. An order from God is similar to a Biblical requirement: God says thou shalt not kill, thou shalt not steal, or thou shall visit a church to see the Virgin Mary (e.g., *Tiano*). Coming from one’s God, these orders define morality for the individual. But to allow an individual to turn a preference (e.g., to wear a pin) into a moral issue by making a “promise to God” would ignore Congress’ distinction between personal preference and religious practice. This is precisely the problem in religious accommodation cases.

### C. Solving Reasonable Accommodation

The language “emanating from the conscience” describes beliefs that come from God or one’s inner voice and delineates between what is morally right and morally wrong. Thus, as previously discussed, the duty to reasonably accommodate employees’ religious practices prevents employees from choosing between their morality and the job.<sup>394</sup> The prime example is Sabbath observers. They did not choose on what day the Sabbath falls, or their responsibilities on that day; rather, their God instructed them (either personally or through religious text) to observe the Sabbath and not work. Thus, the duty to not work on the Sabbath emanates from their conscience, and Title VII rightfully requires employers attempt to accommodate those people from committing a sin by clocking in. For the employee, this is not an issue of preference, but a religious mandate.

On the other hand, a person who chooses to attend church on Saturday evenings rather than Sunday mornings does so out of convenience, not out of any moral obligation. An employer should not be forced to accommodate this preference merely because it has some attenuation to a religious belief. Reasonable accommodation was intended to resolve conflict between one’s morality and employment, but where one’s morality is not at issue—as with a personal preference—there is no terrible conflict to be avoided. In other words, Title VII puts a small burden on employers (the duty to reasonably accommodate) in order to avoid the placing a great burden on an employee (sacrificing moral values to avoid an adverse action).

Yet due to Title VII’s poorly constructed and cyclical definition of “religious beliefs,”<sup>395</sup> judges have erroneously broadened the beliefs that are protected as

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of beliefs—Catholicism—and it demands she obey God. Thus, she would have been morally obligated to wear the pin, just as anyone who received an order from God would be.

<sup>394</sup> *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 136 (3d Cir. 1986), *superceded by statute*, 42 U.S.C. § 1981a (1991).

<sup>395</sup> 42 U.S.C. § 2000e(j) (1991) (“all aspects of religious observance and practice, as well as belief”).

religious. In *Redmond*, the employer was obligated to accommodate the employee's work hours because his church rescheduled his Bible study class.<sup>396</sup> There was no issue or morality—God didn't change the Sabbath or require Bible study on a given day. Rather, the church made the change for its own convenience, and the employer was essentially required to accommodate the church's preference. This is no different than the employee who makes a "promise to God" to go to church during his lunch break, requiring an additional 30 minutes more than other employees. Title VII was intended to resolve conflict between religion and employment, not provide a benefit merely for having religious beliefs.

The proposed definition solves this problem by better framing the question as whether the practice of attending Bible Study on Tuesday emanates from the plaintiff's conscience? The answer is clearly no. Title VII puts no duty on employers to accommodate the mere preferences of its religious employees. Yet some courts have expanded the purview of reasonable accommodation significantly by allowing reasonable accommodation for any practice that is somehow tied to religion, so much so that merely being religious now confers the benefit of exempting oneself from his or her company policy, and threatening a lawsuit if held to the standards of secular employees.

The "religiously-motivated" test endorsed by the Second and Seventh Circuits<sup>397</sup> would be put to rest with my proposed definition. In *Redmond*, the court went to great lengths to justify the test, to include intentionally misinterpreting a Supreme Court case to claim "precedence."<sup>398</sup> In *Reyes*, a court in the Second Circuit held that participation in a Lay Pastor Program deserved accommodation (even though enrollment in a secular subject would not be).<sup>399</sup> Did the need to enroll emanate from his conscience? Would he have considered his actions immoral if he chose not to sign up for this program? If not, why should his employer be required to accommodate his school schedule, but not the schedules of its other employees seeking higher education?

Other circuits, like the Tenth Circuit, have adopted the "religiously-required" test in determining whether an accommodation is necessary,<sup>400</sup> and while this appears more logically sound, it too fails in practical application. The *Banks* case was within the Tenth Circuit, and involved cashiers who violated company policy by telling customers "God Bless you" (and received numerous complaints).<sup>401</sup> In that case, the plaintiffs claimed this was required and they couldn't "stop the practice without

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<sup>396</sup> See *supra* text accompanying notes 157-176.

<sup>397</sup> See *supra* text accompanying notes 174-193.

<sup>398</sup> See *supra* text accompanying notes 157-176.

<sup>399</sup> See *supra* text accompanying note 193.

<sup>400</sup> See *supra* text accompanying notes 230-232.

<sup>401</sup> See *supra* text accompanying notes 209-212.

violating their beliefs.”<sup>402</sup> Under the “religiously-required” test, they deserve an accommodation. The Conscience test, however, doesn’t require magic words or specific testimony. While the underlying religious beliefs of honoring God and believing in Him may emanate from the conscience, the focus must be on the practice of greeting customers with this phrase; the question is whether the practice of saying “God Bless You” to this customer emanates from the plaintiff’s conscience? Do the plaintiffs believe this is a moral requirement to greet people in a specific way, or conversely, do they believe it is immoral if they greet customers differently?

We don’t know the answers to these questions, but if the plaintiffs had some discretion by which they could say “God Bless You” to some people but not others, isn’t it appropriate for the employer to expect they exert that discretion while at the workplace? Certainly when balancing discretionary practices, the employee’s discretion is no greater or more important than the employer’s discretion to have a policy against such a practice. Just as Title VII puts a small burden on employers to avoid the great burden of an employee sacrificing his moral values, Title VII should place no burden on an employer when there is similarly no burden to the employee’s immortal soul because the practice he seeks accommodation for is discretionary.

#### D. Resolving the Conflict Between Harassment and Proselytizing

Courts have identified the inherent conflict between harassment and proselytizing, and scholars have recommended different types of balancing tests to determine when proselytizing should be allowed or forbidden.<sup>403</sup> To condone any form of proselytizing, however, is to suggest that a reasonable accommodation under Title VII can give an individual the right to violate Title VII and harass others. The Conscience test resolves this conflict and eliminates any perceived fuzziness.

Discretionary practices, where the individual asserts one’s “power...to... act according to one’s own judgment,”<sup>404</sup> are not protected under the Conscience test. As explained above, merely stating a practice is “required” doesn’t necessarily mean it is without discretion. Many evangelical Christians may claim proselytizing is “required” by their faith, but this requirement inherently demands discretion such as to whom do I proselytize, when, for how long, etc. Without some level of discretion,

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<sup>402</sup> See *supra* text accompanying notes 209-212.

<sup>403</sup> See Michael D. Moberly, *Article: Bad News for Those Proclaiming the Good News?: The Employer’s Ambiguous Duty to Accommodate Religious Proselytizing*, 42 SANTA CLARA L. REV. 1, 61-62 (2001) (recommending balancing of employee and employer rights by applying the same standards as used in the National Labor Relations Act and solicitation rights); Charlotte Elizabeth Parsons, *Comment: Doing Justice and Loving Kindness: A Comment on Hostile Environments and the Religious Employee*, 19 U. ARK. LITTLE ROCK L.J. 643 (1997) (recommending categorization to different types of religious harassment); Beiner and DiPippa, *supra* note 11 (arguing for a “true” application of the totality of the circumstances test).

<sup>404</sup> *Discretion Definition*, <http://dictionary.reference.com/browse/discretion> (last visited Jan. 16, 2015).

proselytizers could not go into public places without talking constantly; they would stop every pedestrian they passed, and they couldn't buy anything without sharing their message with the salespeople, cashiers, and other customers. Common sense tells us Christians who are "required" to proselytize make certain judgment calls... the barista at Starbucks is off-limits when it's crowded, people engaged in conversation are off-limits because it would be rude, and the boss is off-limits during business meetings. The Conscience test asks whether the need to proselytize to the coworker *that day* emanated from the believer's conscience, and in all likelihood, the answer would be similar to *Redmond*; Bible study and proselytizing is important, perhaps necessary, but morality doesn't require it occur at a given time or on a given day. Proselytizers have this leeway and utilize it, perhaps out of convenience, respect for social norms, or fear of repercussions. The employer should also have the leeway to prohibit it in the workplace for the very same reasons.

#### E. Final Thoughts

This redefinition both clarifies and explains the principles that have always served as the foundation for "religion" in all contexts, be it the First Amendment, conscientious objectors, and Title VII. It further aids courts in identifying the practice at issue, an important distinction from the religious belief upon which the practice is founded. By adopting "religion" redefined as "a system of beliefs emanating from the conscience," employers and employees will have a greater understanding of the law, better predict the outcome of cases, and there will be fewer religious claims—and fewer violations—as all parties see the bright line between legal action and illegal religious discrimination.

To attempt to distinguish between valid and invalid "religions" is an exercise in futility. There are at least 41,000 sects of Christianity worldwide and thus 41,000 distinct sets of religious beliefs based on a single text.<sup>405</sup> But we can identify the types of beliefs deserving protection when we use the word "religion." They are those beliefs that fundamentally circumscribe one's morality, the bright line between right and wrong. Whether a person receives this morality from Jehovah, Allah, God, Zeus, Shiva, Jesus, Thor, Gaea, or his or her inner voice of conscience is irrelevant. We, as Americans, are free from persecution of such beliefs by our Government under the First Amendment of the Constitution, and free from discrimination based on these beliefs by our employer under Title VII of the Civil Rights Act. The redefinition of "religious beliefs"—a system of beliefs emanating from the conscience—executes Congress' intent that "religious beliefs" and "conscientious scruples"<sup>406</sup> are one in the same under the law.

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<sup>405</sup> Pew Research Center's Forum on Religion and Public Life, *Global Christianity: A Report on the Size and Distribution of the World's Christian Population* 95 (Dec. 19, 2011), available at <http://www.pewforum.org/files/2011/12/Christianity-fullreport-web.pdf>.

<sup>406</sup> 86 CONG. REC. 11418 (1940).





JURISDICTION OVER AGENCY ORDERING DECISIONS IN  
STANDARDIZED SOFTWARE PROCURMENTS UNDER THE  
FEDERAL ACQUISITION STREAMLINING ACT: THE CASE FOR  
STATUTORY REFORM

*MAJOR BENJAMIN P. CURRIER\**

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*If Congress intended to prohibit protests stemming from any action related to a task order contract, then it could have explicitly drafted a statute that barred any protest in connection with a task order. It did not do so.*<sup>1</sup>

## I. INTRODUCTION

On October 13, 1994, President Clinton signed the Federal Acquisition Streamlining Act<sup>2</sup> (FASA) into law, thereby providing the executive branch with an array of procurement tools designed to improve and expedite procurements for goods and services. The 103rd Congress passed the FASA in response to the findings of panels chartered by Congress to review the effectiveness and efficiency of federal acquisition and procurement laws.<sup>3</sup> In response to the panels' findings, Congress enacted the FASA to "revise and streamline the acquisition laws of the Federal government," which included provisions reforming protest procedures aimed at reducing the volume of protests.<sup>4</sup> Congress expressly limited the otherwise broad statutory protest jurisdiction of federal courts<sup>5</sup> and the Government Accountability Office (GAO).<sup>6</sup> The FASA only authorizes protests alleging that the government is

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<sup>1</sup> *DataMill, Inc. v. United States*, 91 Fed. Cl. 740, 753 (2010) (quoting *Global Comp. Enter., Inc. v. United States*, 88 Fed. Cl. 350, 414–15 (2009)).

<sup>2</sup> Federal Acquisition Streamlining Act, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in scattered sections of Titles 10 and 41 of the U.S. Code). The FASA's provisions addressing jurisdiction over agency orders are codified for civilian agencies at 41 U.S.C. § 4106(f) (2011) and the Department of Defense at 10 U.S.C. § 2304c(e) (2013). The statutes are substantially the same with one exception. Section 4106(f) contains a sunset provision regarding the authorization of protests valued at over \$10 million and the Government Accountability Office's (GAO) exclusive jurisdiction over such protests. Section 2304c(e) does not contain this sunset provision. For clarity, this article cites primarily to the provision in Title 41.

<sup>3</sup> See *infra* Part III.A (discussing the historical bases for the FASA).

<sup>4</sup> S. REP. NO. 103-258, at 1-2, and 7 (1994), reprinted in 1994 U.S.C.A.N. 2561, 2576.

<sup>5</sup> At the time of enactment, the FASA granted both the U.S. federal district courts and the U.S. Court of Federal Claims (COFC) jurisdictional authority over protests. See *infra* note 32 (discussing the termination of the bid protest jurisdiction of federal district courts on January 1, 2001).

<sup>6</sup> The following discussion provides a brief historical overview of the COFC and the GAO. In 1982, the COFC was reestablished by Congress, through the Federal Courts Improvement Act of 1982, as a federal court under Article I of the U.S. Constitution. See Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25. (1982). The COFC generally hears claims for monetary compensation related to the U.S. Constitution, statute, regulations, or contracts. See 28 U.S.C. § 1491 (2011) and the COFC's background web page, <http://www.uscfc.uscourts.gov/about-court>. The GAO is a forum for resolution of disputes concerning the processes associated with awarding federal contracts. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-96-24, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (6th ed. 1996), available at <http://www.gao.gov/special.pubs/og96024.htm#PAGE3>. In 1984, through the Competition in Contracting Act of 1984 (CICA), the GAO formally received authority to resolve bid protests and to promulgate bid protest regulations, which it had informally exercised since the 1920s. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of Titles 10, 31, and 41 of the U.S.C.); Daniel I. Gordon, *In the Beginning: The Earliest Bid Protests Filed with the US General Accounting Office*, 13 PUB. PROC. L.R. NA147 (2004) (explaining that the GAO has informally exercised jurisdiction over bid protests since the 1920s).

expanding the scope, period, or maximum value of the contract<sup>7</sup> used to issue an order or a protest is allowable if such an order is valued in excess of \$10 million.<sup>8</sup> Consistent with the congressional sponsors' intent in passing the FASA to facilitate more expeditious procurements, the jurisdictional limitations were intended to reduce costly and time-consuming litigation.

A federal district court and the Court of Federal Claims (COFC) have seemingly misapplied the FASA's jurisdictional boundaries because the limitations do not align with the courts' otherwise broad protest jurisdiction under the Tucker Act<sup>9</sup> and, in some instances, are deemed anti-competitive under the Competition in Contracting Act (CICA).<sup>10</sup> Disappointed vendors have repeatedly challenged agencies' decisions to issue an order for standardized software by arguing that the GAO and the courts have jurisdiction over the challenges and that the agencies' decisions and processes<sup>11</sup> were anti-competitive. The courts have oscillated in issuing decisions that either uphold or bypass the FASA jurisdictional bar and, in some instances, impose CICA's competition requirements. A recent protest demonstrates that the COFC is actively settling on a rationale that bypasses the FASA's jurisdictional limitations and requires competition.<sup>12</sup> The courts' rationale in bypassing the FASA is best exemplified in challenges to orders for standardized software.<sup>13</sup>

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<sup>7</sup> The FASA created a contracting mechanism allowing agencies to enter into open-ended single or multiple award task or delivery order contracts. Task or delivery order contracts refer to the same contracts alternatively described as indefinite delivery/indefinite quantity (IDIQ) contracts. Task or delivery order contracts or IDIQ contracts are contractual vehicles establishing a contract or contracts for goods or services with provisions allowing for follow-on task or delivery orders. Task order contracts are for services and delivery order contracts are for supplies, such as software licenses. Agencies issue task or delivery orders under single or multiple award contracts to meet specific requirements with a definite amount of goods or services. *See generally* Federal Acquisition Regulation [hereinafter FAR], Part 16 (Jan. 2014). The Code of Federal Regulations provisions for the FAR begin at 48 C.F.R. and are available at <http://www.acquisition.gov/far/>.

<sup>8</sup> 41 U.S.C. § 4106(f) (2011).

<sup>9</sup> Tucker Act, Pub. L. No. 104-320, § 12(b), 110 Stat. 3870, 3875 (1996) (codified as amended at 28 U.S.C. § 1491(b)). The COFC has jurisdiction to render judgments concerning actions by an interested party objecting to an agency award or proposed award of a contract or any violation of a pertinent statute or regulation. *See infra* Part III.B (discussing the COFC's protest jurisdiction under the Tucker Act).

<sup>10</sup> 41 U.S.C. § 3301(a) (2011). *See also infra* Part V (discussing statutory and regulatory competition requirements in procurements under the FASA).

<sup>11</sup> Task or delivery orders allow agencies flexibility in rapidly acquiring necessary software or related support services. *See infra* notes 22–25 and accompanying text (discussing the typical agency processes associated with the decision to fulfill an agency requirement through the issuance of a task or delivery order under the FASA).

<sup>12</sup> *McAfee, Inc. v. United States*, 111 Fed. Cl. 696, 706–08 (2013). In *McAfee, Inc.*, the COFC recently bypassed the FASA's jurisdictional limitation on protests of task or delivery orders. *See infra* Part IV.C (analyzing the jurisdictional ruling bypassing the FASA's limitation in *McAfee, Inc.*).

<sup>13</sup> Agencies, in response to policymakers' demands, have worked to achieve cost effectiveness and enhanced operational effectiveness through *standardization* of software systems, applications, and programs. The United States government is one of the largest consumers of information technology

The courts have scrutinized agency decisions<sup>14</sup> to acquire standardized software through task or delivery orders<sup>15</sup> under the FASA. The COFC has reviewed the applicability of the FASA's protest jurisdictional limitations by parsing agency acquisition processes to isolate agency decisions in order to attach the court's broad protest jurisdiction established by the Tucker Act. Specifically, the COFC has separated an agency's decision to issue an order under the FASA from the overarching procurement process by characterizing the decision as a separate "procurement" that is not protected by the FASA. The court has asserted that such a decision is a separate procurement subject to the court's broad jurisdiction under the Tucker Act. These judicial decisions undermine the FASA by subjecting agencies to costly and time-consuming litigation concerning the decisional processes that Congress intended to exempt from the court's jurisdiction. If left unaddressed, this development could adversely stymie a federal agency's ability to achieve cost savings through software standardization and may also erode the FASA's positive aspects of achieving cost savings in other acquisitions involving task or delivery orders. Accordingly, this article recommends a legislative revision that protects Congress's intent in including the FASA's jurisdictional limitations.

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(IT) products and services. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIR. NO. A-130, MANAGEMENT OF FEDERAL INFORMATION RESOURCES, para. 6(s) (Nov. 28, 2000) (defining "information technology" as any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by an executive agency). In fiscal year 2013, the federal government spent approximately \$79 billion on IT expenditures. See PowerPoint Presentation, Steven VanRoekel, Office of the U.S. Chief Information Officer, Federal Chief Information Officer's Budget Rollout Presentation on slide 6 (Feb. 13, 2012), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/egov\\_docs/2013\\_it\\_budget\\_rollout\\_20120213.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2013_it_budget_rollout_20120213.pdf) (providing an analysis of the fiscal year 2013 executive branch IT budget). Given the significant costs associated with IT expenditures and recently constrained budgets, Congress and the leaders in the executive branch are actively exerting pressure on federal agencies to develop new or update existing IT systems with less funding and at a faster pace. See generally OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO. NO. M-11-29, CHIEF INFORMATION OFFICER AUTHORITIES, 2 (Aug. 8, 2011) [hereinafter OMB MEMO. M-11-29]. Agencies frequently implement the software standardization requirements through task or delivery order contracts for related support services or software licenses under single or multiple award IDIQ contracts under the FASA. See *infra* Part II (explaining the term "software standardization"); see also *supra* note 7 (explaining IDIQ task and delivery orders under the FASA).

<sup>14</sup> Part IV addresses five protests that refer to agency "procurement decisions" in the context of exercising protest jurisdiction. For purposes of the discussion in this article, the term agency "decision" is in the context of, and synonymous with, the common law term "procurement decision," which the courts have characterized as an agency action or series of activities related to issuing a task or delivery order under the FASA. The agency activities associated with a decision to issue a task or delivery order for standardized software are the responsibility of a number of agency officials, including, but not limited to, officials separately responsible for budget, acquisition, and IT functions. See *infra* notes 22–25 (discussing the roles of agency IT and acquisition professionals in agency decisions to issue a task or delivery order for standardized software).

<sup>15</sup> See *infra* Part II (discussing task and delivery order contracts in the context of software standardization procurements).

The development of the court's rationale for bypassing the FASA's jurisdictional limitations has created a need for a legislative revision. A revision would preserve Congress's intent regarding the limitations on protest<sup>16</sup> jurisdiction for task and delivery orders, thereby ensuring agencies may issue task or delivery orders unencumbered by costly and time-consuming protests.<sup>17</sup> This article examines the development of the COFC's contemporary rationale for bypassing the FASA's protest boundaries in the context of protests of orders for standardized software or related services. The protestors in the select cases argued that, under the Tucker Act, the COFC possesses jurisdiction over agency decisions to issue orders, and in turn, the ordering decisions violated statutory competition requirements under the CICA.<sup>18</sup> While some advocates for increasing competition in the issuance of task or delivery orders may argue in favor the COFC's expanded jurisdiction over agency decisional processes, any perceived benefits are outweighed by the loss of time and resources through the inability to rapidly achieve software standardization through such orders. Congress should remedy the erosion of the FASA's jurisdictional boundaries by amending the FASA to preserve Congress's intent in providing agencies with an expedited procurement process.

In making the recommendation for congressional action, this article, in Part I, provides background information concerning agency software standardization requirements and protest jurisdiction, examines opinions of the GAO and relevant jurisprudence, and proposes statutory language to ensure the FASA protest limitations endure. Part II provides background information concerning agency requirements for standardized software, then Part III addresses the jurisdictional limitations of the COFC and the GAO under the FASA and the COFC's broad protest jurisdiction under the Tucker Act. Part IV examines key protests of standardized software procurements illustrating the federal court's inconsistent application of the law leading to the erosion of the FASA's jurisdictional limitations. Part V addresses the arguments in favor of the court's jurisdiction over challenges to orders for standardized software under the FASA that allege violations of statutory competition requirements. Part VI recommends that Congress revise the FASA's protest limitations to ensure agencies may issue task or delivery orders unencumbered by litigation. Part VII serves as a useful summary of the argument for revising the FASA's protest boundaries. Finally,

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<sup>16</sup> For purposes of this article, the term "protest" refers to protests "in connection with the issuance or proposed issuance of a task or delivery order" under the FASA at 41 U.S.C. § 4106(f) (2011). Compare the use of the term protest under the FASA with the broader use of term "protest" of "proposed or actual awards of contracts alleging any violation of statute or regulation in connection with a procurement" under the Tucker Act, 28 U.S.C. § 1491(b)(1).

<sup>17</sup> Bid protests often have a significant impact on the timelines associated with awarding and executing government contracts, including delaying contract execution by up to four years. Furthermore, the overall volume of bid protests has increased significantly since 2008, which has exacerbated the effect on timeliness. See Andy Medici & Jim McElhatton, *How Bid Protests are Slowing Down Procurements*, FED. TIMES, Jul. 21, 2013, available at <http://www.federaltimes.com/article/20130721/ACQUISITION03/307210001/How-bid-protests-slowng-down-procurements>.

<sup>18</sup> See *infra* Part V (discussing statutory and regulatory competition requirements in the context of issuing orders under the FASA).

Appendix A contains the suggested substantive changes to the FASA to ensure the appropriate protest boundaries endure in future challenges.

## II. SOFTWARE STANDARDIZATION

The Clinger-Cohen Act<sup>19</sup> and Office of Management and Budget (OMB) policies mandate that agencies “develop comprehensive plans for IT systems and acquisitions to assure maximum efficiency in those acquisitions.”<sup>20</sup> Agency information technology (IT) system architecture development often involves the requirement to achieve system interoperability or integration through standardization of IT software programs. Agency Chief Information Officers (CIO) are generally responsible for IT program management, to include ensuring IT system success.<sup>21</sup>

Agency decisions to acquire standardized software generally follow a two-part process with three phases.<sup>22</sup> First, agencies, through their respective Offices of the CIO, make a program-level determination that standardized software is required to meet a certain objective, generally captured in an agency acquisition strategy.<sup>23</sup> Second, agency program officials coordinate with agency procurement officials, through the acquisition planning process,<sup>24</sup> to decide which particular manufacturer’s software satisfies the agency’s programmatic requirements.<sup>25</sup> The identification of a

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<sup>19</sup> Federal Acquisition Reform Act and Information Technology Management Reform Act of 1996, Pub L. No. 104-106, 110, Stat. 659 (1996) (codified as amended in scattered sections of Titles 40 and 41 of the U.S. Code) [hereinafter Clinger-Cohen Act].

<sup>20</sup> *Corel Corp. v. United States*, 165 F. Supp. 2d 12, 16 (D.D.C. 2001) (citing 40 U.S.C.A. § 1425(d) (2000)). See OMB Memo. M-22-29, *supra* note 13.

<sup>21</sup> See OMB Memo. M-11-29, *supra* note 13.

<sup>22</sup> Generally, an agency procurement occurs in three distinct phases: 1) identification of a requirement, 2) the decision to acquire a good or service to fulfill the need, and 3) development of an acquisition plan or strategy to acquire the good or service. *DataMill Inc.*, 91 Fed. Cl. at 756.

<sup>23</sup> Procurement and program officials develop written planning documents, typically referred to as acquisition strategies or acquisition plans, which address the program requirements an agency may achieve through a single or multiple procurements. See FAR 2.101 (definitions); FAR 7 (acquisition planning); DEFENSE ACQUISITION UNIVERSITY, DEFENSE ACQUISITION GUIDEBOOK § 2.7 (June 28, 2013), available at <https://acc.dau.mil/CommunityBrowser.aspx?id=510067>.

<sup>24</sup> Contracting officers prepare acquisition plans that form the basis for implementing a contract action, such as issuing a task or delivery order. See FAR 7.1 (acquisition planning); DEFENSE ACQUISITION GUIDEBOOK, *supra* note 23, at § 2.7.

<sup>25</sup> Agency contracting officers are required to complete a written justification and approval document to substantiate their decision to acquire “items peculiar to one manufacturer,” including brand-name specific products or products that contain a feature associated with a particular manufacturer. FAR 16.505(a)(4). For an agency to issue an order for a specific brand, the contracting officer must demonstrate that the product or feature is essential to the government’s requirements and, through market research, demonstrate that other manufacturer’s products cannot meet the agency’s needs. *Id.* For purposes of the analysis and recommendations in this article, the terms agency “decision” or “decisional processes” are inclusive of the agency business and programmatic processes, in accordance with agency-specific regulations or policies and the FAR, to develop and implement acquisition strategies and plans that comply with the FAR ordering procedures.

requirement for standardized software often arises during an agency's review of its IT infrastructure. The standardization requirement evolves within the requirements development process, leading to an eventual procurement of IT services or products. Agencies have cited a number of bases for requiring software standardization to achieve a performance or cost objective, such as integration, interoperability or modularity, or overall cost savings.<sup>26</sup>

Task and delivery orders under the FASA offer tremendous flexibility by allowing agencies to place orders for software or support services against existing contracts as specific needs arise. Agencies can issue orders for goods or services without having to form a new contract on each occasion.<sup>27</sup> In the context of software procurements, task or delivery order contracts offer a menu of choices of software licenses acquired either through actual manufacturers or authorized resellers. Accordingly, agencies often satisfy the requirement for standardized IT products and related services through task or delivery order contracts. As demonstrated below, the jurisprudence concerning the use of this process to achieve software standardization demonstrated that the COFC is abrogating Congress's desire to limit the COFC's protest jurisdiction over task or delivery order contracts.

### III. PROTEST JURISDICTION (FEDERAL ACQUISITION STREAMLINING ACT AND TUCKER ACT)

The protest jurisdiction of the COFC and the GAO is set forth in various statutes and regulations. This part provides an overview of the key jurisdictional elements in the FASA and the provision in the Tucker Act the COFC has relied on in eroding the FASA's limitations. Subpart A addresses the FASA and subpart B discusses the Tucker Act in terms of the jurisdictional authorities of the COFC and the GAO.

#### A. The Federal Acquisition Streamlining Act

From the late 1980s through the early 1990s, Congress chartered a series of panels and commissions to review the effectiveness of existing acquisition and procurement laws. The Congressional findings uniformly emphasized the need for legislation to update federal procurement law in order to create a "single, consistent, and greatly simplified procurement statute."<sup>28</sup> Congress acknowledged that the federal acquisition and procurement laws and regulations had grown into a "complex and unwieldy system."<sup>29</sup> In 1994, Congress passed the FASA to streamline federal

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<sup>26</sup> See, e.g., *Corel Corp.*, 165 F. Supp. at 21. In *Corel Corp.*, the U.S. Department of Labor articulated a number of specific bases for standardizing its software systems. *Id.* at 16-18.

<sup>27</sup> See generally FAR 16.505 (ordering under indefinite delivery contracts).

<sup>28</sup> S. REP. NO. 103-258, at 3 (1994), *reprinted in* 1994 U.S.C.C.A.N 2563.

<sup>29</sup> *Id.* at 1-2 (1994), *reprinted in* 1994 U.S.C.C.A.N 2561, 2576.



acquisition processes and procedures<sup>30</sup> and to facilitate the efficient and expeditious acquisition of goods and services.<sup>31</sup>

Congress, in furtherance of its overarching objectives, placed limits on the ability of contractors to protest task or delivery orders issued against an underlying indefinite delivery/indefinite quantity (IDIQ) contract.<sup>32</sup> The FASA prohibits protests “in connection with the issuance or proposed issuance of a task or delivery order.”<sup>33</sup> There are two exceptions to the FASA’s jurisdictional bar. First, an interested party<sup>34</sup> may protest an order or proposed order if the order “increases the scope, period, or maximum value” of the underlying IDIQ contract.<sup>35</sup> Second, in 2008, Congress amended the FASA to allow protests of task and delivery orders with a value of more than \$10 million, while vesting the GAO with “exclusive jurisdiction” over such protests.<sup>36</sup> Clearly, Congress intended to permit protests of task and delivery orders under limited circumstances. The purpose of the limitations was to reduce litigation risks by streamlining the procurement processes for acquiring goods and services through the issuance of task or delivery orders, whereas the purpose of the Tucker Act was to grant the courts broad jurisdictional authority over alleged violations of federal procurement law.<sup>37</sup>

## B. The Tucker Act

The COFC exercises broad protest jurisdiction in accordance with the Tucker Act.<sup>38</sup> The Tucker Act empowers the COFC to review protests of an award of a contract for any alleged violation of statute or regulation *in connection with a*

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<sup>30</sup> The FASA’s legislative history describes the pertinent acquisition processes and procedures as activities associated with acquisition of commercial products, the enhanced use of simplified procedures for small purchases, and generally the acquisition practices of federal agencies in obtaining goods and services. *Id.* at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Corel Corp.*, 165 F. Supp. at 21 (citing 41 U.S.C.A. § 253j(d) (2008), amended by 41 U.S.C. § 4106(f) (2011)). *Corel Corp.* was filed in a U.S. federal district court before the Administrative Dispute Resolution Act terminated the U.S. federal district courts’ bid protest jurisdiction on January 1, 2001. Administrative Dispute Resolution Act, Pub. L. No. 104-320, § 12(d), 110 Stat. 3870, 3874-75 (1996).

<sup>33</sup> 41 U.S.C. § 4106(f)(1) (2011).

<sup>34</sup> For purposes of filing a protest, the FAR defines the term “interested party” as “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” FAR 33.101.

<sup>35</sup> 41 U.S.C. § 4106(f)(1)(a) (2011).

<sup>36</sup> *Id.* §§ 4106(f)(1)–(2).

<sup>37</sup> *Corel Corp.*, 165 F. Supp. at 23 (citing 28 U.S.C. § 1491(b)(1)).

<sup>38</sup> 28 U.S.C. § 1491 (2011). Under the Tucker Act, the COFC is the only federal court with jurisdiction over protests. *See supra* note 32 (discussing the elimination of the bid protest jurisdiction of the federal district courts). The analysis in this article examines the erosion of the FASA’s jurisdictional limitations beginning with a protest filed before a federal district court prior to the elimination of the district court’s protest jurisdiction.

procurement or a proposed procurement.<sup>39</sup> Consequently, the jurisdictional language in both the FASA and the Tucker Act contain the phrase “in connection with” a proposed or actual procurement. This phrase is frequently the subject of litigation regarding its scope and application in the context of the decisional processes associated with task and delivery orders.

The COFC has leveraged the broad jurisdictional grant in the Tucker Act against the limiting language in the FASA by isolating agency decisions as procurements that are separate and apart from the overall ordering processes. The COFC, by isolating agency ordering decisions as separate procurements, attaches jurisdiction to the “procurement decision”<sup>40</sup> through the Tucker Act’s broad jurisdictional grant. As a result, the COFC has in essence frustrated Congress’s intent by expanding its protest jurisdiction over task and delivery orders through a rationale that bypasses the FASA’s jurisdictional bar.

#### IV. JUDICIAL AND ADMINISTRATIVE INTERPRETATIONS OF THE FASA’S JURISDICTIONAL LIMITATIONS IN CHALLENGES TO AGENCY DECISIONS TO ISSUE ORDERS FOR STANDARDIZED SOFTWARE

An analysis of key protests, before the federal courts and the GAO, demonstrates the COFC’s seemingly incorrect interpretation of the scope of its protest jurisdiction over standardized software orders under the FASA, whereas the GAO has consistently upheld the FASA’s jurisdictional limitations. Protestors have argued in favor of the federal court’s jurisdiction over the challenges by alleging the government violated competition requirements when issuing a task or delivery order under the FASA. Recently, the COFC asserted such jurisdiction, which is contrary to the protest boundaries set forth in the FASA, through its rationale that an agency decision to issue an order is reviewable under the jurisdictional grant in the Tucker Act. Consequently, the COFC has also asserted that such orders under the FASA might violate statutory and regulatory competition requirements.<sup>41</sup>

##### A. The Beginning of the End of the FASA’s Protest Jurisdiction Limitations

The U.S. District Court for the District of Columbia’s decision in *Corel Corp. v. United States*<sup>42</sup> represents the first instance in which a federal court bypassed the jurisdictional bar in the FASA. The court exercised jurisdiction over a challenge to the issuance of a delivery order for standardized software, finding that the agency’s decision was anti-competitive. In *Corel Corp.*, the Department of Labor (DOL), through an outside consultant and pursuant to requirements established

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<sup>39</sup> 28 U.S.C. § 1491(b)(1) (2011) (emphasis added).

<sup>40</sup> *Corel Corp.*, 165 F. Supp. at 23.

<sup>41</sup> See *infra* Part V (discussing competition requirements in agency ordering processes under the FASA).

<sup>42</sup> *Corel Corp.*, 165 F. Supp. at 12.

under the Clinger-Cohen Act,<sup>43</sup> began an assessment of its information technology (IT) systems.<sup>44</sup> The DOL concluded that the lack of standardization among the software programs resulted in a host of problems based on a lack of interoperability and integration.<sup>45</sup> As a result, the DOL decided to migrate the disparate software programs to Microsoft products to build a unified suite of programs that provided all the necessary functionality in one package.<sup>46</sup> The DOL implemented its standardization decision through a delivery order for Microsoft products provided by a Microsoft reseller.<sup>47</sup>

Corel, a competing software manufacturer, challenged the agency's "administrative decision"<sup>48</sup> to issue a delivery order for acquiring software. Corel argued that the DOL's standardization decision was within the jurisdiction of the federal district court under the Tucker Act and that the decision violated the statutory competition requirements.<sup>49</sup> Prior to protesting at the COFC, Corel claimed at the GAO that the DOL's decision to purchase Microsoft products was an improper sole-source procurement.<sup>50</sup> The GAO denied the protest, finding that the protest of the DOL's delivery order was barred by the FASA, because Corel did not allege that the delivery order increased the scope, period, or maximum value of the contract against which the order was placed.<sup>51</sup>

Corel then petitioned the U.S. district court<sup>52</sup> after unsuccessfully challenging the DOL's underlying decision to standardize its systems at the GAO. Corel

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<sup>43</sup> The Clinger-Cohen Act mandates that federal agencies design and build IT systems and conduct associated acquisitions ensuring maximum efficiency consistent with an agency's strategic and management goals. *Id.* at 16 (citing 40 U.S.C. § 1425(d) (West Supp. 2000)).

<sup>44</sup> Corel Corp., 165 F. Supp. at 17.

<sup>45</sup> *Id.* See also *supra* Part II (discussing interoperability and integration in the context of software standardization).

<sup>46</sup> Corel Corp., 165 F. Supp. at 16–17.

<sup>47</sup> *Id.* at 18. The Department of Labor (DOL) selected the Microsoft Office suite as the standard office suite for the entire agency. The DOL implemented its standardization decision through an existing multiple award IDIQ contract maintained by the National Institutes of Health (NIH). The NIH contract was a type of IDIQ contract, referred to as a Government-wide Acquisition Contract, which was available for use by any federal agency. See *supra* note 7 (definition of IDIQ contracts). The DOL awarded the delivery order for the Microsoft Products to an authorized reseller of Microsoft products who was an awardee of the NIH contract. *Id.*

<sup>48</sup> *Id.* at 22. Corel asserted a challenge against DOL's "overarching administrative decision" and the associated agency processes leading to the decision to standardize to one manufacturer's products. *Id.*; see also *supra* notes 22–25 (discussing the agency decisional processes associated with implementing a delivery order, including requirements for issuing an order for a product or service that is purposefully restricted to one manufacturer or supplier).

<sup>49</sup> See *infra* Part V (discussing statutory competition requirements in issuing task or delivery orders under the FASA).

<sup>50</sup> Corel Corp., Comp. Gen. B-283862, Nov. 18, 1999, 1999 CPD ¶ 90.

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

<sup>52</sup> See *supra* note 33 (discussing the eventual termination of the federal district court's protest jurisdiction).

alleged that the DOL's standardization decision violated competition requirements in CICA<sup>53</sup> and was arbitrary and capricious pursuant to the Administrative Procedure Act (APA).<sup>54</sup> In response to the protest, the DOL argued that the district court, not unlike the previously successful jurisdictional argument made before the GAO, lacked jurisdiction under the FASA's jurisdictional limitations over task and delivery orders.<sup>55</sup> The DOL asserted that the FASA's jurisdictional limitation barring protests "in connection with the issuance or proposed issuance of task or delivery order"<sup>56</sup> protected the processes associated with issuing a task order.

The district court, despite the well-reasoned jurisdictional determination made by the GAO, bypassed the FASA's jurisdictional bar and exercised jurisdiction over Corel's challenge to the delivery order. The district court reasoned that the DOL's overarching standardization decision violated both the CICA and the APA and was sufficient to establish "federal question" subject matter jurisdiction pursuant to 28 U.S.C. § 1331<sup>57</sup> and the Tucker Act. The district court found that the Tucker Act granted broad jurisdiction to the federal courts in reviewing and rendering judgment over a broad range of actions taken by the government "in connection with" an actual or proposed procurement.<sup>58</sup> The district court cited to and followed the U.S. Court of Appeals for the Federal Circuit's interpretation of the phrase "in connection with" as granting a very broad jurisdictional scope, including both proposed and actual procurements.<sup>59</sup> Despite the express jurisdictional limitations in the FASA, the district court found that Corel, by alleging that the DOL's standardization decision violated CICA and was "in connection with" a procurement, had sufficiently established the court's jurisdiction.<sup>60</sup>

In subsequent challenges to orders for standardized software through FASA procurements, the COFC initially deviated from the district court's findings in *Corel Corp.* and, consistent with the GAO's analysis, upheld the FASA's protest limitations. The COFC, as demonstrated in the discussion of the following protests, adopted the government's counter-arguments regarding the interpretation of the FASA protest

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<sup>53</sup> 10 U.S.C. § 2304 (2011); 41 U.S.C. § 3301 (2011).

<sup>54</sup> *Corel Corp.*, 165 F. Supp. 2d at 18 (citing the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (1994)).

<sup>55</sup> *Id.* (see 41 U.S.C.A. § 253j (2008), amended by 41 U.S.C. § 4106(f) (2011)).

<sup>56</sup> *Id.*

<sup>57</sup> The federal district courts have "federal question" jurisdiction over all civil cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1980).

<sup>58</sup> *Corel Corp.*, 165 F. Supp. at 22 (citing 28 U.S.C.A. § 1491(b)(1)(2011)). At the time *Corel Corp.* was filed, the Tucker Act granted district courts authority "to render judgment on an action by an interested party" involving "any alleged violation of a statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1) (2011); see also *supra* note 33 (briefly discussing the termination of the federal district courts' protest jurisdiction).

<sup>59</sup> *Corel Corp.*, 165 F. Supp. at 23 (citing *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999)).

<sup>60</sup> *Id.*

limitations over agency orders for standardized software. However, this correct jurisdictional rationale proved temporary as the COFC has recently returned to the rationale in *Corel Corp* in interpreting the FASA's jurisdictional limitations.<sup>61</sup> At a minimum, the COFC holdings discussed below that diverged from *Corel Corp*. demonstrate confusion in the courts and the need for congressional action.

## B. The Return of the FASA's Protest Limitations: Three Cases Distinguishing *Corel Corp*.

The cases discussed in this subpart demonstrate that some COFC judges have departed from the rationale in *Corel Corp*. and have adhered to the FASA's jurisdictional bar. These protests were filed after *Corel Corp*. and are significant because the COFC, after analyzing the FASA's protest restriction under very similar facts, chose to not exercise jurisdiction over the agency decisional processes leading to the issuance of an order. Although these cases no longer represent the contemporary jurisdictional rationale applied by the COFC, the cases collectively provide a strong counter-analysis to the rationale of *Corel Corp*.

### 1. *Ezenia!, Inc. v. United States*

In 2008, the COFC in *Ezenia!, Inc.*, considered a protest of the Department of the Army's decision to issue a delivery order for software where the vendor argued that the decision violated competition requirements.<sup>62</sup> In this case, the Army decided to standardize software to rectify interoperability problems caused by the variety of legacy software programs. To resolve the interoperability problems, the Army conducted a "best of breed"<sup>63</sup> evaluation of available software manufacturers. The Army, in part through the software evaluation process, arrived at a decision to standardize its software using an Adobe product. The Army purchased the Adobe software by issuing an order for licenses through a reseller on the Federal Supply Schedule.<sup>64</sup> The incumbent software provider, *Ezenia!*, protested the Army's software procurement decision. *Ezenia!* argued that the Army's decision to standardize software was within the jurisdiction of the COFC under the Tucker Act and violated statutory competition requirements.<sup>65</sup>

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<sup>61</sup> See *supra* Part IV.A (discussing the jurisdictional rationale in *Corel Corp*. where the district court found that an order placed under the FASA was within the district court's jurisdiction). The *Corel Corp*. holding is distinguished by the three cases analyzed in Part IV.B.

<sup>62</sup> *Ezenia!, Inc. v. United States*, 80 Fed. Cl. 60, 62 (2008).

<sup>63</sup> See *infra* note 71 (discussing the best of "breed software" evaluation process).

<sup>64</sup> Pursuant to FAR 8.4, the General Services Administration (GSA) facilitates the Federal Supply Schedule (FSS). The FSS provides agencies with an expeditious contracting mechanism for acquiring commercial supplies and services. The GSA, in maintaining the FSS, enters into IDIQ contracts with vendors to provide supplies or services at set prices for a specified time period. Agencies place orders directly with the vendors who are a party to the FSS. See 1 WEST'S FED. ADMIN. PRAC. § 630 *Contracting by Negotiation-Federal Supply Schedule* (2013).

<sup>65</sup> *Ezenia!, Inc.*, 80 Fed. Cl. at 63–64.

Although the COFC granted the Army's motions to dismiss the protest on both jurisdictional grounds and for a lack of standing, the court paradoxically proceeded with reviewing the protest. The court accepted general jurisdiction over the protest under the Tucker Act and rendered an opinion analyzing the standardization actions taken by the Army.<sup>66</sup> In *Ezenia! Inc.*, the COFC analyzed the jurisdictional boundaries of the federal courts with respect to protests under the Tucker Act and the FASA at 10 U.S.C. § 2304c(e).<sup>67</sup> The COFC scrutinized the Army's decision-making processes associated with standardizing to Adobe products. The court, albeit through a gap in its analysis, adopted the Army's argument that the decision to standardize software was not a procurement decision triggering the court's jurisdiction under the Tucker Act.<sup>68</sup> Accordingly, the opinion contains a subsection heading titled "Agency Standardization Decisions are Not Procurement Decisions" with no direct accompanying analysis. Under this subsection heading, the court simply finds that the Army best of breed software evaluation<sup>69</sup> sufficed to demonstrate agency action that fell outside the court's jurisdictional boundaries under the Tucker Act.<sup>70</sup>

The COFC found that *Ezenia!* failed to assert that the Army had violated the FASA prohibition against taking an action that affects the contract under which the order was issued.<sup>71</sup> Nonetheless, the COFC relied on a rationale similar to the

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<sup>66</sup> *Id.* at 62, 64.

<sup>67</sup> See *supra* note 2 (explaining the FASA's jurisdictional provisions codified in Title 10 and Title 41 of the U.S. Code).

<sup>68</sup> The court in *Ezenia!, Inc.* found that the agency's decision to procure only one brand of software was not a procurement decision within the bounds of the court's jurisdictional authority under 28 U.S.C. § 1491(b)(1) (2011). *Ezenia!, Inc.*, 80 Fed. Cl. at 63. The court formed its jurisdictional rationale by characterizing the agency's procurement decision as a competitive decisional process leading to the order of a specific brand of software without the actual intention of "knocking out other parties, for a sole-source procurement." *Id.* at 64; see *infra* note 69 (discussing the "best of breed" software evaluation process). In the absence of a more detailed discussion in the *Ezenia!, Inc.* opinion, the court's rationale seems to mischaracterize the agency best of breed software evaluation process leading to the issuance of the order for a specific brand of software as a form of competition. Despite the court's finding in *Ezenia!, Inc.*, the Army did not conduct a competition as part of its decisional process. The concept of competition requirements in the issuance of task or delivery orders under the FASA is discussed in Part V. The FASA does not require competition as a predicate to the issuance of a task or delivery order. The FASA does, however, require competition in the award of the overarching IDIQ contract for goods or services under which an agency issues an order. See 41 U.S.C. § 4106(b)(2) (2011).

<sup>69</sup> In *Ezenia!, Inc.*, the court reviewed the Army's software evaluation processes that were comprised of an analysis of various software based on the "best of breed" of available software products. 80 Fed. Cl. at 63. Compare the court's definition of a best of breed software evaluation in *Ezenia!, Inc.* with the definition of the best of breed software evaluation process relied on by the court in *Corel Corp.*, 165 F. Supp. at 16. In the context of software evaluations and consistent with the findings in *Corel Corp.*, a best of breed software product is "identified as the best product of its type" among available software products. GARTNER, IT GLOSSARY, <http://www.gartner.com/it-glossary/best-of-breed> (last visited Mar. 18, 2014). Therefore, the Army, rather than conducting a full and open competition, merely evaluated various commercially available software products.

<sup>70</sup> *Ezenia!, Inc.*, 80 Fed. Cl. at 64 (citing 28 U.S.C.A § 1491(b)(1) (2011)).

<sup>71</sup> *Id.* at 65.

holding in *Corel Corp.* in exercising general jurisdiction over agency procurement decisional processes pursuant to the Tucker Act, while paradoxically finding that the agency's software standardization decision itself was not a procurement decision within the court's bid protest jurisdiction. The court, unlike the district court in *Corel Corp.*, found that it lacked protest jurisdiction over the ordering decision under the Tucker Act and the FASA. Despite the FASA's express bar against protests "in connection with the issuance or proposed issuance of a task or delivery order,"<sup>72</sup> the divergent opinions in *Corel Corp.* and *Ezenia!, Inc.* foreshadowed that COFC judges in future protests may not uphold the FASA's protest restrictions in deciding challenges to agency decision-making processes for standardized software orders. In 2010, following *Ezenia!, Inc.*, the COFC revisited its jurisdictional analysis in challenges to agency decisions in the issuance of orders for standardized software under the FASA.

## 2. DataMill, Inc. v. United States

In *DataMill, Inc.*, the Army decided to replace DataMill's logistics management software program with a different vendor's software program. The Army acquired the competitor's software program through a delivery order on an existing IDIQ contract.<sup>73</sup> DataMill unsuccessfully protested the Army's delivery order at the GAO, arguing that the Army's underlying decision regarding the order violated the CICA's competition requirements.<sup>74</sup> The GAO denied DataMill's protest because the FASA bars protests that do not allege that an order increases the scope, period, or maximum value of the contract under which the order is placed and the FASA bars protests valued at less than \$10 million.<sup>75</sup>

Following the denial of the protest at the GAO, DataMill then protested at the COFC.<sup>76</sup> Before the COFC, DataMill argued that the Army's underlying decision to issue the delivery order violated CICA's competition requirements because DataMill did not have the opportunity to compete for the follow-on requirement.<sup>77</sup> DataMill argued that the COFC possessed jurisdictional authority over the agency decisional processes associated with placing orders under the FASA.<sup>78</sup> The Army asserted that the FASA barred the protest because DataMill's protest was "in connection with the issuance" of an order. The court disagreed with DataMill's assertion

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<sup>72</sup> 41 U.S.C. § 4106(f)(1) (2011).

<sup>73</sup> *DataMill, Inc.*, 91 Fed. Cl. at 743–44. The Army decided to replace DataMill's software program because of a concern over the security of the Army's logistics data after the data was transferred into DataMill's software program. *Id.*

<sup>74</sup> *Id.* at 751 (citing 10 U.S.C.A. § 2304). *See also infra* Part V (discussing competition requirements in the issuance of task and delivery orders under the FASA).

<sup>75</sup> *Id.* at 749.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 748.

<sup>78</sup> *Id.* at 748–49 (DataMill argued that the COFC possessed jurisdiction over the agency decisional processes under 28 U.S.C. § 1491(b)(1)).

that the decision to issue an order is separate and distinct from the processes that lead to the actual issuance of a task or delivery order.<sup>79</sup>

Similar to the jurisdictional finding in *Ezenia!, Inc.*, the COFC found that the FASA's restriction on protests in connection with the actual or proposed issuance of an order applies to an agency's underlying decision to acquire goods or services through a delivery order.<sup>80</sup> Consistent with the *Ezenia!, Inc.* opinion, the court ultimately found that the Army's decision to place an order "has a direct and causal relationship to the proposed issuance or issuance" of the order that is ultimately placed.<sup>81</sup> Unlike the district court in *Corel Corp.*, the COFC, after applying significant scrutiny and admitting that it was a close factual determination, as demonstrated in the *Ezenia!, Inc.* and *DataMill, Inc.* opinions that FASA's protest limitations do protect agency decision-making processes in issuing an order for standardized software. Likewise, in *Bayfirst Solutions, LLC*,<sup>82</sup> the COFC issued an opinion that relied on the jurisdictional rationale in *DataMill, Inc.*, was consistent with *Ezenia!, Inc.*, and differs from the district court's prior jurisdictional determination in *Corel Corp.*

### 3. Bayfirst Solutions, LLC v. United States

In *Bayfirst Solutions, LLC*, the COFC considered a pre-award protest of the Department of State's (DOS) decision to issue a task order for security services.<sup>83</sup> Bayfirst Solutions argued that the agency's proposed issuance of a task order violated regulations concerning competition requirements in contract awards to small businesses.<sup>84</sup> The DOS argued that the FASA's protest restrictions at 41 U.S.C. § 4106(f) barred a protest of a regulatory violation in connection with the proposed issuance of a task order. The court agreed with the DOS's argument regarding the FASA's protest limitation and offered insightful analysis of the court's interpretation of the extent of the FASA's protest restrictions.<sup>85</sup>

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<sup>79</sup> *DataMill Inc.*, 91 Fed. Cl. at 756.

<sup>80</sup> *Id.* at 758. *DataMill*, in support of its argument that the FASA does not bar a protest over the decision to issue a task or delivery order, cited to *Distributed Solutions, Inc.*, where the Court of Appeals for the Federal Circuit found that, for purposes of jurisdiction under the Tucker Act, "A proposed procurement, like a procurement, begins with the process for determining a need for property or services." *Distributed Solutions, Inc. v. United States*, 539 F.3d 1340, 1346 (Fed. Cir. 2008). The COFC, in *DataMill, Inc.*, wholly distinguished the Court of Appeals for the Federal Circuit's (CAFC) jurisdictional interpretation under the Tucker Act in *Distributed Solutions, Inc.* The COFC found that "[t]he FASA bar was neither implicated nor discussed" in *Distributed Solutions, Inc.* and that the Tucker Act's jurisdictional grant is limited by the FASA. *DataMill, Inc.*, 91 Fed. Cl. at 749.

<sup>81</sup> *Id.* at 756.

<sup>82</sup> *Bayfirst Solutions, LLC v. United States*, 104 Fed. Cl. 493, 501–03 (2012).

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

<sup>84</sup> *Id.* at 504.

<sup>85</sup> *Id.* at 507.



The court acknowledged that the COFC, in previous cases, had changed its interpretation of the term “in connection with” in relation to agency’s decisional processes in challenges to orders under the FASA. The court cited to *DataMill, Inc.*, among other related cases,<sup>86</sup> in finding that the COFC had struggled with interpreting the scope of the FASA’s protest restriction.<sup>87</sup> The court asserted that the variations in interpretation of the protest restriction are explained by the complex nature of the individual protests. The court concluded by holding that “when a procurement decision is connected to the proposed issuance or issuance of a task order, and the protest ground challenging that action does not fall within the enumerated exceptions presented in 41 U.S.C.A. § 4106(f), the court has no jurisdiction over that particular challenge.”<sup>88</sup> Although the COFC struggled with its analysis of the scope of the FASA’s jurisdictional limitations, the holding in *Bayfirst Solutions, LLC* is generally consistent with the application of the FASA’s protest limitations under very similar facts in the previous two protests discussed in this part.

Unfortunately, the court’s reasoned analyses in *Bayfirst Solutions, LLC* and *DataMill, Inc.* concerning the FASA’s protest restrictions was not binding on subsequent protests in adjacent chambers in the COFC. The decisions presenting a counter-argument to the jurisdictional analysis in *Corel Corp.* failed to survive because the COFC later seized on the relatively broad jurisdictional analysis in *Bayfirst Solutions, LLC* and coupled that holding with the *Corel Corp.* rationale to bypass the jurisdictional bar. The COFC’s recent inconsistent and confusing application of the FASA’s protest limitations demonstrates the need for Congress to take action ensuring the protest bar endures.

### C. The Contemporary Jurisdictional Rationale Returns to *Corel Corp.*

Despite the COFC’s jurisdictional determinations in *Ezenia!, Inc.*, *DataMill, Inc.*, and *Bayfirst Solutions, LLC*, the court has recently strained its jurisdictional analysis and bypassed the FASA’s jurisdictional restrictions by adopting the dis-

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<sup>86</sup> *Id.* at 503 (citing *MORI Assocs., Inc. v. United States*, 102 Fed. Cl. 503, 534 (2011)) (explaining that in *MORI Assocs.* the COFC, possibly in dicta, divided the early stages of a procurement into a “needs identification” stage and a “contract vehicle selection stage”). In *MORI Assocs., Inc.*, the COFC demonstrated its willingness to strain the FASA’s jurisdictional ban in finding that the “decision making stage” was not in connection with a procurement and, therefore, within the court’s jurisdiction under the Tucker Act and outside the FASA’s protest ban. *MORI Assocs., Inc.*, 102 Fed. Cl. at 517. The court in *Bayfirst Solutions, LLC*, also cited to *Mission Essential Pers., LLC v. United States*, 104 Fed. Cl. 170, 179 (2012) where the COFC, consistent with holdings analyzed in this article, decided that the agency’s procurement decision to award task orders “went to the heart of the decision to issue the tasks orders” and was protected by the FASA’s protest ban. *Bayfirst Solutions, LLC*, 104 Fed. Cl. at 503.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 503 (citing *Omega World Travel, Inc. v. United States*, 82 Fed. Cl. 452, 464 (2008)).

strict court's analysis in *Corel Corp.*<sup>89</sup> In *McAfee, Inc. v. United States*,<sup>90</sup> the court exercised protest jurisdiction over a subcontractor's allegation that the Department of the Air Force's software standardization decision violated CICA's competition requirements.<sup>91</sup> In *McAfee, Inc.*, the Air Force made a decision to acquire a specific IT network security solution. The Air Force planned to implement the network security solution through an eventual delivery order for software and an in-scope modification to an existing delivery order for services.<sup>92</sup> McAfee filed suit at the COFC, requesting an injunction against the Air Force's efforts to standardize software systems. Like the protestors in *Corel Corp.* and *DataMill, Inc.*, McAfee argued that the COFC has jurisdiction over the agency's software standardization decision under the Tucker Act.<sup>93</sup> The Air Force argued that, consistent with the jurisdictional determination in *DataMill, Inc.*, the COFC is barred from exercising jurisdiction over protests in connection with the proposed or actual issuance of an order under the FASA.<sup>94</sup>

In *McAfee, Inc.*, the court rejected the Air Force's jurisdictional argument and relied on the Tucker Act in order to bypass the FASA's jurisdictional restrictions. The court ruled that it possessed jurisdiction over the Air Force's decision to issue a delivery order for a specific type of software in order to standardize the agency's system.<sup>95</sup> In support of its ruling, the court cited to the opinion in *Bayfirst Solutions, LCC*,<sup>96</sup> in which the COFC held that in terms of applying the FASA's protest restrictions, "it may be that each protest requires a fact-intensive inquiry as to the agency's decision making process, and a careful analysis of the connectedness of each challenged procurement decision to the issuance or proposed issuance of a task order."<sup>97</sup> In *McAfee Inc.*, the court found that, despite the FASA's jurisdictional

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<sup>89</sup> See *supra* note 86 (discussing *MORI Assocs. Inc.*, 102 Fed. Cl. at 503, where in the dicta the COFC similarly demonstrated its willingness to bypass the FASA's protest ban through exercising jurisdiction under the Tucker Act despite the FASA's protest ban).

<sup>90</sup> *McAfee, Inc.*, 111 Fed. Cl. at 706.

<sup>91</sup> Although the issue of judicial standing in protests of standardized software procurements under the FASA is outside the scope of this article, *McAfee, Inc.* raises a significant concern for the government regarding judicial standing and further demonstrates that the court should not have exercised jurisdiction over the protest. In *McAfee, Inc.*, the Air Force argued that McAfee lacked standing, as an interested party, to challenge the Air Force's decision to issue an order because McAfee was a prospective subcontractor that would possibly support an eventual government contract holder. The court determined that McAfee had standing as an interested party and exercised jurisdiction under the Tucker Act because of the ultimate effects and possible harm the Air Force's decision might have on the particular vendor community. The COFC's judicial standing analysis in *McAfee, Inc.* demonstrates a potentially significant broadening of the range of eligible vendors who may protest orders under the FASA. *Id.* at 707–10 (citing 28 U.S.C. § 1491(b)(1) (2011)).

<sup>92</sup> *McAfee, Inc.*, 111 Fed. Cl. at 711.

<sup>93</sup> *Id.* at 706.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 710.

<sup>96</sup> *Id.* (citing *Bayfirst Solutions, LLC*, 104 Fed. Cl. at 503).

<sup>97</sup> *Id.*

ban, which had been upheld in *Ezenia!, Inc.*, *DataMill, Inc.*, and *Bayfirst Solutions, LLC*, the rationale in *Bayfirst Solutions, LLC* allowed discretion for the court to parse agency decisional processes leading to an order under the FASA.<sup>98</sup>

The COFC distinguished the jurisdictional findings in *DataMill* by asserting that McAfee's protest of the standardization decision was connected to the procurement process.<sup>99</sup> The COFC's decision in *McAfee, Inc.*, by distinguishing *DataMill, Inc.* and by finding that the analysis in *Bayfirst Solutions, LLC* allowed the court's discretion in applying the FASA's protest ban in asserting jurisdiction over agency task or delivery orders, demonstrates a critical inconsistency in the COFC's application of the FASA's jurisdictional boundaries. Apparently, the COFC is now willing to bypass the FASA in order to resolve the jurisdictional concerns identified in the protests. As a result of the federal courts' oscillating jurisprudence over the past decade, Congress should take action to amend the FASA by ensuring the limitation on protests endures, thus protecting agency decisional processes associated with issuing task or delivery orders.<sup>100</sup>

#### V. JUDICIAL INTERPRETATIONS OF COMPETITION REQUIREMENTS IN THE JURISDICTIONAL ANALYSIS OF CHALLENGES TO ORDERS FOR STANDARDIZED SOFTWARE UNDER THE FASA

The COFC has considered several challenges to orders under the FASA where the protesters have asserted that the COFC possesses jurisdiction over arguments that such orders violate statutory and regulatory competition requirements.<sup>101</sup> These cases present a counter-argument to a jurisdictional revision to the FASA because the COFC generally reviews any challenge to a procurement on the grounds that the action violated competition requirements. Several courts have relied on Tucker Act jurisdiction to examine whether issuing task or delivery orders for standardized software are improper "sole-source" or "brand-name" procurements that are subject to open competition among all available vendors who can meet the agency's requirements.<sup>102</sup> Under the FASA, agencies are required to conduct full and open competition in establishing the IDIQ contract that enables an agency to issue follow-on task or delivery orders. However, FASA expressly excludes full and open competition in the processes associated with issuing task or delivery orders under

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<sup>98</sup> *Id.* at 710.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 709–12.

<sup>101</sup> *See supra* Part IV (discussing protests asserting that orders for standardized software violate statutory competition requirements).

<sup>102</sup> *Id.*

the IDIQ contracts.<sup>103</sup> Nonetheless, the COFC has exercised jurisdiction over such challenges and found that some agency ordering decisions were anti-competitive.<sup>104</sup>

Protestors challenging agency ordering decisions under the FASA often argue for the COFC to assert jurisdiction under the Tucker Act to consider whether an agency's ordering decision was anti-competitive in violation of statutory competition requirements.<sup>105</sup> Agency decisions to issue task or delivery orders do not violate competition requirements under express statutory provisions in both the FASA and the CICA. Therefore, the courts should not review a protest based on this assertion.<sup>106</sup>

Agencies are required to conduct full and open competition in establishing the underlying IDIQ contract against which the follow-on task or delivery orders are issued.<sup>107</sup> After the award of an IDIQ contract, the FASA requires that eligible contractors receive a "fair opportunity to be considered" for the follow-on award of a task or delivery order under the IDIQ contract.<sup>108</sup> The fair opportunity requirement falls short of the competition requirements otherwise required by the CICA and is satisfied when contracting officers provide every awardee the chance to be considered. The CICA also contains a "savings provision" whereby agencies are not required to follow full and open competition requirements "in the case of procurement procedures otherwise expressly authorized by statute."<sup>109</sup> The CICA savings provision is applicable to task or delivery orders issued pursuant to the authority

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<sup>103</sup> 41 U.S.C. § 4106(b)(2) (2011). The FASA requires that an agency provide eligible vendors with a "fair opportunity to be considered" at the time of issuing a task or delivery order under a multiple award contract valued above \$2500. *Id.* § 4106(c). Also, the FASA enumerates enhanced competition requirements for orders in excess of \$5 million. *Id.* § 4106(d).

<sup>104</sup> *See, e.g., Savantage Fin. Servs. v. United States*, 81 Fed. Cl. 300 (2008). The COFC exercised jurisdiction over a challenge to the Department of Homeland Security's decision to use one of two software programs, out of many other available programs, for standardization of its financial services systems. In *Savantage*, the COFC scrutinized the agency's acquisition planning processes, including an internal brand name justification document forming the basis for excluding other sources, well before the agency issued an order under the FASA. The COFC determined that the decision to use only two software systems was a procurement for purposes of jurisdiction and that the decision violated CICA's competition requirements contained within FAR 6.3. *Id.*

<sup>105</sup> *See, e.g., Savantage Fin. Servs.*, 81 Fed. Cl. at 300.

<sup>106</sup> 41 U.S.C. § 4106(b)(2) (2011). The FASA's congressional sponsors, in streamlining federal procurements, did not intend for task or delivery orders to undergo full competitive procedures. The FASA's purpose was to ensure that agencies had discretion in establishing task or delivery order contracts by requiring that all contractors party to an IDIQ contract receive only a "reasonable opportunity to be considered" for the issuance of task or delivery orders. *DataMill Inc.*, 91 Fed. Cl. at 753 (citing S. REP. NO. 103-259 at 15). The CICA requires that agencies obtain goods and services through "full and open competition" with competitive procedures that were established under statute and regulation unless procurement procedures are used under separate statutory procurement authority, such as task and delivery order award procedures under the FASA. 41 U.S.C. § 3301(a) (2011).

<sup>107</sup> 41 U.S.C. § 4106(b)(2); 41 U.S.C. § 3301.

<sup>108</sup> 41 U.S.C. § 4106(c); FAR 15.505(b)(2) (implementing the fair opportunity requirement for orders valued in excess of \$2500 and providing for limited exceptions to this requirement).

<sup>109</sup> 41 U.S.C. § 3301(a).

established in the FASA.<sup>110</sup> Accordingly, agencies are not required to openly compete task or delivery orders under the FASA.

The COFC has demonstrated that there is some confusion regarding valid FASA-based orders through inconsistent rulings regarding the applicable competition requirements in the agency decisional processes associated with issuing orders. The COFC has repeatedly scrutinized agency standardization decisions that occur in connection with the planned or actual issuance of an order.<sup>111</sup> The resulting jurisprudence demonstrates the COFC's aspiration for some form of competition in the agency decisional processes leading to the issuance of an order for a specific type of software or related support service.

In *Ezenia!, Inc.*, the court stretched its analysis by applying a vague competition standard to the FASA's ordering process which is outside the requirements of either the CICA or the FASA.<sup>112</sup> *Ezenia!, Inc.* demonstrates there is some confusion regarding competition requirements in agency ordering processes because the court accepted the Army's best of breed software evaluation as a form of competition that sufficed under procurement law that was not applicable to FASA-based procurements.<sup>113</sup> In *DataMill, Inc.*, the COFC considered whether the Army's decision to issue a delivery order for standardized software constituted an unlawful sole-source procurement in violation of the CICA. Unlike the opinion in *Ezenia!, Inc.*, the court found that the decision to issue delivery orders under the FASA is not subject to competition requirements under the CICA.<sup>114</sup> Conversely, the COFC recently exemplified the confusion over competition requirements in *McAfee, Inc.* where, under similar facts, the COFC determined that the government violated competition requirements under the CICA when the Air Force decided to use a delivery order for software.<sup>115</sup> Despite the inconsistent rulings in *Ezenia!, Inc.* and *McAfee, Inc.* and consistent with the COFC's ruling in *DataMill, Inc.*, agencies, unless an order modifies the IDIQ contract's scope, cost, or duration, are not required to conduct full and open competitions in issuing task or delivery orders per express provisions in both the CICA and the FASA.

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<sup>110</sup> *Ezenia!, Inc.*, 80 Fed. Cl. at 64 (citing *Corel Corp.*, 165 F. Supp. at 19–20).

<sup>111</sup> *See, e.g.*, *Savantage Fin. Servs.*, 81 Fed. Cl. at 306–308.

<sup>112</sup> *Ezenia!, Inc.*, 80 Fed. Cl. at 63–65.

<sup>113</sup> In *Ezenia!, Inc.*, the COFC adopted the rationale in *Corel Corp.* concerning competition requirements, finding that the FASA does not require competition at the task or delivery order level when an order is issued against an IDIQ contract. *Ezenia!, Inc.*, 80 Fed. Cl. at 64 (citing *Corel Corp.* 165 F. Supp. at 19–20). *But see supra* note 69 (discussing the analytical paradox in *Ezenia!, Inc.* where the COFC held that while FASA task or delivery orders are not subject to CICA's competition requirements, the Army had conducted a valid procurement through a competitive “best of breed” software evaluation leading to the issuance of a delivery order for software).

<sup>114</sup> *DataMill Inc.*, 91 Fed. Cl. at 761.

<sup>115</sup> *McAfee, Inc.*, 111 Fed. Cl. at 712.

Despite a protestor’s arguments in favor of competition in the decisional processes associated with issuing orders, the FASA does not require a legislative revision specifically addressing competition requirements. At present, Congress unambiguously requires that an agency conduct a full and open competition at the time of award of an IDIQ contract under which order will be placed.<sup>116</sup> Congress, however, should amend the FASA to clarify the jurisdictional boundaries of the COFC and ensure that challenges to agency ordering processes are not reviewed, including challenges alleging a violation of the CICA’s competition requirements.

## VI. A CALL FOR CONGRESSIONAL ACTION

Federal courts have selectively ignored agency arguments and the GAO’s determinations in eroding the FASA’s protest restrictions. The court in *Bayfirst Solutions, LLC* correctly articulated the jurisdictional concerns when it stated, “There seems to be some variation in this court’s approach to interpreting the term ‘in connection with’ when applying the ban on task order protests in particular cases.”<sup>117</sup> If left unaddressed, the jurisdictional rationale developed through misinterpretations of the scope of the FASA jurisdictional bar over the past decade will undoubtedly stymie Congress’s intent to provide agencies with an expeditious procurement process. Accordingly, Congress should amend the FASA to clarify that the phrase “in connection with” includes agency decisional processes.<sup>118</sup>

### A. A Proposed Revision to the FASA

Congress should revise the FASA in order to reinforce and clarify the protest jurisdictional boundaries, thus allowing agencies latitude in making expeditious procurement decisions that would be free from costly and time-consuming judicial scrutiny. Section 4106(f)(1) of Title 41 of the U.S. Code bars protests, subject to certain limited exceptions, in connection with the issuance of a proposed or actual task or delivery order.<sup>119</sup> Congress should amend this section to read, “A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order, including agency decisional processes associated with or leading to the issuance or proposed issuance of a task or delivery order.” The proposed revision would reinforce the original jurisdictional bar and further minimize the volume of

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<sup>116</sup> *Id.*

<sup>117</sup> *Bayfirst Solutions, LLC*, 104 Fed. Cl. at 502.

<sup>118</sup> As an alternative to enacting the legislation proposed in this article, an appellate ruling could resolve the COFC’s inconsistent jurisprudence regarding the scope of the FASA’s jurisdictional bar coupled with the overly broad interpretation of the jurisdiction established by the Tucker Act. To date, the CAFC, in its capacity as the appellate court for the COFC, has not considered an appeal from the government addressing the question of the scope of the FASA’s jurisdictional bar in the context of standardized software procurements.

<sup>119</sup> Under 41 U.S.C. § 4106(f)(1), task and delivery orders may be protested only if the protest is on the grounds that the order modifies the scope, duration, or maximum value of the underlying IDIQ contract or the order is valued in excess of \$10M.

costly and time-consuming litigation over agency decisional processes leading to an order. In the event Congress does not address the jurisdictional concern raised by the COFC's inconsistent jurisprudence, the FASA's existing protest ban will completely erode in the context of orders for standardized software.

## B. A Missed Opportunity: The Federal Information Technology Acquisition Reform Act

The President recently signed legislation, incorporated into the National Defense Authorization Act of 2015 (NDAA), to strengthen the federal information technology acquisition processes. The Federal Information Technology Acquisition Reform Act<sup>120</sup> (FITARA), as enacted in the NDAA, now represents a missed opportunity for Congress to amend the FASA's protest limitation to ensure key acquisition objectives are not encumbered by the COFC. The FITARA legislation updated the Clinger-Cohen Act and modified the FAR to streamline and strengthen IT acquisition by encouraging the formation of Government-wide commodity IT contracts that would replace unnecessary and duplicative Government-wide contract vehicles.<sup>121</sup> The benefits the FITARA seeks to achieve are based in large part on granting the authority for agencies to consolidate information technology requirements and implement such consolidated requirements through FASA-based government-wide IDIQ contracts. Given the line of cases analyzed in this article, the contract vehicles proposed through FITARA to acquire extensive information technology solutions are at serious risk because they will likely be subject to the COFC's jurisdiction through litigation.

The FITARA's updates can only streamline agency acquisition processes if Congress ensures the jurisdictional boundaries in the FASA endure. The enactment of FITARA will very likely amplify the constraints placed on agencies by the COFC's decisions to selectively exercise jurisdiction over task or delivery orders. For FITARA to achieve its objectives, Congress must protect agency decisional processes associated with the issuance of orders from the COFC's jurisdiction. Accordingly, Congress should revisit the FITARA legislation by adding the proposed statutory amendment in Appendix A of this article to future legislation, which would serve to clarify the scope of the FASA jurisdictional bar and reinforce Congress's intent that orders be excluded from judicial scrutiny.

## VII. CONCLUSION

The COFC's active erosion of the FASA's protest jurisdictional limitations will adversely affect agencies' ability to expeditiously implement key operational

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<sup>120</sup> National Defense Authorization Act for Fiscal Year 2015, H.R. 3979, 113th Cong. (2014). See Darrel Issa, *Crafting 21st Century IT Reform*, NEXTGOV (Sept. 20, 2012), available at <http://oversight.house.gov/itreform/>.

<sup>121</sup> *Id.*

programs through orders for products and services. Despite contrary Comptroller General opinions and jurisprudence, the COFC is now seemingly settling on a rationale that bypasses the FASA's protest limitations through application of the Tucker Act. The COFC, consistent with the recent holding in *McAfee, Inc.*, will likely continue to expose agency task or delivery orders to protest litigation, placing critical programs at risk in terms of time and funding.

Congress should take action to protect agency decisions “in connection with” task or delivery orders and preserve the availability of streamlined standardized acquisitions under the FASA.<sup>122</sup> The quote from *DataMill, Inc.* provided at the outset of this article clearly identifies the need for Congress to revisit FASA's protest bar. Congress did enact a statute that bars protests over task and delivery orders. The COFC has simply chosen to ignore it. An amendment to the FASA would ensure Congress's original intent in providing agencies with an expeditious procurement process endures by directly eliminating time-consuming and wasteful litigation over task or delivery orders for standardized software. The amendment to the FASA proposed in this article would ensure the FASA's expeditious task and delivery order procurement mechanism remains intact and free from protest litigation.

#### Appendix A. Proposed Legislation to Amend Protest Jurisdiction over Agency Decisional Processes in Procurements Under the FASA

Title 41 U.S.C.A., section 4106(f)(1) bars protests, subject to certain limited exceptions, in connection with the issuance of a proposed or actual order. As stated in this article, this jurisdictional provision requires a revision in order to protect agency decisional and procurement processes associated with the issuance of an actual or proposed order. Accordingly, this article recommends the following changes, identified in red text, to the respective section of the statute:

**(a) Application.**—This section applies to task and delivery order contracts entered into under sections 4103 and 4105 of this title.

**(b) Actions not required for issuance of orders.**—The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

**(1)** A separate notice for the order under section 1708 of this title or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

**(2)** Except as provided in subsection (c), a competition (or a waiver of competition approved in accordance with section 3304(e) of this title) that is separate from that used for entering into the contract.

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<sup>122</sup> 41 U.S.C. § 4106(f)(1) (2011).



**(c) Multiple award contracts.**—When multiple contracts are awarded under section 4103(d)(1)(B) or 4105(f) of this title, all contractors awarded the contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts, unless—

(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing the opportunity to all of those contractors would result in unacceptable delays in fulfilling that need;

(2) only one of those contractors is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

(3) the task or delivery order should be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

(4) it is necessary to place the order with a particular contractor to satisfy a minimum guarantee.

**(d) Enhanced competition for orders in excess of \$5,000,000.**—In the case of a task or delivery order in excess of \$5,000,000, the requirement to provide all contractors a fair opportunity to be considered under subsection (c) is not met unless all such contractors are provided, at a minimum—

(1) a notice of the task or delivery order that includes a clear statement of the executive agency's requirements;

(2) a reasonable period of time to provide a proposal in response to the notice;

(3) disclosure of the significant factors and subfactors, including cost or price, that the executive agency expects to consider in evaluating such proposals, and their relative importance;

(4) in the case of an award that is to be made on a best value basis, a written statement documenting—

(A) the basis for the award; and

(B) the relative importance of quality and price or cost factors; and

(5) an opportunity for a post-award debriefing consistent with the requirements of section 3704 of this title.

**(e) Statement of work.**—A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

**(f) Protests.**—

**(1) Protest not authorized.**—A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order, including agency decisional processes associated with or leading to the issuance or proposed issuance of a task or delivery order;

except for—

**(A)** a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued; or

**(B)** a protest of an order valued in excess of \$10,000,000.

**(2) Jurisdiction over protests.**—Notwithstanding section 3556 of title 31, the Comptroller General shall have exclusive jurisdiction of a protest authorized under paragraph (1)(B).

**(3) Effective period.**—Paragraph (1)(B) and paragraph (2) of this subsection shall not be in effect after September 30, 2016.

**(g) Task and delivery order ombudsman.**—

**(1) Appointment or designation and responsibilities.**—The head of each executive agency who awards multiple task or delivery order contracts under section 4103(d)(1)(B) or 4105(f) of this title shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on those contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (c).

**(2) Who is eligible.**—The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's advocate for competition.



AUTOMATING THE RIGHT STUFF? THE HIDDEN  
RAMIFICATIONS OF ENSURING AUTONOMOUS AERIAL  
WEAPON SYSTEMS COMPLY WITH INTERNATIONAL  
HUMANITARIAN LAW

MAJOR JASON S. DESON\*

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*Persons who authorize the use of, direct the use of, or operate autonomous and semi-autonomous weapon systems must do so with appropriate care and in accordance with the law of war, applicable treaties, weapon system safety rules, and applicable rules of engagement (ROE).<sup>1</sup>*

*When the showdown came—and the showdowns always came—not all the wealth in the world or all the sophisticated nuclear weapons and radar and missile systems it could buy would take the place of those who had the uncritical willingness to face danger, those who, in short, had the right stuff.<sup>2</sup>*

## I. INTRODUCTION

*[W]e're not against high tech. What we're really against is unsuitable complexity or technology that doesn't suit the mission.<sup>3</sup>*

On July 10, 2013, the U.S. Navy's X-47B Unmanned Combat Air System (UCAS) successfully landed on the aircraft carrier USS *George H.W. Bush* off the coast of Virginia.<sup>4</sup> The fact that an aircraft landed on a ship may not sound that impressive in and of itself, but no human was in control of this particular aircraft. The drone landed all by itself, which may represent the first small step toward fully autonomous aerial weapon systems. The giant leap to an aircraft that can engage targets on its own could be right around the corner. The idea of robots fighting our wars for us has long since been the stuff of science fiction. Indeed, no such fully autonomous weapon systems capable of complex warfighting decision making like those seen in the films *Terminator* or *Stealth* are known to exist at this time.<sup>5</sup> However, it is quite possible that with the recent performance of the X-47B, their development and employment is in the not-so-distant future. Indeed, the X-47B is already equipped with a 4,500 pound twin internal weapons bay.<sup>6</sup>

<sup>1</sup> U.S. DEP'T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS para. 4.b (21 Nov. 2012) [hereinafter DoDD 3000.09].

<sup>2</sup> TOM WOLFE, *THE RIGHT STUFF* 30 (Picador 1979).

<sup>3</sup> *United States Military Reform After Operation Desert Storm: Hearing Before the H. Armed Serv. Comm.*, 102nd Cong. (1991) (testimony of Colonel (Retired) Robert Boyd, U.S. Air Force).

<sup>4</sup> Drew F. Cohen, *Drones Off the Leash*, U.S. NEWS & WORLD REPORT, Jul. 25, 2013, <http://www.usnews.com/opinion/articles/2013/07/25/autonomous-drones-and-the-ethics-of-future-warfare.html>

<sup>5</sup> See generally ARMIN KRISHNAN, *KILLER ROBOTS: LEGALITY AND ETHICALITY OF AUTONOMOUS WEAPONS* 1–2, 43–44 (2009). Krishnan divides autonomy into three types: (1) pre-programmed autonomy; (2) limited or supervised autonomy; and (3) complete autonomy. He notes that there already exists pre-programmed autonomous weapons systems, such as the U.S. Navy's Phalanx that autonomously selects and engages certain targets after it is activated. He also notes that there are many examples of limited or supervised autonomous military robots, but robots with complete autonomy “only exist as experimental robots and are built entirely for research purposes.” *Id.* at 44.

<sup>6</sup> Northrop Grumman Fact Sheet, X-47B, available at <http://www.northropgrumman.com/>

In 2013, two high-profile documents called for either a moratorium on the development or an outright ban of autonomous weapons before they can be developed.<sup>7</sup> Interestingly, the International Committee of the Red Cross (ICRC) has not joined this call yet.<sup>8</sup> The focus of the criticism contained in these writings is that such autonomous weapon systems cannot comply with International Humanitarian Law (IHL).<sup>9</sup> In May 2014, a Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS) took place under the auspices of the Convention on Certain Conventional Weapons (CCW) to discuss “the questions related to emerging technologies in the area of lethal autonomous weapons systems.”<sup>10</sup> At this meeting, the International Committee of the Red Cross (ICRC) asked the following in its prepared statement: “How can the development and deployment of the weapon system be lawful if there is no guarantee that it will perform in accordance with IHL?”<sup>11</sup> While this is an important issue to address, the greater concern posited in this article is not whether humans *can* develop such weapon systems that *guarantee* compliance with IHL, but rather if humans *should* develop such weapon systems that *guarantee* compliance with IHL. The danger being the increased reliance on machines to do the fighting and an unnecessary restriction of IHL principles to the point where humans may not be able to fully comply with them. What happens when human compliance with IHL cannot be guaranteed?

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Capabilities/X47BUCAS/Documents/UCAS-D\_Data\_Sheet.pdf (last visited Nov. 19, 2013).

<sup>7</sup> See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Christof Heyns, U.N. Doc. A/HRC/23/47 (Apr. 9, 2013). This report on Lethal Autonomous Robots (LARs) calls for a moratorium on their development. It concludes, “If the experience of drones is an indication, it will be important to ensure that transparency, accountability, and the rule of law are placed on the agenda from the state. Moratoria are needed to prevent steps from being taken that may be difficult to reverse later. . . .” *Id.* at 21. See also HUM. RTS. WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2013) [hereinafter LOSING HUMANITY], available at [http://www.hrw.org/sites/default/files/reports/arms1112\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/arms1112_ForUpload.pdf) [hereinafter, LOSING HUMANITY]. This report details specific legal arguments against the development of automated weapons systems or “killer robots.” Among various arguments, the report argues from the IHL perspective that proportionality and military necessity requires human judgment and a machine cannot have it. LOSING HUMANITY at 32–35. Further, under the Martens Clause, which HRW argues “requires that means of warfare be evaluated according to the ‘principles of humanity’ and the ‘dictates of public conscience,’” machines killing humans may never be legally justifiable because “a large number” find the idea “shocking and unacceptable.” *Id.* at 35.

<sup>8</sup> See *Autonomous Weapon Systems – Q & A*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/document/autonomous-weapon-systems-challenge-human-control-over-use-force..>

<sup>9</sup> LOSING HUMANITY, *supra* note 7, at 3. “The rules of distinction, proportionality, and military necessity are especially important tools for protecting civilians from the effects of war, and fully autonomous weapons would not be able to abide by those rules.

<sup>10</sup> Report of the 2014 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), U.N. Doc. CCW/MSP/2014/3 (Jun. 11, 2014) available at <http://daccess-ods.un.org/access.nsf/Get?Open&JN=G1404896> (last visited Dec. 23, 2014).

<sup>11</sup> Statement of the International Committee of the Red Cross (ICRC), 13 May 2014, available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/C99C06D328117A11C1257CD7005D8753/file/ICRC\\_MX\\_LAWS\\_2014.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/C99C06D328117A11C1257CD7005D8753/file/ICRC_MX_LAWS_2014.pdf) (last visited Dec. 23, 2014).

Assuming that such weapon systems are not outright banned, this article exposes the hidden legal dangers of guaranteeing compliance with IHL by focusing on the practical legal consequences of replacing the human pilot with a robot pilot. As the number of U.S. Air Force drones (the Air Force currently prefers the term, “remotely piloted aircraft” or “RPA”) grows, human pilots are disappearing from the planes they fly, but not completely from the controls (hence the preference for the “RPA” label). This has generated a separate debate over the ethicality and legality of current RPA strikes.<sup>12</sup> What happens when those pilots are completely removed from the controls? This article will attempt to answer that question by identifying at least three dangers of replacing the human pilot with a robot pilot. The first involves how the robot pilot will be programmed to fully comply with IHL. How exactly will this be done? Can IHL principles be converted into formulas for the machine? Will excessive casualties be limited to a certain number so the machine knows when to engage or not? The second danger is an increased restriction on IHL principles themselves. Just as current drone warfare has arguably led to the demand for more precise engagements and a heightened restriction on the IHL principle of proportionality, the use of robot pilots may result in even higher standards for perfection in air-to-air and air-to-ground engagements with zero tolerance of collateral damage and possibly an end to the Rendulic Rule itself.<sup>13</sup> Third and finally, the law governing the use of force itself may be fundamentally altered.

Ultimately, the practical effort to make robot pilots fully comply with IHL may not only unnecessarily restrict the current IHL as it applies to aerial warfare, but also restrict the commander’s ability to accomplish the mission. The quotation at the start of this introduction from the legendary Colonel Robert Boyd, one of America’s greatest fighter pilots, may best describe the true danger of the robot

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<sup>12</sup> See generally *Examining the Legality of Unmanned Targeting*, Hearing before the H. Subcomm. on Nat’l. Sec. & Foreign Affairs, 111th Cong. (2010), available at [https://www.fas.org/irp/congress/2010\\_hr/drones2.pdf](https://www.fas.org/irp/congress/2010_hr/drones2.pdf). The statements from this hearing provide a good summary of the pros and cons of current drone operations. See also Kenneth Anderson, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won’t Work and How the Laws of War Can*. Anderson writes,

Debates over autonomous robotic weapons (and also over UAVs) sometimes sound similar to those that arose with respect to technologies that emerged with the industrial era, such as the heated arguments of a century ago over submarines and military aviation. A core objection, then as now, was that they disrupted the prevailing norms of warfare by radically and illegitimately reducing combat risk to the party using them—an objection to the ‘remoteness,’ joined to a claim (sometimes ethical, sometimes legal, and sometimes almost aesthetic) that it is unfair, dishonorable, cowardly, or not sporting to attack from a safe distance, whether with aircraft, submarines, or, today, a cruise missile, drone, or conceivably an autonomous weapon operating on its own.

*Id.*

<sup>13</sup> The Rendulic Rule states that “commanders and personnel should be evaluated based on information reasonably available at the time of the decision.” INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422 OPERATIONAL LAW HANDBOOK OPS LAW HANDBOOK 12.



pilot; it will simply be a high-tech weapon that will be too unsuitably complex to adequately comply with IHL and as a result it will not fit the mission.

## II. “THE NEED FOR SPEED!” WHO WILL THE ROBOTIC “MAVERICK” BE?

*Fighter pilot is an attitude. It is cockiness. It is aggressiveness. It is self-confidence. It is a streak of rebelliousness, and it is competitiveness.*<sup>14</sup>

In the film *Top Gun*, the character Maverick makes the following remark during a post-hop debrief, “You don’t have time to think up there. If you think, you’re dead.”<sup>15</sup> When he said this, Maverick not only highlighted a very real fact of life for fighter pilots, but he may also have identified the single most important limitation on human pilots that a robot pilot can possibly overcome. A fighter pilot must constantly maintain “situational awareness”<sup>16</sup> to track and engage targets and they must do it while “zipping around at rifle-bullet speeds.”<sup>17</sup> This section defines autonomous weapons systems, outlines the role of fighter pilots, and the anticipated role of robot pilots; as those roles are described, it becomes clear that “[i]t takes more than just fancy flying.”<sup>18</sup>

### A. Autonomous Weapon Systems: Defining the Robot Pilot

*It may take longer than the visionaries think, but the pilot in the cockpit is already an endangered species.*<sup>19</sup>

The Department of Defense (DoD) defines an autonomous weapon system as:

A weapon system that, once activated, can select and engage targets without further intervention by a human operator. This includes human-supervised autonomous weapon systems that are designed

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<sup>14</sup> ROBIN OLDS: FIGHTER PILOT: THE MEMOIRS OF LEGENDARY ACE ROBIN OLDS 291 (2010).

<sup>15</sup> TOP GUN (Paramount Pictures 1986).

<sup>16</sup> See Lieutenant Colonel Robert A. Coe & Lieutenant Colonel Michael N. Schmitt, *Fighter Ops for Shoe Clerks*, 42 A.F. L. REV. 49, 78 (1997) (“On combat sorties, though, the simple act of ‘flying’ the aircraft has to be second nature because the pilot’s mental activity must be focused on gaining and maintaining ‘situational awareness’ (SA) of the mission and what is happening around him. Should he fail to do so, the pilot risks becoming ‘task saturated’ and, as a result, a combat statistic.”). *Id.*

<sup>17</sup> DAN HAMPTON, VIPER PILOT: A MEMOIR OF AIR COMBAT 135 (2012).

<sup>18</sup> TOP GUN, *supra* note 15.

<sup>19</sup> *Unmanned Aerial Drones: Flight of the Drones: Why the Future of Air Power Belongs to Unmanned Systems*, ECONOMIST, Oct. 8, 2011, available at <http://www.economist.com/node/21531433>.

to allow human operators to override operation of the weapon system, but can select and engage targets without further human input after activation.<sup>20</sup>

The key element of this definition, and the focus of this article, is the ability of the robot pilot to not only fly a plane, but also its ability to select and engage targets on its own. Currently, the armed RPAs in the U.S. Air Force arsenal still rely on human operators to select and engage targets.<sup>21</sup> These operators are pilots and many formerly occupied the cockpits of manned aircraft like the F-16 Viper (officially the Fighting Falcon) or the F-15 Eagle.<sup>22</sup> The next section will focus on the role fighter pilots currently perform in air operations. Arguably, it is these roles that the robot pilot of the future might be called upon to replicate. The focus will then turn to how robot pilots might perform those functions as good as or better than human pilots.

## B. The Role of Fighter Pilots

*[W]e experienced the fundamental realization that we, the pilots, were the weapons. The success or failure of fighter operations lay with the pilot. This was one of the many things that made a fighter pilot different from other types of military aviators. The jet was the horse to get us to the fight, but the fighting was up to us.*<sup>23</sup>

So what exactly do fighter pilots do and what would we be calling on robot pilots to do in their place? There are several missions that U.S. Air Force fighter pilots perform. A full exploration of all those missions is beyond the scope of this article; however, a few basic mission concepts are addressed under the two general Air Force doctrinal functions of counterair and counterland missions.<sup>24</sup>

### 1. Counterair Missions

Counterair missions are designed to achieve air superiority and can be offensive or defensive in nature.<sup>25</sup> Offensive counterair (OCA) missions proactively

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<sup>20</sup> DoDD 3000.09, *supra* note 1, glossary, pt. II, Definitions.

<sup>21</sup> See generally U.S. DEP'T OF AIR FORCE, MQ-1B PREDATOR FACT SHEET (July 20, 2010), available at <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104469/mq-1b-predator.aspx> (last visited Nov 15, 2013); U.S. DEP'T OF AIR FORCE, MQ-9 REAPER FACT SHEET (Aug 18, 2010), available at <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx> (last visited Nov 15, 2013).

<sup>22</sup> See Anna Mulrine, *UAV Pilots*, A.F. MAG., Jan. 2009, at 35.

<sup>23</sup> HAMPTON, *supra* note 18, at 44.

<sup>24</sup> See generally LeMay Ctr. for Doctrine, *Air Force Core Doctrine Vol. IV, Operations*, at <https://doctrine.af.mil/dnv1vol4.htm>. See also Coe & Schmitt, *supra* note 16, at 54. This primer is an excellent introduction to fighter operations written specifically for legal professionals who may be called upon to advise pilots on legal rules governing air operations.

<sup>25</sup> LeMay Ctr. for Doctrine, *Air Force Doctrine Annex 3-01, Counterair Operations*, at 2, available

“destroy, disrupt, or degrade enemy air capabilities by engaging them as close to their source as possible, ideally before they are launched against friendly forces.”<sup>26</sup> Specific missions include attack operations, fighter sweep, escort, and suppression of enemy air defenses (SEAD).<sup>27</sup> Generally, attack operations would include attacks against counterair targets such as an enemy airfield, while fighter sweep missions would involve attacks on enemy aircraft already in the air.<sup>28</sup> An example of escort missions would be fighters escorting bombers to a target.<sup>29</sup> Finally, SEAD missions are designed to “neutralize, destroy, or degrade enemy surface-based air defenses by destructive or disruptive means.”<sup>30</sup> Meanwhile, defensive counterair (DCA) missions “protect friendly forces and vital interests from enemy airborne attacks and is synonymous with air defense.”<sup>31</sup> There are two approaches to DCA. First, active air and missile defense is defensive action taken to “destroy, nullify, or reduce the effectiveness of air and missile threats against friendly forces and assets.”<sup>32</sup> The second approach is passive air and missile defense, which is defined as “all measures, other than active defense, taken to minimize the effectiveness of hostile air and missile threats against friendly forces and assets.”<sup>33</sup>

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at <https://www.doctrine.af.mil/download.jsp?filename=3-03-Annex-COUNTERLAND.pdf>.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 22-23.

<sup>28</sup> *Id.* at 22. Air Force doctrine defines attack operations as those “intended to destroy, disrupt, or degrade counterair targets on the ground.” *Id.* Targets include “enemy air and missile threats, their C2 [command and control], and their support infrastructure (e.g., airfields, launch sites, launchers, fuel, supplies, and runways).” *Id.* The main goal of attack operations “is to prevent enemy employment of air and missile assets.” *Id.* Fighter sweep is defined as an “offensive mission by fighter aircraft to seek out and destroy enemy aircraft or targets of opportunity in a designated area.” *Id.*

<sup>29</sup> *Id.* at 23. Escort are “aircraft assigned to protect other aircraft during a mission (JP 1-02). Escort missions are flown over enemy territory to target and engage enemy aircraft and air defense systems. *Id.*

<sup>30</sup> *Id.* The Air Force divides SEAD into three categories: (1) Area of responsibility (AOR)/joint operating area (JOA) air defense suppression, which focuses on degradation of the enemy’s total air defense system to enable effective friendly operations; (2) localized suppression, which focuses on degradation of the system in certain geographic area, such as near a friendly transit route; and (3) opportune suppression: which includes unplanned self-defense or attacks against targets of opportunity. *Id.*

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.* at 23. Active air defense is further defined as “defensive measures designed to destroy attacking enemy manned or unmanned air vehicles in the atmosphere, or to nullify or reduce the effectiveness of such attack.” *Id.* Active missile defense is defined as “defensive measures designed to destroy attacking enemy missiles, or to nullify or reduce the effectiveness of such attack.” *Id.*

<sup>33</sup> *Id.* at 24. Examples of this include, but are not limited to: hardening of facilities, camouflage, concealment, redundancy, and early detection and warning systems, etc. *Id.*

## 2. Counterland Missions

Counterland missions consists of “airpower operations against enemy land force capabilities.”<sup>34</sup> The aim is “to dominate the surface environment using airpower” and thereby “assist friendly land maneuver while denying the enemy the ability to resist.”<sup>35</sup> Counterland missions are divided into two types. Air interdiction (AI) missions are designed “to divert, disrupt, delay, or destroy the enemy’s military potential before it can be brought to bear effectively against friendly forces. . . .”<sup>36</sup> More specifically, “AI can channel enemy movement, constrain logistics, disrupt communications, or force urgent movement to put the enemy in a favorable position for friendly forces to exploit.”<sup>37</sup> Notably, AI is conducted at “such distance from friendly forces that detailed integration of each air mission with the fire and movement of friendly forces is not required.”<sup>38</sup> Close air support (CAS) missions, on the other hand, “directly supports land maneuver forces.”<sup>39</sup> As such, CAS involves “operations against enemy forces in contact with or in the vicinity of friendly ground operations.”<sup>40</sup> Because of that close proximity, the Air Forces stresses, “CAS requires a significant level of coordination between air and surface forces to produce desired effects and prevent fratricide.”<sup>41</sup> To this end, CAS missions fall under “terminal attack control” of a specially qualified and trained individual.<sup>42</sup> This is especially

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<sup>34</sup> LeMay Ctr. for Doctrine, *Air Force Doctrine Annex 3-03, Counterland Operations*, at 3, available at <https://www.doctrine.af.mil/download.jsp?filename=3-03-Annex-COUNTERLAND.pdf>. [hereinafter, AF DOCTRINE ANNEX 3-03]

<sup>35</sup> *Id.* Air Force doctrine provides the historical context for counterland operations as follows: “World War I saw the first widespread use of airpower in support of Allied land operations when combat aircraft began cutting supply routes, strafing trenches, and bombing fielded forces. Military leaders soon realized that airpower added a synergistic element to conventional ground forces because of its ability to attack behind enemy lines and support offensive breakthroughs. Since then, counterland operations have occurred in every major war as well as numerous smaller conflicts characterized by protracted, low-intensity conflict.” *Id.* at 4-5.

<sup>36</sup> *Id.* at 9. Notably, AI targets include “fielded enemy forces or supporting components such as operational C2 [command and control] nodes, communications networks, transportation systems, supply depots, military resources, and other vital infrastructure.” *Id.*

<sup>37</sup> *Id.* at 20.

<sup>38</sup> *Id.* at 9. The advantage of this lack of integration is that it increases “airpower’s efficiency.” *Id.* at 20.

Detailed integration requires extensive communications, comprehensive deconfliction procedures, and meticulous planning.” *Id.* As such, “AI is inherently simpler to execute in this regard.” *Id.* The ultimate advantage is that, “AI conducted before friendly land forces make contact can significantly degrade the enemy’s fighting ability and limit the need for close air support (CAS) when the two forces meet in close combat.

*Id.*

<sup>39</sup> *Id.* at 3.

<sup>40</sup> Coe & Schmitt, *supra* note 16, at 54.

<sup>41</sup> AF DOCTRINE ANNEX 3-03, *supra* note 34, at 10.

<sup>42</sup> *Id.* at 43.

true for RPAs, where Air Force doctrine states, “There is an increased chance of fratricide, midair collision, and confusion if procedures are not clearly defined.”<sup>43</sup> This raises another point. In many cases Air Force pilots are receiving information from or being controlled by other sources, whether it is the controller on the ground or perhaps in another aircraft, such as an AWACS (Airborne Warning and Control System) aircraft, which “provides situational awareness of friendly, neutral and hostile activity, command and control of an area of responsibility, battle management of theater forces, all-altitude and all-weather surveillance of the battle space, and early warning of enemy actions during joint, allied, and coalition operations.”<sup>44</sup> This begs an ancillary question of just how independent a robot pilot would be in the existing Air Force operational construct. In many circumstances, especially CAS, the robot pilot would be under the command and control of the ground controller no different than a human pilot. To be clear, this article does not suggest that a robot pilot would be turned loose to accomplish all Air Force missions on its own without input or control from human controllers or commanders. All pilots are subject to orders from their commanders. Robot pilots should be no different. A human decision should be made to employ the robot pilot. The question is whether that robot pilot can do what the human pilot could do. Robots should arguably be good at following orders. What if those orders violate IHL? Would the robot pilot recognize it? Would the human pilot recognize it? In the end, it may not always be up to the pilot, but when it is, that is the concern of this paper.

### C. The Role of the Robot Pilot

*Some future missions will benefit from having a human presence, but for many missions, the unmanned aircraft will provide far superior capabilities.*<sup>45</sup>

#### 1. *Performing Counterair and Counterland Without Getting Tired or Task-Saturated*

While attempting to complete various counterair or counterland missions, “pilots must carefully apportion their attention among the complexities of commu-

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To integrate air-ground operations safely and effectively, either a joint terminal attack controller (JTAC) or forward air controller-airborne (FAC[A]) provides terminal control for CAS missions. Terminal attack control is defined as “the authority to control the maneuver of and grant release clearance to attacking aircraft” (JP 3-09.3, *Close Air Support*).

*Id.*

<sup>43</sup> *Id.* at 49.

<sup>44</sup> U.S. DEPT OF AIR FORCE, E-3 SENTRY (AWACS) FACT SHEET (1 November 2003), available at <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104504/e-3-sentry-awacs.aspx> (last visited Jan 5, 2015).

<sup>45</sup> ARMIN KRISHNAN, KILLER ROBOTS: LEGALITY AND ETHICALITY OF AUTONOMOUS WEAPONS 63 (2009) (quoting the U.S. Air Force Roadmap 2006–2025).

nications, navigation, enemy threats, and his ultimate task—locating the target and precisely delivering his weapons.”<sup>46</sup> It is no wonder that fighter pilots require a high degree of mental and physical discipline.<sup>47</sup> “[T]he sheer physical strain of high-g maneuvers extracts a considerable toll—especially if the pilot must constantly move his head to keep track of other jets.”<sup>48</sup> Lieutenant Colonel Dan Hampton, a former F-16 Fighting Falcon pilot and author of *Viper Pilot: A Memoir of Air Combat*, writes,

Nothing reveals the physical limits of yourself and the jet like BFM [Basic Fighter Maneuvers]. It is fast, violent, and death is literally a few seconds away. There are midair collisions, out-of-control situations, and blackouts from G-locks. This is the blood draining agony of sustained, multidimensional maneuvering at seven to nine times the force of gravity. It will kill you.<sup>49</sup>

Machines are unlikely to have such physical or mental limitations. With regard to simple flying, in his book *Wired for War*, author P.W. Singer highlights this concept when he writes, “Looking forward, officers describe unmanned systems as being perhaps more suitable than human-piloted planes for many other roles, including refueling aircraft, in which a premium is placed on endurance and the ability to fly precisely at a steady speed and level.”<sup>50</sup> With all that fighter pilots have to focus on, from flying the plane to keeping the “cranium on a swivel”<sup>51</sup> looking for bogeys, one wonders if a robot pilot might be able to perform a counterair or counterland mission with more precision. The idea is not lost on Singer, who notes the following, “Indeed, with UAVs [unmanned aerial vehicles] becoming easier to fly and more lethal, ‘Maybe you don’t need fighter pilots at all. . . .’”<sup>52</sup>

Mark Bowden, author of *Black Hawk Down*, also sees this advantage in current RPA operations. “From a pilot’s perspective, drones have several key

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<sup>46</sup> Coe & Schmitt, *supra* note 16, at 78.

<sup>47</sup> Kenneth Anderson & Matthew Waxman, *Law and Ethics for Robot Soldiers* 3 (American University Research Paper No. 2012-32; Columbia Law School Public Law & Legal Theory Working Paper Group Paper Number 12-313), available at <http://ssrn.com/abstract=2046375>. The authors also note, “Drone aircraft might gradually become capable of higher speeds, torques, g-forces, and other stresses than a human pilot can endure. . . .” *Id.* Further, “[g]iven that speed in every sense—including turning and twisting in flight, reaction and decision times—is an advantage, design will emphasize automating as many of these functions as possible, in competition with the enemy’s systems.” *Id.*

<sup>48</sup> PETE ALESHIRE, *EYE OF THE VIPER* 162 (2005).

<sup>49</sup> HAMPTON, *supra* note 18, at 134.

<sup>50</sup> P.W. SINGER, *WIRED FOR WAR* 129–30 (2009).

<sup>51</sup> Fighter pilot terminology for looking around the sky to watch for potential threats. See e.g., First Lieutenant Jeff Mustin, “Future Employment of Unmanned Aerial Vehicles,” *Aerospace Power J.*, Vol. XVI, No. 2 (Summer 2002), 91. “The external pilot lacks the overarching awareness provided by 20/20 vision- not to mention a cranium on a swivel beneath a bubble canopy.” *Id.*

<sup>52</sup> *Id.* at 130 (quoting retired marine Major General Tom Wilkerson, a Top Gun fighter pilot school graduate with over one thousand hours of flying experience).

advantages. First, mission duration can be vastly extended, with rotating crews. No more trying to stay awake for long missions, nor enduring the physical and mental stresses of flying.”<sup>53</sup> It may not be long before this advantage in RPAs turns into an advantage of fully autonomous drones. Professor Ronald Arkin of Georgia Tech University and author of *Governing Lethal Behavior in Autonomous Robots*, already sees this advantage:

In the fog of war it is hard enough for a human to be able to effectively discriminate whether or not a target is legitimate. Fortunately, it may be anticipated, despite the current state of the art, that in the future autonomous robots may be able to perform better than humans. . . .<sup>54</sup>

Professor Arkin lists several reasons why autonomous robots may be better than humans.<sup>55</sup> For pilots, those reasons can include: (1) “The ability to act conservatively: That is, they do not need to protect themselves in cases of low certainty of target identification;”<sup>56</sup> (2) “[t]he eventual development and use of a broad range of robotic sensors better equipped for battlefield observations than humans currently possess;”<sup>57</sup> (3) “[t]hey can be designed without emotions that cloud their judgment or result in anger and frustration with ongoing battlefield events;”<sup>58</sup> and (4) “[t]hey can integrate more information from more sources far faster before responding with lethal force than a human possibly could in real-time.”<sup>59</sup> That machines can be programmed without emotions echoes the idea that machines can also be programmed to avoid the mental and physical demands of flying and fighting in an air-to-air or air-to-ground engagement. That they may also be able to integrate more information and respond faster than a human pilot, and therefore win the engagement, is discussed next.

## 2. *Performing Counterair and Counterland Faster Than the Human Pilot*

In his briefing, “Patterns of Conflict,” Colonel Robert Boyd notes, “[I]n order to win, we should operate at a faster tempo or rhythm than our adversaries—or, better yet, get inside adversary’s observation-orientation-decision-action

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<sup>53</sup> Mark Bowden, *The Killing Machines: How to Think About Drones*, THE ATLANTIC, Sept. 2013, at 63. Additionally, Bowden quotes a former B-1 Lancer pilot, now a drone operator, who states, “After you’ve been sitting in an ejection seat for 20 hours, you are very tired and sore.” *Id.*

<sup>54</sup> RONALD C. ARKIN, *GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS* 29 (2009).

<sup>55</sup> *See generally id.* at 29–30.

<sup>56</sup> *Id.* at 29.

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

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

<sup>59</sup> *Id.* at 30.

time cycle or loop.”<sup>60</sup> Colonel Boyd’s “OODA Loop” is still celebrated today.<sup>61</sup> His theory was that the first person to complete the OODA loop would effectively get into the mind of the opponent to confuse them and ultimately win the engagement.<sup>62</sup> As robot technology advances, it may become a reality for a machine to be better than a human at completing the OODA loop before an opponent does.<sup>63</sup> As Robert Coram notes in his biography of Colonel Boyd, “The military believes *speed* is the most important element of the cycle, that whoever can go through the cycle the fastest will prevail.”<sup>64</sup> Arguably, this is the advantage a robot pilot could bring to aerial warfare, but Coram also writes:

Becoming oriented to a competitive situation means bringing to bear the cultural traditions, genetic heritage, new information, previous experiences, and analysis/synthesis process of the person doing the orienting—a complex integration that each person does differently. These human differences make the loop unpredictable.... The unpredictability is crucial to the success of the OODA loop.<sup>65</sup>

As seen in the last section, Professor Arkin believes that machines may one day be able to access and apply all of this information during an engagement and do it more quickly than humans, but what about the unpredictability factor? The overall goal of the fighter pilot is to achieve a superior position so that they can engage the enemy before the enemy can engage them.<sup>66</sup> By being unpredictable, a fighter pilot can achieve that superior position. One author describes that unpredictability through the use of pilot tricks: “The great fighter pilots quickly learn not only to make instant decisions, but to throw in feints to fool the enemy. The flash of a wing edge thrown in before a roll to the opposite side can cause the fatal, split second

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<sup>60</sup> PowerPoint Presentation of Colonel (Retired) Robert Boyd, U.S. Air Force, on Patterns of Conflict, slide 5 (Dec. 1986), available at <http://www.ausairpower.net/JRB/poc.pdf>.

<sup>61</sup> See ROBERT CORAM, *BOYD: THE FIGHTER PILOT WHO CHANGED THE ART OF WAR* 334–39 (2002). This biography gives an excellent account of the development of the OODA loop.

Today, anyone can hook up to an internet browser, type ‘OODA Loop,’ and find more than one thousand references. The phrase has become a buzz word in the military and among business consultants who preach a time-based strategy. But few of those who speak so glibly about the OODA Loop have a true understand of what it means and what it can do.

*Id.* at 334.

<sup>62</sup> *Id.*

<sup>63</sup> See William C. Marra & Sonia K. McNeil, *Understanding “The Loop”*: *Regulating the Next Generation of War Machines*, 36 HARV. J.L. & PUB. POL’Y 1139, 1176 (2013). See also Anderson & Waxman, *supra* note 48, at 3–4.

<sup>64</sup> *Id.*

<sup>65</sup> CORAM, *supra* note 62, at 335.

<sup>66</sup> See ALESHIRE, *supra* note 48, at 41. Aleshire writes, “In fact, Boyd’s application of Sun Tzu’s adages captures perfectly the fighter pilot’s art of killing his enemy—preferably before the enemy even knows he’s there.” See also HAMPTON, *supra* note 18, at 135. Hampton writes, “If you can kill a guy before he gets close enough to shoot at you, it’s always better.” *Id.* at 135.



of indecision on the part of the enemy pilot.”<sup>67</sup> A robot pilot may be able to think faster than a human opponent, but this may not necessarily mean that it will do a better job than a human pilot. Arguably, a programmer might be able to create a program in the future that allows for seemingly “random” acts by the robot pilot to fool the opponent. If a machine can thus be programmed to perform as well, if not better than its human counterpart, are there any disadvantages to letting the robot Maverick take off into the wild blue yonder and feel the need for speed? Maybe the answer lies in the law.

### III. “SHALL WE PLAY A GAME?” TEACHING IHL TO THE ROBOT PILOT

*A strange game. The only winning solution is not to play.*<sup>68</sup>

In the climactic scene of the film, *WarGames*, the young protagonist played by Matthew Broderick tells the W.O.P.R. (War Operation Plan and Response) computer to play the child’s game tic-tac-toe against itself to learn the lesson of futility before it launches the U.S. nuclear arsenal against targets in the Soviet Union. After playing dozens of games to stalemate, the computer then begins to test several nuclear strategies, each resulting in no winner. Finally, it learns that the only winning scenario is not to launch the missiles at all. This film may have been well ahead of its time. The manner in which the machine learned its lesson as depicted in the film, through the testing of various scenarios, is interesting because it suggests that the only way for a computer to learn its lesson is to be given various scenarios to play out. This raises the question of whether a similar process would be required to teach IHL to a robot pilot. The challenge is not lost on Professor Arkin, who identifies “[t]he transformation of International Protocols and battlefield ethics into machine-usable representations and real-time reasoning capabilities for bounded morality using modal logics” as one of several “daunting problems.”<sup>69</sup> Thus, compliance with IHL may be the hardest component of the right stuff to impart on the robot pilot.

#### A. How Will the Robot Pilot Learn?

*Up until today, each of the functions of war took place within the human body and mind. The warrior’s eyes saw the target, their brain identified it as a threat, and then it told their hands where to direct the weapon, be it a sword or rifle or missile. Now each of these tasks is being outsourced to the machine.*<sup>70</sup>

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<sup>67</sup> ALESHIRE, *supra* note 48, at 41.

<sup>68</sup> *WARGAMES* (Metro Goldwyn Mayer 1983). This is the famous line uttered by the W.O.P.R. machine after it has tested all the nuclear launch strategies and aborts the missile launch.

<sup>69</sup> ARKIN, *supra* note 54, at 211.

<sup>70</sup> SINGER, *supra* note 50, at 78.

How the robot pilot will learn will depend primarily on two things—the sensors that provide it with information and the “intelligence” that tells it what to do with that information.<sup>71</sup> As the sensors and intelligence improve, machines will arguably be able to better interact with their environment and learn from that interaction. In turn, this greater interaction may lead to greater autonomy. P.W. Singer writes:

With the rise of more sophisticated sensors that better see the world, faster computers that can process information more quickly, and most important, GPS that can give a robot its location and destination instantaneously, higher levels of autonomy are becoming more attainable, as well as cheaper to build into robots.<sup>72</sup>

One form of intelligence, proposed by Professor Arkin, is called the “ethical governor.”<sup>73</sup> This is one of two IHL “compliance mechanisms” identified by Human Rights Watch (HRW) in *Losing Humanity*.<sup>74</sup> The other is “strong A.I.,”<sup>75</sup> which P.W. Singer describes as the “idea of robots, one day being able to problem-solve, create, and even develop personalities past what their human designers intended.”<sup>76</sup> Artificial intelligence is a highly speculative concept and not without controversy. There is arguably more to being human than simply being able to solve problems, create things, or even develop artificial personalities. As HRW argues, “Even if the development of fully autonomous weapons with human-like cognition became feasible, they would lack certain human qualities, such as emotion, compassion, and the ability to understand humans.”<sup>77</sup>

Professor Arkin’s ethical governor is only one of four components in his proposed architecture, although he does suggest that it could function on its own.<sup>78</sup> Its purpose is to “conduct an evaluation of the ethical appropriateness of any lethal response that has been produced by the robot architecture prior to its being enacted.”<sup>79</sup> Arkin lists several possible “architectural desiderata” for his system to make it perform better than humans in the battlefield. Some of these prerequisites include: (1) “Permission to kill alone is inadequate, the mission must explicitly obligate the use of lethal force;” (2) “The Principle of Double Intention, which extends beyond the LOW requirement for the Principle of Double Effect, is enforced;” (3) “Strong evidence of hostility is required (fired upon or clear hostile intent), not simply the

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<sup>71</sup> *Id.* at 75.

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

<sup>73</sup> ARKIN, *supra* note 54, at 127–33.

<sup>74</sup> LOSING HUMANITY, *supra* note 7, at 27.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> SINGER, *supra* note 50, at 79.

<sup>77</sup> LOSING HUMANITY, *supra* note 7, at 29.

<sup>78</sup> ARKIN, *supra* note 54, at 125. The other components are called: (1) the ethical behavior control; (2) the ethical adaptor; and (3) the responsibility advisor.

<sup>79</sup> *Id.* at 127.

possession or display of a weapon;” (4) “Proportionality may be more effectively determined given the absence of a strong requirement for self-preservation, reducing the need for overwhelming force;” and (5) “Adhering to the principle of ‘first, do no harm,’ which required that in the absence of certainty. . .the system is forbidden from acting in a lethal manner.”<sup>80</sup> These desiderata will be discussed later. However, the Principles of Double Intention and Double Effect require further discussion here. Arkin defines Double Effect as follows: “As long as their use of force is proportional to the gain to be achieved and discriminate in distinguishing between combatants and noncombatants, soldiers and marines may take actions where they knowingly risk, but do not intend, harm to noncombatants.”<sup>81</sup> In other words, an attack on a military objective is legal when noncombatants will be harmed in that attack, but the harm is proportional to the military advantage gained from the attack. Double Intention, according to Arkin, “argues for the necessity of intentionally reducing noncombatant casualties as far as possible. Thus the acceptable (good) effect is aimed to be achieved narrowly, and the agent, aware of the associated evil effect (noncombatant casualties), aims intentionally to minimize it, accepting the costs associated with that aim.”<sup>82</sup> In other words, an attack on a military objective should not be made, even if proportional, unless the known harm caused to noncombatants is reduced to the greatest possible extent. It is not enough that collateral damage is known to occur after the proportionality analysis is complete, there must be additional steps taken to reduce the collateral damage so that it is as low as possible.

Professor Arkin is the first to state that his work represents only the first steps toward an “autonomous robotic system architecture capable of the ethical use of lethal force.”<sup>83</sup> He also adds that these steps “are very preliminary and subject to major revision, but at the very least they can be viewed as the beginnings of an ethical robotic warfighter.”<sup>84</sup> Despite these very preliminary steps, HRW warns, “These types of weaponized robots could become feasible within decades, and militaries are becoming increasingly invested in their successful development.”<sup>85</sup>

For this article, it is assumed that a robot pilot with a compliance mechanism similar to that of Professor Arkin’s ethical governor is more likely to appear in the future than a robot pilot with strong A.I. That is, the robot pilot has programming that tells it to engage or not to engage a target based on human-programmed application of IHL principles. Where this author sees an issue is not in the lack of humanity of

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<sup>80</sup> *Id.* at 120–21.

<sup>81</sup> *Id.* at 72.

<sup>82</sup> *Id.* at 47. Arkin states that Double Intention “has the necessity of a good being achieved (a military end), the same as for the Principle of Double Effect,” but does not simply tolerate collateral damage. *Id.*

<sup>83</sup> *Id.* at 211.

<sup>84</sup> *Id.* Arkin’s stated goal remains “to enforce the International Laws of War in the battlefield in a manner that is believed achievable, by creating a class of robots that not only conform to International Law but also outperform human soldiers in their ethical capacity.” *Id.*

<sup>85</sup> LOSING HUMANITY, *supra* note 7, at 46.

the machine, but rather how humanity will make the robot pilot comply with IHL principles.

## B. What Will the Robot Pilot Learn?

*If there is such a thing as “the right stuff” in piloting, then it is experience.*<sup>86</sup>

“The law of armed conflict applicable to aerial warfare has not been codified. It is largely found in the general principles of the law of armed conflict. . . .”<sup>87</sup> The ICRC echoes this sentiment, “Although up-until-today States have not adopted a specific regulation of modern air warfare, it is clear that the general principles and rules of IHL apply. Aerial bombardment, for example, must be conducted according to IHL principles and distinguish between military targets and civilians and must be proportionate.”<sup>88</sup> In 2009, Harvard University’s Program on Humanitarian Policy and Conflict Research (HPRC) published the HPRC Manual on International Law applicable to Air and Missile Warfare.<sup>89</sup> This manual describes itself as providing “the most up-to-date restatement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts.”<sup>90</sup> Recognizing the lack of a dedicated codification of laws relating to air warfare, the manual’s goal is to “present a methodical restatement of existing international law on air and missile warfare, based on the general practice of States accepted as law (*opinio juris*) and treaties in force.”<sup>91</sup> The questions are how these legal principles will be taught to the machine and how they will be applied. First, it is necessary to examine the legal principles involved in targeting and engaging military objectives on the ground and in the air.

### 1. *Legal Principles When Attacking Military Objectives on the Ground*

“Air attacks on military objectives on the ground are held to the same legal standard as other means and methods of warfare, not a higher standard.”<sup>92</sup> That is, the

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<sup>86</sup> CHUCK YEAGER & LEO JANOS, *YEAGER: AN AUTOBIOGRAPHY* 408 (Bantam 1986).

<sup>87</sup> U.S. DEP’T OF AIR FORCE, *A.F. OPERATIONS & THE LAW* 10 (3d ed. 2014) [hereinafter *A.F. OPS & LAW*].

<sup>88</sup> *Air and Naval Warfare*, INT’L. COMM. OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/conduct-hostilities/air-naval-warfare/overview-air-and-naval-warfare.htm> (last visited Dec. 31, 2013).

<sup>89</sup> *IHL in Air and Missile Warfare: About the Project*, INT’L HUMANITARIAN L. RES. INITIATIVE, <http://www.ihlresearch.org/amw/about-project> [hereinafter *IHL Project*].

<sup>90</sup> *Id.*

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

<sup>92</sup> *A.F. OPS & LAW*, *supra* note 87, at 25 (“Technological advances have greatly increased the accuracy of certain air delivered weapons, decreasing the risk of collateral damage when compared with the early years of air power. The same advances have to some extent created false impressions of the infallibility of air power and unrealistic expectations of the ability to limit collateral

attacks must comply with the IHL principles of military necessity, proportionality, discrimination, and unnecessary suffering.<sup>93</sup> Likewise, “[t]he selection of weapons for a particular attack will be governed by the general principles of the law of armed conflict.”<sup>94</sup> The principle of military necessity “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”<sup>95</sup> The principle of proportionality requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained.<sup>96</sup> “The final determination of whether a specific attack is proportional is the sole responsibility of the air commander.”<sup>97</sup> The principle of discrimination or distinction requires parties to a conflict to “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly. . . direct their operations only against military objectives.”<sup>98</sup> While aerial bombardments of undefended civilian population centers is forbidden, “[t]he prohibition does not prevent otherwise lawful attacks upon military objectives present within civilian population centers.”<sup>99</sup> Finally, the principle of unnecessary suffering “requires military forces to avoid inflicting gratuitous violence on the enemy.”<sup>100</sup> “All conventional weapons in the U.S. inventory are permissible for

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damage.” *Id.* at 24).

<sup>93</sup> *Id.* at 13–19. The Air Force also includes the principle of chivalry, which “demands a certain amount of fairness in offense and defense, and a degree of mutual respect and trust between forces.” *Id.* at 19. Chivalry denounces dishonorable conduct like perfidy, but does not prohibit lawful acts like ruses. *Id.*

<sup>94</sup> *Id.* at 25.

<sup>95</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3a (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. *But see*, U.S. DEP’T OF NAVY, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, para. 5.2, which states that, “Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.”

<sup>96</sup> FM 27-10, *supra* note 95, at para. 41.

<sup>97</sup> A.F. OPS & LAW, *supra* note 87, at 19 (“Depending on the circumstances the responsible air commander may be any commander from the joint forces air component commander (JFACC) down to the individual flight or aircraft commander—regardless, the decision may not be delegated.”).

<sup>98</sup> Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977) (entered into force Dec. 7, 1978) (signed by the United States Dec. 12, 1977, not transmitted to U.S. Senate, see S. TREATY DOC. NO. 100-2) [hereinafter AP I]. While the United States has not ratified AP I, the United States does consider many of its provisions to be customary international law. *See* OPS LAW HANDBOOK, *supra* note 13 at 12 n.10. *See also* IHL Project, *supra* note 90 (“[W]hile the Geneva Conventions are universal in their scope of application, other instruments (especially AP/I) are not binding on all States: non-Contracting States (primarily the United States) explicitly contest some of their rules.”).

<sup>99</sup> A.F. OPS & LAW, *supra* note 87, at 25.

<sup>100</sup> OPS LAW HANDBOOK, *supra* note 13, at 13.

use unless otherwise restricted by higher authority for operational reasons.”<sup>101</sup> Professor Arkin’s architectural design has the autonomous machine run through these principles algorithmically before acting with lethal force.<sup>102</sup>

The Air Force divides air attacks upon military objectives on the ground into two categories: (1) “pre-planned attacks upon previously identified targets;” and (2) “immediate attacks upon emerging targets.”<sup>103</sup> According to Air Force doctrine, pre-planned attacks are generated through a process known as “deliberate targeting” and immediate attacks are conducted by a process known as “dynamic targeting.”<sup>104</sup> With pre-planned attacks, “the majority of the effort to ensure a successful attack in accordance with the law of armed conflict is carried out in advance of the attack” and “may be carried out collectively by a number of personnel during the planning process.”<sup>105</sup> The same is not true for immediate attacks that require dynamic targeting.

(a) *Pre-Planned Attacks on Ground Targets: Robots and Deliberative Targeting*

With regard to deliberate targeting, practically speaking, unless the Air Force were to radically change its air planning process, a robot pilot may be no different than a human pilot assigned to a counterland mission. The pilot has not selected the target in this case, he or she is merely carrying out his or her assigned mission.<sup>106</sup> Yet, this is not the end of the analysis. The difficulty arises where, “[i]n the absence of clear information to the contrary, aircrew are entitled to rely upon the information provided to them identifying the target as a military objective and assessing the relative military advantage and collateral damage risk.”<sup>107</sup> What this says is that the pilot may assume that the pre-planned target is a legal target unless he or she (or it) encounters different criteria upon target engagement.<sup>108</sup> For example,

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<sup>101</sup> A.F. OPS & LAW, *supra* note 87, 272.

<sup>102</sup> ARKIN, *supra* note 54, at 121–23.

<sup>103</sup> A.F. OPS & LAW, *supra* note 87, at 25.

<sup>104</sup> *Id.* at 276.

<sup>105</sup> A.F. OPS & LAW, *supra* note 87, at 25.

<sup>106</sup> Benjamin Kastan, *Autonomous Weapons Systems: A Coming Legal “Singularity”?*, U. ILL. J.L. TECH & POL’Y 45, 57 (2013). “AWS [Automated Weapon Systems] would fit into the deliberate targeting framework without having to change much, if anything. The autonomy of the weapon system would merely take over the autonomy of the pilot. The designation of the target and the approval to attack it would remain with the commander.” *Id.*

<sup>107</sup> A.F. OPS & LAW, *supra* note 87, at 25.

<sup>108</sup> See LeMay Ctr. for Doctrine, *Air Force Doctrine Annex 3-60, Targeting: Dynamic Targeting Engagement Authority*, at <https://doctrine.af.mil/download.jsp?filename=3-60-D19-Target-Dynamic-Auth.pdf>. This section of Air Force doctrine states, “At the tactical level, engagement authority normally resides with the ‘shooter’ (aircrew, system operator, etc.) for those planned events on the current tasking order being executed; this follows the tenet of decentralized execution.” *Id.* In dynamic targeting, “where the target is not specified in the ATO [air tasking order] prior to takeoff or execution, engagement may require that the ‘shooter’ be ‘cleared to target’ from a C2 [command and control] entity outside the AOC [air operations center]...due to identification or other restrictions required prior to attack. *Id.*

an F-16 or unmanned aircraft may approach the target and find more civilians present around the target area than previous intelligence indicated. Practically speaking, this is highly unlikely with a human pilot traveling at high altitudes and high speed. A machine may not have the same difficulty.

What happens if the pilot, human or robot, has the ability to identify a changed circumstance that might suggest that elimination of a pre-planned target could violate IHL? Practically speaking, the human pilot may call back to seek guidance or additional authority to drop the bombs given the change in circumstances. Arguably, the robot pilot would do this as well. An exception might be if it were previously programmed with the maximum allowable collateral damage risk and it has programming that allows it to attack if the risk is not as excessive to the military advantage. This contemplates that the military advantage has still been predetermined by humans. How can this be done? Will that military advantage be the same in every situation? What if the robot pilot's programming is simply too limited and it refuses to attack the target even if a human commander makes the determination that the collateral damage is not excessive in a particular situation? Ultimately, while it is simply too early to tell at this point, the risk of a robot pilot being unable to attack an otherwise legal target due to pre-programmed limitations will not be acceptable to a commander, especially if the overall mission is not accomplished as a result.

(b) *Immediate Attacks on Ground Targets: Robots and Dynamic Targeting*

“For attacks on emerging targets, the obligation to identify the target and assess military advantage and collateral damage risk may fall more heavily upon the aircrew carrying out the attack or on the parties directing or controlling the attack.”<sup>109</sup> A robot pilot may be useful in dynamic targeting because they can more quickly go through the IHL analysis than a human.<sup>110</sup> Hypothetically, how would a robot pilot respond to an emerging target? If it follows Arkin's ethical governor architecture, it will apply the IHL principles and conduct its analysis. First, it has to be assigned responsibility. In other words, it has to be told that it can engage the target.

Assume that a robot pilot has been assigned a “wild weasel” SEAD mission. During this mission, the unmanned aircraft will enter enemy territory to locate and destroy enemy surface-to-air missile (SAM) sites so that friendly force bombers can carry out their attacks on enemy airfields. The robot pilot has been obligated to destroy any SAM site that “locks on” to the aircraft with its targeting radar. Ordinarily, there is no legal issue here. A human pilot would be authorized to engage in self-defense if fired upon or “locked on” in a threatening manner exhibiting hostile intent. But what if the enemy uses the simple tactic of refusing to turn on its radar as the Iraqis did in Operation Iraqi Freedom?<sup>111</sup> How would the robot pilot identify

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<sup>109</sup> *Id.*

<sup>110</sup> See Kastan, *supra* note 106, at 58–59.

<sup>111</sup> Brendan P. Rivers, *Coalition Routs Iraqi Forces Despite Iraq's Lessons Learned*, J. ELECTRONIC

the SAM site, especially if it is no longer where human controllers think it is? This task is difficult enough for the human pilot who also must fly the plane.<sup>112</sup> The robot pilot would need to determine if a potential target is the SAM site itself. Perhaps other sensor information such as physical characteristics will identify it as such. If the robot's sensors are that good, could they also be used to conduct a better IHL analysis that human pilots could not?

It is not inconceivable to imagine that as the technology advances for target identification, those systems may become more accurate in determining whether an attack is legal under IHL. Where previous technology and tactics precluded the human pilot from conducting an IHL analysis in the cockpit, new automated capabilities may allow for it. The question then becomes what analysis will the robot pilot undertake? Assume that those sensors can detect the presence of humans around the SAM site. The machine must now determine whether those humans are combatants or civilians given this new information. This may be where the programming becomes too complex. It may be easy for the robot pilot's sensors to identify persons carrying arms openly, but that does not necessarily make them combatants?<sup>113</sup>

Maybe the sensors can identify the uniforms of the enemy. Perhaps those sensors will also be able to tell the robot pilot that those humans are either SAM site operators or human shields, but perhaps not. In the absence of positive knowledge, the only viable solutions may be to assign an arbitrary number of acceptable losses for the destruction of the SAM site or for the robot pilot to risk itself by getting closer to the target for more information. If the machine follows Arkin's Double Intention principle, it may find that there are too many humans around the site and not engage the site at all. The SAM then launches its missiles and knocks out the robot pilot and the B-52s it was escorting out of the sky all because the "automated wild weasel" mission failed.

Commanders and military leaders must decide if this enhanced capability is worth the perceived risk. Human pilots and their inherent "right stuff" may be saved by using robot pilots for inherently dangerous mission like SEAD,<sup>114</sup> but giving that "right stuff" to the robot pilot may mean a heightened requirement for

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DEF., May 2003, at 30, 31.

<sup>112</sup> See Benjamin S. Lambeth, *Kosovo and the Continuing SEAD Challenge*, AIR & SPACE POWER J., 3 Jun 2002, available at <http://www.airpower.maxwell.af.mil/airchronicles/apj/02/sum02>.

<sup>113</sup> ARKIN, *supra* note 54, at 94. Here, Arkin notes that the ability to distinguish between combatants and noncombatants is "no mean feat." *Id.* In some scenarios, Arkin uses being fired at or being located within a certain geographical area as factors to assist the machine in determining whether the person is a combatant.

<sup>114</sup> See Capt Michael W. Byrnes, *Nightfall: Machine Autonomy in Air-to-Air Combat*, AIR & SPACE POWER J., May-June 2014, at 48, 54. "Losing a human pilot is a tragedy, and in cold but factual terms that a commander must face, it means the loss of an enormous investment of time and money in training and operational experience." *Id.*



IHL compliance that prevents a mission that might otherwise be legally achieved by a human pilot from being legally achieved by a robot pilot in the cockpit. To paraphrase Chuck Yeager, it is the *human* pilot's experience and judgment that matters in the end. Too much hidden risk exists in automating the right stuff.

## 2. *Legal Principles When Attacking Military Objectives in the Air*

“While the general principles of the law of armed conflict apply to attack upon airborne targets, few aspects of the law are specific to air to air combat.”<sup>115</sup> In terms of air to air combat, former F-16 pilot, Lieutenant Colonel Dan Hampton, describes two categories: (1) Within Visual Range (WVR) and (2) Beyond Visual Range (BVR).<sup>116</sup> In WVR engagements, “you’re fighting an opponent you can see with your eyes.”<sup>117</sup> BVR engagements “take advantage of the American technical superiority that permits long-range missile deployment.”<sup>118</sup> However, even with WVR, a problem remains of ensuring that the target is a military objective. “Identification of the target as a military objective may occur using electronic and other means.”<sup>119</sup> The criteria used to determine whether an airborne target is a valid military objective may be specified in applicable ROE.<sup>120</sup> The law of armed conflict does not specify the degree of confidence or probability that must exist before determining that an airborne aircraft is a military objective.<sup>121</sup> The robot pilot, depending on its sensors and programming, may be able to make better determinations on whether a potential aerial target is a legitimate target at a greater distance than a human pilot. As such, there may be a different standard of confidence or probability for the robot pilot to engage an airborne target than for a human pilot. This will be explored in the next section.

Another means of reducing risk of attacking an aircraft “not being used for military purposes” is to establish “no fly zones or air defense identification zones.”<sup>122</sup> In this case, the robot pilot might be programmed to intercept and possibly engage all unidentified aircraft that enter such zones and fail to respond to communication requests thereby becoming a hostile threat. This concept of geographic limitation will also be addressed in the next section.

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<sup>115</sup> A.F. OPS & LAW, *supra* note 87, at 26.

<sup>116</sup> HAMPTON, *supra* note 17, at 135.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> A.F. OPS & LAW, *supra* note 87, at 26 (“For example, the airfield that was the point of origin of an airborne radar contact combined with its course and speed may provide enough information to be sufficiently certain that it is in fact an enemy military aircraft.”).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (“By publicly declaring zones that will be hazardous for civil aircraft to enter, the belligerents provide warning to civilian aircrew. Aircraft that fail to heed such warnings are at risk of attack.”).

#### IV. “YOU ARE TERMINATED!” LEGAL PROBLEMS WITH THE ROBOT PILOT ENGAGING TARGETS

*Death, destruction, disease, horror. That’s what war is all about. . . That’s what makes it a thing to be avoided. You’ve made it neat and painless. So neat and painless, you’ve had no reason to stop it.*<sup>123</sup>

In a classic episode of the original *Star Trek* television series, the crew of the U.S.S. Enterprise arrives at a planet that has been at war for hundreds of years with a neighboring planet, but when they beam down to the planet surface they can see no evidence of destruction. Eventually, Captain Kirk learns that computers on both planets are fighting the war. When an attack occurs, the computers identify casualties who voluntarily report to disintegration chambers. Unfortunately for Kirk and his crew, the computer destroys the *Enterprise* in a simulated attack. Rather than submit to the computer and require his crew to report for disintegration, Kirk destroys the computer, a violation of the agreement between the two planets, which means that a real attack will be imminent from the enemy planet. Kirk explains to the planet’s leaders that he has given them back the horrors of war and reminds them that it is those horrors that make war something to be avoided. He leaves them with the choice of either fighting their enemy for real or suing for peace. This episode is an excellent allegory for the moral dilemma of autonomous weapon systems, namely that humans may be more inclined to use force or less inclined to end warfare when there is little risk to human life or little human involvement in the conflict itself. Closely tied to this moral dilemma is a related legal dilemma: what happens to IHL when machines can do a better job at fighting than humans can? Will the law adapt to this new reality? Perhaps IHL will evolve to legalize only those engagements conducted by the machines. SEAD missions will only be legal when a robot pilot conducts them. Warfare itself thus becomes more legally restrictive than it is now. The process may already be underway.

##### A. Perfecting Proportionality? The Robot Pilot and Precision Engagement

*[B]efore any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set. Now this last point is critical, because most of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties.*<sup>124</sup>

Perhaps at no other time in the history of human warfare has a technology afforded a belligerent such accuracy and precision as the current use of armed, unmanned drones by the United States.<sup>125</sup> Unmanned aircraft like the MQ-1 Preda-

<sup>123</sup> *Star Trek: A Taste of Armageddon* (NBC, Feb. 23, 1967).

<sup>124</sup> President Barack H. Obama, Address to the National Defense University (May 23, 2013).

<sup>125</sup> See generally, Christopher J. Markham & Michael N. Schmitt, *Precision Air Warfare and the*

tor and MQ-9 Reaper are both described identically by the Air Force as follows: “Given its significant loiter time, wide-range sensors, multi-mode communications suite, and precision weapons—it provides a unique capability to perform strike, coordination, and reconnaissance against high-value, fleeting, and time-sensitive targets.”<sup>126</sup> Yet, even with these incredible capabilities, drones have also yielded incredible controversies. The result may be that IHL itself will be redefined.

### 1. *The Predator Pilot, The Rocket Man, and the Old Man*

In his book, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot's Story*, Lieutenant Colonel Matt J. Martin, an MQ-1 Predator pilot, recounts his experience of eliminating a target nicknamed “the Rocket Man,” so named because the insurgent would travel around the city of Najaf, Iraq, randomly shooting rockets at U.S. forces.<sup>127</sup> After observing a botched attack on U.S. soldiers, Lieutenant Colonel Martin tracked the Rocket Man’s movements to a densely populated area in the city. When the Rocket Man finally parked his truck under a tree, Lieutenant Colonel Martin and the Joint Terminal Attack Controller [JTAC] surveyed the scene to determine the potential collateral damage of a strike and “whether the payoff was worth the risk.”<sup>128</sup> Ultimately, they decided to engage and Lieutenant Colonel Martin began to look for the best angle of attack to minimize collateral damage.<sup>129</sup> What is interesting about this story is the amount of deliberation over collateral damage that went into determining whether to engage the target. Compellingly, he writes:

Nobody else should be hurt, which was an integral element of our rules of engagement. I doubted whether B-17 and B-29 pilots and bombardiers of World War II agonized over dropping tons of bombs over Dresden or Berlin as much as I did over taking out one measly perp in a car.<sup>130</sup>

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*Law of Armed Conflict*, 89 INT’L L. STUD. 669 (2013).

<sup>126</sup> MQ-1B PREDATOR FACT SHEET, *supra* note 21. This sentence is also found in the MQ-9 Reaper’s fact sheet, but “coordination and reconnaissance” are combined under the term SCAR. See MQ-9 REAPER FACT SHEET, *supra* note 21.

<sup>127</sup> LIEUTENANT COLONEL MATT J. MARTIN WITH CHARLES W. SASSER, PREDATOR: THE REMOTE-CONTROL AIR WAR OVER IRAQ AND AFGHANISTAN: A PILOT’S STORY (2010).

<sup>128</sup> *Id.* at 52. It is interesting to note what Martin writes about his feelings of the attack. He states, “I was nevertheless hesitant about firing. The thought of living in the aftermath of having harmed or killed innocent people chilled the marrow of my being.” *Id.* This would seem to counter the argument that remotely piloted aircraft operators are more inclined to engage targets because of their distance from the conflict. He adds, “Those who would call this a Nintendo game had never sat in my seat. Those were real people down there. Real people with real lives.” *Id.* at 55.

<sup>129</sup> *Id.* at 53.

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

After Lieutenant Colonel Martin found the best angle of attack, he fired the Hellfire missile to strike the target. The missile reached the target in thirty seconds. While en route, an old man appeared around the target area. The attack could not be aborted and the missile's course could not be changed. The shock wave of the missile's detonation threw the old man into the street and Martin could never determine whether the old man got up or not. He concludes, "The Rocket Man had it coming. The old man did not. By the time this war was over...I was apt to have more innocent blood on my hands."<sup>131</sup>

Was killing the Rocket Man a valid shoot? Recall that there are no specific rules for aerial warfare under IHL. That leaves the analysis to the four principles of military necessity, distinction, proportionality, and unnecessary suffering. Additional Protocol I to the Geneva Convention concludes that "[a]n 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" violates the principle of proportionality.<sup>132</sup> The question in this case is thus whether the potential death of or injury to the old man was excessive in relationship to the death of the Rocket Man, the intended military objective.<sup>133</sup>

Arguably, the attack on a known insurgent responsible for multiple attacks on U.S. forces that may have resulted in the death of one civilian (who happened to enter the blast radius after the missile was launched) did not violate IHL. First, this was not a discrimination problem, since the insurgent was the target and the old man only appeared after Lieutenant Colonel Martin launched the missile. Further, the missile could not be aborted or have its trajectory altered after it was fired. Finally, even if Lieutenant Colonel Martin spotted the old man before he fired the Hellfire, he may not have violated the principle of proportionality since the death or injury to the old man may not have been excessive to the military advantage obtained by eliminating the Rocket Man, who was responsible for multiple attacks on U.S. Forces. Thus, under IHL, this was a legal shoot.

Lieutenant Colonel Martin's situation highlights how the Predator's combined capabilities of loiter, imagery, and precision guided munitions have given the United States an incredibly accurate weapon with the ability to place a bomb on target with little to no collateral damage. Yet, "No matter how precisely placed, when a 500-pound bomb or a Hellfire missile explodes, there are sometimes going to

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<sup>131</sup> *Id.*

<sup>132</sup> AP I, *supra* note 98, art. 51(5)(b).

<sup>133</sup> It must be noted that Lieutenant Colonel (Lt Col) Martin did not initially see the Old Man when he fired the missile. The old man appeared after the weapon was launched. Under the Rendulic Rule, which holds commanders accountable for their actions based on the information available to them at the time, Lt Col Martin's decision to engage the target would not be subject to a proportionality analysis because he was not aware of the civilian in the blast radius until after he fired. See OPS LAW HANDBOOK, *supra* note 13, at 12.

be unintended victims in the vicinity.”<sup>134</sup> In this case, the attack eliminated a known killer of multiple American soldiers with the loss of one civilian life. Lieutenant Colonel Martin is correct that this is far cry from the aerial bombardments of World War II. Airstrikes have become incredibly precise since that time. Drone strikes have become so precise that they seemed to be the preferred method for eliminating terrorist targets outside of Afghanistan. With that preference came a new policy on what rules would govern their use.

## 2. *Policy Becoming Law*

In May 2013, President Barack Obama, in a speech to the National War College, provided his guidance on drone strikes, part of which was quoted at the beginning of this section. Shortly after, the White House issued a fact sheet, entitled U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities.<sup>135</sup> The policy memo lists four preconditions for the use of lethal force outside “areas of active hostilities.”<sup>136</sup> Additionally, the third precondition lists five criteria that must be met prior to using lethal action.<sup>137</sup> Among these criteria is the requirement, “Near certainty that non-combatants will not be injured or killed.”<sup>138</sup> This appears to be a codification of a higher standard than that required by IHL, however, the policy only applies outside of areas of “areas of active hostilities.” This implies that it is very limited in its scope. Injury to or death of non-combatants must be avoided and minimized, however, IHL does not prohibit an attack solely because non-combatants

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<sup>134</sup> Bowden, *supra* note 53, at 66–67.

<sup>135</sup> WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, FACT SHEET: U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 23, 2013).

<sup>136</sup> *Id.* Those preconditions are essentially: (1) legal basis for use of force; (2) targets poses continuing, imminent threat to U.S. persons; (3) five criteria are met; and (4) respect for national sovereignty and international law, including the law of armed conflict. *Id.*

<sup>137</sup> *Id.* Those five criteria are: (1) near certainty that the terrorist target is present; (2) near certainty that non-combatants will not be injured or killed; (3) an assessment that capture is not feasible at the time of the operation; (4) an assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and (5) an assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons.

<sup>138</sup> *Id.* Non-combatants are defined in the fact sheet as follows:

Non-combatants are individuals who may not be made the object of attack under applicable international law. The term “non-combatant” does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.

*Id.*

are injured or killed.<sup>139</sup> Instead, IHL prohibits attack if the collateral damage is excessive in relation to the direct military advantage obtained.<sup>140</sup> The combined capabilities of the RPAs may be the reason for this policy restriction.<sup>141</sup> With the greater capability for precision strike, there may be a growing expectation that a target can be engaged with near-certainty of zero non-combatant casualties.<sup>142</sup> HRW and Amnesty International criticize the policy,<sup>143</sup> not because of its restrictions, but because the United States may not be complying with it.<sup>144</sup> The question is whether this policy could be codified into IHL in the future.

W. Hays Parks, in his comprehensive article *Air War and the Law of War*, suggests that this might have been the case with U.S. policy in Vietnam eventually becoming codified in Additional Protocol I to the Geneva Conventions.<sup>145</sup> During Vietnam, the United States, for policy reasons, refused to bomb dams and dikes in the Red River Valley of then North Vietnam. This was communicated in diplomatic messages to the Government of North Vietnam. In response, the North Vietnamese stored “critical war material...ground-control intercept (GCI) radar and anti-aircraft guns on top of or adjacent to the dikes.”<sup>146</sup> The United States did damage the dikes and dams by attacking these military objectives in vicinity of the dams and dikes. In

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<sup>139</sup> OPS LAW HANDBOOK, *supra* note 13, at 13.

<sup>140</sup> See AP I, art. 51(4), (5). These provisions govern indiscriminate attacks. Article 51(5)(b) specifically states, “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.”

<sup>141</sup> See Aaron M. Drake, *Current U.S. Air Force Drone Operations and their Conduct in Compliance with International Humanitarian Law—An Overview*, 36 DENV. J. INT’L. & POL’Y. 629, 642 (2011). “Although perhaps not possessing the first hand ‘in-person’ knowledge of their targets, RPA pilots are often better able to distinguish between civilians and combatants on the battlefield—more so than pilots of other manned aircraft—due to an RPA’s [remotely piloted aircraft] capabilities.” *Id.* at 642.

<sup>142</sup> *Id.* at 645 (“Due to RPA’s enhanced capabilities, the USAF actually has an increased burden in doing “everything feasible” to avoid targeting civilians and civilian objects. Certainly, ‘everything feasible’ is a much higher burden now than it was even just a decade ago.”).

<sup>143</sup> See HUM. RTS. WATCH, BETWEEN A DRONE AND AL-QAEDA: THE CIVILIAN COST OF U.S. TARGETED KILLING IN YEMEN [hereinafter, DRONE & AL-QAEDA], available at <http://www.hrw.org/reports/2013/10/22/between-drone-and-al-qaeda-0>. See also AMNESTY INT’L, “WILL I BE NEXT?” U.S. DRONE STRIKES IN PAKISTAN [hereinafter, WILL I BE NEXT], available at <http://www.amnesty.org/en/library/asset/ASA33/2013/hen/041c08cb-fb54-47b3-b3fe-a72c9169e487/asa330132013en.pdf>.

<sup>144</sup> *Id.*

<sup>145</sup> W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 216 (1990). “The restraint in attack on the North Vietnamese dikes and dams exercised by U.S. national authorities was a policy decision, based upon the limited nature of the conflict in Vietnam as it was viewed by national leadership. Article 56 has taken an American policy decision in a limited conflict and made it into a legally binding prohibition for all future wars, regardless of the level of the conflict.” *Id.*

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

addition, the dikes and dams “were part of major lines of communications moving military supplies by rail or truck into the Hanoi area. . . .”<sup>147</sup>

After Vietnam, Article 56 of Additional Protocol I to the Geneva Conventions was introduced, which states, “Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack. . . .”<sup>148</sup> Thus, it appears that a U.S. policy decision was turned into a codified IHL protection. The question is whether that is ultimately a good thing. According to Parks, “Just as North Vietnam exploited to its military advantage the restraint exercised by the United States—at a cost of hundreds of American lives and aircraft, if not the war—article 56 offers an avenue of exploitation which few, if any, future opponents would be likely to ignore.”<sup>149</sup> Similarly, is it possible that the U.S. policy calling for near-certainty of zero civilian casualties in the context of strikes against terrorists in non-international armed conflict will find its way into future codified IHL? Amnesty International is already calling on the United States to

[e]nsure prompt, thorough, independent and impartial investigations into all cases where there are reasonable grounds to believe that drone strikes resulted in unlawful killings. This must include all attacks in which civilians are reported to have been killed or injured.”<sup>150</sup>

Note that these investigations do not seem limited to attacks where civilian losses are proportional.

Most recently, when the United States began targeted airstrikes against the Islamic State in Iraq and the Levant (ISIL), the administration had to announce that the “near-certainty standard” did not apply to its operations in Iraq and Syria because that policy was only meant to apply to areas outside of “areas of active hostilities.”<sup>151</sup> Further, at the beginning of 2015, the Pentagon announced that it was investigating “credible” reports of civilian casualties in Iraq and Syria as a result of the strikes.<sup>152</sup> The Department of Defense already investigates all reportable incidents, which it defines as, “A possible, suspected, or alleged violation of the law of war, for which

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

<sup>148</sup> API, *supra* note 98, at art. 56(1).

<sup>149</sup> Parks, *supra* note 145, at 216.

<sup>150</sup> WILL I BE NEXT, *supra* note 143, at 58.

<sup>151</sup> Karen DeYoung, *Is it a ‘War’? An ‘Armed Conflict’? Why Words Matter in the U.S. Fight vs. the Islamic State*, WASH. POST (Oct. 7, 2014), [http://www.washingtonpost.com/world/national-security/is-it-a-war-an-armed-conflict-why-words-matter-in-the-us-fight-vs-the-islamic-state/2014/10/06/f4528a6c-49a1-11e4-891d-713f052086a0\\_story.html](http://www.washingtonpost.com/world/national-security/is-it-a-war-an-armed-conflict-why-words-matter-in-the-us-fight-vs-the-islamic-state/2014/10/06/f4528a6c-49a1-11e4-891d-713f052086a0_story.html).

<sup>152</sup> Dan Lamothe, *In Shift, U.S. Military Says It Is Investigating Credible Civilian Casualty Reports in Iraq and Syria*, WASH. POST (Jan. 6, 2015), <http://www.washingtonpost.com/news/checkpoint/wp/2015/01/06/in-shift-pentagon-says-civilian-casualties-possible-in-islamic-state-campaign/>.

there is credible information.”<sup>153</sup> But was there a possible or suspected violation of IHL in these airstrikes? Or is the Department investigating all credible reports of *any* civilian casualties? A higher standard for civilian casualties may already be becoming more than policy, especially if any incident of civilian casualties is now being investigated. If this continues, it may become a state practice. The legal obligation piece still remains elusive for now, but the pendulum of public sentiment both at home and abroad may be shifting to less toleration of *any* civilian casualties in war as advances in technology make weapons increasingly precise. As weapons technology advances, the *excessiveness* requirement in IHL may find itself to be obsolete software in this new era of warfighting.

### 3. *The Robot Pilot Engages the Rocket Man*

Fast forward in time. Now a robot pilot is about to engage the Rocket Man. It follows Arkin’s ethical governor architecture. IHL now requires near-certainty of zero civilian fatalities. Near-certainty is easily programmed into the machine by using a probability scale algorithm. The robot pilot, utilizing its superior sensors, spots the old man outside of the blast radius and at the same time is able to calculate that the old man will enter the blast radius if he continues walking in a certain direction. The computer predicts that there is a greater than fifty percent chance that the old man will enter the blast radius, therefore it does not fire. A human pilot operating under the same IHL standard may make a similar decision. The only difference may be that the Robot’s sensors will be better at predicting the old man’s entry into the blast radius.

Is something lost in this analysis? The military value of the Rocket Man is ignored. And what happens if the Rocket Man knows that the robot pilot will not engage targets if there is likelihood of civilian casualties and he knowingly starts to hide among large groups of civilians? Neither the human or robot pilot may engage at all and the Rocket Man gets away to launch another attack on U.S. troops. Are these limitations acceptable for the commander?

When dealing with near-certainty standards, it may be easier for a machine to comply with IHL standards. Should the law be changed to match the increase in technology? Where the machine may have the advantage is its ability to see better than a human and think faster. The point is that even now, with humans still in the loop, the ability of an RPA to loiter over a target, observe that target, and launch a precision guided munition may be leading to a revolution in how humans think about the IHL principle of proportionality. Where civilian casualties could not be *excessive* in the past, new capabilities may call for near-certainty of *no* civilian casualties in the future. The ability of robot pilots to achieve this may make what is

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<sup>153</sup> U.S. DEP’T OF DEF., DIR. 2311.01E, DoD LAW OF WAR PROGRAM 2 (May 9, 2006, Incorporating Change 1, Nov. 15, 2010, Certified Current as of Feb. 22, 2011) [hereinafter DoD DIR. 2311.01E], available at, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.



currently a limited policy into law. Once that is done, even humans may no longer be able to carry out certain attacks that they could before. All in the name of making war “neat and painless.”

## B. Perfecting Discrimination? The Robot Pilot and Target Identification

In addition to the proportionality problem, a problem with the principle of discrimination or distinction also exists. The question posed here is whether the robot pilot can properly identify a military target. The discrimination problem is analyzed by looking at two possible scenarios that a robot pilot might encounter in the air. The first is an encounter with a civilian airliner that has been hijacked and might now be a threat if the hijackers intend to use the aircraft as a weapon. The second scenario is a target that is beyond-visual-range.

### 1. *The Robot Pilot and the Civilian Airliner*

One of the “greatest weaknesses” of Professor Arkin’s ethical governor architecture is its inability to define civilians.<sup>154</sup> When the United Kingdom unveiled its latest unmanned drone in July 2010, Peter Felstead of Jane’s Defence Weekly told the British Broadcasting Corporation (BBC) that with regard to air-to-air engagements, humans would have to stay in the loop.<sup>155</sup> He cited the following scenario: “If you have, say, an airliner that is reportedly hijacked, you are going to need that human factor to evaluate just what’s going on with the plane, what he can see through the windows and everything else. That’s not something, for now, that can be done remotely.”<sup>156</sup> Absent a human in the loop, some other measures must be taken to distinguish a legitimate airborne target from a civilian airliner. However, with civilian airliners, the pilots are never acting alone and usually communicating with controllers to determine what course of action to take and obtain necessary authorization. What about other fighters? How can the machine distinguish between friendly and enemy aircraft, especially if they are not squawking?

One proposed method is “geographic, mission-specific limitations.”<sup>157</sup> An example of such limitations might involve a fighter sweep over a confined airspace. The robot pilot would only be allowed to engage aircraft that it is capable of identifying as enemy fighters within that confined airspace. What happens when the robot pilot encounters a bogey in that airspace? Hopefully, in this scenario the enemy does not fly aircraft similar to friendly aircraft so that the robot pilot may be able to identify the bogey as an enemy aircraft based on its physical characteristics, radar signature, or other data available to it.

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<sup>154</sup> Kastan, *supra* note 106, at 60.

<sup>155</sup> Daniel Emery, *MOD Lifts Lid on Unmanned Combat Plane Prototype*, BBC NEWS (Jul. 12, 2010, 10:24 ET), <http://www.bbc.co.uk/news/10602105>.

<sup>156</sup> *Id.*

<sup>157</sup> Kastan, *supra* note 106, at 61.

## 2. *The Robot Pilot and BVR Engagements*

BVR engagements have been problematic over the years for human pilots. For example,

During the Gulf War, the air forces were controlled strictly for safety reasons. Maximum use was made of the various aircrafts' EW [electronic warfare] suites and the abilities of the United States Air Force E-3 AWACS and United States Navy E-2C Hawkeyes to provide information on the presence and types of threat...two independent electronic identifications had to be obtained before an engagement was authorized...Future aerial conflicts will encounter similar problems of beyond-visual-range identification and over-the-horizon targeting. The missiles employed on modern aircraft allow for the occurrence of such engagements, but the concerns for downing a friendly or neutral aircraft restricts their being employed. This was a viable concern in Vietnam where the ROE required visual identification because the electronic capabilities were not ideal.<sup>158</sup>

Automated weapons have been labeled as “a more sophisticated form of ‘fire and forget’ self-guided missiles.”<sup>159</sup> Fire and forget technology allows a missile to be fired at a target based on initial information received from the aircraft’s radar; the pilot can then turn the aircraft’s attention to another target while the missile’s on-board system takes over to continue tracking to the target.<sup>160</sup> Target identification still remains a problem.

Assuming again that the robot is on a pre-programmed fighter sweep within a limited airspace, a robot pilot may be able to overcome that difficulty if it has sensors better capable to detect enemy aircraft at longer ranges. Assuming that the bogey can be identified BVR with reasonable certainty as an enemy aircraft, what happens when the enemy aircraft leaves the confines of that airspace before the robot pilot can engage it? Would the robot pilot be allowed to pursue the enemy aircraft? A human pilot would have a similar problem, *unless he or she was not limited in the geographic region.*

Artificially limiting the battlespace so humans are more comfortable letting autonomous systems engage targets on their own could lead to a potential target getting away or worse, turning around and engaging from outside the robot pilot’s engagement zone or attacking other aircraft outside the engagement zone. Once

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<sup>158</sup> Lieutenant Commander Guy R. Phillips, *Rules of Engagement: A Primer*, ARMY LAW., July 1993, at 4, 23.

<sup>159</sup> Anderson & Waxman, *supra* note 47, at 4.

<sup>160</sup> *Id.* at 65–66.

again, the limitations on the robot pilot may simply be too much for the robot pilot to be effective, unless a human remains in the loop to tell it what to do. If the enemy fighters cannot be effectively engaged, then the fighter sweep mission will be a failure.

### C. Automating the Rendulic Rule? The Robot Pilot and Reasonableness

The Rendulic Rule states that “commanders and personnel should be evaluated based on information reasonably available at the time of the decision.”<sup>161</sup> The rule finds its origins in the Nuremberg trial of General Lothar Rendulic, who was not convicted for destroying civilian property in an effort to avert an enemy invasion that did not occur.<sup>162</sup> The Rendulic Rule is reflected in understandings attached to recent IHL treaties by the U.S. Senate as follows:

[A]ny decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person’s assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review and shall not be judged on the basis of information that comes to light after the action under review was taken.<sup>163</sup>

What happens to the Rendulic Rule when the robot pilot makes decisions previously reserved to human pilots? If the robot pilot is held to a higher standard, it is possible that the Rendulic Rule will simply not apply. It is unlikely that a robot pilot could make reasonable actions contemplated by the Rendulic Rule because the rule is based on reasonable actions from *humans* on the information those humans have available to them at the time of action. Arguably, it would not apply to a machine itself since the Rendulic Rule involves liability for actions on the battlefield.<sup>164</sup> This protection from liability is based on whether there was justifiable *human* error. *Human* error is not likely to exist for a machine. If the Rendulic Rule does not apply to machines, perhaps a human commander will be liable for the loss of life caused by a robot pilot that acted on erroneous information.

Another possibility is that the human pilot is held to the robot pilot’s standard if the human pilot does something that the machine would not have. For example,

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<sup>161</sup> OPS LAW HANDBOOK, *supra* note 13, at 12.

<sup>162</sup> *Id.* See also “Opinion and Judgment of Military Tribunal V,” United States v. Wilhelm List, X TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1296 (Feb. 19, 1948) (Case 7) [hereinafter *Hostage Case*].

<sup>163</sup> S. EXEC. REP. NO. 110–22, at 13 (2008) (CCW Protocols III (incendiary weapons) and IV (blinding laser weapons)); S. EXEC. REP. NO. 106–2, at 20 (2009) (CCW Amended Protocol II (landmines and booby traps)). See also S. EXEC. REP. NO. 110–26, at 10 (2008) (Hague Cultural Property Convention).

<sup>164</sup> OPS LAW HANDBOOK, *supra* note 13, at 12.

the human pilot engages a target, when the machine would not have engaged the target based on its IHL programming. Will the Rendulic Rule protect the human decision? If a robot pilot would not have engaged a target after conducting its analysis, the Rendulic Rule may no longer protect the human pilot or controller making the decision to engage the target anyway. In other words, it will not be *reasonable* for a human to attack if the robot would not have attacked. This is another second-order legal effect that must be considered before giving the robot pilot authority to attack targets.

There may be a historic example of this. Consider the case of the USS *Vincennes* and the downing of Iran Air Flight 655 in 1988. During the incident, the ship's AEGIS radar system led the crew to mistakenly identify a civilian airliner as an F-14 fighter jet. Even though the system also provided the crew with data to indicate that the aircraft was not descending in an attack pattern and was broadcasting a civilian radio signal indicating that it was a civilian aircraft, the crew nonetheless trusted the machine and authorized a missile launch against the aircraft. In this case, if the humans had trusted all the data the machine provided, they would probably not have launched the missile.<sup>165</sup>

Would the Rendulic Rule give the crew protection? Arguably, reliance on the machine was unreasonable, which in this case, sent mixed signals to the crew. Moreover, ignoring the other information that was coming in to indicate that the aircraft was not an F-14 was unreasonable as well. Perhaps, the discussion is moot if the machine itself had the authority to shoot. Since the information it had at the time indicated that the plane was not a threat, it may not have fired at all. There is still a potential issue if humans can override that decision.

## V. "WHAT DO YOU THINK YOU'RE DOING, DAVE?" THE ROBOT PILOT AND SELF DEFENSE

*A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.*<sup>166</sup>

In air warfare, the fighter pilot essentially faces two kinds of threats. The first are threats from enemy aircraft and the second are threats from enemy anti-aircraft defenses. Human Rights Watch (HRW) argues in *Losing Humanity* that "fully autonomous weapons would not possess the human qualities necessary to assess an individual's intentions, an assessment that is key to distinguishing targets."<sup>167</sup> In support of this argument, HRW analogizes to a frightened mother chasing after her

<sup>165</sup> See SINGER, *supra* note 50, at 124–25.

<sup>166</sup> *Issac Asimov's Third Law of Robotics*, available at <http://www.auburn.edu/~vestmon/robotics.html> (last visited Nov. 21, 2013). The author concedes that reference to Asimov's Third Law here is ironic in that the First Law is that, "A robot may not injure a human being, or, through inaction, allow a human being to come to harm." *Id.*

<sup>167</sup> LOSING HUMANITY, *supra* note 7, at 31.

two children to stop them from playing with toy guns near a soldier. Human Rights Watch argues that a human would recognize the emotions and see the children as harmless, but a machine might see an approaching armed threat and engage.<sup>168</sup> Human Rights Watch argues, “Technological fixes could not give fully autonomous weapon systems the ability to relate to and understand humans that is needed to pick up on such cues.” Of course, HRW assumes that the machine is only programmed in such a way to engage targets approaching in a threatening manner. Can a machine act in self-defense? The next sections will look at the law governing self-defense and whether it can apply to the robot pilot.

#### A. The Standing Rules of Engagement and the Inherent Right to Self-Defense

The DoD defines ROE as, “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”<sup>169</sup> The basic ROE document governing all U.S. forces during all military operations outside of U.S. territory and not constituting a law enforcement action is Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/Rules for the Use of Force for U.S. Forces* (SROE). The SROE contains an unclassified enclosure that provides the basic rules governing the use of force in self-defense. Specific ROE related to air operations are classified and will not be discussed here.<sup>170</sup>

According to the SROE, “Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.”<sup>171</sup> The use of force in self-defense must be necessary and proportionate.<sup>172</sup> Necessary and proportionate force in self-defense must not be confused with the basic IHL principles discussed earlier. Necessity, for purposes of the SROE, exists when a hostile act is committed or hostile intent is demonstrated against U.S. forces or other designated persons or property.<sup>173</sup> Proportionality under the SROE “may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration and scope of force used should not exceed what is required.”<sup>174</sup> A hostile act is any use of force against U.S. forces,

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<sup>168</sup> *Id.* at 32.

<sup>169</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEP’T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 236 (8 NOV. 2010, as amended through 15 Oct. 2013) [hereinafter JP 1-02].

<sup>170</sup> OPS LAW HANDBOOK, *supra* note 13, at 78.

<sup>171</sup> CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES, encl. A, para. 3 (13 June 2005).

<sup>172</sup> *Id.* encl. A, para. 4.

<sup>173</sup> *Id.* encl. A, para. 4.a.(2).

<sup>174</sup> *Id.* encl. A, para. 4.a.(3). Additionally, the SROE cautions that the concept of proportionality in a self-defense situation is different from the requirement to minimize collateral damage during offensive operations.

designated persons and property, or intended to impede the mission of U.S. forces.<sup>175</sup> Hostile intent is “[t]he threat of imminent use of force against the United States, U.S. forces, or other designated persons or property.”<sup>176</sup> Whether or not a use of force is imminent, “will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level.”<sup>177</sup>

## B. Robot Self-Defense in Air-to-Air Engagements

It may be fairly easy for humans to tolerate a robot pilot acting in self-defense to a hostile act in the air because it is most likely going to occur when the aircraft is shot at by another aircraft. Determining if a robot pilot can respond to hostile intent is more difficult. Michael N. Schmitt discusses the difficulty for human pilots when enforcing no-fly zones:

For instance, if a target State fighter approaching the no-fly zone illuminates an enforcement aircraft with its fire control radar (“locks on”), it may or may not be intending to take a missile shot. Perhaps it only aims to frazzle enforcement aircrews, demonstrate resolve against the operation, or desensitize enforcement aircraft in order to catch them off-guard when it really does intend to shoot. Or perhaps it is about to launch a deadly air-to-air missile.<sup>178</sup>

He adds that the determination of hostile intent is “contextual.”<sup>179</sup> In assessing context, Schmitt lists political situation, prior practice, indications and warning intelligence, and capabilities as factors to consider. He concludes, “The fact that the determination of hostile intent is subjective and contextual renders it unwise to include a laundry list of acts which amount to hostile intent in the ROE.”<sup>180</sup> This is a potential legal problem with the robot pilot. Utilizing the Arkin compliance mechanism, the machine would require programming telling it when it is okay to respond to a given hostile intent scenario. Attempting to program into the robot pilot all the possible scenarios in which the robot pilot would be able to respond is simply not wise. If the machine is limited to only returning fire when fired upon, there would arguably no longer be any hostile intent authorization to use force in self-defense. Should it be abandoned so quickly? The answer should be no. Humanity may be more willing to risk a pilotless machine acting in self-defense, but the loss of the robot pilot may mean mission failure or result in the loss of human pilots or ground forces it is supporting.

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<sup>175</sup> *Id.* encl. A, para. 3.e.

<sup>176</sup> *Id.* encl. A, para. 3.f.

<sup>177</sup> *Id.* encl. A, para.3.g.

<sup>178</sup> Michael N. Schmitt, *Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement*, 20 LOY. L.A. INT’L & COMP. L.J. 727, 756–57 (1998).

<sup>179</sup> *Id.* at 757.

<sup>180</sup> *Id.*

Hostile intent is not just a problem for machines; it is a problem for humans as well. The difficulty of determining hostile intent in its legal context is best described by Professor Richard J. Grunawalt in his primer on the SROE. He writes:

It is difficult to define the intention of another party under the best of circumstances. When that judgment must be made in a dynamic operational context on the basis of incomplete and often conflicting information, and when the on-scene commander may not have the luxury of 90 seconds to make a decision, the complexity of the equation is several orders of magnitude greater. Moreover, the commander must always bear in mind the terrible consequences of being wrong. To be overly cautious may result in the destruction of the unit. Conversely, to be too fast to respond may risk death or injury to persons innocent of hostile intention.<sup>181</sup>

If it is this difficult for a human to make the decision on hostile intent, a machine may not be able to do any better. A robot pilot may be able to process information more quickly, without the emotions associated with a dynamic situation, but what if the robot pilot errs on the side of being overly cautious? Worse, as seen in this article, the robot may be preprogrammed to be overly cautious to begin with. If that happens, destruction of friendly forces may result. For example, the robot pilot performing a CAS mission that does not calculate the enemy to be demonstrating sufficient hostile intent may not engage the enemy. As a result, the unit that was under fire may get destroyed. In another scenario, a robot pilot could misinterpret the advance of certain individuals as a threat to friendly forces and wrongfully engage them. In this scenario, humans would likely not forgive the machine, much less the human commander who authorized its use.<sup>182</sup> Human commanders may not want to expose themselves to that potential liability and thus be hesitant to employ robot pilots instead of human pilots.

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<sup>181</sup> Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate's Primer*, 42 A.F. L. Rev. 245, 253 (1997). Note that this analysis would have been of the SROE before the 2008 update, however, the 2008 update did not change the definition of hostile intent.

<sup>182</sup> The problem of accountability has been a subject of the debate over autonomous weapons. This paper adopts the position that an autonomous weapon system would not be like any other weapon system that has been reviewed and assumed to be legal under IHL by the Air Force prior to adding it to the arsenal. See Tony Gillespie & Robin West, *Requirements for Autonomous Unmanned Air Systems Set By Legal Issues*, 4 INT'L C2 J., no. 2, at 4 (2010). Applying UK standards, which are similar to the US, Gillespie and West write,

Current policy is that legal responsibility will always remain with the last person to issue commands to the military system. There are assumptions that the system's principles of operation have already been shown to meet LOAC and that it will behave in a predictable manner after the command is issued. With long-endurance systems and complex scenarios, this person will need to supervise it to ensure that its actions meet the applicable ROEs. This creates a new, more symbiotic, relationship between man and machine.

*Id.*

### C. Robot Self Defense in Air-to-Ground Engagements

The analysis for self-defense in the air-to-ground context is not much different than air-to-air. Robot pilots could face various air-to-ground threats. Human pilots encounter several different threats during missions. “Somewhere enroute to or from the target area, the flight is likely to encounter SAMs, anti-aircraft guns (AAA), or small arms fire.”<sup>183</sup> A human pilot deals with the threats in different ways:

For radar guided threats, he may get an audible indication on his radar warning receiver, or ‘RWR’ (pronounced “raw”), that he is being “painted” or detected. Of course, a pilot may also detect the threat visually. In response to a SAM launch, he may ‘jink’ (a hard turn) or perform other similar choreographed maneuvers.<sup>184</sup>

The response depends on a number of factors, one of which is proximity to the target.<sup>185</sup> “In the target area, weapons delivery may take priority over self-defense.”<sup>186</sup> The same ROE analysis would apply as it does for air-to-air engagements. The issue remains one of hostile intent. This time, instead of threat coming from the air, it is coming from the ground. Programming a robot pilot about to engage in a SEAD mission with explicit authority to engage any target that exhibits hostile intent by painting the robot pilot seems logical. Specific programming into the machine is required. Recall, however, that pilots are often faced with SAM sites that do not turn on their radars. What about the issues of target identification and distinction discussed earlier? In defensive situations, the easiest programming likely requires the machine to wait until it actually receives fire. Is this being too cautious? Perhaps not, but commanders will need consider to whether it is effective for mission accomplishment to purposely expose their automated air assets to SAMs or anti-aircraft artillery (AAA) and risk losing those assets during the mission.

## VI. CONCLUSION

*“We have just won a war with a lot of heroes flying around in planes. The next war may be fought by airplanes with no men in them at all...Take everything you’ve learned about aviation in war, throw it out of the window, and let’s go to work on tomorrow’s aviation. It will be different from anything the world has ever seen.”*<sup>187</sup>

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<sup>183</sup> Coe & Schmitt, *supra* note 16, at 81.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> General Henry “Hap” Arnold, *quoted in* Colonel Chris R. Chambliss, *MQ-1 Predator and MQ-9 Reaper Unmanned Aircraft Systems at the Crossroads*, AIR & SPACE POWER J. Jan 1, 2009, available at <http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2008/4tri08/chambisseng.htm>.



While the laws of war as they relate to aerial warfare were successfully collected and restated in the form of the HPRC Manual, a successful attempt to create a comprehensive codification of specific laws for aerial warfare remains allusive. W. Hays Parks noted that the 1923 Hague Air Rules “suffered an ignominious death, doomed from the outset by language that established rules for black-and-white situations in a combat environment permeated by shades of gray.”<sup>188</sup> Similarly, attempting to make robot pilots comply with IHL requires applying black-and-white rules to the grayish fog of war. This should not be done. At best, a restatement, similar to the HPRC Manual on how the current law of war can be applied to this new form of warfare may be more appropriate. This assumes, of course, that this new form of warfare ever begins. This article has only scratched the surface of the potential issues that might present themselves if robot pilots take to the skies. Many unresolved issues remain. It is too early to answer many of the questions posed in this article because the capabilities just do not exist at this time. However, just as Professor Arkin has undertaken to develop a potential architecture for ethical lethal robots, legal experts within the DoD should also start thinking about whether such systems are really a good idea from a legal perspective. No doubt remains that robot pilots offer several advantages over human pilots. Autonomous weapon systems may inevitably enter the Air Force arsenal for those reasons. However, no clear legal answers exist to address every possible given situation in war. That is not to say no legal answers exist to begin otherwise there would be no IHL. However, IHL has evolved over the years as the result of human actions and decisions in war. As legal experts in the United Kingdom concluded, “Complexity and ambiguities will ensure that there will always need to be human intervention.”<sup>189</sup> In this case, the complexity of war may require a human pilot, rather than robot pilot; even if that pilot is not in the cockpit, he or she should still be in control of the aircraft. It appears, to paraphrase Colonel Boyd, that robot pilots will simply be unsuitably complex to fit the missions they would be called upon to perform. In other words, the right stuff should be left to humans and not be reduced to algorithms for robot Mavericks.

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<sup>188</sup> Parks, *supra* note 145, at 35.

<sup>189</sup> Gillespie & West, *supra* note 182, at 23.

IMPROVING THE TOXIC SUBSTANCES CONTROL ACT:  
A PRECAUTIONARY APPROACH TO TOXIC  
CHEMICAL REGULATION

*MAJOR COLIN P. EICHENBERGER\**

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## I. INTRODUCTION

“On the morning of Thursday, January 9, 2014, the people of Charleston, West Virginia awoke to a strange tang in the air off the Elk River. It smelled like licorice.”<sup>1</sup> The smell that permeated Charleston was the result of a large spill of MCHM, 4-methylcyclohexane methanol, a cleaning agent used to wash the clay off of coal before it is burned. A tank containing the chemical, located near the banks of the Elk River, leaked, spilling 10,000 gallons of the chemical into the river and the drinking water supply for nearly 300,000 of the state’s residents. The chemical’s properties and potential impacts to human health and the environment were largely unknown, putting public health officials in the difficult position of having no answers for a population being told that they could not use their tap water to drink, cook, wash or bathe.<sup>2</sup> Four months after the accident, many residents in the area still rely on bottled water for their daily needs.<sup>3</sup> The accident in West Virginia prompted renewed calls from lawmakers to reform the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2697(2012), to ensure that disasters like the one faced by the residents of Charleston, West Virginia could be faced with answers instead of questions and uncertainty.<sup>4</sup>

TSCA, 15 U.S.C. §§ 2601 et seq., is the primary federal statute governing the U.S. chemical industry. It was enacted in 1976 amid growing concern that a significant number of chemicals were being introduced to the U.S. market without sufficient information about their impact to human health or the environment and without effective regulatory authority to control them. Thirty-eight years later, the same concerns underlie the debate about its reform.

In 2013, the late Senator Frank Lautenberg, proposed two separate pieces of legislation seeking to reform TSCA.<sup>5</sup> Though both bills were admirable efforts to gain bi-partisan support for incremental change, neither addressed TSCA’s major deficits. TSCA has been largely criticized for its failure to generate information about the chemicals in commerce and the lack of regulatory authority it gives the Protection Agency (“EPA”) to address the dangerous chemicals it knows about. To correct the deficiencies that allowed the Elk River to be polluted by a chemical we know very little about, TSCA reform efforts need to (1) ensure new legislation adopts a precautionary approach, allowing regulation in the face of scientific uncertainty; (2) improve information generation about the chemicals in commerce; (3) guide the

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<sup>1</sup> Evan Osnos, *Chemical Valley*, THE NEW YORKER, Apr. 7, 2014, [http://www.newyorker.com/reporting/2014/04/07/140407fa\\_fact\\_osnos](http://www.newyorker.com/reporting/2014/04/07/140407fa_fact_osnos).

<sup>2</sup> *Id.*

<sup>3</sup> *Here and Now: Water Crisis Not Over After West Virginia Chemical Spill*, NATIONAL PUBLIC RADIO (Apr. 8, 2014), <http://hereandnow.wbur.org/2014/04/08/charleston-chemical-water>.

<sup>4</sup> Pat Rizzuto, *Data Deficit on Elk River Chemicals Shows Need for TSCA Reform, Legislators Say*, BNA DAILY ENV’T REPORT, Feb. 4, 2014, at 1.

<sup>5</sup> Safe Chemicals Act of 2013, S. 696, 113th Cong. (2013); Chemical Safety Improvement Act, S.1009, 113th Cong. (2013).

chemical industry towards “green chemistry;” and (4) improve the dissemination of information to all interested parties.

In the following sections, this paper provides a brief background on the history of TSCA’s enactment and the provisions in Title I that give the EPA the bulk of its regulatory authority. That is followed by an analysis of TSCA’s impact since its enactment, the continuing need for effective chemical legislation, and an explanation of how the above four principles can be used to guide TSCA reform efforts.

## II. BACKGROUND ON TSCA’S ENACTMENT

The Toxic Substances Control Act (TSCA) was originally enacted in 1976 in an effort to create comprehensive federal regulation of toxic substances prior to their introduction into commerce.<sup>6</sup> The Act sought to fill the gap left by other environmental statutes, which primarily focused on pollutants already in our environment or on specific media (Clean Air, Clean Water, Food, etc).<sup>7</sup> In the broadest sense, TSCA was an attempt to identify and, when appropriate, regulate toxic substances, which were not regulated elsewhere.

The impetus for TSCA was a 1971 report, Toxic Substances, produced by the President’s Council on Environmental Quality (CEQ).<sup>8</sup> The report revealed a strikingly large gap in both our understanding of the chemicals currently in our marketplace and our ability to regulate those chemicals. At the time of CEQ’s report, there were over 55,000 unregulated chemical substances in U.S. commerce and there was a growing concern about the potential impacts of these substances on human health and the environment.<sup>9</sup>

Ultimately, the CEQ report made four fairly straightforward findings about toxic risk: (1) toxic substances were entering the environment; (2) the effects of these substances were largely unknown and potentially severe; (3) existing legal mechanisms were not suited to address these effects; and (4) new legal authority

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<sup>6</sup> See, e.g., S. REP. NO. 94-698, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 4491.

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Council on Environmental Quality, Toxic Substances (Apr. 1971), as reprinted in ENVIRONMENTAL AND NATURAL RESOURCES POLICY DIVISION, LEGISLATIVE HISTORY OF THE TOXIC SUBSTANCES CONTROL ACT 757 (1976) [hereinafter Toxic Substances]; see also John S. Applegate, *Synthesizing TSCA and REACH: Practical Principles for Chemical Regulation Reform*, 35 ECOLOGY L.Q. 721, 723 (2008); David Markell, *An Overview of TSCA, Its History and Key Underlying Assumptions, and Its Place in Environmental Regulation*, 32 WASH. U. J.L. & POL’Y 333, 338-39 (2010).

<sup>9</sup> See S. REP. NO. 94-698, at 1; LINDA-JO SCHIEROW, CONG. RESEARCH SERV., RL31905, THE TOXIC SUBSTANCES CONTROL ACT (TSCA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 3 (Apr. 1, 2013) [hereinafter CRS TSCA Summary].

was required.<sup>10</sup> The findings in the CEQ report became the basis for TSCA and the major sections in Title I.

One of the foundational principles TSCA adopted from the CEQ report was the need to give regulators an effective tool to generate and collect chemical safety information.<sup>11</sup> The Bill's proponents highlighted chemical manufacture notification, data submission, record maintenance, and testing provisions as the mechanisms by which the new law would not only bring forth the information that CEQ's report identified as missing, but would do so by placing the burden on manufacturers to generate and submit the information.<sup>12</sup> The goal was a change to our chemical industry and regulation that would ensure chemicals received "careful premarket scrutiny" prior to their entrance into the commerce.<sup>13</sup>

The Congressional concern over information generation was not simply a product of the recognition that data was lacking for our decision makers, but also a realization that the chemical industry was not effectively policing itself in the absence of effective regulation. During the hearings of the Subcommittee on the Environment of the Senate Commerce Committee, witnesses testified and produced information that certain chemical manufacturers and processors knew about the carcinogenic effects of chemicals used in their processes, but intentionally withheld the information from the public, their employees, and the government in an effort to avoid liability and regulation.<sup>14</sup> As a consequence, Congress emphasized that TSCA must contain requirements that put the onus on industry to turn over what they already knew about the potential impacts of their products, while also requiring that manufacturers and distributors work to fill any remaining information gaps.<sup>15</sup> It was Congress' intent that the industry would bear the burden of identifying and understanding the risks posed by their processes and products.

An equally important principle highlighted by the Congressional members that debated TSCA was the need to give the EPA an effective regulatory scheme, which would allow them to place limitations or prohibitions on harmful toxic substances prior to their entry into the market place.<sup>16</sup> Recognition of this need was prompted in large part by the realization that the most effective way to ensure safety and avoid the environmental disasters of that era was to create effective regulation,

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<sup>10</sup> Toxic Substances, *supra* note 8, at 759-60.

<sup>11</sup> S. REP. NO. 94-698, at 2.

<sup>12</sup> *Id.*; H.R. REP. NO. 94-1679, at 2 (1976) (Conf. Rep.), as reprinted in U.S.C.C.A.N. 4539.

<sup>13</sup> H.R. REP. NO. 94-1679, at 2.

<sup>14</sup> S. REP. NO. 94-698, at 5; see also Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L.J. 1619 (2004) (discussing the persistence of this problem and environmental law's failure to generate information).

<sup>15</sup> Applegate, *supra* note 8, at 730.

<sup>16</sup> *Id.* at 5; H.R. REP. NO. 94-1679, at 2.

which would restrict harmful substances before they ever had a chance to impact the public.<sup>17</sup>

Though Congressional concerns for safety and information gaps formed the beginnings of TSCA, competing concerns in support of industry helped shape the final product. The legislative history shows that Congress sought to balance concerns over toxic exposure and our information deficit with assurances that our burgeoning chemical industry would maintain its ability to operate and innovate.<sup>18</sup> The Congressional expectation was that every action taken by the Administrator under TSCA would be guided by a balancing of the competing environmental, economic, and social impacts.<sup>19</sup>

Early versions of the bill, an industry friendly House version and a tougher Senate version, died in the 92nd and 93rd Congresses.<sup>20</sup> In 1976, the urgency of passing the bill received an unanticipated and tragic increase due to an outbreak of severe neurological disorders in workers at a company that manufactured household pesticides.<sup>21</sup> The incident received national media coverage and helped usher in the legislation to reform the chemical industry.

### III. SUMMARY OF TSCA'S TITLE I PROVISIONS

TSCA was signed into law by President Ford in 1976.<sup>22</sup> The statute's purpose section sets out the cost-benefit analysis sewn through most of the Act's major sections, mandating that the EPA Administrator carry out TSCA in "a reasonable and prudent manner...[considering] the environmental, economic, and social impact of any action."<sup>23</sup> The original legislation contained a single Title, now designated Title I, which set the overall framework for EPA's authority to gather information, regulate chemical substances, and disseminate the information it collects to interested parties.<sup>24</sup>

Title I's information generation, dissemination and regulation provisions generally direct the EPA to require manufacturer testing of existing chemicals under certain circumstances (§4), require pre-market screening and regulatory tracking for new chemicals (§5), control unreasonable risks through regulation (§6), gather

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<sup>17</sup> H.R. REP. NO. 94-1679, at 2.

<sup>18</sup> S. REP. NO. 94-698, at 13; Applegate, *supra* note 8, at 731.

<sup>19</sup> S. REP. NO. 94-698, at 12.

<sup>20</sup> See, e.g., U.S. ENVTL PROT. AGENCY, OFFICE OF POLLUTION PREVENTION AND TOXICS, EPA 744-R-97-003, CHEMISTRY ASSISTANCE MANUAL FOR PREMANUFACTURE NOTIFICATION SUBMITTERS107 (1997) (discussing the legislative history of the TSCA).

<sup>21</sup> *Id.*

<sup>22</sup> CRS TSCA Summary, *supra* note 9, at 2.

<sup>23</sup> Applegate, *supra* note 8, at 731.

<sup>24</sup> CRS TSCA Summary, *supra* note 9, at 3.

information about production, use, and adverse effects of existing chemicals (§8), and protect certain business information it receives (§14). Though these general authorizations should allow the EPA to regulate the lifecycle of a chemical, the factual predicates and procedural requirements that must be satisfied prior to implementing any of their authority have proven burdensome and the information protection provisions have proven susceptible to overuse by a protective industry. The following is a brief overview of sections 4, 5, 6, 8, and 14, followed by a critique of EPA's ability to implement them.

#### A. TSCA – Section 4 – Chemical Testing Provision

15 USC § 2603 (TSCA §4) is the chemical testing provision of TSCA and generally allows the EPA to require manufacturers and processors to test chemical substances when there is not enough data to make a safety determination. The section allows the EPA to issue rules requiring testing of any chemical that either (1) “may present an unreasonable risk of injury to health or the environment” or (2) “is or will be produced in substantial quantities” and will enter the environment in substantial quantities or have substantial human exposure.<sup>25</sup> In both situations (substantial exposure or unreasonable risk of injury), prior to issuing a test rule, the EPA must also find that there is insufficient data and experience to predict the effects of the substance and that testing is necessary to develop the data.<sup>26</sup> Congress declared that “this provision would no longer allow the public or the environment to be used as a testing ground for the safety of [chemical] products”<sup>27</sup> and expressed an intent to have manufacturers generate the data necessary to evaluate chemicals in our market place.<sup>28</sup>

#### B. TSCA – Section 5 – New Chemical Review

15 U.S.C. § 2604 (TSCA § 5) is TSCA's notice requirement and new chemical review provision, commonly referred to as the pre-manufacture notification provision. It requires a company to provide EPA with notice ninety days in advance of manufacturing a new chemical or subjecting an existing chemical to a “significant new use” as determined by the Administrator.<sup>29</sup> The notice must include the chemical name/identity, proposed use, reasonable estimates of the total amount produced, a description of the byproducts caused by the manufacturing process, a reasonable estimate of the number of people who will be exposed, the manner or method of disposal, any test data currently in the possession of the person making the notice,

<sup>25</sup> 15 U.S.C. § 2603(a)(1)(A)(i), (B)(i) (2013).

<sup>26</sup> 15 U.S.C. § 2603(a)(1)(A)(ii), (A)(iii), (B)(ii), (B)(iii) (2013).

<sup>27</sup> S. REP. NO. 94-698, at 3 (1976); cited by Lauren Trevisan, *Human Health and the Environment Can't Wait For Reform: Current Opportunities for the Federal Government and States to Address Chemical Risks under the Toxic Substances Control Act*, 61 AM. U. L. REV. 385, 391 (2011).

<sup>28</sup> Applegate, *supra* note 8, p. 730, citing S. REP. NO. 94-698, at 17.

<sup>29</sup> 15 U.S.C. § 2604(a)(1)(A), (B) (2013).

and a description of any other data on environmental and health effects – in so far as these criteria are reasonably known or ascertainable to the person making the notice.<sup>30</sup>

After receiving notice, the EPA has ninety days to review the information and identify any potential risks.<sup>31</sup> Based on the information submitted and the risk determined, the EPA can either (1) take no action; (2) issue a proposed order to prohibit or limit manufacture until additional information is received to allow a reasoned evaluation of effects; or (3) prohibit or limit the manufacture if the Administrator has a reasonable basis to conclude the chemical will present an unreasonable risk of injury to health or the environment.<sup>32</sup> If the ninety-day period passes without any affirmative action by the EPA, the manufacturer by default is cleared to proceed.<sup>33</sup>

If any new information is received by the manufacturer or any of the information the manufacturer submitted changes, there is no requirement in Section 5 for the manufacturer to update the EPA.<sup>34</sup> Section 5 also authorizes the EPA to maintain a list of chemicals, which may present an unreasonable risk of injury to health or the environment, referred to as the chemicals of concern list.<sup>35</sup> If a chemical substance is placed on the list, the EPA can, by rule, require a small manufacturer of that chemical to submit reports under TSCA § 8 (small manufacturers are otherwise exempt from Section 8’s reporting requirement) and require additional export notifications.<sup>36</sup>

### C. TSCA – Section 6 – Regulatory Authority

15 U.S.C. § 2605 (TSCA §6) grants the EPA its authority to regulate chemicals. Under section 6, the EPA may regulate a chemical if it has a reasonable basis to conclude that the chemical may present an unreasonable risk of injury to health or the environment.<sup>37</sup> Though the phrase “unreasonable risk” is used throughout TSCA, the statute does not define it. The EPA has interpreted the unreasonable risk standard to require “a balancing of the considerations of both the severity and the

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<sup>30</sup> 15 U.S.C. §§ 2604(d), 2607(a)(2) (2013).

<sup>31</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-249, EPA HAS INCREASED EFFORTS TO ASSESS AND CONTROL CHEMICALS BUT COULD STRENGTHEN ITS APPROACH 9 (2013) [hereinafter GAO 13-249].

<sup>32</sup> 15 U.S.C. § 2604(e), (f), (g) (2013).

<sup>33</sup> GAO 13-249, *supra* note 31, 9.

<sup>34</sup> *Id.* Though TSCA §5 does not require the proponent to update their notice when new information is received, 15 U.S.C. § 2607(e) (TSCA § 8(e)) requires manufacturers, processors, or distributors to notify the Administrator if they obtain any new information that reasonably supports a conclusion that a chemical substance or mixture presents a substantial risk of injury to health or the environment.

<sup>35</sup> 15 U.S.C. § 2604(b)(4)(A)(i); GAO 13-249, *supra* note 31, at 9.

<sup>36</sup> U.S. ENVTL PROT. AGENCY, TSCA SECTION 5(B)(4) CONCERN LIST, <http://www.epa.gov/oppt/existingchemicals/pubs/sect5b4.html>.

<sup>37</sup> 15 U.S.C. § 2605(a) (2013); GAO 13-249, *supra* note 31, at 9.



probability that harm will occur against the effect of the final regulatory action on the availability to society of the benefits of the chemical substance.”<sup>38</sup>

Once EPA makes an unreasonable risk determination, it may apply by rule one or more of seven specified regulatory actions, ranging from a complete ban on the substance to a requirement that manufacturers provide notice to distributors and the public regarding the potential impacts of the substance.<sup>39</sup> Prior to taking any one of the seven potential regulatory actions, the EPA must conduct a cost-benefit analysis of the proposed regulation, considering effects on human health and the environment against the benefits of the substance, availability of substitutes and the reasonably ascertainable economic consequences.<sup>40</sup> Then, the EPA must select the least burdensome of the listed regulatory actions that will adequately protect against their identified risk.<sup>41</sup> Additionally, Section 6 expands the normal administrative rulemaking process to include requirements that interested parties be allowed to present information orally and in writing and engage in cross-examination of relevant witnesses.<sup>42</sup>

#### D. TSCA – Section 8 – Reporting & Retention of Information

15 U.S.C. § 2607 (TSCA § 8) is the statute’s mechanism to obtain data on an existing chemical, including exposure and toxicity information. In general, §8(a) requires manufacturers to maintain records and submit information the EPA Administrator reasonably requires.<sup>43</sup> The information that the Administrator may require includes “the chemical identity, categories of use, production levels, by-products, existing data on adverse human health and environmental effects, and the number of workers exposed to the chemical, to the extent such information is known or reasonably ascertainable.”<sup>44</sup>

Section 8(b) requires the EPA to compile and keep current a list of all chemical substances manufactured or processed in the United States (referred to as the chemical inventory). Section 8(c) requires manufacturers, processors, and distributors to maintain records of significant adverse reactions to health or the environment alleged to have been caused by the chemical, as determined by EPA rulemaking. Section 8(d) provides the EPA with the authority to promulgate rules

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<sup>38</sup> Premanufacture Notification Exemptions, 60 Fed. Reg. 16,316, 16,328 (Mar. 29, 1995) (to be codified at 40 C.F.R. pt. 723), *citing* H.R. REP. NO. 94-1341 at 14 (1976).

<sup>39</sup> 15 U.S.C. § 2605(a)(1)-(7) (2013).

<sup>40</sup> 15 U.S.C. § 2605(c)(1) (2013).

<sup>41</sup> 15 U.S.C. § 2605(a) (2013).

<sup>42</sup> 15 U.S.C. § 2605(c)(2), (3) (2013).

<sup>43</sup> 15 U.S.C. § 2607(a)(1)(A) (2013); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 13-696T, CHEMICAL REGULATION: OBSERVATIONS ON THE TOXIC SUBSTANCES CONTROL ACT AND EPA IMPLEMENTATIONS 6 (2013) [hereinafter GAO 13-696T].

<sup>44</sup> 15 U.S.C. § 2607(a)(2) (2013); GAO 13-696T, *supra* note 43, at 6.

requiring companies to submit existing health and safety studies.<sup>45</sup> Section 8(e) requires manufacturers, processors, and distributors to inform the EPA whenever they obtain information that reasonably supports a conclusion that a chemical substance poses “a substantial risk” to health or the environment.<sup>46</sup>

#### E. TSCA – Section 14 –Disclosure of Chemical Data

15 U.S.C. § 2613 (TSCA § 14) specifies what the EPA may do with the chemical information it obtains from manufacturers and processors. In general, companies may claim that certain information provided to the EPA should be protected as confidential business information and the EPA must protect that information from disclosure under penalty of fine and imprisonment.<sup>47</sup> The substantive criteria used by the EPA to evaluate requests for confidentiality of information are laid out at 40 C.F.R. § 2.208. The regulation generally requires the EPA to grant a confidentiality request if the requester demonstrates that they have taken reasonable measures to protect the information and will continue to do so, the information has not been reasonably attainable by other persons, there is no statutory requirement to disclose, and disclosure would either harm the business or harm the government’s ability to get information in the future.<sup>48</sup> Once designated as confidential business information, the information must be protected and can only be released to other agencies, government contractors or to protect public health.<sup>49</sup>

### IV. TSCA’S IMPACT SINCE 1976

Despite the congressional intent to give EPA the authority to generate information and effectively regulate chemicals prior to their entry into commerce, TSCA has been ineffective at achieving either goal. A significant contributor to this failing was the decision to grandfather in existing chemicals at the time of TSCA’s enactment. From 1979 to 1982, the EPA identified 62,000 chemicals in commerce, included them on their chemical inventory, but never subjected the substances to testing, data collection or regulation.<sup>50</sup>

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<sup>45</sup> 15 U.S.C. § 2607(d) (2013), GAO 13-696T, *supra* note 43, at 6; GAO 13-249, *supra* note 31, at 11.

<sup>46</sup> 15 U.S.C. § 2607(e) (2013); GAO-13-249, *supra* note 31, at 11.

<sup>47</sup> 15 U.S.C. § 2613 (a), (d) (2013).

<sup>48</sup> 40 C.F.R. § 2.208(b)-(e) (2013).

<sup>49</sup> 15 U.S.C § 2613(a) & (b) (2013).

<sup>50</sup> Pat Rizzuto, *EPA Hasn’t Had Clear Understanding of Chemicals in Commerce for Decades*, BNA DAILY ENV’T REPORT, NOV. 13, 2013, at 1-2; *Title I of the Toxic Substances Control Act; Understanding Its History and Reviewing Its Impact: Hearing Before the Subcomm. On Env’t and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 4 (2013) (statement of Daniel Rosenberg, Senior Attorney, Natural Resources Defense Council) [hereinafter D. Rosenberg Testimony].

The EPA's track record generating information and effectively regulating chemicals introduced since 1982 has not fared much better. In 2005, the Government Accountability Office (GAO) analyzed TSCA and found its failures significant enough to place TSCA on their "high risk" list of federal statutes desperately in need of reform.<sup>51</sup> The GAO reported that the EPA's primary problems implementing TSCA revolved around the agency's inability to gather and generate information, regulate harmful chemicals, and effectively deal with industry claims of confidentiality over the information provided to EPA.<sup>52</sup>

Since the GAO's 2005 report, the picture has not changed much. Despite additional attempts by the EPA to improve their utilization of TSCA, the agency has been unable to gather information or regulate effectively.<sup>53</sup> In September of 2013, during an interview discussing the topic of federal chemical regulation, Administrator Gina McCarthy told reporters that, "[r]ight now, I don't have a law that gives [EPA] authority to do things in a reasonable way... there is broad consensus that TSCA is broken and ineffective and needs to be updated."<sup>54</sup> Without fundamental change to the law, the agency predicts that it "will not be able to successfully meet the goal of ensuring chemical safety now and into the future."<sup>55</sup>

The dismay over TSCA's ineffectiveness has not been confined to the EPA. Both chemical industry advocates and environmental protection groups have been vocal about the need to update TSCA.<sup>56</sup> Pro-industry representatives site the need for reform to increase public confidence, keep pace with science, increase uniformity of regulation, and spur innovation,<sup>57</sup> while environmental protection groups call for reform due to the lack of effective regulation and the potential risks a poorly regulated chemical industry poses to public health and the environment.<sup>58</sup>

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<sup>51</sup> See Noah Sachs & Matthew Schudtz, *Reforming TSCA: Progressive Principles for Toxic Risk Regulation*, CENTER FOR PROGRESSIVE REFORM, ISSUE ALERT #1307, Jul. 2013, at 4; U.S. GOV'T ACCOUNTABILITY OFFICE, HIGH RISK LIST (2005), available at <http://www.gao.gov/highrisk/overview>; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-290, HIGH RISK LIST: TRANSFORMING EPA'S PROCESS FOR ASSESSING AND CONTROLLING TOXIC CHEMICALS (2015), [http://www.gao.gov/highrisk/transforming\\_epa\\_and\\_toxic\\_chemicals/why\\_did\\_study](http://www.gao.gov/highrisk/transforming_epa_and_toxic_chemicals/why_did_study).

<sup>52</sup> GAO 13-696T, *supra* note 43, at 2.

<sup>53</sup> GAO 13-696T, *supra* note 43, at 12-13.

<sup>54</sup> Pat Rizzuto, *McCarthy Says Improved Chemical Management, Safety Remain Priority at EPA*, BNA DAILY ENV'T REPORT, Sep. 25, 2013, at 1.

<sup>55</sup> GAO 13-696T, *supra* note 43, at 20.

<sup>56</sup> Sachs & Schudtz, *supra* note 51, at 32.

<sup>57</sup> *S.1009, The Chemical Safety Improvement Act (CSIA): Hearing on S.1009 Before the Subcomm. On Env't and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 4-6 (2013) (statement of Ernest Rosenberg, President & CEO, American Cleaning Institute); *S.1009, The Chemical Safety Improvement Act (CSIA): Hearing on S.1009 Before the Subcomm. On Env't and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 1-3 (2013) (statement of Cal Dooley, President and CEO of the American Chemistry Council).

<sup>58</sup> *S.1009, The Chemical Safety Improvement Act (CSIA): Hearing on S.1009 Before the Subcomm. On Env't and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. (2013) (statement of

## A. TSCA's Failure to Generate Information

CEQ's 1971 report placed significant emphasis on generating missing information as a fundamental necessity of chemical regulation. However, in the thirty plus years since its enactment, TSCA has failed to generate much information, despite a number of statutory sections that appear to have that specific design. The testing provisions (§4), premanufacture notice requirements (§5), and the chemical inventory and data provisions (§8), are all attempts to improve our knowledge about chemicals in commerce, but each of these sections has been proven to be flawed.

### 1. §4 – Testing of Chemical Substances and Mixtures

TSCA § 4 authorizes the EPA to require testing of any chemical substance, where information is lacking and certain risk factors are met. It was included in TSCA to give the EPA the authority to require manufacturers to generate missing data on the substances they market. One of §4's unique aspects is that it makes no distinction between new or old chemicals and allows the EPA to require manufacturers to test any chemical if the requisite findings are made.<sup>59</sup> Despite the Congressional intent for this provision to ensure safety and prevent humans and the environment from acting as a chemical testing ground, in the thirty plus years since TSCA's enactment, the EPA has successfully required testing on only 200 chemicals out of the 84,000 currently listed on TSCA's chemical inventory.<sup>60</sup>

A large part of this failure is the structure of Section 4 and the burden it places on the EPA. Section 4 creates what some commentators have referred to as a Catch-22, by requiring regulators to make findings about risk and exposure levels prior to issuing a test rule, but giving regulators no mechanism to generate the information needed to make those findings.<sup>61</sup> Even in the cases where EPA has enough information to require testing, TSCA requires it to engage in formal rule making, which is time consuming and subjects their rule to judicial review under a substantial evidence standard.<sup>62</sup> The substantial evidence standard is much more rigorous than the arbitrary and capricious standard typically applied to informal

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Andy Igrejas, Director of Safer Chemicals, Healthy Families); D. Rosenberg Testimony, *supra* note 50; *see also* Sachs & Schudtz, *supra* note 51.

<sup>59</sup> 15 U.S.C. § 2603 (2013).

<sup>60</sup> *S.1009, The Chemical Safety Improvement Act (CSIA): Hearing on S.1009 Before the Subcomm. On Env't and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 3 (2013) (statement of Jim Jones, EPA Assistant Administrator) [hereinafter Jones Testimony]; U.S. DEP'T OF HEALTH & HUMAN SERV., PRESIDENT'S CANCER PANEL, REDUCING ENVIRONMENTAL CANCER RISK 22 (2008-09).

<sup>61</sup> Sachs & Schudtz, *supra* note 512, at 4; Hammond et al., *TSCA Reform Preserving Tort and Regulatory Approaches*, CENTER FOR PROGRESSIVE REFORM, ISSUE ALERT #1309, Oct. 2013, at 5.

<sup>62</sup> *See* 15 U.S.C. §§ 2603(a), 2618(c) (2013); Chem. Mfrs. Ass'n v. EPA, 859 F.2d 977 (D.C. Cir. 1988).

rulemaking, requires more stringent judicial review, and significantly limits the agency's discretion in arriving at any factual predicate.<sup>63</sup>

Though the structure of the statute hinders EPA's ability to require testing, the D.C. Circuit's decision in *Chem. Mfrs. Ass'n. v. EPA*, gave the EPA a small boost regarding the standard that it must meet to issue a test rule. In that case, the court held that EPA could require testing as long as it had "more than a theoretical basis" for its findings and allowed the EPA to rely on inferences from structurally similar chemicals and/or potential exposure patterns to support a proposed test rule.<sup>64</sup> In reaching the finding, the court highlighted the fact that section 4's threshold was meant to be lower than section 6's standard for regulation because the testing was designed as a preliminary tier to help generate information for the regulatory decision.<sup>65</sup>

Even with that favorable ruling, the agency has shied away from issuing test rules because of the cumbersome and lengthy rulemaking process. According to EPA officials, it can take on average, three to five years for the agency to promulgate a test rule and an additional two years for the companies to complete the requested testing.<sup>66</sup> The agency has stated that the chemical testing provision is "difficult to use, time consuming, and costly," and instead of issuing test rules, they have largely relied on voluntary testing agreements.<sup>67</sup>

## 2. §5 – Premanufacture Notice

TSCA § 5 requires notifications for new chemicals or new uses of existing chemicals. While TSCA's premanufacture notification requirement has been reasonably successful at requiring companies to notify the EPA when a new chemical is manufactured or an existing chemical is put to a new use, the section suffers from its

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<sup>63</sup> See, e.g., *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1214 (5th Cir. 1991) citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967) and *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258 (D.C. Cir.1973).

<sup>64</sup> *Chem. Mfrs. Ass'n*, supra note 62, at 979.

<sup>65</sup> One important factor to note about this case is the somewhat fortunate position that the EPA was in to have the studies it relied upon to justify the test rule. The studies relied upon by EPA included work done by the National Toxicology Program (NTP), National Institute of Health (NIH), and various private sector toxicological journals. EPA did not conduct the testing itself, nor contract the testing out, and was not supplied the information by the chemical manufacturers. It was only after EPA made its draft rule public that the chemical manufacturers association submitted information and that information was only related to use of gloves by workers and how well those protected against skin exposure. With nearly 1,000 new chemicals introduced annually, finding the number of studies relied upon in this case (which was just enough to justify further testing) is the exception for EPA, not the rule. See *2-Ethylhexanoic Acid, Proposed Test Rule*, 50 Fed. Reg. 20,678, 20,682 (May 17, 1985) (to be codified at 40 C.F.R. pts. 798, 799).

<sup>66</sup> GAO 13-249, supra note 31, at 17.

<sup>67</sup> GAO 13-696T, supra note 43, at 20.

failure to generate any information past basic chemical identity.<sup>68</sup> Though estimates vary, on average the EPA receives between 600 to 2000 premanufacture notifications per calendar year.<sup>69</sup> In general, these notifications contain no testing data and only an estimated fifteen percent contain any health and safety information.<sup>70</sup>

While § 5 states that the notice shall include health, safety and test data, the manufacturer is only required to provide what is known to them or reasonably ascertainable.<sup>71</sup> Not surprisingly, the EPA does not receive much information in the notifications. If the EPA wants to delay manufacture and distribution of a chemical which they feel lacks sufficient health and safety information, the agency has the burden to show that the manufacture, processing, or distribution of the chemical may present an unreasonable risk or will result in substantial exposure.<sup>72</sup> Since there is no minimum information threshold the proponent is required to provide the EPA, this burden puts the EPA in the untenable position of trying to make risk or exposure determinations without any information.

Not only does the burden shift to the EPA to justify a delay, but their timeline for review and action under §5 is limited. After receiving the initial notice from a chemical manufacturer, the EPA has just 90 days to evaluate the information and act – inaction by the agency allows the chemical to go to market. The statute allows for short extensions in limited circumstances, but the limited time for review, typical lack of agency resources and inability to move quickly makes it nearly impossible for EPA to conduct an adequate premarket review based on the notifications.<sup>73</sup> The result of this structure is the creation of backwards incentives for market participants, rewarding businesses who do little to generate information about their chemical's safety and putting companies with extensive testing at a competitive disadvantage during EPA's premanufacture review.<sup>74</sup>

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<sup>68</sup> See, e.g., *Strengthening Public Health Protections by Addressing Toxic Chemical Threats: Hearing Before S. Comm. on Env't & Public Works*, 113th Cong. 3 (2013) (statement of Thomas O. McGarity, Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, University of Texas School of Law); Applegate, *supra* note 8, at 735-736; GAO 13-696T *supra* note 43, at 9; Hammond et al., *supra* note 61, at 5-6.

<sup>69</sup> GAO 13-249, *supra* note 31, at 5; CRS TSCA Summary, *supra* note 9, at 7, ROBERT GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 763 (Aspen 6th ed. 2011).

<sup>70</sup> That number is even smaller for high production chemicals (those produced in amounts greater than 1 millions pounds per calendar year), with some estimates as low as 7%. See GAO 13-696T, *supra* note 43, 9; Sachs & Schudtz, *supra* note 51, at 4, citing U.S. EPA Office of Pollution Prevention and Toxics, *What Do We Really Know About the Safety of High Production Volume Chemicals? EPA's 1998 Baseline of Hazard Information that is Readily Available to the Public* (Apr. 1998), <http://www.epa.gov/hpv/pubs/general/hazchem.pdf>.

<sup>71</sup> 15 U.S.C. § 2604(d)(1)(A) (2013); Hammond et al., *supra* note 61, at 5-6.

<sup>72</sup> 15 U.S.C. § 2604(e)(1) (2013); Applegate, *supra* note 8, at 735, 737; Hammond et al., *supra* note 61, at 5-6.

<sup>73</sup> Hammond et al. *supra* note 61, at 5-6.

<sup>74</sup> Sachs & Schudtz, *supra* note 51, at 8.

### 3. §8 – Chemical Inventory / Data Submission

TSCA § 8(a) contains the general information gathering provisions, but it suffers from the same problem as §§ 4 and 5, by only requiring a manufacturer to submit data if it is “known... or reasonably ascertainable.”<sup>75</sup> There is no minimum data set that must be submitted to the EPA about the chemicals and no effective mechanism to force production of chemical information. Additionally, Section 8(b)’s chemical inventory, which was supposed to create a comprehensive list of chemicals currently in commerce,<sup>76</sup> is widely accepted as inaccurate.<sup>77</sup> This is due primarily to the EPA’s inability to remove chemicals that are not in commerce from §8(b)’s chemical inventory and the exemptions from §8(b)’s reporting requirements (exclusions include certain chemical volume thresholds, chemical mixtures, chemicals present in equipment when not “intentionally” removed, by-products, and chemical substances produced by certain chemical reactions).<sup>78</sup> EPA’s reluctance and inability to remove chemicals from the inventory is due primarily to their inability to determine which chemical notifications actually made it into commerce and which did not, and the fact that the EPA does not receive any notice when a particular chemical is taken out of distribution.<sup>79</sup>

The result of the exemptions is that chemicals currently in commerce are left off the inventory and the lack of removal ability results in the retention of chemicals that may have been removed from commerce years ago or may never have entered the market. Current industry estimates place the actual number of chemicals in commerce at about 25,000 (versus the 84,000 chemicals contained on the inventory).<sup>80</sup> The result, according to former director Lynn Goldman, is that the EPA does have an accurate idea of the overall number or specific identity of the chemicals currently in commerce.<sup>81</sup>

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<sup>75</sup> 15 U.S.C. § 2607(a)(2) (2013).

<sup>76</sup> S. REP. NO. 94-698 at 18-19 (1976).

<sup>77</sup> GAO 13-249, *supra* note 31, at 16; Pat Rizzuto, *McCarthy Says Improved Chemical Management, Safety Remain Priority at EPA*, BNA Daily Env’t Report, Sep. 25, 2013 at 2; *Title I of the Toxic Substances Control Act; Understanding Its History and Reviewing Its Impact: Hearing Before the Subcomm. On Env’t and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 4 (2013) (statement of Beth D. Bosley, President of Boron Specialties, LLC).

<sup>78</sup> Rizzuto, *supra* note 77 at 2; 40 C.F.R. § 710.4 (2014); Lynn R. Goldman, M.D., M.S., M.P.H., Dean, Geo. Wash. Sch. of Pub. Health and Health Services, Presentation at The Geo. Wash. U. Workshop on Identifying and Reducing Env’tl Health Risks of Chemicals in our Soc’y (Nov. 13, 2013), <http://www.iom.edu/Activities/Environment/EnvironmentalHealthRT/2013-NOV-07/Day%201/Session%201/2-Goldman-Video.aspx> [hereinafter Goldman presentation].

<sup>79</sup> Goldman presentation, *supra* note 78.

<sup>80</sup> *Id.*

<sup>81</sup> Pat Rizzuto, *EPA Hasn’t Had Clear Understanding of Chemicals in Commerce for Decades*, BNA DAILY ENV’T REPORT, NOV. 13, 2013, at 2.

## B. Ineffective Regulation of Chemicals

While the EPA's ability to generate information has been hampered by TSCA's procedural structure, the structure of §6 has made regulation of harmful chemicals nearly non-existent. In the thirty-seven years since TSCA's enactment, the EPA has used its regulatory authority to ban or restrict chemical manufacture or processing only five times, with their last attempt occurring nearly twenty years ago.<sup>82</sup> Their impotence with TSCA regulation is a product of the steep regulatory burdens in the statute and the 5th Circuit's interpretation of those burdens in *Corrosion Proof Fittings v. EPA*.<sup>83</sup>

In *Corrosion Proof Fittings*, the Fifth Circuit struck down EPA's attempt to ban most uses of asbestos by applying a stringent interpretation of the burdens TSCA creates for the agency. Setting out TSCA's standard for regulatory action, the court began by noting that TSCA was not intended to eliminate all risk, but only unreasonable risk, and the agency was required to determine what was unreasonable using a cost-benefit analysis.<sup>84</sup> That cost-benefit analysis required weighing a substance's health and environmental impacts against its benefits, consideration of the availability of substitutes and the reasonably ascertainable economic consequences of regulation.<sup>85</sup> The court noted that the EPA's analysis must show that the use of substitutes would not pose a greater risk than the regulated material and the agency had to specifically evaluate each lesser regulatory option and show that they were insufficient to achieve a reasonable level of risk.<sup>86</sup> All of the EPA's analysis must be included in their rule making record and must be supported by substantial evidence.<sup>87</sup>

Applying these factors to the agency's asbestos rule, the court found that the EPA did not demonstrate a reasonable basis for regulation (by failing to adequately consider substitutes or the lack thereof) or a basis for their unreasonable risk finding (by failing to adequately consider the cost side of its regulation). Additionally, the court found that the EPA failed to adequately consider each less burdensome regulation and prove that they would not be adequate to achieve an acceptable level of risk.<sup>88</sup>

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<sup>82</sup> GAO 13-249, *supra* note 31 at 6; Jones Testimony, *supra* note 60, at 3; GAO 13-696T, *supra* note 43, at 10; D. Rosenberg Testimony, *supra* note 50, at 4.

<sup>83</sup> *Corrosion Proof Fittings*, *supra* note 63, at XXX.

<sup>84</sup> *Id.* at 1215, 1222.

<sup>85</sup> *Id.* at 1216 (citing 15 U.S.C. § 2605(c)(1)(C)-(D) (2013)).

<sup>86</sup> *Id.* at 1220-1221.

<sup>87</sup> *Id.* at 1214, citing *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1258 (D.C. Cir. 1973); 15 U.S.C. 2618(c)(1)(B)(i) (2013).

<sup>88</sup> *Corrosion Proof Fittings*, *supra* note 63, at 1216.



This case highlighted the herculean procedural requirements of TSCA.<sup>89</sup> Prior to implementing any regulation, the burden is on the agency to prove risk, then prove the risk outweighs the benefits, then prove that substitutes will not pose a greater harm. As note above, the agency undertakes this process without an ability to require information from the chemical manufacturer. Even if the agency is able to fully evaluate the risk of the substance and its substitutes and prove that the risk presented is unreasonable, it must still fully evaluate the hierarchy of potential regulations, proving that each less stringent alternative than its chosen regulation will not reduce the risk effectively. All of this must be done in a formal rulemaking proceeding, providing interested parties a right to present contradictory oral and written information and cross-examine EPA witnesses. Once the EPA has finished that process, their final rule is subject to judicial review under the stringent significant evidence standard.

As the Center for Progressive Reform (CPR) noted in a 2013 critique of §6's regulatory burden, "[t]his standard creates a very weak protective benchmark... inherently biased against protective regulatory action, since the benefits of a chemical that is already in use are typically obvious and easily exaggerated, while the risks that it poses to health and the environment are often clouded by uncertainty and easily belittled or ignored."<sup>90</sup> Based upon the difficulty in utilizing §6's chemical regulation provisions, EPA officials reported to the GAO that they view this as a last resort and will only consider it after exhausting all other available options.<sup>91</sup>

### C. Controlling Confidentiality Claims

TSCA §14 allows companies to request designation of information that they provide to the EPA as protected confidential business information ("CBI"). If their

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<sup>89</sup> To fully understand the impact of the court's ruling, it is important to evaluate the process the agency undertook and the evidence it considered prior to issuing this regulation. The EPA began its asbestos rulemaking proceedings in 1979 and issued its final rule in 1989. During that ten-year period, the EPA appointed a panel to review over 100 studies on health and environmental impacts, reviewed numerous additional studies and safety actions from other agencies, conducted public hearings and reviewed substantial public comments, and allowed interested parties to cross examine EPA personnel about the basis for the proposed rule. After completing that process, the EPA concluded that there was wide agreement among scientific organizations, health agencies, and independent experts that asbestos was one of the most hazardous substances to which humans were exposed, was a known carcinogen at all levels of exposure, and that asbestos-related diseases were life-threatening and caused substantial pain and suffering. On the basis of that information, the EPA determined that asbestos presented an unreasonable risk to human health and drafted a final rule prohibiting the manufacture, importation, processing and distribution of asbestos in nearly all asbestos containing products. The complete ban did not take effect immediately; instead it was implemented in three phases over a seven-year period, depending on toxicity and the availability of substitutes. *Id.* at 1207-1208; Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460-62, 68-69 (Jul. 12, 1989) (to be codified at 40 C.F.R. pt. 763).

<sup>90</sup> Hammond et al., *supra* note 61, at 6.

<sup>91</sup> GAO 13-249, *supra* note 31, at 25.

request is approved, the EPA is prohibited from disclosing the company's information except in limited circumstances and must notify the party prior to any intended disclosure.<sup>92</sup> According to EPA reports, ninety-five percent of all the information they receive on new chemicals is claimed confidential by the proponent.<sup>93</sup> The EPA routinely does not challenge these claims, because it claims to lack the resources to do so.<sup>94</sup> As a result, one report estimated that ninety percent of all premanufacture notices, twenty-five percent of all substantial risk notifications and twenty percent of all reported health and safety studies were held by the EPA as CBI.<sup>95</sup> This extensive protection of information impacts the EPA's ability to share information with other interested parties and unduly damages the public's right-to-know about basic health and safety information on the chemicals in commerce.<sup>96</sup>

## V. EFFECTIVE CHEMICAL REGULATION IS STILL REQUIRED

Since TSCA's ineffectiveness has not resulted in an endless stream of casualties at the hands of irresponsible chemical manufacturers over the last thirty-seven years, one could argue that the comprehensive regulation that was envisioned at the time of TSCA's enactment may no longer be necessary. However, the threats that were originally identified by Congress – lack of information, potential for serious health consequences, and lack of effective regulatory ability – are still present. We still lack understanding of the chemicals presently in commerce, we have little to no information about many of the long-term effects of the chemicals in use, and we lack effective comprehensive regulation to address any problems that are discovered.<sup>97</sup>

One of the most disturbing trends in the studies of chemicals on health and the environment is the prevalence of chemicals in the developing fetus. The Envi-

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<sup>92</sup> Disclosure is required when necessary to protect health or the environment. LINDA-JO SCHIEROW, CONG. RESEARCH SERV., RL43136, PROPOSED REFORM OF THE TOXIC SUBSTANCES CONTROL ACT (TSCA) IN THE 113TH CONGRESS: S.1009 COMPARED WITH S.696 AND CURRENT LAW 9 (July 10, 2013).

<sup>93</sup> GAO 13-249, *supra* note 31, at 25.

<sup>94</sup> GAO 13-696T, *supra* note 43, at 11; Jessica N. Schifano et al., *The Importance of Implementation in Rethinking Chemicals Management Policies: The Toxic Substances Control Act*, ENVTL. L. REP. NEWS & ANALYSIS 10,527, 10,538 (June 2011).

<sup>95</sup> Alair MacLean, *Enhancing the Public's Right-to-Know About Environmental Issues*, VILL. ENVTL. L. J. 287, 310 (1993).

<sup>96</sup> *Id.* at 310-11.

<sup>97</sup> LaSalle D. Leffall, Jr., & Margaret L. Kripke, Introductory Letter to the President for Nat'l Cancer Institute, Nat'l Institutes of Health, U.S. Dep't of Health and Human Services, Reducing Environmental Cancer Risk: What We Can Do Now: 2008-2009 Annual Report, (2010), [http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP\\_Report\\_08-09\\_508.pdf](http://deainfo.nci.nih.gov/advisory/pcp/annualReports/pcp08-09rpt/PCP_Report_08-09_508.pdf); Noah M. Sachs, *Rescuing the Strong Precautionary Principle from Its Critics*, 2011 U. ILL. L. REV. 1285, 1287 (2011), *citing* Dep't of Health & Human Servs. et al., Fourth National Report on Human Exposure to Environmental Chemicals (2009), [http://www.cdc.gov/exposurereport/pdf/FourthReport\\_ExecutiveSummary.pdf](http://www.cdc.gov/exposurereport/pdf/FourthReport_ExecutiveSummary.pdf); Tracey J. Woodruff et al., *Environmental Chemicals in Pregnant Women in the US: NHANES 2003-2004*, ENVTL. HEALTH PERSP. 878, 879 tbl.1 (2011); see also Richard A. Denison, *Ten Essential Elements in TSCA Reform*, 39 ENVTL. L. REP. 10,020, 10,023 (2009).

ronmental Working Group (EWG), an environmental health research and advocacy group, examined the umbilical cords of infants born in 2004 and found that on average, the cords contained 200 industrial and manmade chemicals.<sup>98</sup> The chemicals found included mercury, polychlorinated biphenyls (PCBs), perfluorinated chemicals (PFCs), polybrominated diphenyl ethers (PBDEs), dichlorodiphenyltrichloroethane (DDT), and other pesticides and chemicals from industrial solvents.<sup>99</sup> Many of these substances are known endocrine disruptors, carcinogens, cause birth defects, developmental defects, nervous system problems and reproductive impacts.<sup>100</sup> Some of these chemicals, such as PCBs, are no longer in use, but their ability to persist in the environment and remain in our tissue allows them to remain a threat and impact future generations.<sup>101</sup>

The EWG conducted a follow-up of their 2004 study five years later and found over 230 chemicals present in the infants tested, including bisphenol-A (BPA).<sup>102</sup> BPA is a chemical produced in large quantities for use primarily in food and beverage containers, cashier receipts, and other products.<sup>103</sup> It is a known endocrine disrupting substance and has been linked to disturbances in fetal development in animal studies.<sup>104</sup> The 2009 study was the eleventh biomonitoring investigation conducted by the EWG and the results prompted Anila Jacob, senior scientist and co-author of the report, to remark that “each time we look for the latest chemical of concern in infant cord blood, we find it.”<sup>105</sup> Similar studies have been conducted by scientists at the University of California, the University of San Francisco, and Washington State University. Each study found that one hundred percent of the umbilical cord blood samples tested contained BPA. More than a third of those samples contained BPA levels at or higher than those shown to produce harmful health effects.<sup>106</sup>

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<sup>98</sup> Lauren Trevisan, *Human Health and the Environment Can't Wait for Reform: Current Opportunities for the Federal Government and States to Address Chemical Risks Under The Toxic Substances Control Act*, 61 Am. U. L. Rev. 385, 386, (2012), citing Jane Houlihan et al., *Body Burden: The Pollution in Newborns*, 2005 ENVTL WORKING GRP. 13, <http://www.ewg.org/research/body-burden-pollution-newborns>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

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

<sup>102</sup> *Toxic Chemicals Found In Minority Cord Blood*, 2009 ENVTL WORKING GRP., <http://www.ewg.org/news/news-releases/2009/12/02/toxic-chemicals-found-minority-cord-blood>.

<sup>103</sup> NATIONAL INSTITUTE OF ENVIRONMENTAL HEALTH SCIENCES, BISPHENOL A, QUESTIONS AND ANSWERS ABOUT BISPHENOL A (2014), <https://www.niehs.nih.gov/health/topics/agents/sya-bpa/>; Hammond et al., *supra* note 61, at 1; *BPA Studies Explore Fetal Exposures, Gene Changes*, BNA DAILY ENV'T REPORT, 38 DEN A-17, Feb. 26, 2014.

<sup>104</sup> BISPHENOL A, *supra* note 103.

<sup>105</sup> *Toxic Chemicals Found In Minority Cord Blood*, *supra* note 102.

<sup>106</sup> Hammond et al., *supra* note 61, at 1, citing *New Study Suggests 'Universal Fetal Exposure' to BPA*, ENVTL HEALTH NEWS (Aug. 23, 2013), [http://www.environmentalhealthnews.org/ehs/newscience/2013/08/2013-0822\\_bpa-in\\_umbilical\\_cord\\_blood/](http://www.environmentalhealthnews.org/ehs/newscience/2013/08/2013-0822_bpa-in_umbilical_cord_blood/).

The impact of our increasing exposure to chemicals at such a young age is concerning many scientists, particularly with regard to the impact on neurodevelopment. Neurodevelopment is a term used to describe the growth and development of the brain or central nervous system and neurodevelopmental disorders are impairments in the growth and development of that system.<sup>107</sup> Neurodevelopmental disorders have risen fairly sharply in the past four to five decades and now affect roughly 10-15% of the population.<sup>108</sup> According to some researchers, this represents a significant increase in diagnostic rates, particularly with autism spectrum disorder conditions, which before 1980 were consistently estimated at between 2-5 per 10,000 children and now number as many as 1 in 68.<sup>109</sup>

A recent article published in *The Lancet Neurology* concluded that “strong evidence exists that industrial chemicals widely disseminated in the environment are important contributors to what we have called the global, silent pandemic of neurodevelopmental toxicity.”<sup>110</sup> The article was written by Philippe Grandjean, an adjunct environmental health professor at the Harvard School of Public Health, and Philip Landrigan, a pediatrician from the Mt. Sinai School of Medicine.<sup>111</sup> The authors noted that the number of known developmental neurotoxicants has doubled in the last seven years, including methylmercury, polychlorinated biphenyls (PCBs), polybrominated diphenyl ethers (PBDEs), DDT, and fluoride and that there is a growing body of evidence that these substances are strong contributors to the growing rate of developmental disorders in children worldwide.<sup>112</sup>

A number of the chemicals listed by Grandjean and Landrigan were the same as those found in the numerous cord blood studies conducted by the EWG.<sup>113</sup> While the conclusions directly linking exposure to these chemicals as a causal factor for developmental disorders are controversial and have been challenged as overreaching<sup>114</sup>, the research reveals a significant area of concern and one where our information is lacking.

Neurodevelopment is not the only area that researchers have begun arguing is impacted by the prevalence of environmental toxins. Recent studies have

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<sup>107</sup> CECIL R. REYNOLDS & SAM GOLDSTEIN, *HANDBOOK OF NEURODEVELOPMENTAL AND GENETIC DISORDERS IN CHILDREN 3-8* (The Guilford Press 1999).

<sup>108</sup> CTR. FOR DISEASE CONTROL AND PREVENTION, *AUTISM SPECTRUM DISORDER, DATA AND STATISTICS*, <http://www.cdc.gov/ncbddd/autism/data.html> (last visited Mar. 30, 2014).

<sup>109</sup> BRYAN JEPSON, M.D. WITH JANE JOHNSON, *CHANGING THE COURSE OF AUTISM*, 24 (2007).

<sup>110</sup> P. Grandjean & P.J. Landrigan, *Developmental Neurotoxicity of Industrial Chemicals*, *THE LANCET* (Nov. 8, 2006), abstract available at <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2806%2969665-7/abstract>.

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

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

<sup>113</sup> *Body Burden*, *supra* note 98.

<sup>114</sup> Pat Rizzuto, *Two Prominent Doctors Say Global Policies Vital to Address Children's Brain Disorders*, *BNA DAILY ENV'T REPORT*, 32 DEN A-12, Feb. 14, 2014.

begun to examine the strong connection between neurodegenerative diseases and toxic chemical exposure.<sup>115</sup> Neurodegeneration is a term used to describe the loss or destruction of neurons in the brain and nervous system later in life, resulting in neurological disorders, including Alzheimer's and Parkinson's disease.<sup>116</sup> Recent studies of Parkinson's disease have begun to link exposure to chemical solvents, primarily Trichloroethylene (TCE), to the causation of symptoms.<sup>117</sup> TCE is a volatile organic chemical that has historically been used as a dry cleaning agent, a method to decaffeinate coffee, an industrial solvent, and in commercial degreasers, carpet cleaners, and glues.<sup>118</sup> Though TCE use has declined significantly over the years, the chemical, like many others, bioaccumulates in our tissue and persists in the environment.<sup>119</sup> The result of that bioaccumulation and the chemical's ability to migrate through soil and ground water has caused TCE to be one of the most commonly identified groundwater contaminants, with some estimating it is contained in roughly one-third of domestic drinking water supplies.<sup>120</sup>

Relatively recent research on exposure to TCE and onset of Parkinson's has concluded that even very limited exposure increases the risk of having Parkinson's disease (up to a nine-fold increase when coupled with exposure to other chemical agents).<sup>121</sup> The researchers found that this increased risk is present regardless of the number of exposures to TCE, their duration, or the lifetime total exposure rate.<sup>122</sup>

More and more research has begun linking exposure to various chemicals used in industrial processes, building and electronic materials and other applications to the rising incidence of serious chronic health problems such as infertility, diabetes, cancer, and other neurological disorders.<sup>123</sup> Though much of the research

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<sup>115</sup> Jason R. Cannon & J. Timothy Greenamyre, *The Role of Environmental Exposures in Neurodegeneration and Neurodegenerative Diseases*, TOXICOLOGICAL SCIENCES (Sep. 13, 2011), <http://toxsci.oxfordjournals.org>; Steven Neese & Wendy Hessler, *Solvent Exposure at Work, Home May Increase Risk of Parkinson's Disease*, ENV'T'L HEALTH NEWS, Feb. 21<sup>st</sup>, 2012.

<sup>116</sup> Cannon & Greenamyre, *supra* note 115, at 225-226.

<sup>117</sup> *Id.* at 231; Neese & Hessler, *supra* note 115.

<sup>118</sup> CRS TSCA Summary, *supra* note 9, at 231; Neese & Hessler, *supra* note 115.

<sup>119</sup> Neese & Hessler, *supra* note 115.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* The degree of risk increased as exposure levels increased, with researchers finding that industrial workers with the highest exposure levels had the highest risk of developing Parkinson's.

<sup>123</sup> See generally, Pat Rizzuto, *EPA Focusing on Assessing Chemicals In Commerce, Identifying Safer Chemistries*, BNA DAILY ENV'T REPORT, 183 DEN A-15, Sep. 20, 2013; Pat Rizzuto, *EPA Issues Analysis of Possible Substitutes For Flame Retardant Used in Construction*, BNA DAILY ENV'T REPORT, 186 DEN A-17, Sep. 24, 2013; Stephen Gardner, *EU Chemicals Agency Seeks Comments on Proposal to Classify Methanol as Reprotoxic*, BNA DAILY ENV'T REPORT, 210 DEN A-3, Oct. 30, 2013; Robert Iafolla, *Study of 30,000 Firefighters Shows Elevated Risk of Some Cancers Due to Toxic Exposure*, BNA DAILY ENV'T REPORT, Oct. 22, 2013; S.1009, *The Chemical Safety Improvement Act (CSIA): Hearing on S.1009 Before the Subcomm. On Env't and the Econ., H. Comm. on Energy and Commerce*, 113th Cong. 1-3 (2013) (statement of Richard A. Denison,

identifies troubling connections, the ability to develop a definitive causal connection has been nearly impossible, both because of the role of genetic factors that increase susceptibility to various conditions and because of the sheer number of chemicals that we are exposed to everyday.<sup>124</sup>

The cumulative and synergistic elements of chemical exposure hinder our ability to trace the health impact back to any individual substance.<sup>125</sup> Chemicals can enter our systems through various pathways, interact with one another in various ways, impact certain portions of the population more significantly than others, and have significant latency periods.<sup>126</sup> While researchers are able to draw certain troubling connections and correlations between exposures and symptoms, our ability to draw causal connections to impacts that may occur years after exposure is severely lacking. Having some basic level of understanding about the properties and potential impacts of chemicals prior to significant population exposure was TSCA's original goal and that goal is still valid today. Once exposure to harmful chemicals occurs it is often extremely difficult, if not impossible, to eliminate the resulting adverse effects and stop disease progression. Having an effective regulatory system that identifies and prevents exposure to harmful chemicals is imperative to our long-term, generational health.

Addressing the risk of potentially serious health consequences from the chemicals in our market place and improving our lack of understanding of those risks was exactly what TSCA was enacted to do, but it has been unsuccessful. TSCA's current statutory framework, which gives the EPA its authority (or lack thereof) to regulate the chemical industry needs reformation in order to achieve TSCA's original goals, but the question is how to bring about those needed changes.

## VI. HOW TO IMPROVE TSCA

One of the most fundamental reform measures that must be implemented in TSCA's reform is a transition from the current cost/benefit structure, which places the burden of proof on the regulator, to a precautionary principle that shifts the burden of proof to the regulated community. This transition is necessary to ensure public safety and increase incentives for industry to improve their information generation. Under TSCA's current structure, the regulated community benefits from withholding or failing to generate information about their products and instead, using their resources to create doubt. The void of information hinders TSCA's regulatory authority and we are left with a system that makes it easier to get unknown substances to market

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Ph.D., Senior Scientist Environmental Defense Fund). [hereinafter Denison Testimony].

<sup>124</sup> Cannon & Greenamyre, *supra* note 115, at 241.

<sup>125</sup> Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 *ECOLOGY L.Q.* 989,1025 (2012); Nathan Ostrander, *A Warning Signal that Justifies Precautionary Chemical Regulation: Exploitation of the Availability Heuristic by Economically Motivated Actors*, 18 *BUFF. ENVTL. L. J.* 199, 227-228 (2010-2011).

<sup>126</sup> Roesler, *supra* note 125, at 1025; Ostrander, *supra* note 125, at 228.

than it is to regulate potential dangers. A system that flips that dynamic around is needed to increase information production and facilitate restriction of dangerous substances.<sup>127</sup>

A second important fundamental change necessary in TSCA's statutory framework is the establishment of a clear, minimum data threshold that any proponent must meet in order to gain access to the U.S. market. Setting an informational floor as the gateway to entrance is the only way to ensure that our lawmakers and regulators have the necessary information to operate an effective regulatory regime. Third, any TSCA reform must include clear guidance to the regulated community regarding the direction for improvement. One of the by-products of strong precautionary regulation is the necessity for manufacturers to fill voids left by substances banned from the market. TSCA reform must guide that substitution effort with clearly expressed goals. Finally, TSCA reform should improve public awareness of the chemicals in our market place and increase information sharing between companies to help improve the safety of the entire chemical industry. Many of these suggested improvements are based on the European Union's (EU) chemical regulation regime (REACH). In the following section, I will provide a brief overview of REACH, address each of the suggested improvements, and attempt to develop a practical method of reforming the structure of TSCA.

#### A. REACH

The EU's chemical regulatory regime, REACH, which stands for Registration, Evaluation, Authorization, and Restriction of Chemicals, was enacted in 2006<sup>128</sup> and is generally viewed as a much more successful chemical regulation regime than its U.S. counterpart. Though a thorough explanation of REACH's regulatory authority and procedural requirements is beyond the scope of this paper, I will attempt to provide a brief overview of its substantive provisions. In general, REACH utilizes the precautionary principle and adopts a no data / no access rule for nearly all chemical substances manufactured in, or imported to, the EU.<sup>129</sup> REACH's basic regulatory process breaks down into four parts: registration, evaluation, authorization, and restriction.<sup>130</sup>

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<sup>127</sup> Sachs, *supra* note 97, at 1300-1301, *citing* Wagner, *supra* note 14.

<sup>128</sup> EUROPEAN COMMISSION, REACH—REGISTRATION, EVALUATION, AUTHORISATION AND RESTRICTION OF CHEMICALS, [http://ec.europa.eu/enterprise/sectors/chemicals/reach/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/chemicals/reach/index_en.htm).

<sup>129</sup> Adam D.K. Abelkop et al., *Regulating Industrial Chemicals: Lessons for U.S. Lawmakers From the European Union's REACH Program*, 2012 ENVTL L. REP. NEWS & ANALYSIS 11,042, 11,044 (November 2012).

<sup>130</sup> Applegate, *supra* note 8, at 742; Ablekop et al, *supra* note 129, at 11,044; EUROPEAN COMMISSION, HOW DOES REACH WORK?, [http://ec.europa.eu/enterprise/sectors/chemicals/reach/how-it-works/index\\_en.htm](http://ec.europa.eu/enterprise/sectors/chemicals/reach/how-it-works/index_en.htm).

The registration process is an aggressive data-gathering procedure, required for both existing and newly introduced chemicals.<sup>131</sup> All manufacturers and importers of chemicals in quantities of one metric ton per year or greater must submit a registration application prior to importation or manufacture.<sup>132</sup> The information required in the registration application includes a minimum data set of physiochemical properties, toxicological information, and ecotoxicology, with the level of information required increasing as the volume introduced increases.<sup>133</sup> Manufacturers and importers have a continuing obligation to keep the registration information up-to-date by supplementing it with any new relevant information received, without “undue delay.”<sup>134</sup> Chemical data, including information obtained in the registration applications, is shared up and down the supply chain to increase efficiency, avoid duplicative testing, and allow downstream users to implement safety measures.<sup>135</sup>

The second stage of REACH is evaluation of the chemical and its accompanying registration information. Evaluation has two major components: (1) an evaluation of the application for compliance with registration requirements and (2) an independent evaluation of the chemical substance at issue.<sup>136</sup> During the substance evaluation, reviewers may look at the information contained in the chemical dossier submitted with the application as well as any other relevant data (including chemical dossiers for the same or similar chemical substances submitted in other applications).<sup>137</sup> The reviewer may also conduct testing of the chemical and may request additional information from the applicant. In this way, the information required for registration is simply a floor and if additional information is needed to fully evaluate the chemical, the reviewer may generate it or require it from the applicant.<sup>138</sup>

Once evaluation is complete, authorization occurs. REACH’s authorization process takes the data from registration and evaluation and uses it to identify Substances of Very High Concern (SVHC).<sup>139</sup> The aim is to have SVHCs replaced with safer alternatives or, where that is not possible, have the substances phased out of the market. A SVHC chemical is any chemical that is either: (1) carcinogenic,

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<sup>131</sup> Ablekop et al., *supra* note 129, at 11,045.

<sup>132</sup> EUROPEAN CHEMICALS AGENCY (ECHA), GUIDANCE ON REGISTRATION, [https://echa.europa.eu/documents/10162/13632/registration\\_en.pdf](https://echa.europa.eu/documents/10162/13632/registration_en.pdf). (May 17, 2012) [hereinafter ECHA Guidance on Registration].

<sup>133</sup> *Id.* at 55, Table 2.

<sup>134</sup> *Id.* at 86-87.

<sup>135</sup> Applegate, *supra* note 8, at 742; Ablekop et al., *supra* note 129, at 11,044-45; ECHA Guidance on Registration, *supra* note 132, at 64-65.

<sup>136</sup> Ablekop et al., *supra* note 129; Applegate, *supra* note 8, at 742; ECHA, EVALUATION PROCESS, <http://echa.europa.eu/regulations/reach/evaluation/evaluation-procedure>.

<sup>137</sup> Ablekop et al., *supra* note 129; Applegate, *supra* note 8, at 742; ECHA, EVALUATION PROCESS, <http://echa.europa.eu/regulations/reach/evaluation/evaluation-procedure>.

<sup>138</sup> Ablekop et al., *supra* note 129, at 33-36.

<sup>139</sup> ECHA, AUTHORISATION, <http://echa.europa.eu/regulations/reach/authorisation>.



mutagenic, or toxic for reproduction; (2) persistent, bioaccumulative and toxic or very persistent and very bioaccumulative; or (3) has evidence of potential serious effects that cause an equivalent level of concern as the first two categories.<sup>140</sup> The European Commission has the burden of identifying and listing SVHCs, but once listed the burden shifts to the manufacturer to justify continued production or use.<sup>141</sup> In order to justify continued use, the proponent must submit an application that is use-specific and shows that the specified use either meets a safety threshold or, if there is no safety threshold, the socio-economic benefits of the use outweigh the dangers and there are no suitable alternatives.<sup>142</sup> Additionally, if suitable alternatives are available the applicant must submit a substitution plan or if no suitable alternative exists, the applicant must submit a research and development plan to discover one.<sup>143</sup>

The final prong of REACH, restriction, addresses any remaining chemicals that pose an unacceptable risk, but are not regulated under other provisions of REACH or other environmental laws.<sup>144</sup> REACH allows restriction of either the substance or specific uses of these substances, depending on the risk identified.<sup>145</sup> The burden of justifying that a restriction is necessary lies with the European Commission, though what constitutes an unacceptable risk is not clearly defined in REACH.<sup>146</sup>

## B. Effective Regulatory Authority

One of REACH's strengths and a principle that sets it apart from TSCA is its adoption of the precautionary principle. Though the precautionary principle is subject to various definitions,<sup>147</sup> in a very general sense, it stands for the proposition that a lack of information may not stand in the way of regulation.<sup>148</sup> The strength of the concept comes from the way that it treats uncertainty in regulatory decision-

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<sup>140</sup> Ablekop et al., *supra* note 129, at 40; AUTHORISATION, *supra* note 139. .

<sup>141</sup> Ablekop et al., *supra* note 129, at 40; AUTHORISATION, *supra* note 139.

<sup>142</sup> Ablekop et al., *supra* note 129, at 43, *citing* REACH, *supra* note 128, Article 60(4).

<sup>143</sup> Ablekop et al., *supra* note 129, at 43, *citing* REACH, *supra* note 128, Article 60(4)(a)-(d).

<sup>144</sup> Ablekop et al., *supra* note 129 at 46; ECHA, RESTRICTION, <http://echa.europa.eu/regulations/reach/restriction>.

<sup>145</sup> Ablekop et al., *supra* note 129, at 47.

<sup>146</sup> Applegate, *supra* note 8, at 792; Ablekop et al., *supra* note 129, at 55.

<sup>147</sup> See, e.g., Sachs, *supra* note 97, at 1292; James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L.J. 423, 432-36 (1995) (identifying fourteen "articulations of the Precautionary Principle in the major environmental instruments"); Per Sandin, *Dimensions of the Precautionary Principle*, 5 HUM. & ECOLOGICAL RISK ASSESSMENT 889 (1999) (cataloging nineteen different versions of the Precautionary Principle); Joel A. Tickner et al., *A Compass for Health: Rethinking Precaution and Its Role in Science and Public Health*, 32 INT'L J. EPIDEMIOLOGY 489, 489 (2003) (describing the five-part definition of precaution in the 2001 Lowell Statement on Science and the Precautionary Principle).

<sup>148</sup> Sachs, *supra* note 97, at 1291-92; Applegate, *supra* note 8, at 748.

making. Rather than allowing uncertainty to be used against regulators, by requiring the regulator to generate proof of actual harm prior to regulation, the precautionary approach allows regulators to justify regulation through evidence of potential harm coupled with scientific uncertainty. As explained by Professor Elizabeth Fisher, procedurally, the precautionary approach ensures that a lack of information about harm is never equated with evidence of no harm.<sup>149</sup>

Professor Noah M. Sachs examined the idea of applying a strong precautionary principle to TSCA reform in his 2011 law review article, “Rescuing the Strong Precautionary Principle from Its Critics.”<sup>150</sup> Under Professor Sachs’ “strong”<sup>151</sup> precautionary approach to TSCA reform, evidence of a serious threat to human health or the environment would result in default regulation of a chemical substance.<sup>152</sup> Professor Sachs’ approach would allow regulators to demonstrate a serious threat by showing a substance possesses intrinsic hazards (capability of causing cancer, reproductive harm, or other adverse health or ecosystem effects shown through animal testing, in vitro analysis, ecological fate and transport studies, or computer modeling) or evidence of the chemical’s persistence in human tissue or blood.<sup>153</sup>

Neither of these risk triggers would require a specific finding of harmful impacts to human health. Instead Professor Sachs’ “strong” precautionary approach allows intrinsic hazards or persistence to act as sufficient indicators of potential harm, warranting default regulation.<sup>154</sup> Once default regulation applies, in order to retain their access to the market, the burden of proof would shift to the manufacturer or importer to show: “(1) the actual risks to human health or the environment are not substantial, (2) the risks can be controlled by limiting exposure, or (3) the benefits of the chemical to society outweigh any risk.”<sup>155</sup>

Much like Professor Sachs, Professor John Applegate’s article “Synthesizing TSCA and REACH: Practical Principles For Chemical Regulation Reform,” sought to incorporate REACH’s precautionary approach into a new U.S. system of chemical regulation. Professor Applegate recommended four general principles of reform that could be incorporated in TSCA: (1) a preventative approach to regulation, proportionate to the risk identified; (2) progressive improvement in chemical

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<sup>149</sup> Applegate, *supra* note 8, at 748, citing Elizabeth Fisher, *Precaution, Precaution Everywhere: Developing a “Common Understanding” of the Precautionary Principle in the European Community*, 9:1 MAASTRICHT J. OF EUR. & COMP. L. 7, 12 (2002).

<sup>150</sup> Sachs, *supra* note 97.

<sup>151</sup> Sachs distinguishes what he terms a “weak” precautionary approach, one that simply allows the government regulation in the face of uncertainty, from the “strong” approach he favors, which makes regulation the default in the face of serious risk and scientific uncertainty. Sachs, *supra* note 97, at 1293, 1295.

<sup>152</sup> *Id.* at 1296.

<sup>153</sup> *Id.* at 1296, 1333.

<sup>154</sup> *Id.* at 1334-1335.

<sup>155</sup> *Id.* at 1336.

safety; (3) increased regulatory authority in the face of limited information; and (4) a transparent and simple regulatory process.<sup>156</sup> Instead of advocating for default regulation, Professor Applegate suggests lowering the bar that regulators must meet prior to regulation, by allowing regulation where information is lacking and allowing adaptation as information changes.<sup>157</sup>

Though he advocates for a general precautionary approach, Professor Applegate never expressly states what identified risks should act as triggers to authorize regulation. Instead, Professor Applegate's approach places a heavier emphasis on incentivizing safer substitutes for risky chemicals by including a requirement for use reduction plans and making full chemical safety information open to the public. Professor Applegate also advocates for removing aggressive judicial review from TSCA to help ensure agency actions are not held to an artificially high standard.<sup>158</sup>

Redefining risk and adjusting proof standards are central concepts in both Professors Sachs' and Applegate's proposed applications of the precautionary principle to TSCA reform. While both concepts are important in TSCA reformation, a singular redefinition of these standards is not enough. In addition to pushing the risk definition and proof standards in a precautionary direction, any redefinition of risk needs to include a clear distinction between risk identification and risk management functions. TSCA's current risk standard, unreasonable risk, uneasily blends these concepts together.<sup>159</sup> In order to identify an unreasonable risk, the agency must identify the harm, determine its severity and probability, and then weigh that harm against the impact to society caused by loss of the substance's benefits from the proposed regulation. The second part of this equation is a risk management decision, not a risk identification function.

The harm from blending these ideas together is evident in the number of sections that require an unreasonable risk finding prior to regulatory action. Unreasonable risk is a finding that must be made prior to the EPA issuing a test rule,<sup>160</sup> temporarily regulating a new substance pending development of additional information after notification,<sup>161</sup> or imposing one of the seven restrictive actions under §6.<sup>162</sup> Each of these actions is undertaken for distinct reasons, with distinct impacts on industry, and distinct levels of finality. They do not operate with the same risk management options and so, should not require the same level of risk identification. Therefore any redefinition of risk and reassignment of the burden of

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<sup>156</sup> Applegate, *supra* note 8, at 761.

<sup>157</sup> *Id.* at 763-765.

<sup>158</sup> *Id.* at 763, 767-768.

<sup>159</sup> Denison Testimony, *supra* note 123, at 4-5.

<sup>160</sup> 15 U.S.C. 2603(a)(1)(A)(i) (2013).

<sup>161</sup> 15 U.S.C. 2604(e)(1)(A)(ii)(I) (2013).

<sup>162</sup> 15 U.S.C. 2605(a) (2013).

proof, which incorporates precautionary principles, should account for the separation of these ideas and their separate application to TSCA's individual sections.

Under §4's testing requirements or §5's data and regulation pending the development of information, the most severe risk management decision that can be imposed is a temporary limitation on the manufacturer's ability to access the market, coupled with a requirement to generate additional information about their product.<sup>163</sup> These are less stringent regulatory options than those available under §5(f) and §6, which can result in a complete and permanent ban. Since the impact to the affected industry is less severe for action under §§ 4 and 5, the level of risk identified should also be lessened.<sup>164</sup>

An appropriate risk identification standard for §§ 4 and 5, and one that is less stringent than the current unreasonable risk standard, is Professor Sachs' intrinsic hazard concept. By utilizing it as the risk trigger for regulatory action under §§ 4 and 5, regulators would have an effective risk identification standard, which would allow them to justify additional information production when there is any evidence of potential harm. By allowing evidence of *potential* harmful impacts to be catalysts for action under §§ 4 and 5 and removing the requirement to weigh the identified risk against the substance's benefits, we would ease the burden on regulatory decision making by eliminating the need for regulators to make a distinct risk finding, then weigh it against a known benefit prior to moving forward.

Once a §4 or §5 risk is established, the agency should be empowered to impose additional specific testing requirements, additional health or environmental impact information generation requirements, and/or temporary limitations on downstream use until the information is provided. Though Professor Sachs makes a compelling case to require a default ban on products that demonstrate intrinsic hazards, his approach may go too far. A system that employs a default ban on the basis of intrinsic hazards may grind the chemical industry to a halt, by shifting the unreasonable scientific burden currently facing the agency to manufacturers.<sup>165</sup> Where the lack of information is the driving force behind the risk concern, the regulatory options should be limited to additional information production and temporary limitations on distribution. By combining Professor Sachs' intrinsic hazard concept

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<sup>163</sup> 15 U.S.C. §§ 2603(b), 2604(b), (e). 15 U.S.C. § 2604(f) can impose more stringent regulation, but it requires the same findings as 15 U.S.C. § 2605, so for the purposes of this distinction it is included with 15 U.S.C. § 2605.

<sup>164</sup> A similar division between these sections was identified in *Chemical Manufacturers Association*, which recognized TSCA's lowered burden of proof for a test rule, giving this type of risk division some legal support. *Chem. Mfrs. Ass'n v. EPA*, 859 F.2d 977, 984-5 (D.C. Cir. 1988).

<sup>165</sup> Requiring proof of safety in the face of risk relies on a hidden assumption that scientists can develop toxicity screening and testing tools that can accurately predict / prove health or environmental problems. In most instances that is not scientifically possible. See Pat Rizzuto, *Laws in Canada, California Said to Help Agencies Address Chemicals Management*, BNA DAILY ENV'T. REP. 219 DEN A-11, Nov. 13, 2013 (quoting Bernard Goldstein, emeritus professor of environmental and occupational health, University of Pittsburgh Graduate School of Public Health).

with the “more than a theoretical basis” standard of proof articulated in *Chemical Manufacturers Association*, we could create a system that gives the EPA effective regulatory authority, without unduly impacting our chemical industry.

The level of risk that would warrant §6’s restrictive actions should be more closely focused on direct evidence of harmful impacts to human health or the environment, utilizing standards similar to REACH’s SVHC identification standards. Once that level of risk is identified, §6 should employ Professor Sachs’ concept of default regulation. If a substance is shown to be (1) carcinogenic, mutagenic, or toxic for reproduction; (2) persistent, bioaccumulative and toxic or very persistent and very bioaccumulative; or (3) has evidence of potential serious effects that cause an equivalent level of concern as the first two categories, it would meet the level of risk to warrant §6 restrictions. Once a substance is shown to pose one of these risks to human health or the environment, default restrictions should apply, shifting the burden of proof back to the manufacturer, processor, importer or distributor to show that the risk does not actually exist, can be managed sufficiently through downstream limitations, or the benefits of the proposed use outweigh the level of risk. A regulatory system that employs this type of risk identification and burden shifting to the manufacturer will ensure that the most dangerous substances are removed from the market without unnecessary delay.

### C. Improved Information Generation

Effective chemical regulation is fundamentally reliant upon regulators possessing a sufficient level of information to facilitate informed decision-making.<sup>166</sup> REACH has attempted to generate that level of information through its registration process, which sets a minimum information threshold and a no data/no access rule for their chemical industry. In addition to the burden shifting and precautionary reforms noted above, TSCA reform should adopt a version of REACH’s information threshold as a prerequisite to market entry and incorporate the practical lessons learned from REACH’s implementation.

Adam D.K. Abelkop et al., evaluated REACH’s registration process for practical lessons in 2012.<sup>167</sup> They found that REACH’s no data/no access rule resulted in more chemical information becoming available to regulators, the supply chain and the public than had ever been available before.<sup>168</sup> Additionally, by placing responsibility on manufacturers and importers to generate the required information, REACH’s registration process resulted in increased product knowledge, increased communication, and improved risk management coordination throughout the entire supply chain. Prior to REACH, some chemical manufacturers were unaware of the end uses of their products. The requirement to provide exposure and risk information

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<sup>166</sup> Applegate, *supra* note 8, at 729.

<sup>167</sup> Ablekop et al., *supra* note 129, at 11,045.

<sup>168</sup> *Id.* at 11,046.

in their registration applications required development of that information.<sup>169</sup> Other benefits included improved industry-wide understanding of the specific toxicities identified in REACH, more unified product classification and safety data sheets, and better intra-firm communication about safety and regulatory compliance.<sup>170</sup>

The implementation of REACH's registration process, however, was not without its flaws. The primary issue noted was the overwhelming number of registration applications received during the initial rounds of registration.<sup>171</sup> Abelkop et al. found that REACH's registration requirement for both new and existing chemicals imported or produced in excess of 1 metric ton per year resulted in the European Chemicals Agency (ECHA) receiving millions of applications during pre-registration and registration phases.<sup>172</sup> The sheer volume of applications nearly crippled the agency and left it unable to accomplish its initial goal of compiling a comprehensive list of the chemicals currently in the EU market.<sup>173</sup> Even with a limited review mandate, the burden of registration review on the agency is proving excessive.<sup>174</sup>

As noted during the discussion of TSCA in sections III and IV, the EPA suffers from both an inability to maintain an accurate list of the chemicals in commerce and an inability to generate information about individual chemicals. To cure these defects, TSCA reform should incorporate a variation on REACH's concepts of a minimum data threshold and no data/no access rule, but alter them in a way that avoids the overwhelming influx of information that nearly crippled ECHA. One benefit TSCA's current structure enjoys over REACH is the statutory distinction it makes between §8(a)'s data reporting provisions and §8(b)'s chemical inventory requirement. By maintaining §8's current division, TSCA could allow the EPA to generate the chemical inventory under §8(b), separate and apart from any broad requirement on manufacturers to provide chemical information during registration, which would allow it to avoid an initial information overload.

Section 8(b)'s chemical inventory requirement could be limited to a requirement that manufacturers, processors, distributors, and importers submit a list of the chemicals they currently manufacture, process, distribute or import and update their submissions on a semi-annual basis. The list should require nothing more than the chemical identity, so that submission and agency review burdens would be as low as possible and accuracy would be assured.

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<sup>169</sup> *Id.* at 11,046-47.

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

<sup>171</sup> *Id.* This is not a complete list of the issues identified or the suggested fixes in the article.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 11,046-48.

<sup>174</sup> REACH contains a limited mandate to review only 5% of each tonnage band's applications. *Id.* at 11,056.

Section 8(a) should then be amended to include the minimum data requirements that have been applied in REACH. The first practical change needed in that direction is the removal of any reference in TSCA limiting manufacturers' or processors' duty to provide information only to the extent "known or reasonably ascertainable." That discretionary provision has proven to be an easy out for manufacturers and processors to avoid generating and/or providing any information on the health and safety of their products.<sup>175</sup> The resulting information deficit broadly impacts the agency's ability to meet the findings of risk or exposure necessary to implement TSCA's remaining regulatory provisions.

Nearly as important as removal of that limitation is the inclusion of a minimum data requirement that acts as a gateway to the U.S. market. That requirement has proven to be an effective information generation tool in REACH. Currently, TSCA §8(a)(2) contains a list of information that the Administrator "may" require, including the collection of "all existing data concerning the environmental and health effects" of any chemical.<sup>176</sup> By making the generation and collection of information mandatory, both for the EPA and as a gateway to access our market, and developing a minimum data threshold that includes basic chemical data and health and safety information, we could develop the same type of system that has proven to be a successful information generation tool in REACH.

In addition to setting a clear data threshold, TSCA's reformation should eliminate the concept of grandfathered substances. The application of that idea to TSCA's original enactment resulted in a huge number of chemicals avoiding regulatory scrutiny and information development. While grandfathering should be avoided to ensure we develop information on the chemicals in commerce, having a blanket informational requirement for any chemical produced above a *de minimis* volume has not worked well for the EU.

To avoid the overwhelming influx of chemical information and the bottleneck that agency review of all chemicals in commerce would create, the data requirement could be implemented on a priority schedule. The priority to provide information could begin with chemicals currently characterized as HPV chemicals (on an industry wide basis) and those substances that currently have the greatest known health concerns.<sup>177</sup> By focusing on high production and known dangers, we would ensure that the agency's limited resources are marshaled toward the most serious threats first and prevent agency inaction through information overload. By applying these variations to REACH's minimum data threshold and maintaining

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<sup>175</sup> Applegate, *supra* note 8, at 738; Sachs & Schudtz, *supra* note 51, at 4; Hammond et al., *supra* note 61, at 6; Denison Testimony, *supra* note 123, at 6.

<sup>176</sup> 15 U.S.C. § 2607(a)(2)(A)-(G) (2013).

<sup>177</sup> Ablekop et al., *supra* note 129, at 11,048-49; Sachs, *supra* note 95, at 1331-32; Applegate, *supra* note 8, at 763.

some of TSCA's original structure, TSCA's ability to generate information could be improved without overburdening the agency or industry.

#### D. Guided Technological Improvement

One potential benefit of stringent regulation and improved information generation is the incentive it creates for manufacturers and processors to find safer alternatives for any product that is identified as possessing a regulated risk. If a substance presents sufficient risk to warrant limitations or an all-out ban, rather than spend resources attempting to disprove the risk, as would be required in a scheme that utilizes default regulation and burden shifting, a manufacturer may find it more cost feasible to look for safer alternatives. The concept of forcing safer substitutions is directly applied in REACH's authorization phase and advocated for by Professor Applegate. In REACH's authorization process, once a substance is designated as an SVHC, the manufacturer or importer is required to prove that its continued use is justifiable and submit a substitution plan or a research and development plan to discover a substitute.<sup>178</sup> The goal is for all SVHC substances to be replaced and to force industry identification and implementation of the substitutions. Professor Applegate advocates reforming TSCA by adopting REACH's approach and adding a requirement for manufacturers to generate use reduction plans in order to force positive technology improvements in the chemical industry.<sup>179</sup>

Professor Thomas McGarity examined the United States' experience forcing technological innovation through statutory requirements in his law review article *Radical Technology-Forcing in Environmental Regulation*.<sup>180</sup> Professor McGarity evaluated different versions of technology-forcing regulations, including media quality and technology-based approaches<sup>181</sup>, phased limitations on harmful sub-

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<sup>178</sup> Ablekop et al., *supra* note 129, at 43, *citing* REACH, *supra* note 128, Article 60(4)(a)-(d).

<sup>179</sup> Applegate, *supra* note 8, at 763-763.

<sup>180</sup> Thomas O. McGarity, *Radical Technology-Forcing in Environmental Regulation*, 27 *LOY. L.A. L. REV.* 943 (1994).

<sup>181</sup> Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q, & Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1387: The EPA was charged with enforcing the deadlines and any failures to reach the goals, but as compliance with the deadlines began to appear unattainable for some sources, the EPA proved unwilling or unable to hold sources accountable. Instead of enforcing the deadlines through punitive measures, the EPA extended deadlines or abandoned goals altogether. Their reluctance to strictly enforce statutory goals did not result in a complete failure to achieve improvements, but the result was that neither the CAA or FWPCA amendments met the original targets set. *Id.* at 944-945.



stances<sup>182</sup>, and complete bans.<sup>183</sup> Radical technology-forcing, which he refers to as banning or phasing out items and activities, historically proved to be the most successful in application.<sup>184</sup>

Professor McGarity noted that the most significant advantage of radical technology-forcing to the other methods was its ease of implementation.<sup>185</sup> All that is required of regulators prior to implementing strict regulation is a determination that the risks at existing levels of exposure are unacceptable. Once that finding is made, regulators evaluate whether feasible substitutes are likely to be available if the product is banned.<sup>186</sup> Even where substitutes are not presently available, the radical approach allows regulators to take a “leap of faith” by using a phased ban to provide time for substitution development.<sup>187</sup> This approach negates the need for regulators to delve into a complicated cost-benefit analysis and instead allows the focus to remain solely on risk identification. Though Professor McGarity acknowledges that radical technology-forcing is not appropriate in all circumstances, in practice it has been very effective in addressing specific harms caused by a single substance. Professor McGarity’s assessment of the success radical technology-forcing measures have had in practice was echoed by professor Timothy F. Malloy, who found that:

[m]ost evidence of systematic innovation under direct regulations can be found in two areas... whenever the government begins to regulate a previously unregulated process, or significantly tightens standards applicable to a currently regulated process... Second, very stringent regulation such as outright bans on use or production of a chemical leads to invention and commercialization of new

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<sup>182</sup> The EPA began requiring removal in 1973, but their regulation was fiercely contested by the petroleum industry. The initial attempt to reduce lead levels was a slow phase-out, which allowed exemptions, but the approach failed. In order to generate the desired industry wide change, the EPA was required to institute an abrupt and rapid reduction, which prompted the complete removal of lead from gasoline without the need for a final rule banning it. Ultimately, as with the CAA and FWPCA, a goal setting, phased approach did not work and aggressive EPA action was necessary to require change. *Id.* at 948-52.

<sup>183</sup> The EPA’s first successful attempt to force technological innovation was their prohibition of the pesticide Mirex. Mirex was used widely to kill fire ants, which were a significant problem in the Southern United States, but was also a suspected carcinogen. Under increasing pressure from environmental activists and the Environmental Defense Fund (EDF), the EPA issued a phased prohibition on its use. The move drew criticism and concern that fire ant populations would quickly expand through the southern states, because the EPA was taking away the only known weapon before industry had a chance to develop an alternative. *Id.* at 946-47.

<sup>184</sup> *Id.* at 944, 955.

<sup>185</sup> *Id.* at 956.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 957. The EPA used the phase out approach in their attempted asbestos ban, but their rule was struck down by the Fifth Circuit in *Corrosion Proof Fittings*, *supra* note 63, based on TSCA’s current procedural hurdles and requirement to use the least burdensome regulatory option available. By adding precautionary principles to TSCA’s structure, phase out bans should be feasible under a reformed statute.

technologies and products... Evidence of systematic innovation beyond these two areas is lacking.<sup>188</sup>

TSCA reform that incorporates the precautionary principles advocated for above, allowing regulators to impose stringent limitations or complete bans on dangerous products, will have the radical technology-forcing effect Professors Malloy and McGarity describe. Under TSCA's reformed risk identification and management standards, if a substance is identified as possessing a risk warranting a §6 ban or restriction, the manufacturer would be required to disprove the risk or show that the benefit of the product outweighs the danger. If they could not meet these requirements, the manufacturer would face a default ban or stringent limitation on the production and distribution of their chemical, forcing them to find safer alternatives if they wish to remain in the market.

As Professor McGarity discussed above, the value of the product and availability of alternatives should temper the speed with which §6's default regulation takes effect. If a manufacturer can show that despite the substance's risk, it provides a valuable societal function and has no known substitutes, the EPA should be authorized to approve a phase out approach instead of an immediate ban. The onus, however, should be on the manufacturer to prove that phase out is appropriate. If approved by the EPA, any phased ban must incorporate REACH's and Professor Applegate's requirements for detailed substitution and use reduction plans to help increase the pressure on manufacturers and processors to develop alternatives. The substitution plan should thoroughly describe research efforts, funding, and a timeline of goals. Once the EPA approves the phase out plan, if the manufacturer wishes to extend the phase out timeline because of their inability to develop adequate substitutes, they should be required to show compliance with their approved substitution plan. Failure to comply with the substitution plan would be grounds for the EPA to deny any phase out extension.

Radical technology-forcing through strict regulation focused solely on identifying and removing "bad" substances, however, can present its own set of challenges. One challenge noted by suppliers who get similar dictates from their purchasers centered on the difficulty presented when only the problem is identified, but goals for the solution are left undefined. By focusing solely on what the purchaser wants eliminated in a product, the supplier is left without sufficient guidance for the substitution and may resort to an alternative that presents a greater risk than the substance that was eliminated.<sup>189</sup>

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<sup>188</sup> Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531, 549-550, (2002).

<sup>189</sup> Pat Rizzuto, *Producers Say Chemical Lists Ineffective In Achieving Corporate Stewardship Goals*, BNA DAILY ENV'T REP., 184 DEN A-9, Sep. 23, 2013.

While forced removal and substitution would be the heart of a reformed TSCA's radical technology-forcing impact, for TSCA to have a truly successful technology-forcing effect, its reform should provide clearly defined goals for substitution. One potential goal for substitution in TSCA's statutory reform is the goal of constant improvement towards "green chemistry." Under this substitution goal, manufacturers and importers would be required to look for substitutes that "are less toxic to organisms and ecosystems, are not persistent or bioaccumulative, and are inherently safer with respect to handling and use."<sup>190</sup> A similar goal has already been articulated in a voluntary agreement between manufacturers and distributors to replace chemicals of concern, referred to as the "Commons Principles for Alternatives Assessment," which "provides a framework for companies to replace chemicals of concern with safer substances."<sup>191</sup> The common principles for alternative assessment focuses on reducing hazards, minimizing exposure, using the best available information to inform decision making, requiring disclosure and transparency across the supply chain, resolving trade-offs based on a defined set of goals and values, and taking action proactively to replace harmful chemicals.<sup>192</sup> The principles have been kept general to ensure understanding and application across the spectrum of companies involved and the final agreement garnered signatures from more than 100 business representatives.<sup>193</sup> By setting out goals to pursue green chemistry and incorporating the common principles for alternative assessment, TSCA reform could help ensure that the technology is forced in the right direction and industry representatives have sufficiently clear guidance for alternatives assessment.

#### E. Improved Information Sharing

To build off the increased information generation and help facilitate guided technological improvement in our chemical market, TSCA reform should include mechanisms to improve its control over confidential business information claims and public information dissemination. Granting increased access to information about the chemicals in commerce can be a powerful incentivizing mechanism for production of safer products by allowing consumer choices to help dictate the market outcomes and by providing benchmark incentives among industry competitors.<sup>194</sup>

As noted above, the EPA's management of TSCA's current data disclosure provision (§ 14) has resulted in an over protection of chemical information. A large part of TSCA's shortcomings in this area stem from the ease with which manufacturers and distributors can make confidentiality claims and the lack of a sunset provision

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<sup>190</sup> Sachs & Schudtz, *supra* note 51, at 8.

<sup>191</sup> Robert Iafolla, *General Framework for Safer Chemical Alternatives Attracts 100 Signatories*, BNA DAILY ENV'T REP., 202 DEN A-10, Oct 18, 2013, 1.

<sup>192</sup> THE COMMONS PRINCIPLES FOR ALTERNATIVES ASSESSMENT, [http://www.bizngo.org/static/ee\\_images/uploads/resources/commons\\_principles\\_AA\\_2013\\_10\\_14.pdf](http://www.bizngo.org/static/ee_images/uploads/resources/commons_principles_AA_2013_10_14.pdf), (last accessed Apr. 13, 2014).

<sup>193</sup> Iafolla, *supra* note 191, at 1.

<sup>194</sup> Katherine Renshaw, *Sounding Alarms: Does Informational Regulation Help or Hinder Environmentalism*, 14 N.Y.U. ENVTL. L.J. 654, 658-59 (2006).

on the claims.<sup>195</sup> The over protection of this information impedes regulators and other interested parties from fully assessing the risk of any given substance and unnecessarily impedes the industry from sharing information.

A partial solution to the public disclosure problem is already contained in TSCA §14(b)(1), which authorizes the disclosure of health and safety studies for any chemical offered for commercial distribution, which is subject to a test rule or premanufacture notice.<sup>196</sup> Additionally, regulators are authorized to release all chemical data in their possession to other government employees and contractors when needed to carry out their duties or when needed to protect public health and safety.<sup>197</sup> This, at a minimum, ensures that data can be used to prevent and/or address harm to the public. With the increased information that should be generated from the reforms noted above, this provision would be an effective tool to share information. However, to fully assess risk, interested parties need information beyond health and safety studies. One problem with limiting release to health and safety studies is that the studies typically do not assess the risks of end uses and do not provide information on exposure levels.<sup>198</sup>

To improve this area of TSCA, reforms need to increase the level of information that can be shared, the circumstances that allow sharing and create disincentives for overly broad confidentiality claims. By creating disincentives, a company has to make overly broad CBI claims, TSCA reform could limit the amount of information that companies seek to protect in the first place and generally increase information availability. To change the current incentives companies have to make overly broad claims, TSCA reform should require upfront substantiation that the information meets criteria for protection<sup>199</sup> and require a fee for CBI claims.<sup>200</sup> The EPA could then publish information that is not protected by CBI on a publicly available data sharing website.<sup>201</sup>

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<sup>195</sup> Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J.L. & MED. 119, 130-131 (2004).

<sup>196</sup> 15 U.S.C. § 2613(b)(1)(A) (2013).

<sup>197</sup> 15 U.S.C. § 2613(a)(1), (2) (2013).

<sup>198</sup> *Id.*

<sup>199</sup> The EPA standard for CBI is: “(1) the business has asserted a confidentiality claim; (2) the business has shown that it has ‘taken reasonable measures to protect’ the information and will continue to do so; (3) the information is not ‘reasonably obtainable without the business’s consent’ by nongovernmental persons using ‘legitimate means’ (e.g., reverse engineering); (4) no statute requires disclosure; and (5) the ‘business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’s competitive position. *Id.*, at 1038, citing 40 C.F.R. §2.208 (2010).

<sup>200</sup> Environmental Law Reporter News & Analysis, *Toxic Substances Control Act Reform: Risk Management*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10591, 10594 (dialogue / webinar) (Thomas Cluderay discussing a critique of TSCA).

<sup>201</sup> The EPA currently provides the chemical inventory and other public chemical information on data.gov, which is linked from their TSCA website. U.S. ENVTL PROTECTION AGENCY, HOW TO ACCESS

Increasing the level and circumstances that warrant information sharing where a company asserts that the information should be protected as CBI is a difficult undertaking. Courts have traditionally recognized CBI as a form of property and requiring too much disclosure may invite regulatory takings claims by the companies forced to disclose their information.<sup>202</sup> Additionally, any requirement to share information will have to be tempered and carefully balanced so that it does not take away the profit incentive companies have to innovate. REACH utilizes its registration requirement of “one substance, one registration” to induce information sharing in its chemical industry, but that provision has been met with some confusion and complaints from the chemical industry.<sup>203</sup> Abelkop et al., suggests building on REACH’s experience by coupling information sharing requirements among competitors with an explicit and mandatory compensation scheme and a low cost arbitration mechanism to handle disputes between companies.<sup>204</sup> A system that requires information sharing, but also requires just compensation for the information, would help to limit any regulatory takings claims, help to ensure that businesses only seek competitor information they are willing to pay for, and maintain the profit motive for innovation because companies would still receive a financial benefit from their work. The improved information sharing between companies could help ensure that safety innovations are shared across the market and safety benchmarks are recognized industry-wide, resulting in improved chemical safety.

Additionally, increasing public access to chemical information may help incentivize positive changes. As interested consumers become more aware of the dangers posed by certain chemicals, they can adapt their consumption choices correspondingly, forcing companies to respond to consumer pressure. While TSCA reform should increase information availability to the public to achieve this pressure, influencing consumer choices should not be a focal point for TSCA reform. Chemical safety information provided with registration applications will likely be complex and difficult to understand. Pushing that information out to consumers

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THE INVENTORY, <http://www.epa.gov/oppt/existingchemicals/pubs/tscainventory/howto.html>.

<sup>202</sup> Roesler, *supra* note 125, at 1038. The regulatory takings issue was addressed in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), where Monsanto challenged FIFRA’s data sharing provisions. FIFRA was amended in 1978 to require data sharing between registrants and to provide health and safety information publicly. The court held that a prerequisite to a valid takings claim was a showing that the regulation interfered with a reasonable, investment backed expectation. A pesticide registrant, who submitted their registration after FIFRA’s amendment, could not have a reasonable expectation that their information would be kept confidential and the requirement that a registrant give up their property interests in order to register was not an unconstitutional taking. However, FIFRA data submitted prior to the amendment, which was approved for protection as confidential information, but later released, may qualify as a taking. The court held that the takings claim in that situation could be overcome by arbitration that provides the registrant with just compensation. *Id.* at 987-989.

<sup>203</sup> Ablekop et al., *supra* note 129, at 11,051.

<sup>204</sup> Ablekop et al., *supra* note 129, at 11,052; the constitutionality of using binding arbitration agreements to settle disputes among FIFRA registration participants was upheld in *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568 (1985).

directly, through warnings or information campaigns, could result in oversaturation, causing the warnings to lose their influential ability.<sup>205</sup> Instead, TSCA should simply make chemical information publicly available on a data sharing website, allowing interested consumers to have access without attempting to push warnings out to every person potentially affected. This would still apply some amount of pressure to companies who would have their names attached to potentially harmful chemicals in a publicly accessible format, without oversaturating the average member of the public.

## VII. CONCLUSION

TSCA was enacted to bridge the information and regulatory gaps in our chemical industry, but it has been unable to achieve those goals. Its lack of success is due primarily to the procedural hurdles and burdens that TSCA places on the agency's shoulders. Though TSCA's effectiveness has lagged, the health and environmental concerns that motivated its original passage are still present today and are arguably worse. Regulators need to take action to improve TSCA so the EPA can address the chemical risks we face.

By applying the practical lessons from REACH's implementation to TSCA's current structure and the concepts of reform discussed above, we can sculpt a new version of TSCA that is workable in the United States. In a fundamental sense, TSCA's framework is designed to cover the lifecycle of a chemical--it provides mechanisms to create a baseline inventory of chemicals and their safety data (§8), requires notification for anything new, including new uses of existing substances (§5), gives the agency the ability to examine information and direct testing if additional information is needed (§4), and provides authority to regulate chemicals that are shown to be unsafe (§6). By improving TSCA's ability to carry out these regulatory functions, improving information generation, forcing technological improvements and increasing the amount of information that is shared, we can help usher in a desperately needed era of renewed chemical safety.

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<sup>205</sup> Renshaw, *supra* note 194, at 665-666.



THE HISTORY AND DEVELOPMENT OF 10 U.S.C. § 2667 AND ITS  
USE IN MANAGING AIR FORCE REAL PROPERTY

*MAJOR DOUGLAS E. DeVORE II\**

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## I. INTRODUCTION

Nearly fifty years ago, Air Force Chief of Staff General Thomas D. White observed that “the mission of the Department of Defense is more than just aircraft, guns, and missiles. Part of the defense job is protecting the land, water, timber, and wildlife—the priceless natural resources that make this great nation of ours worth defending.”<sup>1</sup> A key part of General White’s definition of natural resources was “land.” The Department of Defense is one of the largest land owners in the United States. One of the ways the Department manages its natural resources is by leasing real property to maximize the benefit to the nation’s citizens. “Enhanced use leases” have become an important tool in managing its property. Enhanced use leases provide an opportunity to use land that is otherwise underutilized, and they give the Department an additional way to fulfill its overall mission. The statute used to regulate enhanced use leases dates to World War II, and the concept is even older. However, the utilization of enhanced use leases is a relatively recent development. To realize their full potential, several changes are needed. First, Congress should define what constitutes an “enhanced use lease” by statute. Second, Congress should articulate that enhanced use leases are the preferred method for real property leases in the Department of Defense. Third, measures should be taken to ensure that the enhanced use lease process is conducted openly and transparently. Fourth, to the extent that it has not already been done, the enhanced use lease process should be formalized and streamlined within the Department of the Air Force through continuous evaluation of guides and handbooks with updates as needed to maximize the benefit to the Department and to the nation.

Section II will analyze property generally and the rights associated with property ownership, including the distinction between jurisdiction and ownership. This will include a discussion about how property ownership includes the right to grant leaseholds or “leases.” It will also introduce “enhanced use leases” as the term is used in military applications. Section III will present the history and development of 10 U.S.C. § 2667. This statute is the legal authority for most enhanced use leases between the Department of Defense and other entities, although the words “enhanced use lease” are not expressly defined by the statute. Section IV will discuss three separate examples where the Department of the Air Force entered into enhanced use leases with other parties for successful development projects.<sup>2</sup> Section V will be a critique of these projects, highlighting factors that could have led to their failure. It will also include brief observations about energy development, a new and potentially rich subject of future enhanced use leases. Section VI, will include recommendations of how the enhanced use lease program can be successfully used in the future.

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<sup>1</sup> *Dep’t of Def. Authorization for Appropriations for Fiscal Year 1996 & the Future Years Def. Programs: Hearing on S. 1026 Before the S. Comm. on Armed Services*, 104th Cong. 129 (1995) (statement of Sherri W. Goodman, Deputy Under Sec’y of Def. (Envtl. Sec.)).

<sup>2</sup> Although there are examples where enhanced use leases have failed or have been terminated, such failures are not the subject of this article.

## II. PROPERTY DEFINED

To understand the concept of federal property ownership and the legal arrangements that can be made regarding that property, it is important to understand several concepts. One concept is the notion of “property” itself. Another concept is the “ownership” of property. A third concept is “jurisdiction.” A final concept is the relationship between the rights associated with property ownership and the way those rights may be transferred to another.

### A. What Is Property?

“Property” is “the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment and disposition.”<sup>3</sup> It is not merely the actual object. “[Instead, it]...denote[s] the *group of rights* inhering in the citizen’s relation to the physical *thing, as the right to possess, use, and dispose of it....*”<sup>4</sup> In this thesis, “property” is limited to “real property” or a tract of land. Regarding that parcel, “[t]he modern conception of the meaning of property is the dominion over or right of use and disposition which one may lawfully exercise... generally to the exclusion of all others....”<sup>5</sup>

The second concept to understand is property “ownership.” “One who is the ‘owner’ of property possess[es] the fullest extent of rights and privileges regarding that property as recognized by the owner’s jurisdiction. . . .”<sup>6</sup> In this context, ownership is commonly referred to as the “bundle of privileges,”<sup>7</sup> or “sticks in the bundle of rights”<sup>8</sup> with “[e]ach stick represent[ing] one of the total number of possible interests in sum of rights, powers, privileges, immunities and liabilities.”<sup>9</sup> Several rights associated with ownership of property include the right to “the undisturbed occupation and enjoyment of the property;”<sup>10</sup> the right to exclude others from property;<sup>11</sup> the rights to use and enjoy property, including all the rights to sell and

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<sup>3</sup> David A. Thomas, *The Nature of Property*, in 2 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 14.03(a) (David A. Thomas ed., 2000).

<sup>4</sup> Penn Central Transp. Co. v. New York, 438 U.S. 104, 142–43 (1978) (Rehnquist, J., dissenting (citing United States v. Gen. Motors Corp., 323 U.S. 373, 377–78 (1945) (emphasis in original))).

<sup>5</sup> Thomas, *supra* note 3, at § 14.03.

<sup>6</sup> *Id.* at § 14.02(a).

<sup>7</sup> Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937) (citing Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U.S. 249, 267–68 (1933)).

<sup>8</sup> Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

<sup>9</sup> Thomas, *supra* note 3, at § 14.04(c)(1).

<sup>10</sup> *Id.* at § 14.02(a).

<sup>11</sup> Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1011 (1984) (citing Kaiser Aetna, 444 U.S. at 176).

transmit;<sup>12</sup> and the right to dispose of property.<sup>13</sup> The rights associated with property ownership can be transmitted through easements, tenancies, and leases, among other methods.

## 1. Property Ownership and Ownership by the United States Government

The next important factor to understand is the development of ownership of the land itself.<sup>14</sup> Generally speaking, the Anglo-Saxon tradition held that the Sovereign owned real property and granted property to others by royal prerogative. When English settlers came to North America, companies often claimed land on the basis of royal warrants and charters.<sup>15</sup> Over time, the presumption of royal ownership of all land receded, especially after the American Revolution. By that time, Americans also began an inexorable push west to claim land across the entire continent.

## 2. Federal Acquisition of Real Property—Purchase

Notwithstanding the presumption that pursuit of and possession of property was an inalienable right of Americans, the Framers of the Constitution recognized a need for the newly-created federal government to own land itself. For this reason, the United States Constitution expressly authorized the federal government to acquire land from the states not just for “Forts, Magazines, Arsenals, and dock-Yards,” but also “other needful Buildings.”<sup>16</sup> Purchase became one of several methods by which the federal government acquired land.

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<sup>12</sup> *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731, 736 (9th Cir. 1980) (“[O]wnership’ is a collection of rights to use and enjoy property....” (citing *Henneford*, 300 U.S. at 582)); *Energy Oils, Inc.*, 626 F.2d at 736 (“[O]wnership’ [of property]...includ[es] the right to sell and transmit the same.” (citing *State v. Gleason*, 277 P.2d 530 (Mont. 1954)).

<sup>13</sup> *Thomas*, *supra* note 3, at § 14.02(a).

<sup>14</sup> For a discussion of the historical development of Anglo-Saxon property law, *see* David A. Thomas, 1 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION chs. 3–4 (David A. Thomas ed., 2000).

<sup>15</sup> For example, King James granted a warrant to the company that eventually settled the Jamestown Settlement in present-day Virginia. Professor Thomas observed how broad the original charter was:

The first grant, to the Virginia proprietors, was the most extreme. Officially the boundaries ran several hundred miles to the north and south, and to the west, from sea to sea. Although several colonies’ westward boundaries extended, by their terms, all the way to the Pacific Ocean, it was then unknown how far it actually was to that westward limit.

David A. Thomas, *How the Public Domain Was Assembled*, in 7 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 55.02 (David A. Thomas ed., 2000).

<sup>16</sup> U.S. CONST., art. I, § 8. The full text of this section reads: “The Congress shall have Power... to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings....” *Id.* (emphasis added).

The first of these actions was the Louisiana Purchase in 1803<sup>17</sup> whereby the United States acquired the Louisiana Territory from France for approximately \$15 million.<sup>18</sup> In 1819, Spain ceded its holdings in North America—principally Florida—to the United States for \$5 million.<sup>19</sup> In 1848, the United States acquired land from Mexico through the Treaty of Guadalupe Hidalgo for \$15 million.<sup>20</sup> In 1850, the federal government acquired a portion of Texas' land for \$10 million in return for paying debts<sup>21</sup> which Texas had accrued while it was a separate country and before it became a state.<sup>22</sup> In 1853, the United States acquired land south of the Gila River and West of the Rio Grande in the Southwest for \$10 million.<sup>23</sup> And in 1867, the United States bought Alaska when the Secretary of State negotiated its acquisition from Russia for \$7 million.<sup>24</sup>

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<sup>17</sup> See Treaty Between the United States of America and the French Republic, Apr. 30, 1803, 8 Stat. 200.

<sup>18</sup> Convention between the United States of America and the French Republic, art. I, Apr. 30, 1803, 8 Stat. 206. The United States agreed to pay sixty million francs with the exchange rate set at one dollar equal to approximately five and one-third francs. *Id.* at 208. The United States also agreed to pay French debts up to twenty million francs. See Convention between the United States of America and the French Republic, art. II, Apr. 30, 1803, 8 Stat. 209–10. All or part of fifteen states were later formed from land acquired in this purchase: Arkansas, Iowa, Kansas, Missouri, Nebraska, and Oklahoma; most of North Dakota and South Dakota; and parts of Colorado, Louisiana, Minnesota, Montana, New Mexico, Texas, and Wyoming. See David A. Thomas, *Reception of the English Common Law on Property in the American States and the District of Columbia*, in 1 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 7.02 (David A Thomas ed., 2000).

<sup>19</sup> Treaty of Amity, Settlement, and Limits, between the United States of America and his Catholic Majesty, U.S.-Spain, art. XI, Feb. 22, 1819, 8 Stat. 260. Spain ceded Spanish Florida, which consisted of modern-day Florida and parts of Alabama, Louisiana, and Mississippi. See Thomas, *supra* note 18, at § 7.02.

<sup>20</sup> Treat of Peace, Friendship, Limits, and Settlement Between the United States of America and the Republic of Mexico, art. XII, Feb. 2, 1848, 9 Stat. 932. This treaty set the Rio Grande as the boundary for Texas. Mexico also relinquished ownership of California and territory which later became the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming. See Thomas, *supra* note 18, at § 7.02.

<sup>21</sup> Holman Hamilton, *Texas Bonds and Northern Profits: A Study in Compromise, Investment, and Lobby Influence*, 43 MISS. VALLEY HIST. REV. 579, 579 (1957); see also J.J. Bowden, *The Texas-New Mexico Boundary Dispute Along the Rio Grande*, 63 SW. HIST. Q. 221 (1959). Strictly speaking, the federal government's acquisition of Texas land was not a "purchase" in the ordinary sense of the word. Instead, the federal government agreed to assume Texas' debts and obligation in return for the state ceding land to the federal government. Bowden, 63 SW. HIST. Q. at 228. This land later became part of the states of Oklahoma, New Mexico, Kansas, Colorado, and Wyoming. See Thomas, *supra* note 18, at § 7.02.

<sup>22</sup> Joint Resolution for Annexing Texas to the United States, J. Res. 8, 28th Cong. 5 Stat. 797–98 (1845).

<sup>23</sup> Treaty between the United States of America and the Mexican Republic, art. III, Dec. 30, 1853, 10 Stat. 1033–34.

<sup>24</sup> Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America, art. VI, Mar. 30, 1867, 15 Stat. 539, 542–43.

### 3. Federal Acquisition of Real Property—Cession

The federal government also acquired ownership of property through state cession, by which the United States acquires jurisdiction exclusive of all other state authorities.<sup>25</sup> A cession is the act of relinquishing property rights.<sup>26</sup> Authority for the states to cede jurisdiction to the federal government “springs from the implied authority of the [s]tates to deal with the general government in any manner to accomplish the powers reserved to them by the Constitution.”<sup>27</sup>

At the conclusion of the Revolutionary War, sovereign title of the lands of Great Britain transferred to the newly-independent American states.<sup>28</sup> Seven of the newly-independent states—New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia—had extensive landholdings that dated to their royal warrants and grants, but the remaining six did not. This issue became a source of contention between the states. As the new country developed, the six states that did not possess western territory pressed the other states to cede land to the federal government, and the national Congress pledged to hold these lands for the common benefit of the United States.<sup>29</sup> Between 1781 and 1802, New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia ceded land to the federal government.<sup>30</sup> And in 1787, Congress adopted the Northwest Ordinance,<sup>31</sup> which created the federally-administered Northwest Territory from ceded lands north and west of the Ohio River, east of the Mississippi River, and south of the Great Lakes. Other states also ceded land to the federal government, and additional states entered the Union on the same basis.<sup>32</sup>

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<sup>25</sup> See John C. Roberts, *Jurisdiction of Naval Reservations*, JAG J., Jul. 1948, at 8.

<sup>26</sup> BLACK’S LAW DICTIONARY 259 (9th ed. 2009).

<sup>27</sup> Roberts, *supra* note 25, at 8.

<sup>28</sup> Thomas, *supra* note 15, at § 55.02.

<sup>29</sup> *Id.*

<sup>30</sup> The states ceded land to the federal government only reluctantly; however, these cessions had the effect of strengthening the national government and “played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the U.S. Constitution.” ROSS W. GORTE, CAROL HARDY VINCENT, LAURA A. HANSON & MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2012).

<sup>31</sup> An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).

<sup>32</sup> *Id.* at 51. In addition to being one of the first instances where territory was under federal and not state control, the Northwest Ordinance was important for other reasons. Five new states were eventually created from the territory created by the Northwest Ordinance: Ohio, Illinois, Indiana, Michigan, and Wisconsin. In addition, a significant part of Minnesota came from this territory. When these states were admitted to the union, each was “equal” to all other states already admitted. See Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 18–30 (2001).

States also ceded land to the federal government for purposes other than the creation of new states. As will be discussed below in connection with the Philadelphia Mutiny of 1783, individual states often did not have the same interests as the federal government. The Framers of the Constitution were concerned that a single state could dominate the national government, so Article I, Section 8 expressly called for a 10-square mile district under exclusive federal control to become the seat of government. Maryland<sup>33</sup> and Virginia<sup>34</sup> ceded land to the federal government to create the District of Columbia.<sup>35</sup> In 1875, Kansas ceded land to the United States for the creation of Fort Leavenworth.<sup>36</sup> The federal government has also acquired property by other means, including “purchase based upon voluntary agreement, condemnation for public use, foreclosure of liens, devise or succession<sup>37</sup> where state law does not prohibit such devises, by acceptance as a gift from states and individuals, and by setting it aside from the public domain.”<sup>38</sup> Though rarely used, the federal government has acquired property through condemnation.<sup>39</sup>

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<sup>33</sup> For the Maryland cession of land to create the District of Columbia see Act of Dec. 23, 1788 to Cede to Congress a District of Ten Miles Square in This State for the Seat of Government of the United States, ch. 46, in 2 LAWS OF MARYLAND (William Kilty rev., 1800).

<sup>34</sup> For the Virginia cession of land to create the District of Columbia, see Act of Dec. 3, 1789 for the Cession of Ten Miles Square, or Any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of Government, ch. 8, in 1 THE REVISED CODE OF THE LAWS OF VIRGINIA 44–45 (B.W. Leigh ed., 1819). In 1846, Arlington County and the City of Alexandria were retroceded back to Virginia. See Act of Jul. 9, 1846 to Retrocede the County of Alexandria, in the District of Columbia, to the State of Virginia, ch. 35, 9 Stat. 35; see also VA. CODE ANN. § 1-311 (2011).

<sup>35</sup> Act Concerning the District of Columbia, ch. 15, 2 Stat. 103 (1801).

<sup>36</sup> Fort Leavenworth Ry. Co. v. Lowe, 114 U.S. 525, 527–28 (1885).

<sup>37</sup> This clause has reference to acquisition of property by a properly-executed will. “Devise” is the act of giving property by will. BLACK’S LAW DICTIONARY 517–18 (9th ed. 2009). Historically, the term was restricted to the disposition of real property, but the term has been broadened to include both real and personal property. See RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.1 cmt. d (1999). “Succession” is the acquisition of rights or property by inheritance under the laws of descent and distribution. BLACK’S LAW DICTIONARY 1569 (9th ed. 2009). Therefore, when the United States receives property through a donative transfer, it exercises all rights associated with that parcel.

<sup>38</sup> Ralph B. Hammack, *Annexation of Military Reservations by Political Subdivisions*, 11 MIL. L. REV. 99, 101 (1961). Captain Hammack cites the following cases as instances where courts have recognized the federal government’s acquisition of property by different means: United States v. Perkins, 163 U.S. 625 (1896) (holding that the foreclosure of lien was valid); Van Brocklin v. Tennessee, 117 U.S. 151 (1886) (holding that a purchase of land without ratification by a state legislature was valid); Kohl v. United States, 91 U.S. 367 (1875) (holding that the federal government could acquire property through eminent domain); Fay v. United States, 204 F. 559 (1st Cir. 1913) (holding as valid a perpetual conveyance of land from a private individual to the federal government); Crook, Horner & Co. v. Old Point Comfort Hotel, 54 F. 604 (E.D. Va. 1893) (holding the conveyance of a hotel following cession of land by the state government to the federal government at Fort Monroe was valid); Dickson v. United States, 125 Mass. 311 (1877) (holding the bequest of a personal estate to the United States was valid); State v. Oliver, 35 S.W.2d 396 (Tenn. 1930) (approving the ability of the federal government to accept lands donated by the state for the creation of Great Smoky Mountains National Park). *Id.*

<sup>39</sup> See Kohl, 91 U.S. at 374.



## B. Distinction between “Ownership” and “Jurisdiction”

The preceding section explained the primary ways that property has been acquired by the federal government. Another important concept related to “ownership” is “jurisdiction.” Whereas ownership is the actual control of the rights associated with a parcel, jurisdiction is “[a] government’s general power to exercise authority over all persons and things within its territory.”<sup>40</sup> As will be explained below, the federal government may “own” property while at the same time have no more authority over that property than any other landowner.

The idea of federal jurisdiction first arose toward the close of the Revolutionary War. As mentioned above, most of the American colonies had been established under royal charters and warrants. Although there were economic and social interactions among the colonists themselves, each colony was individually situated toward England. There was no single national representative who spoke for the colonies as a whole; each had its own executive and legislative body and governed its affairs accordingly.<sup>41</sup>

### 1. Mutiny of 1783 and the Need for Federal Land Ownership

When the Revolutionary War ended, the newly-independent states enacted the Articles of Confederation and established the first “national” government. However, a national government existed only with respect to foreign affairs.<sup>42</sup> In domestic relations, it was virtually powerless and was almost wholly dependent upon the states for support. The weakness of the federal government was highlighted by the “Philadelphia Mutiny of 1783.” On June 20, 1783, Congress was in session in Philadelphia when soldiers from Lancaster, Pennsylvania, who had fought in the Revolutionary War came “to obtain a settlement of accounts, which they supposed they had a better chance for in Philadelphia than in Lancaster.”<sup>43</sup> There never appeared to be an imminent threat of riot or violence, but Congress was still concerned enough that it asked Pennsylvania state authorities for protection. No help was provided. By June 24, “the members of Congress abandoned hope that State authorities would disperse the soldiers, and Congress removed itself from Philadelphia.”<sup>44</sup>

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<sup>40</sup> BLACK’S LAW DICTIONARY 927 (9th ed. 2009).

<sup>41</sup> Even the Declaration of Independence used language that refers to the states as being distinct from each other, stating “That these United Colonies *are* . . . Free and Independent States; . . . and . . . as Free and Independent States, *they have* full power . . . to do all other acts and things which Independent States may of right do.” THE DECLARATION OF INDEPENDENCE (1776) (emphasis added).

<sup>42</sup> See ARTICLES OF CONFEDERATION OF 1781, art. VI, IX.

<sup>43</sup> *Origin and Development of Legislative Jurisdiction*, in U.S. ATTN’Y GEN., JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: PART II, A TEXT OF THE LAW OF LEGISLATIVE JURISDICTION 15, 15 (1957) (internal citations omitted) [hereinafter *Origin and Development of Legislative Jurisdiction*].

<sup>44</sup> *Id.* at 16.

Congress later convened in Princeton, New Jersey, Trenton, New Jersey, Annapolis, Maryland, and New York City, and “at no time during the remaining life of the Confederacy was the safety of the members of Congress similarly threatened or the deliberations of the Congress in any way hampered”<sup>45</sup> as it had been in Philadelphia. However, the effect that this incident had on the Continental Congress could not be ignored. On October 7, 1783, the Continental Congress adopted a resolution that called for buildings to be erected on the banks of the Delaware River suitable for a “federal town; and that *the right of soil, and an exclusive or such other jurisdiction* as Congress may direct, *shall be vested in the United States.*”<sup>46</sup>

In 1787, the Constitutional Convention expressly adopted this position and directed the acquisition of a federal district as the seat of government: “The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”<sup>47</sup> The Constitution also extended exclusive jurisdiction over “all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . .”<sup>48</sup> This clause has been liberally construed,<sup>49</sup> and most states now have general laws giving the national government exclusive or concurrent jurisdiction over land so acquired.<sup>50</sup>

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<sup>45</sup> *Id.*; see also Stephen E. Castlen & Gregory O. Block, *Exclusive Federal Jurisdiction: Get Rid of It!* 154 MIL. L. REV. 113, 119–21 (1997).

<sup>46</sup> *Origin and Development of Legislative Jurisdiction*, *supra* note 43 at 17.

<sup>47</sup> U.S. CONST., art. I, § 8, cl. 17.

<sup>48</sup> *Id.*

<sup>49</sup> *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938).

<sup>50</sup> For state laws granting jurisdiction to the federal government see ALA. CODE § 42-1-1 (LexisNexis 2013); ARIZ. REV. STAT. ANN. § 37-620.02 (2003); ARK. CODE ANN. § 22-7-102 (2004); CAL. GOV'T CODE § 126 (West 2012); COLO. REV. STAT. § 3-1-103 (2013); CONN. GEN. STAT. ANN. § 48-1 (West 2006); DEL. CODE ANN. tit. 29, §§ 102 to 103 (2003); FLA. STAT. § 6.04 (West 2014); GA. CODE ANN. § 50-2-23 (2013); HAW. REV. STAT. ANN. § 1-4.5 (LexisNexis 2012); IDAHO CODE ANN. § 58-702 (2012); 5 ILL. COMP. STAT. ANN. 510/0.01 to 600/4 (West 2013); IND. CODE ANN. §§ 4-20.5-1 to 4-20.5-2 (LexisNexis 2008); IOWA CODE ANN. § 1.4 (West 2008); KAN. STAT. ANN. § 27-102 (2001); KY. REV. STAT. ANN. § 3.010 (West 2010); LA. REV. STAT. ANN. § 52:1 (2004); ME. REV. STAT. tit. 1, § 8 (1989); MD. CODE ANN., STATE GOV'T § 14-102 (LexisNexis 2009); MASS. ANN. LAWS ch. 1, § 7 (LexisNexis 2011); MICH. COMP. LAWS §§ 3.201 to 3.203 (West 2013); MINN. STAT. ANN. § 1.042 (West 2013); MISS. CODE ANN. § 3-5-5 (2002); MO. ANN. STAT. § 12.020 (West 1999); MONT. CODE ANN. § 2-1-202 (2013); NEB. REV. STAT. § 84-198 (2008); NEV. REV. STAT. ANN. § 328.075 (LexisNexis 2013); N.H. REV. STAT. ANN. § 123:1 (2013); N.J. STAT. ANN. § 52:30-1 (West 2010); N.M. STAT. ANN. § 19-2-2 (LexisNexis 1994); N.Y. STATE LAW §§ 20 to 37 (McKinney 2003); N.C. GEN. STAT. ANN. § 104-7 (West 2013); N.D. CENT. CODE § 54-01-06 (2008); OHIO REV. CODE ANN. § 159.04 (West 2002); OKLA. STAT. tit. 80, § 2 (West 2002); OR. REV. STAT. ANN. § 272.030 (West 2007); 74 PA. CONS. STAT. § 1 (West 2008); R.I. GEN. LAWS § 42-2-1 (2007); S.C. CODE ANN. § 3-1-10 (1986); S.D. CODIFIED LAWS § 1-1-4 (2012); TENN. CODE ANN. §§ 4-1-106 to 4-1-107 (2011); TEX. GOV'T CODE ANN. § 2204.103 (West 2008); UTAH CODE ANN. 63L-1-201 (LexisNexis 2011); VT. STAT. ANN. tit. 1, §§ 551 to 552 (2010); VA. CODE ANN. §§ 1-400 to 1-401 (2011); WASH. REV. CODE ANN. §§ 37.04.010 to 37.04.040 (West 2003); W. VA. CODE ANN. § 1-1-3 (LexisNexis 2013); WIS. STAT. ANN. § 1.02 (West 2013); WYO. STAT. ANN. § 36-10-102 (2013).

## 2. Jurisdiction on Federally-owned Land

The method of property acquisition has not been uniform, so the jurisdiction exercised by the federal government has likewise not been uniform and varies based on how the land was acquired.<sup>51</sup> Prior to February 1940, the federal government was prohibited from spending “public money for the erection of public works until there had been received from the appropriate state the consent to the acquisition by the United States of the site.”<sup>52</sup> Congress made state consent optional rather than mandatory in 1940,<sup>53</sup> and it also changed the general policy regarding the acquisition of land for federal use. Prior to February 1, 1940, “acceptance of [exclusive] jurisdiction by the United States [from a state by means of consent or cession] was presumed in the absence of intent by the federal government not to accept such jurisdiction.”<sup>54</sup> Regarding property acquired after that date, there is “a conclusive presumption against the acceptance of any legislative jurisdiction over lands acquired...by the federal government, unless a formal acceptance of jurisdiction is filed by the United States.”<sup>55</sup>

The concept of “jurisdiction” as applied to federal real property is “the power to pass and enforce United States laws on matters that are ordinarily reserved for the states.”<sup>56</sup> “Jurisdiction” can generally be divided into four main categories: exclusive, concurrent, partial, and proprietorial (or proprietary).<sup>57</sup> In an area of “exclusive jurisdiction,” the federal government “has acquired...all of the state’s authority in an area, and the state concerned has not reserved the right to exercise any of that authority except the right to serve state civil or criminal process.”<sup>58</sup> In an area of exclusive jurisdiction, “not [s]tate but [f]ederal law is applicable...for enforcement not by [s]tate but [f]ederal authorities, and in many instances [action is taken] not in [s]tate but in [f]ederal courts.”<sup>59</sup>

The second type of jurisdiction is “concurrent” jurisdiction. This occurs when “[t]he state, in granting the [federal g]overnment exclusive legislative jurisdiction over an area, has reserved to itself the right to exercise the same authority at the

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<sup>51</sup> Hammack, *supra* note 38 at 101.

<sup>52</sup> *Id.*; see also Rev. Stat. § 355 (1875). For an explanation of this statute, see also JOHN M. GOULD & GEORGE F. TUCKER, NOTES ON THE REVISED STATUTES OF THE UNITED STATES AND THE SUBSEQUENT LEGISLATION OF CONGRESS 39–41 (1889).

<sup>53</sup> Hammack, *supra* note 38 at 101.

<sup>54</sup> *Id.* (citation omitted).

<sup>55</sup> *Id.*; see also 40 U.S.C. §§ 3111–12 (2012).

<sup>56</sup> See U.S. DEP’T OF AIR FORCE, INSTR. 32-9001, ACQUISITION OF REAL PROPERTY, Jul. 27, 1994, at ¶ 1.9; see also U.S. DEP’T OF THE ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION, Feb. 21, 1974, at ¶ 3.a.

<sup>57</sup> U.S. DEP’T OF AIR FORCE, INSTR. 32-9001, *supra* note 56, at attach. 2.

<sup>58</sup> *Id.* at ¶ A2.1.

<sup>59</sup> *Origin and Development of Legislative Jurisdiction*, *supra* note 43, at 4.

same time.”<sup>60</sup> Therefore, both state *and* federal law is applicable, and both state *and* federal authorities may take action in either state *or* federal courts. The third type of jurisdiction is “partial” jurisdiction. This occurs where the “state has granted the [federal g]overnment some of its authority to legislate but has reserved the right to exercise, alone or with the [federal g]overnment, some authority beyond the right to serve criminal process in the area (for example, the right to tax private property).”<sup>61</sup>

The final type of jurisdiction is “proprietary” jurisdiction. This occurs where the federal “[g]overnment has acquired some right or title to an area in a state but has not obtained any of the state’s authority to legislate over the area.”<sup>62</sup> From the federal government’s perspective, this is the lowest degree of jurisdiction. The federal government owns and occupies the parcel as any landowner would, but it does not exercise jurisdiction over the parcel. Therefore, state law applies to this property, and the federal government would be a party to actions occurring on this property like any other landowner. This is of particular importance because current Air Force policy is to “operate under a proprietorial interest in land unless it needs another interest to carry out the assigned mission.”<sup>63</sup> However, the fact that the federal government may only exercise proprietorial jurisdiction does not mean it cannot exercise the power necessary to perform its assigned duties and functions under the Constitution or federal law.<sup>64</sup> These constitutional and statutory provisions give the federal government “many powers and immunities in acquired land area that ordinary landowners do not have. Further, it holds its properties and performs its functions in a [g]overnmental rather than proprietorial, or business, capacity.”<sup>65</sup>

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<sup>60</sup> This is a rare case that currently exists in Alaska because of the special provisions in the Alaska Statehood Act. See U.S. DEP’T OF AIR FORCE, INSTR. 32-9001, *supra* note 56, at ¶ A2.2.

<sup>61</sup> *Id.* at ¶ A2.3.

<sup>62</sup> *Id.* at ¶ A2.4.

<sup>63</sup> *Id.* at ¶ 1.9.3. The Department of the Army has adopted a similar position: “[I]t is the policy of the Department of the Army to acquire only a proprietorial interest in land and not to acquire any degree of legislative jurisdiction except under exceptional circumstances.” U.S. DEP’T OF THE ARMY, REG. 405-20, *supra* note 56, at ¶ 5. The Department of the Navy position is also the same:

It is the policy of [the Department of the Navy] to acquire legislative jurisdiction over [f]ederal real property only when such acquisition is necessary to the proper performance of military functions, missions, and tasks on the property. When legislative jurisdiction is considered essential, the degree of jurisdiction sought should be limited to the minimum level of jurisdiction required.

U.S. DEP’T OF THE NAVY, INSTR. 11011.47C, ACQUISITION, MANAGEMENT, AND DISPOSAL OF REAL PROPERTY AND REAL PROPERTY INTERESTS BY THE DEPARTMENT OF THE NAVY, Aug. 26, 2013, at ¶ 12.b.

<sup>64</sup> See *Origins and Development*, *supra* note 43, at 11.

<sup>65</sup> U.S. DEP’T OF AIR FORCE, INSTR. 32-9001, *supra* note 56, at ¶ A2.4.

## C. Fee Title and Leaseholds

Once the question whether the federal government actually “owns” the parcel in question is resolved and after the type of jurisdiction which exists over the parcel is determined, then the rights associated with ownership of property can be ascertained and the way those rights may be transferred to another may be known. As a general rule, federal ownership of real property is ownership in fee simple. The fee simple absolute is “[t]he highest form of ownership [that can be had] in real property, because it has no restrictions on its use or enjoyment except those restrictions imposed by public policy for the common good.”<sup>66</sup> When property is owned in fee simple, the owner of that property enjoys the “highest concentration of rights and privileges” that may be exercised.<sup>67</sup> The owner of the fee simple absolute gives the owner the right “to have uncontrolled use and disposition of all of the legal and physical properties thereof.”<sup>68</sup>

### 1. Leases and Leaseholds

As previously noted, ownership of property has been compared to “sticks in the bundle of rights”<sup>69</sup> with “[e]ach stick represent[ing] one of the total number of possible interests in sum of rights, powers, privileges, immunities and liabilities.”<sup>70</sup> One of these interests is a leasehold or a lease. “Historically, leases have been characterized as a conveyance, . . . [which] creates an interest in land.”<sup>71</sup> Now, leases are viewed as contracts between landlord property owners and tenants who receive possessory rights in the land.<sup>72</sup> The Department of Defense manages over 27.7 million acres of land worldwide, the vast majority of which is located in the United States or in territorial possessions.<sup>73</sup> Only forty-eight percent of this land is actually government owned, so the Department of Defense exercises property rights as both an owner and tenant.

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<sup>66</sup> John Makdisi, *Overview of Modern Fee Simple Absolute*, in 2 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 17.01 (David A. Thomas ed., 2000).

<sup>67</sup> David A. Thomas, *The Modern Fee Simple Absolute*, in 2 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 17.07 (David A. Thomas ed., 2000).

<sup>68</sup> *Id.*

<sup>69</sup> *Kaiser Aetna*, 444 U.S. at 176.

<sup>70</sup> David A. Thomas, *The Nature and Kinds of Property*, in 2 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 14.04(c)(1) (David A. Thomas ed., 2000).

<sup>71</sup> James A. Backman, *Conveyance and Contract Characteristics*, in 4 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 39.02(a) (David A. Thomas ed., 2000).

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

<sup>73</sup> DEP’T OF DEF., BASE STRUCTURE REPORT—FISCAL YEAR 2013 DoD-14 (2013), available at [http://www.acq.osd.mil/ie/download/bsr/Base%20Structure%20Report%202013\\_06242013.pdf](http://www.acq.osd.mil/ie/download/bsr/Base%20Structure%20Report%202013_06242013.pdf).

## 2. Enhanced Use Leases

A relatively recent development in the area of federal property management is the “enhanced use lease.” Section 2667, Title 10, United States Code (hereinafter “the Leasing Statute”), is the statutory authority for enhanced use leases, even though the Leasing Statute itself does not define the term. As will be discussed at greater length below, an enhanced use lease is a specific type of lease where a federal asset—real property—is leveraged for a specific development. Enhanced use leases have been used to build office space,<sup>74</sup> solar energy arrays,<sup>75</sup> hotels,<sup>76</sup> and wastewater treatment plants.<sup>77</sup> An important part for enhanced use leases is that the federal land subject to the lease possesses a characteristic that makes it desirable for use.

Enhanced use leases are unique for other reasons. Federal law has been enacted whereby the leaseholder may pay the federal government through payment in kind in addition to cash payment. Enhanced use leases have been summarized this way: “[An enhanced use lease] is essentially a real estate transaction whereby the [tenant—often a real estate or other] developer [—]is leasing land from the [f]ederal agency to construct and operate a [real estate development]. But unlike an ordinary lease, the...developer in an [enhanced use lease] pays the military installation through in-kind considerations equal to the value of the lease rather than directly with cash.”<sup>78</sup> The federal government has entered into enhanced use leases through the Department of Defense and the Department of Veterans Affairs, and other agencies are also permitted to enter into enhanced use leases. This thesis will explore only the development of the Department of Defense’s Leasing Statute.

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<sup>74</sup> In Davis County, Utah, the Department of the Air Force has leased land to a private development company for construction of a business park. *See infra* Part IV.B.2.

<sup>75</sup> In Kern County, California, the Department of the Air Force is leasing land to a private developer for a solar energy project. *See* Dan Weikel and David Zahniser, *Palmdale Airport Land Sought for Solar Farm*, L.A. TIMES, Feb. 23, 2009, at B1; Dan Weikel, *County Studies Solar Plant at Palmdale Airport*, L.A. TIMES, Apr. 20, 2010, at AA4; *see also* Notice of Intent (NOI) to Prepare an Environmental Impact Statement (EIS) for the Oro Verde Solar Project at Edwards Air Force Base and County of Kern, CA, 78 Fed. Reg. 32,240 (May 29, 2013).

<sup>76</sup> A private development company has leased land in Okaloosa County, Florida, from the Department of the Air Force for construction of a 153-room hotel complex on Santa Rosa Island. *See infra* Part IV.C.3.

<sup>77</sup> North Las Vegas, Nevada, and Okaloosa County, Florida, both constructed wastewater treatment facilities on land they leased from the Department of the Air Force. *See infra*, Parts IV.A.2, IV.C.2.

<sup>78</sup> Robert Kwartin et al., Dep’t of Def., Environmental Security Technology Certification Program, Solar Energy Development on Department of Defense Installations in the Mojave and Colorado Deserts 7-74 (2012), *available at* [http://www.acq.osd.mil/ie/download/Solar\\_Energy\\_Development\\_on\\_DoD\\_Installations\\_in\\_the\\_Mojave\\_and\\_Colorado\\_Deserts.pdf](http://www.acq.osd.mil/ie/download/Solar_Energy_Development_on_DoD_Installations_in_the_Mojave_and_Colorado_Deserts.pdf).

### III. HISTORY AND DEVELOPMENT OF THE LEASING STATUTE, 10 U.S.C. § 2667

The history and development of the Leasing Statute is an interesting study, and its history and development track the evolution and transformation of the federal government itself.

#### A. Origin of the Military's Authority to Lease Federal Property

To understand the Leasing Statute and how it is currently used, it is helpful to understand where this law originated. The military first received authority to lease federal property when Congress considered legislation to permit such leases in 1892.<sup>79</sup> Prior to this time, the Department of the Treasury had enjoyed the authority to lease property for over a decade, whereas the Department of War<sup>80</sup> could only convey land through “revocable licenses” which the law did not authorize.<sup>81</sup> In addition, the Secretary of the Treasury's authority to lease property under his control was less restrictive than the authority given to the Secretary of War.<sup>82</sup> Given the difficulties the Department of War had managing its real property, it requested authority similar to the Department of the Treasury.

The proposed legislation had several benefits. First, it established a lawful means whereby the Department of War could authorize the use of federal land under his control that did not then exist.<sup>83</sup> In so doing, Congress aligned the method by which two separate Departments exercised authority over federal land they each controlled.<sup>84</sup> Second, the proposed legislation prescribed “leases” as the preferred

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<sup>79</sup> 23 CONG. REC. 68 (1891).

<sup>80</sup> The Department of War and the Department of the Navy were separate executive branch agencies until 1947, when Congress created a unified National Military Establishment and placed the Army and Navy under the direction of the Department of Defense. *See* National Security Act of 1947, Pub. L. No. 80-253, §§ 201, 205–06, ch. 343, 61 Stat. 495, 500, 501–02.

<sup>81</sup> 23 CONG. REC. 2187 (1892).

<sup>82</sup> *Id.*

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

<sup>84</sup> *Id.* In 1879, the Secretary of the Treasury was given authority “to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is not authority under existing law.” *See* Act of Mar. 3, 1879, ch. 182, ¶ 4, *in* 1 SUPPLEMENT TO THE REVISED STATUTES OF THE UNITED STATES, REVISED AND CONTINUED at 251 (William Richardson ed., 2d ed. 1891). This law was a comprehensive appropriation for 1880, and there is no explanation as to what constituted “unoccupied and unproductive property” when it was enacted. This language appears unimportant because it was not repeated in the later statute giving the same authority to the Department of War. However, it is clear that the Department of War was aware of the authority granted to the Department of the Treasury. It appears that the Senate Committee on Military Affairs asked the Secretary of War for comment on this proposed change. In response to the committee inquiry, the Quartermaster General of the Army and the Chief of Engineers of the Army responded with letters that were placed in the Congressional Record. *See* 23 CONG. REC. 2187. The Chief of Engineers refers to the statutory provision by which the Secretary of the Treasury was permitted to lease federal land under the

method of granting possession of federal land—away from the “revocable licenses” utilized by the Department of War and “for which there [was] apparently no authority in law.”<sup>85</sup> Third, it outlined the criteria for the Secretary of War to use in granting leases on federal land: The Secretary of War, at his discretion, would determine that the lease “[was] for the public good;”<sup>86</sup> was revocable;<sup>87</sup> and did not exceed a term of five years.<sup>88</sup> In addition, the proposed law had the practical effect of “enabl[ing] the Secretary of War to prevent trespassing, and to terminate many disputes in regard to title and possession.”<sup>89</sup> The Senate Committee on Military Affairs considered the legislation and reported it out of committee without amendment.<sup>90</sup> During the Senate floor debate, the bill was amended to exclude “mineral and phosphate lands” from the provisions outlined in the proposed legislation.<sup>91</sup> This amendment was adopted and the bill passed the Senate. The House of Representatives did not amend the bill, and it passed on July 22, 1892.<sup>92</sup> On July 28, 1892, the measure became law and the Secretary of War was now authorized to lease federal lands under his control.<sup>93</sup>

## B. World War II and the Birth of the Leasing Statute

The Department of War’s authority to lease federal property lay dormant until World War II when Congress enacted the provision that became the Leasing Statute. Before World War II began, the industrial base of the United States was inadequate to support the type of effort that would be needed to fight.<sup>94</sup> In only a few years, resources were mobilized that dramatically increased industrial output in the country.<sup>95</sup> Resources were also used to increase federal real property holdings. Between 1940 and 1944, the Department of War “acquired almost nineteen million acres of land, at a cost of approximately [\$300 million]. In addition, a leasing program, involving yearly rentals of [\$65 million, was] in operation covering piers,

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control of the Treasury Department, which was the basis for this proposal. *Id.*

<sup>85</sup> 23 CONG. REC. 2187.

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> 23 CONG. REC. 912 (1892).

<sup>91</sup> 23 CONG. REC. 5434 (1892). This prohibition has remained part of the Leasing Statute to this day.

<sup>92</sup> 23 CONG. REC. 6582 (1892).

<sup>93</sup> Act of Jul. 28, 1892, ch. 316, 27 Stat. 321. At the time of this legislation, the Department of War and the Department of the Navy were separate agencies so separate legislation was needed to grant this authority to the Navy. Similar authority was granted to the Department of the Navy in 1916. See Act of Aug. 29, 1916, ch. 417, 39 Stat. 559–60.

<sup>94</sup> J. Harry LaBrum, *Disposition of Surplus War Property*, 18 TEMP. L.Q. 309, 311 (1944).

Lieutenant Colonel LaBrum stated: “Pearl Harbor found us relatively unprepared. The situation then facing American industry was one of starting practically from scratch in the production of all needed materials for war purposes.” *Id.*

<sup>95</sup> *Id.* at 310–11.



warehouses, storage plants, buildings of all sorts and vacant land.”<sup>96</sup> The increase in real property holdings was attributable “to the intensified mechanization which [took] place.”<sup>97</sup> In addition to piers, warehouses, and storage plants, “[a] sizable segment of the real estate holdings of the federal [g]overnment consisted of *industrial* plants and facilities.”<sup>98</sup> By 1944, the federal government spent approximately \$15½ billion on industrial plants.<sup>99</sup> The military departments expended enormous time and resources in building up that capacity,<sup>100</sup> and they did not want to lose this production capability if it was needed in a future conflict.<sup>101</sup>

With this as a backdrop, the military departments requested new legislation that would address these issues. On April 28, 1947, the Secretary of War and Acting Secretary of the Navy sent the Speaker of the House a proposed bill.<sup>102</sup> The military departments identified three purposes for the proposed legislation. First, the military departments asked Congress to grant “uniform legislative authority for the leasing of

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<sup>96</sup> *Id.* at 353. In addition, Professor White observed that the federal government was also responsible for the buildup of industrial facilities by financing two-thirds of the approximately \$25 billion spent during World War II. See Gerald T. White, *Financing Industrial Expansion for War: The Origin of the Defense Plant Corporation Leases*, 9 J. OF ECON. HIST. 156, 156 (1949).

<sup>97</sup> *Id.* at 354.

<sup>98</sup> *Id.* at 355 (emphasis added).

<sup>99</sup> *Id.* at 357. Lieutenant Colonel LaBrum notes that this amount excludes projects under \$25,000 as well as \$2.78 billion spent for machine tools and equipment. *Id.* at 356–57. “Of the [federal g]overnment-financed plants, [\$]5.3 billion represent aircraft and ship facilities, [\$]5.2 billion ordnance facilities, and [\$]5 billion all other facilities. Approximately one-half of the total investment covers construction costs, and the remainder machinery and equipment purchases.” *Id.*

<sup>100</sup> A joint letter from Department of War and Department of the Navy to Speaker of the House Joseph W. Martin underscored this point: “Experience in this war has indicated that much valuable time...was expended in the construction and conversion of plants for production of essential [materiel]. The time thus required was in the neighborhood of [eighteen] months to [two] years.” H.R. Doc. No. 80-134, at 2212 (1947), reprinted in *Authorizing Leases of Real & Pers. Prop. by the War & Navy Dep’ts: Hearing on S. 1198 (H.R. 3471) Before the S. Comm. on Armed Services*, 80th Cong., 6 (1947) (letter of Apr. 28, 1947 to Speaker Joseph W. Martin from Robert P. Patterson, Sec’y of War, & W. John Kenney, Acting Sec’y of the Navy).

<sup>101</sup> In comments before the Senate Committee on Armed Services on the lease proposal, Secretary W. John Kenney underscored the importance of preserving the nation’s industrial capacity in the war effort:

In conclusion, I wish to emphasize the extreme importance of the bill now before this committee in its relation to the industrial mobilization program of the Nation. Preparation for the mobilization of men is but a single aspect of the obligation imposed upon the armed services in defending the security of the Nation. The mobilization of industry to furnish the requirements for the conduct of modern technological warfare is equally if not more important. This bill will go far toward enabling us to meet that goal.

*Authorizing Leases of Real & Pers. Prop. by the War & Navy Dep’ts: Hearing on S. 1198 (H.R. 3471) Before the S. Comm. on Armed Services*, 80th Cong., 17 (1947) (prepared statement of W. John Kenney, Assistant Sec’y of the Navy).

<sup>102</sup> H.R. Doc. No. 80-134, *supra* note 100, at 2211.

property” under the departments’ control.<sup>103</sup> Although each department had statutory authority to lease federal land under its control, the authority derived from different Code sections. This act would bring the authority into the same Code section. Second, the military departments asked Congress to expand existing peacetime authority to lease federal government property “for performance of [g]overnment or private work.”<sup>104</sup> Finally, the military departments asked Congress to “permit the transfer without reimbursement to the [military d]epartments of certain plants, machinery, and equipment” for use in a “stand-by program.”<sup>105</sup>

### 1. Preserving the Military’s Industrial Capacity

In a committee hearing on the bill, its proponents stated that the principal purpose was “to aid the industrial facilities stand-by programs” of the military departments.<sup>106</sup> By “facilities,” the bill’s proponents meant “[g]overnment-owned propert[ies] which had been furnished to or acquired by war contractors at [g]overnment expense.”<sup>107</sup> When hostilities ceased, the military departments carefully reviewed and analyzed these facilities to determine how they should be managed. This review divided these plants into three categories. The first category consisted of plants which were so important that they were “taken over and incorporated [as a permanent part] in the [military] establishment.”<sup>108</sup> The second category consisted of plants “excess to further requirements of the [military d]epartment[s] and could be disposed of as surplus.”<sup>109</sup>

The third category was more difficult. These plants were often machine tools and production plants that manufactured specialized equipment for the armed forces. The review recommended that these plants “be retained in [federal g]overnment ownership so as to [e]nsure [their] immediate availability for the rapid expansion of the production of essential war [materiel] in the event of a future emergency.”<sup>110</sup> Since these machine tools and production equipment also had non-military industrial purposes, they could be leased when they were not needed for military purposes. In time of conflict, it could quickly be reconverted to support the military departments. Such an approach had several benefits. First, the plants and equipment would not fall into disuse or disrepair. Second, the knowledge to operate the equipment would

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Hearing on H.R. 3471 to Authorize Leases of Real or Pers. Prop. by the War & Navy Dep’ts, & for Other Purposes Before Subcomm. No. 3, Org. & Mobilization, of the H. Comm. on Armed Services, 80th Cong., 2334 (1947) (statement of W. John Kenney, Assistant Sec’y of the Navy) [hereinafter “Kenney Statement before Congress”].*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

be retained. Finally, there would be no need to rebuild a plant if the federal government did not disposed of it. This last benefit was especially important to the bill's proponents. They argued for the new statute, because the time required to build industrial facilities exceeded the amount of advance warning the military departments expected they would have before a future war would actually break out.<sup>111</sup>

## 2. Recalling War-Making Industrial Capacity into Production as Necessary

The ability to maintain an industrial reserve capacity was at the heart of this proposed act, and it was basically divided into two parts.<sup>112</sup> The first part of the proposal contained the key provisions that remain at the heart of this law today. The proposed legislation repealed previous limits that required the leases made by the military departments to be revocable at any time and limited them to terms of no more than five years.<sup>113</sup> Not only were the military department secretaries authorized to approve longer-term leases “where necessary in the interest of national defense or of the public interest,”<sup>114</sup> the leases were now revocable when the President of the United States declared a national emergency.<sup>115</sup>

Ultimately, the need to maintain the industrial capacity of the military persuaded Congress to act. The “principal purpose” of the legislation was to support the “the industrial facilities stand-by program” of the military departments.<sup>116</sup> This law “furnish[ed] the means whereby the real or personal property of the federal [g]overnment under the control of the [military d]epartments may be made available...to aid...in the production of...supplies for the [d]epartments, thereby reduc-

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<sup>111</sup> H.R. DOC. NO. 80-134, *supra* note 100, at 2212.

<sup>112</sup> The second part of the legislation transferred ownership of key industrial plants together with their machine-tool and production equipment reserve to the military departments. *See* Kenney Statement before Congress, *supra* note 106, at 2336.

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

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

<sup>115</sup> *Id.*

<sup>116</sup> H.R. REP. NO. 80-623, at 1 (1947). Senator J. Chandler Gurney summarized the law in a speech to the Senate:

Turning for a moment to a completely different field, a consideration of the legislation enacted by this Congress to provide for more adequate planning for industrial mobilization is of major interest, and serves to emphasize the variety of the problems related to national security. During the war the services had developed, either directly or indirectly, many large industrial facilities which could not be operated during peacetime, but which would again be vital in any future war effort....[S.] 1198 established an industrial stand-by facility plan, built around some of the plants which were operated during the war. These plants will be continued in operation, if possible, either through contracts or by the departments. If this cannot be done, these plants will be maintained in such condition as will make them readily available in the event of a future national emergency....

CONG. REC. 9810 (1948).

ing costs to the [federal g]overnment”<sup>117</sup>. And almost as an afterthought, a final statement in support of this act has become its most significant justification: “[T]he bill will furnish the means... where [the] real or personal property [of the federal government] for the time being is not needed by the [military d]epartments *permits it to be leased to industry as an aid to the civilian economy*.”<sup>118</sup> The law’s principal purpose has receded into history, but the act’s secondary purpose has increased in importance and significance. On August 5, 1947, the Leasing Statute was enacted.<sup>119</sup>

### C. The Leasing Statute’s Era of Limited Use

After 1947, the statute entered an extended period of dormancy. With the exception of a recodification of the military statutes which occurred in 1956,<sup>120</sup> the Leasing Act was virtually unused until 1959 when the United States Supreme Court considered *United States v. 93.970 Acres*.<sup>121</sup> A central issue in *93.970 Acres* was whether a military department could revoke a lease of property of “strategic value,” thereby rendering it ineligible for disposal as surplus.<sup>122</sup> The Court held that the federal government’s right to revoke a lease was not restricted to occasions

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<sup>117</sup> H.R. REP. NO. 80-623. at 2.

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> Pub. L. No. 80-364, ch. 493, 61 Stat. 774 (1947).

<sup>120</sup> Act of Aug. 11, 1956, 70A Stat. 1–595 (later codified as Title 10, United States Code). One additional change during the recodification was the removal of all references to the Defense Plant Corporation, Reconstruction Finance Corporation, War Assets Administration, and other agencies which had been established by the federal government before and during World War II to build up and manage the nation’s industrial base but were either no longer needed or no longer in existence by the time this recodification passed.

<sup>121</sup> 360 U.S. 328 (1959). As originally enacted by Congress in 1947, the Leasing Statute focused on discrete personal and real property which had been identified by the military Departments as having value in the stand-by program. Specifically, the act involved “92,000 items of machine tools... worth about \$9,000 apiece, a total of [\$828 million]” and “77 industrial plants which, at a value of [\$6 million] each, amount to... [\$462 million].” 93 CONG. REC. 10,492 (1947). By the time the United States Supreme Court decided *93.970 Acres*, the scope of the act had expanded beyond the discrete personal and real property originally identified by the military departments.

<sup>122</sup> On May 2, 1947—ironically the same year the Leasing Statute was first considered by Congress but prior to its enactment—the Secretary of the Navy authorized the lease of a naval air field to a private party after determining that the property was “essential” because of its “strategic value” and, therefore, ineligible for disposal as surplus. *United States v. 93.970 Acres of Land, More or Less, Situate in Cook Cnty., Ill.*, 258 F.2d 17, 27–28 (7th Cir. 1958). The lease also stipulated that the Navy was to retain the property for “post-war use in connection with [n]aval [a]viation activities.” *Id.* The original lease was granted for a period of five years with the option of renewing for an additional five. *Id.* at 19–20.

<sup>123</sup> In 1954, the Army expressed interest in the property and the Navy formally transferred the property to the Army. *Id.* at 27. The private party refused to vacate the property and the parties went to court. The private party was awarded damages in federal court, and the federal government appealed. On appeal, the Court of Appeals for the Seventh Circuit affirmed the decision of the lower court. *Id.* at 20–21. On appeal, the Supreme Court granted certiorari and ultimately reversed the Court of Appeals. 360 U.S. at 329.

when it desired to use the land for purposes expressly laid out in the actual lease.<sup>123</sup> Notice of revocation only required the “signatures of the Secretaries of the Army and Navy stating that a national emergency declared by the President in 1950 was still in effect and that both Secretaries deemed revocation of the lease essential.”<sup>124</sup> The Court determined that the law applicable at the time the lease was signed permitted a lease to be terminated *at any time*.<sup>125</sup> Therefore, the lease was revocable.

### 1. The Leasing Statute Affirmed by the Courts

The Supreme Court did not specifically address the applicability of the Leasing Statute in *93.970 Acres*, but it assumed that the statute applied.<sup>126</sup> The opportunity to directly test the applicability of the Leasing Statute finally arose the same year that the Supreme Court decided *93.970 Acres*. In 1950, the Department of the Army offered two government-owned warehouses for lease at a Sub-Depot of Benicia Arsenal located in Stockton, California.<sup>127</sup> The offer was for the buildings to be leased for one year that would end in June 1951.<sup>128</sup> The offer also contained a provision that any lease was “revocable at will by the Secretary of the Army.”<sup>129</sup> Maco Warehouse Company (“Maco Warehouse”) was selected as lessee and signed a lease with the Department of the Army.<sup>130</sup> Before signing the lease, Maco Warehouse stated the revocability provision “would interfere with [its] intended use of the property as a warehouse.”<sup>131</sup> Maco Warehouse was told that the provision was “required by statute...and could not be eliminated[, but . . .] there was in effect a regulation of the Department of the Army stating that *such leases would not be revoked except for military needs which were not foreseen at the time the leases were executed*.”<sup>132</sup> On June 23, 1950, Maco Warehouse signed the lease and at the end of four months, 90 percent of the available space had been rented.<sup>133</sup> On June 26, 1950, hostilities broke out in Korea, and the military suddenly had an urgent need for warehouse space in the Stockton area, given its proximity to the port of San Francisco.<sup>134</sup> That day, the Quartermaster General requested the Chief of Staff

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<sup>123</sup> In this case, the lease’s preamble contained a provision whereby the lease may be revoked if the federal government was to use the land for “aviation purposes.” *93.970 Acres*, 360 U.S. at 329.

<sup>124</sup> *Id.* at 330.

<sup>125</sup> *Id.* at 332. A separate provision expressly stated that a lease “shall be revocable by the Secretary...during a national emergency declared by the President.” *Id.*

<sup>126</sup> *Id.* at 331–32.

<sup>127</sup> *Maco Warehouse Co. Cal. v. United States*, 169 F. Supp. 494, 496 (Ct. Cl. 1959).

<sup>128</sup> *Id.* at 496.

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

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

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* (emphasis added).

<sup>133</sup> *Id.* at 496–97.

<sup>134</sup> *Id.*

to transfer jurisdiction over the Stockton Sub-Depot to another General Depot.<sup>135</sup> On August 25, the Quartermaster General formally requested the Chief of Staff to terminate the lease for military necessity.<sup>136</sup>

On September 8 and in response to this request, the Assistant Chief of Staff pointed out that the “cancellation of [Maco Warehouse’s] lease would result in strong protests by the lessees and by local civil and political organizations.”<sup>137</sup> He also asked the Quartermaster General to determine if alternatives were available to delay the use of the Stockton Sub-Depot until the lease expired in 1951.<sup>138</sup> On October 10, the Quartermaster General replied that the Sub-Depot was, in fact, needed for the war effort, so on November 1, 1950, the Department of the Army served Maco Warehouse with formal notice of revocation of the lease and gave forty-five days to vacate the warehouses.<sup>139</sup> By February 1, 1951, it had essentially vacated the space,<sup>140</sup> however, before leaving, Maco Warehouse had made improvements to the property which it claimed the federal government had requested and for which it had not been paid.<sup>141</sup> On July 5, 1955, legislation was introduced on behalf of Maco Warehouse to reimburse it for the costs associated with this lease.<sup>142</sup> On March 6, 1956, the House of Representatives referred the matter to the United States Court of Claims.<sup>143</sup>

Without addressing the monetary claims raised by Maco Warehouse which the Court of Claims considered, it is helpful to understand why the court nonetheless affirmed the Department of the Army’s action in revoking the lease as “entirely lawful.”<sup>144</sup> Maco Warehouse was the victim of “misfortune and disappointment” when hostilities erupted shortly after the lease was signed, but Army officials “used their honest judgment as to the country’s military needs for storage space” when

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

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

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 498–500.

<sup>142</sup> 101 CONG. REC. 9941 (1955).

<sup>143</sup> 102 CONG. REC. 4059–60 (1956). H. Res. 406 is printed in the Congressional Record: *Resolved*, That the bill (H.R. 7176) entitled “A bill for the relief of the Maco Warehouse Co.,” together with all accompanying papers, is hereby referred to the United States Court of Claims pursuant to sections 1492 and 2509 of title 28, United States Code; and said court shall proceed expeditiously with the same in accordance with the provisions of said sections and report to the House, at the earliest practicable date, giving such findings of fact and conclusions thereon as shall be sufficient to inform the Congress of the nature and character of the demand, as a claim legal or equitable, against the United States, and the amount, if any, legally or equitably due from the United States to the claimant. *Id.*

<sup>144</sup> Maco Warehouse Co. Cal., 169 F. Supp. at 497.

they revoked the lease.<sup>145</sup> The court stated that “[t]here was no reason why, having expressly reserved the right of revocation, the Army should seek out other storage space at inconvenient locations and at added expense. Military needs were given priority, and were legally and equitably entitled to such priority.”<sup>146</sup> Equitable relief, which Maco Warehouse sought from Congress, “is designed to protect the citizen against loss through arbitrary although lawful actions on the part of the Government.”<sup>147</sup> Not only was the Army acting lawfully, its actions were not arbitrary; therefore, the court affirmed the Leasing Statute as a lawful exercise of the military’s authority.<sup>148</sup>

In *Hingham Management Corporation v. United States*, the Court of Claims affirmed the Department of the Navy’s termination of a lease of government property during a national emergency prior to the lease’s expiration.<sup>149</sup> *Maco Warehouse* and *Hingham Management* were important because they underscored two important aspects of the Leasing Statute. First, they confirmed that leases were a lawful exercise of the military departments’ authority delegated to them by Congress.<sup>150</sup> Second, the Leasing Statute could be exercised—at least as it pertained to revocation of leases—only upon a presidential declaration of emergency.<sup>151</sup>

## 2. Broadening the Leasing Statute’s Application

Just as the law’s enactment was a general reflection of the country—namely, the mobilization of the entire country in the war effort—the first major change occurred in the context of broader changes in the United States. In 1975, the United

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<sup>145</sup> *Id.*

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

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

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

<sup>149</sup> 166 F. Supp. 615 (Ct. Cl. 1958). Although the time period involved closely follows the time in *Maco Warehouse*, the facts in this case differ dramatically. In *Hingham Management*, the Department of the Navy was sued by the plaintiff, Hingham Management Corporation (“Hingham Management”), to recover damages after the Navy terminated a lease for military property at the Naval Industrial Reserve Shipyard at Hingham, Massachusetts. *Id.* On April 3, 1950, the parties entered into a five-year lease in which the plaintiff would use warehouse space. *Id.* On December 16, 1950, the President declared the existence of a national emergency. *Id.* On October 29, 1953 and prior to the expiration of the lease, the Navy terminated the lease after it discovered that substantial government property had been removed from the warehouse without authorization. *Id.* at 616. Hingham Management challenged the Navy’s ability to terminate the lease and sought relief for early termination. *Id.* The Court of Claims denied the claim as a lawful exercise of the Navy’s rights under the lease agreement. *Id.* The court also stated: Even if we concede that the right of termination reserved by the Department of the Navy was restricted to its reasonable exercise, or that its exercise was restricted to circumstances bearing some relationship to the national emergency, *the Navy Department’s action was fully justified. The shipyard in question was considered important to the national defense. Its mobilization potential had to be maintained particularly during a period of national emergency.* *Id.* (emphasis added).

<sup>150</sup> *Maco Warehouse Co. Cal.*, 169 F. Supp. at 497.

<sup>151</sup> *Hingham Management Corp.*, 166 F. Supp. at 616.

States started to realign and close several military installations throughout the country.<sup>152</sup> This revision occurred when Congress amended the Leasing Statute by adding language “designed to overcome the prohibition contained in [the law] against the leasing of property which is ‘excess’ to one of the [m]ilitary [d]epartments.”<sup>153</sup> The Leasing Statute was amended to give the military departments the “the ability to place the excess military real property in interim productive civilian use through leasing, pending ultimate disposition by the General Services Administration.”<sup>154</sup> Putting military property to “productive civilian use” would become an important part of the Leasing Statute in the future, and Congress adopted this change on October 7, 1975.<sup>155</sup>

### 3. Eliminating the Leasing Statute’s “National Emergency” Requirement

The second major change occurred when Congress addressed the “national emergency” requirement in the Leasing Statute. This amendment also reflected the political climate in the country. Prior to 1975, one of the Leasing Statute’s key provisions required the declaration of a national emergency before the military departments could revoke leases of military property.<sup>156</sup> In 1972, Congress began examining the ways through which executive power had expanded through the exercise of emergency declarations.<sup>157</sup> By 1975, Congress identified specific sections to repeal, where powers exercised by the executive branch were invoked by the

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<sup>152</sup> *Hearings on H.R. 5210 before the Subcomm. on Military Installations & Facilities of the H. Comm. on Armed Services*, 94th Cong., 613 (1975) (statement of Evan R. Harrington, Dir., Facilities Programing (Installations & Hous.), Office of the Sec’y of Def.).

<sup>153</sup> S. REP. NO. 94-157, at 57 (1975).

<sup>154</sup> *Id.* In clarifying that “excess property” could be leased, Mr. Harrington quoted the definition of “excess property” from 40 U.S.C. § 472(e). He then explained the rationale for the department’s request in this regard:

With the large number of installation[ realignments] and closures over the past few years, positive programs have been initiated by the Department of Defense, in conjunction with other [f]ederal agencies, to assist communities and [s]tates governments affected by the [realignment] in their economic adjustment and recovery programs. Essential to the success of such an adjustment program, in many instances, is the ability to place the excess military real property in interim productive civilian use through leasing, pending ultimate disposition by the General Services Administration.

*Id.*; see also S. REP. NO. 94-157, at 57 (1975); H.R. REP. NO. 94-293, at 53–54 (1975).

<sup>155</sup> Military Constr. Authorization Act of 1976, Pub. L. No. 94-107, § 607, 89 Stat. 566 (1975).

<sup>156</sup> The relevant section stated: “A lease under subsection (a) must be revocable by the Secretary during a national emergency declared by the President.” 10 U.S.C. § 2667 (b)(4) (1970) (emphasis added).

<sup>157</sup> *National Emergencies Act: Hearings on H.R. 3884 Before the Subcomm. on Admin. Law & Gov’t Relations of the H. Comm. on the Judiciary*, 94th Cong., 20–24 (1975) (prepared statement of Sen. Charles C. McMathis).



declaration of a national emergency.<sup>158</sup> The Leasing Statute contained one of these sections.<sup>159</sup> The change was adopted in 1976.<sup>160</sup>

Even if the underlying rationale for the National Emergencies Act was to limit executive power, its effect on the Leasing Statute had the opposite effect. The deletion of the statutory requirement that a lease be revocable by the military department only during a national emergency gave “the [military] departments... the option of either including, or not including such a requirement in their leases”<sup>161</sup> at their discretion. The military departments now had increased flexibility when entering into real property leases, because they could agree to lease terms based on the specifics of particular transactions instead of rigid requirements of law. In other words, the military departments’ authority to lease their property expanded greatly.

#### D. The Leasing Statute Begins to Be Used More Frequently

Over the next several years, the Leasing Statute underwent technical amendments<sup>162</sup> and its implementation was affected by a federal circuit court case.<sup>163</sup> Taken together, these developments were important steps in the Leasing Statute’s evolution toward becoming the “modern” law that currently exists. First, in *City and County of San Francisco v. United States*, the court determined that, with the exception of analysis for abuse of discretion, “action taken pursuant to [the Leasing Statute] is committed to agency discretion and is non-reviewable.”<sup>164</sup> The next phase of its development occurred as the Leasing Statute became a tool for environmental stewardship to be used in connection with the overall maintenance of federal lands on military installations. This occurred through two amendments.

##### 1. Using the Leasing Statute for Environmental Management Purposes

The first amendment occurred when the Leasing Statute evolved from maintaining the industrial capacity of the United States to managing all military property. In 1981, the General Accounting Office issued a report to Congress outlining deficiencies in the way the Department of Defense managed federal property.<sup>165</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> See 10 U.S.C. § 2667 (b)(4) (1970).

<sup>160</sup> The Nat’l Emergencies Act, Pub. L. No. 94-412, § 501(b), 90 Stat. 1258 (1976).

<sup>161</sup> H.R. REP. NO. 94-238, at 9 (1975); see also S. REP. NO. 94-1168, at 6 (1976) (“The change allows military departments the option to decide whether to include a provision of nonexcess property revocable during a national emergency declared by the President.”).

<sup>162</sup> See The Def. Officer Personnel Mgmt. Act, Pub. L. No. 96-513, § 511(92), 94 Stat. 2928 (1980); Act of Oct. 12, 1982, Pub. L. No. 97-295, § 1(34), 96 Stat. 1296.

<sup>163</sup> 443 F. Supp. 1116 (N.D. Cal. 1977), *aff’d* City & Cnty. of San Francisco v. United States, 615 F.2d 498 (9th Cir. 1980).

<sup>164</sup> 443 F. Supp. at 1123.

<sup>165</sup> U.S. GEN. ACCOUNTING OFFICE, DO D CAN INCREASE REVENUES THROUGH BETTER USE OF NATURAL

This report expressly stated that department lands were held “in trust” for a variety of purposes.<sup>166</sup> Department of Defense land managers were responsible for managing the department’s “vast natural resources... under the multiple-use principle.”<sup>167</sup> The report identified ways in which the department’s resources were not fully utilized, and it highlighted ways that additional revenue could be generated through a variety of means.<sup>168</sup> Significantly, the report specifically identified agricultural leases as an area which provided value to the department and which, with additional planning and oversight, could provide additional value.<sup>169</sup> The report then identified “a factor which contribute[d] to the apparent lack of management emphasis on leasing.”<sup>170</sup> In contrast to the forestry and fish and wildlife programs, which were allowed to retain income derived from those programs to continue operations, “income derived from agricultural leases on military lands [could not] be used by the [military departments].”<sup>171</sup>

The report became the basis for congressional action.<sup>172</sup> As a direct result of the report’s findings, Congress amended the Leasing Statute to “authorize[] the use of rental receipts derived from agricultural and grazing leases on military lands to

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RESOURCES IT HOLDS IN TRUST (1981).

<sup>166</sup> *Id.* at i.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at i–ii.

<sup>169</sup> *Id.* at 14–18.

<sup>170</sup> *Id.* at 17.

<sup>171</sup> *Id.* at 17–18.

<sup>172</sup> The following explanation of the Department of Defense’s (“DoD”) interpretation of the General Accounting Office’s (“GAO”) report was provided to Congress:

Question: GAO found that outleasing of land suitable for agriculture was a valuable source of revenue and should be expanded. Even though DoD was outleasing over [one] million acres for a total value of at least \$12 million annually, GAO found there were opportunities for increased leasing of the [seventeen] bases visited, GAO found that additional leases totaling over \$1 million annually were possible at [six] bases. Since the bases visited represented only [seven] percent of all DoD lands, GAO assumed that much more leasing should be possible. GAO concluded that inadequate planning and lack of management emphasis prevented DoD from realizing the full potential of the agricultural leasing program. To improve the situation, GAO recommended that the services be required to: update and improve solid and water conservation plans, develop and implement a system to identify periodically all land available for leasing, and require the maximum leasing possible consistent with managing other resources and the military mission. What has been, or is being done to update and improve soil and water plans? What has DoD and the military departments done, or planned, to develop and implement a system for identifying and leasing more land for agricultural purposes? What has been achieved in the area of planning and increased land outleasing?

Answer: Installations are being tasked to update the natural resource management plans by the end of 1983. Each update is to identify the soils and water resources that offer outleasing potential for agriculture or grazing on mission essential lands. Since many of the better parcels are already being leased, we are not as

(a) finance multiple use land management programs on military installations and (b) cover administrative costs associated with such leasing.<sup>173</sup> This change permitted “lease proceeds [to be used] for administration and multiple land use management expenses [would] provide the necessary incentive to installation commanders to expand their programs.”<sup>174</sup> Not only would lands not presently leased be identified and improved, but these programs would then be “better integrated into the overall operation and management of each installation.”<sup>175</sup> It was expected that this change would generate income in excess of actual costs needed to administer the program, and the net increase in funds was to be deposited in the Treasury.<sup>176</sup> The change was adopted in 1982.<sup>177</sup>

## 2. Authorization to Keep Proceeds of Leases on Defense Department Land

The next amendment was made at the request of the executive branch. Before 1990, “rent for leases of property under the control of the Department [of Defense was required to] be deposited into the Treasury as miscellaneous receipts, except for rent received under a lease for agricultural or grazing purposes.”<sup>178</sup> The requested amendment would authorize “[o]ne half of the proceeds of [these] leases to be returned to the installation...to be used to cover the administrative costs of the

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optimistic as GAO on the outlook for increased revenue. We do agree, however, that revenues can be increased.

We are also evaluating the feasibility of operating an agricultural leasing program similar to our forestry program. Such a program would permit commanders to use outleasing revenues to defray their local costs to develop and administer land outleases. These fiscal incentives would best promote outleasing. Enabling legislation will be sought if needed. Each installation will be required to review annually their outleasing plans and program results to the [Assistant Secretary of Defense, Manpower, Reserve Affairs, & Logistics].

*To Authorize Certain Constr. at Military Installations for Fiscal Year 1983, & For Other Purposes: Hearing on H.R. 5561 before the Military Installations & Facilities Subcomm. of the H. Comm. on Armed Services, 97th Cong. 355–56 (1982) (written answers in response to questions submitted to Robert J. Lanoue, Dir. of NATO & Foreign Programs, Office of the Deputy Assistant Sec’y of Def. (Facilities, Env’t, & Econ.). Adjustment: Office of the Assistant Sec’y of Def. (Manpower, Reserve Affairs, & Logistics)).*

<sup>173</sup> S. REP. NO. 97-440, at 74 (1982).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 74–75.

<sup>176</sup> *Id.* at 75.

<sup>177</sup> Military Constr. Authorization Act, 1983, Pub. L. No. 97-321, § 803, 96 Stat. 1572 (1982).

<sup>178</sup> *Authorizing Appropriations for Fiscal Year 1991 for Military Activities of the Dep’t of Def., for Military Constr., & for Def. Activities of the Dep’t of Energy, to Prescribe Personnel Strengths for Such Fiscal Year for the Armed Forces & for Other Purposes: Part 6, Def. Industry & Tech.: Hearing on S. 2884 Before the S. Comm. on Armed Services, 101st Cong., 1337 (1990) (Appendix – Sectional analysis to S. 2440, The Defense Management Improvement Act) [hereinafter “S. 2440 sectional analysis”].*

lease, real property maintenance, or environmental restoration.”<sup>179</sup> The other half “would be deposited with the [individual military department] involved for use to meet [d]epartment-wide real property maintenance or environmental restoration requirements.”<sup>180</sup>

The amendment was to have two main effects. First, it was hoped that “installation commanders and other real property managers within a military department [would now] examine their immediate land use requirements with a view to increasing the use of leases where deemed appropriate.”<sup>181</sup> The second effect of this proposed change would be to address the increasing backlog in deferred maintenance across the military departments. Through this amendment, an installation commander who was “faced [with or found] that there [was] serious long-term deferral of maintenance that [was] routine [would be given] the opportunity...[to] receive the proceeds from the [lease].”<sup>182</sup> The only real objections to this proposal were that it gave authority to the Department of Defense and not to other agencies, and that it incentivized behavior that was already required.<sup>183</sup> These objections did not prevail, and the measure was adopted November 5, 1990.<sup>184</sup>

Two additional amendments to the Leasing Statute were made over the next two years. Both amendments were relatively minor—the first was a technical amendment<sup>185</sup> and the second clarified that military property had to be leased at fair market value<sup>186</sup>—but they presaged a significant change of which the Leasing Statute was a small part but which would affect the Leasing Statute’s use for several years.

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<sup>179</sup> S. REP. NO. 101-884, at 297 (1990).

<sup>180</sup> *Id.*

<sup>181</sup> S. 2440 sectional analysis, *supra*, note 178, at 1337.

<sup>182</sup> 136 CONG. REC. 22,741 (1990) (statement of Sen. Pete Wilson). Senator Wilson also spoke about the potential to realize a benefit from the *sale* of military property as well. *See* 136 CONG. REC. 22,741 (1990) (statement of Sen. Alan J. Dixon).

<sup>183</sup> 136 CONG. REC. 22,740 (1990) (statement of Sen. John Glenn).

<sup>184</sup> Nat’l Def. Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2806, 104 Stat. 1787 (1990).

<sup>185</sup> *See* Nat’l Def. Authorization Act for Fiscal Years 1992 & 1993, Pub. L. No. 102-190, § 2862, 105 Stat. 1559 (1991).

<sup>186</sup> *See* Nat’l Def. Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 2851, 106 Stat. 2625 (1992). This amendment was made after the Congress became aware that the Department of Defense was leasing military property to private companies that were subsequently used for display. *See* 138 CONG. REC. 25,891 (1992) (statement of Sen. Joseph R. Biden, Jr.). It had been the practice of the Department of Defense to require private companies to lease military property for display at trade shows and expositions where the Department “wasn’t already planning to send that plane or weapons system.” *Id.* However, the Department implemented a policy called “enhanced participation” where the Defense Department sent its military property anyway and the private parties did not lease them from the federal government. *Id.* Adopting this amendment would indemnify the taxpayers if the military property on display was damaged or destroyed in transit to or from the show. *Id.*

## E. The Leasing Statute's Use Expands through the BRAC Process

In the early 1980s, “broad consensus [existed] that, among the approximately 3,800 military bases... in the United States, many could be closed without significant detrimental effect to national security.”<sup>187</sup> Base closures had occurred prior to this period, but they had generally been regarded as an executive branch function and were conducted with little input from the Congress. In 1977, statutory authority for closing obsolete and excess military installations was granted,<sup>188</sup> but the statute imposed onerous procedural requirements for the Department of Defense to follow before proceeding.<sup>189</sup> Closure or realignment of military installations could cause acute hardship in the affected communities while the benefits would be broadly diffused among citizens and taxpayers,<sup>190</sup> so members of Congress formed coalitions to protect threatened installations through the legislative process.<sup>191</sup> In addition, “Congress mandated that the Department of Defense... comply with the requirements of the National Environmental Policy Act... before closings could occur. This requirement made the base closure process far more complex, and each case required a year or more to conclude.”<sup>192</sup> As practical effect of these requirements, virtually no major military installations closed over the next decade.<sup>193</sup>

### 1. Military Base Closure and Consolidation

On May 3, 1988, the Secretary of Defense “chartered the Defense Secretary’s Commission on Base Realignment and Closure.”<sup>194</sup> On December 29, 1988, the “Carlucci Commission” (named after then-Secretary of Defense Frank C. Carlucci who appointed the panel) issued its report and recommended closure and

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<sup>187</sup> DAVID E. LOCKWOOD & GEORGE SIEHL, CONG. RESEARCH SERV., 97-305F, *MILITARY BASE CLOSURES: A HISTORICAL REVIEW FROM 1988 TO 1995* 1 (2004).

<sup>188</sup> Military Constr. Act, 1978, Pub. L. No. 95-82, § 612, 91 Stat. 379 (1977).

<sup>189</sup> LOCKWOOD & SIEHL, *supra* note 187, at 1. One of the purposes of the 1977 statute was to “provide a safeguard against arbitrary [installation] closure.” *Id.* To avoid this possibility, the statute “required the Secretary of Defense to submit a request for closure or realignment as part of the annual appropriations request; the request was to be accompanied by evaluations of the *fiscal, local economic, budgetary, environmental, strategic, and operational consequences of closure or realignment.*” *Id.* at 2 (emphasis added).

<sup>190</sup> *See id.* at 1.

<sup>191</sup> *Id.*

<sup>192</sup> Forrest L. Marion, *Retrenchment, Consolidation, and Stabilization, 1961–1987*, in *LOCATING AIR FORCE BASE SITES: HISTORY’S LEGACY* 101, 101 (Frederick J. Shaw ed., 2014).

<sup>193</sup> LOCKWOOD & SIEHL, *supra* note 186, at 1.

<sup>194</sup> Jeffrey P. Sahaida, *Reorganization after the Cold War, 1988–2013*, in *LOCATING AIR FORCE BASE SITES: HISTORY’S LEGACY* 151, 156 (Frederick J. Shaw ed., 2014). In 1988, the process began with the selection of twelve volunteer commissioners by the Secretary of Defense. Commission members conducted research to determine which installations should be closed or realigned on the basis of criteria issued in the Defense Secretary’s charter... Military value was the dominant factor. The panel stated that its ability to close bases relied on the information it received from the individual services. *Id.*

realignment of 145 military installations.<sup>195</sup> On October 24, 1988 and in the middle of this bureaucratic and legislative maneuvering, Congress passed the Defense Authorization Amendments and Base Closure and Realignment Act of 1988.<sup>196</sup> This act authorized the Secretary of Defense to establish a commission comprised of twelve individuals<sup>197</sup> that would recommend military installations for closure or realignment.<sup>198</sup> The recommendations would then be transmitted to Congress, and Congress would act on the recommendations.<sup>199</sup> In contrast to previous closure and realignment efforts, “Congress could accept or reject the entire list of actions, but [it] could not make changes to the commission’s list of recommended actions.”<sup>200</sup> Nowhere near that amount actually closed, but this marked the beginning of a dramatic transformation that affected virtually every aspect of the armed forces, including use of the Leasing Statute.<sup>201</sup>

In 1989, the Berlin Wall fell and the Communist governments in Eastern Europe were overthrown. Suddenly, the United States had excess military capacity in the form of both real and personal property. In fact, the process to dispose of surplus military property had already begun. On August 2, 1990, the President of the United States announced a “new defense strategy, which shifted focus from Cold War deterrence to regional threats.”<sup>202</sup> This new defense strategy facilitated “a [twenty-five] percent reduction in force structure and personnel.”<sup>203</sup> At approximately the same time, Congress enacted the Base Realignment and Closure Act of 1990,<sup>204</sup> which authorized three additional rounds of base closure and realignment, and which “provide[d] the basic framework for the transfer and disposal of military

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<sup>195</sup> LOCKWOOD & SIEHL, *supra* note 187, at 4.

<sup>196</sup> Pub. L. No. 100-526; 102 Stat. 2627 (enacted as 10 U.S.C. § 2687 (1988)).

<sup>197</sup> Pub. L. No. 100-526, § 203, 102 Stat. 2627 (1988).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> GEORGE H. SIEHL & EDWARD KNIGHT, CONG. RESEARCH SERV., 96-562 F, MILITARY BASE CLOSURES SINCE 1988: STATUS AND EMPLOYMENT CHANGES AT THE COMMUNITY AND STATE LEVEL 2 (1997).

<sup>201</sup> The most significant change that resulted from this initial round of base realignment and closure recommendations was the establishment of a commission to make recommendations and the requirement that the Congress either accept or reject the report *in toto*—that is, the law prohibited individual amendments to the list that precluded the legislative maneuvering that thwarted previous efforts to close bases. See LOCKWOOD & SIEHL, *supra* note 186, at 1. These features were included in the realignment and closure commissions established under the Defense Base Realignment and Closure Act of 1990. See Pub. L. No. 101-150, §§ 2903(e), 2908, 104 Stat. 1485, 1812, 1813.

<sup>202</sup> Sahaida, *supra* note 194, at 156.

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

<sup>204</sup> See Nat’l Def. Authorization Act for Fiscal Year 1991, Pub. L. No. 100-510, § 2901, 104 Stat. 1808 (1990).

installations closed during the base realignment and closure . . . process.<sup>205</sup> In April 1991, the first realignment and closure recommendation was made.<sup>206</sup>

## 2. The Leasing Statute Becomes a BRAC Tool

The full force of the realignment and closure process did not take effect immediately, but once its effects started to be felt, the Leasing Statute became a significant tool in the process. When the first amendment to the Leasing Statute in connection with this process occurred in 1993, two realignment and closure rounds had occurred, and the impact on affected communities was just beginning.<sup>207</sup> This amendment made three significant changes. First, it authorized the leasing of real or personal property on a military base subject to closure “pending final disposition” of the property if the Secretary “determine[d] that such a lease would facilitate [s]tate or local economic adjustment effort.”<sup>208</sup> Second, it authorized the military secretary to “accept consideration in an amount that is less than the fair market value of the lease interest” if either “a public interest [would] be served as a result of the lease,” or if “the fair market value of the lease is [] unobtainable, or [] not compatible with such public benefit.”<sup>209</sup> Third, it directed the military department to consult with the Environmental Protection Agency “to determine whether the environmental condition of the property proposed for leasing is such that the lease of the property is advisable.”<sup>210</sup>

The reasons for these amendments were clear and are best explained by examples. In Myrtle Beach, South Carolina, the Department of Defense announced its intent to close Myrtle Beach Air Force Base and transfer the land to new owners.<sup>211</sup>

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<sup>205</sup> AARON M. FLYNN, CONG. RESEARCH SERV., RS22066, BASE REALIGNMENT AND CLOSURE (BRAC): PROPERTY TRANSFER AND DISPOSAL I (2005).

<sup>206</sup> See DEP’T OF DEF., BASE CLOSURE AND REALIGNMENT REPORT (1991); DEFENSE BASE CLOSURE AND REALIGNMENT COMM’N, REPORT TO THE PRESIDENT (1991). Considerable work has been made on the BRAC process, and the nature and specifics of the entire BRAC process are beyond the scope of this work. However, the process can be summarized in a few steps. First, the Secretary of Defense made the initial recommendation of bases to be closed or realigned. This recommendation was then transmitted to the commission. The commission completed its own review. The committee’s recommendations were then forwarded to the President for his review and approval. The President either accepted or rejected the recommendations in their entirety. He then forwarded the list to the Congress who accepted or rejected the list. See LOCKWOOD & SIEHL, *supra* note 187, at 5–6.

<sup>207</sup> See DEP’T OF DEF., BASE CLOSURE AND REALIGNMENT REPORT (1991); DEF. BASE CLOSURE & REALIGNMENT COMM’N, REPORT TO THE PRESIDENT (1991); DEP’T OF DEF., BASE CLOSURE AND REALIGNMENT REPORT (1993); DEF. BASE CLOSURE & REALIGNMENT COMM’N, 1993 REPORT TO THE PRESIDENT (1993).

<sup>208</sup> Nat’l Def. Authorization Act for Fiscal Year 1994, H.R. 2401, 101st Cong. § 2906(a) (1993).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Def. Conversion Programs in the President’s Fiscal Year 1994 Budget Proposal: Hearing Before the Subcomm. on Econ. Growth & Credit Formation of the H. Comm. on Banking, Finance & Urban Affairs*, 103d Cong. 60 (1993) (statement of John Maxwell, Councilmember, Myrtle Beach, S.C., on behalf of the Nat’l League of Cities).

Among other facilities at the base was a golf course. Local officials expressed interest in acquiring the golf course, because as a resort community, golf was something the community “did well.”<sup>212</sup> However, the law made a transfer very difficult. As a result, the golf course was unused, notwithstanding that even a temporary lease could have put it to beneficial use.<sup>213</sup>

With regard to fair market value, the existing law required that fair market value be used when proceeding with a transaction involving Department of Defense property. However, this approach was problematic when dealing with installations targeted for closure. For one thing, uncertainty surrounding such properties increased the risk of investment to the point that private credit could not be secured.<sup>214</sup> This concern was also echoed by the executive branch.<sup>215</sup> Finally, it was necessary to understand the nature and extent of any environmental contamination that had occurred, because “[u]nder the Comprehensive Environmental Response, Compensation, and Liability Act..., the [federal] government could not transfer land outside federal ownership until it agreed that all remedial action necessary to protect human health and the environment had been taken.”<sup>216</sup> This amendment ensured that military property subject to closure could be put to productive use before a transfer actually occurred.<sup>217</sup> It also provided flexibility to the military departments to begin the transfer process in a way that did not burden the affected communities.<sup>218</sup>

Toward the end of the legislative process for this amendment, Congress commented on the competing interests involved in realignment and closure process:

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Def. Conversion Programs in the President's Fiscal Year 1994 Budget Proposal: Hearing Before the Subcomm. on Economic Growth & Credit Formation of the H. Comm. on Banking, Finance & Urban Affairs*, 103d Cong. 225–26 (1933) (prepared, written statement of the Nat'l Ass'n of Installation Developers) [hereinafter “Statement of the Installation Developers”].

<sup>215</sup> *Hearings on Nat'l Def. Authorization Act for Fiscal Year 1994—H.R. 2401 & Oversight of Previously Authorized Programs Before the Military Installations & Facilities Subcomm. of the H. Comm. on Armed Services*, 103d Cong. 635–36 (1993) (written questions by the Subcommittee and responses from Sherri W. Goodman, Deputy Under Sec'y of Def. (Envtl. Sec.)) [hereinafter “Sec'y Goodman written responses to Subcommittee questions”].

<sup>216</sup> LOCKWOOD & SIEHL, *supra* note 187, at 10.

<sup>217</sup> It was not uncommon for the quick reuse by new owners and cleanup of contamination to lead to disputes about how property could be used. Lockwood and Siehl note: “Since the communities adjoining bases programmed for closure generally wish to obtain the land quickly, while the decontamination process found necessary to restore the environment could be time-consuming, serious conflicts between the interests of economic development and the interests of environmental restoration could occur.” *Id.* Leases of such property could facilitate the reuse more quickly.

<sup>218</sup> The Senate Report of this legislation stated: “In many instances, leasing all or portions of a closing base, as soon as parcels are no longer needed for defense purposes, would be the fastest way to begin economic redevelopment. Leasing will also be necessary where environmental restoration activities will not permit immediate transfer of title.” S. REP. NO. 103-112, at 224 (1993).



One interest is the remediation of the contamination on an expedited basis and reducing or eliminating any health hazards associated with the contamination so the property can be transferred from federal control. Another interest is the community's desire to generate new jobs, often using facilities located on environmentally contaminated parcels of land.<sup>219</sup>

One purpose of this change was to ameliorate the potential loss of jobs associated with the closing or realigning military facility by allowing property to be conveyed free or at a discount for economic development.<sup>220</sup> Another purpose of this change was to give new property owners the ability to begin putting the property to beneficial use while also preserving the military department's ability to clean up contaminated parcels of land. Under the applicable environmental laws, a new property owner who acquired former military property without proper remediation could be liable for a potentially substantial cleanup.<sup>221</sup> Under the existing law, short-term leases which were authorized presented an obstacle to entities seeking financing from capital markets to reuse the property.<sup>222</sup> Leases were part of that process because they could encourage and facilitate reinvestment on these properties where cleanup was not yet complete. But if the property was leased and "[i]f the lease [was] too short, redevelopment prospects would be discouraged from making the necessary capital investment.... The leases should be for the length of time necessary to foster

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<sup>219</sup> H.R. REP. NO. 103-357, at 807 (1993) (Conf. Rep.).

<sup>220</sup> In response to a question about legislative obstacles that were preventing expedited transfer of land at closed military installations, Sherri W. Goodman stated: "As an incentive for economic reinvestment, the [Department of Defense] will delay or forego receipt of cash from certain real estate transactions and will allow all or portions of lease or sale proceeds to be kept by the new owner or property manager." Sec'y Goodman written responses to Subcommittee questions, *supra* note 215, at 635-36.

<sup>221</sup> See Wayne Glass, *Strategies for Controlling Future Cleanup Costs*, in CONG. BUDGET OFFICE, CLEANING UP DEFENSE INSTALLATIONS: ISSUES AND OPTIONS, 32 (Jan. 1995) (internal citations omitted). "The Comprehensive Environmental Response, Compensation, and Liability Act requires that [the Department of Defense] clean up its property before it can sell or transfer the title to private purchasers or buyers other than federal agencies." *Id.*

<sup>222</sup> Commenting on the connection between short-term leases and difficulty reusing military property, one industry representative stated: Only a few major base properties have been transferred pursuant to the 1988 and 1991 base closure laws. *Interim leases have been approved instead of transfers, and these have been limited to [one] year. This has been a major obstacle to local reuse planning and development.* It is difficult for communities to recruit private businesses to locate on a base when the local governing entity can only offer a [one]-year lease. *Policy Matters Concerning the Dep't of Def. Facility Infrastructure; The Fiscal 1994 Military Constr. Budget Request; The Implementation of Military Base Closures: Dep't of Def. Authorization for Appropriations for Fiscal Year 1994 & the Future Years Def. Programs: Hearing on S. 1298 before the Subcomm. on Military Readiness & Def. Infrastructure of the S. Comm. on Armed Services*, 103d Cong. 182 (1993) (statement of Larry E. Naake, Exec. Dir., Nat'l Ass'n of Cntys).

redevelopment but not so long as to discourage the cleanup of the property as expeditiously as possible.”<sup>223</sup> This amendment was enacted November 20, 1993.<sup>224</sup>

### 3. Further Refinements of the Leasing Statute to Allow “In-kind” Payments

The next amendment to the Leasing Statute occurred in 1996. By this time, three rounds of base realignment and closure had occurred, and the full impacts of these changes were now being felt on the affected communities. This amendment was made at the request of the executive branch,<sup>225</sup> after the scope of the environmental issues on military bases that were designated for closure became apparent.<sup>226</sup>

The amendment had two principal purposes. As previously mentioned, some of the environmental effects were now being experienced as excess military installations scheduled for closure were in need of remediation. The first purpose was to allow the secretaries involved “to accept in-kind services...from a lessee in lieu of cash rental payments for leases of property.”<sup>227</sup> “In-kind services” constituted “improvements, maintenance, protection, repair, or restoration services performed on any portion of the installation.”<sup>228</sup> In addition, the National Environmental Policy

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<sup>223</sup> S. REP. NO. 103-112, at 224 (1993).

<sup>224</sup> Nat’l Def. Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2906, 107 Stat. 1920 (1993).

<sup>225</sup> In response to congressional inquiry as to the changes that were needed to make execution of the Department of Defense’s environmental mission easier and more cost effective, the department responded: There are several provisions that need modification in order to facilitate base closures. The [military construction] bill recently forwarded to the House Committee on National Security contained these...provisions which would...*ensure the continued ability of [the Department of Defense] to lease closing property...[and would] transfer property ownership before remedial actions are complete while assuring cleanup will be completed....Hearings on Nat’l Def. Authorization Act for Fiscal Year 1996—H.R. 1530 & Oversight of Previously Authorized Programs Before the H. Comm. on National Security*, 104th Cong. 1030, 131 (1995) (written questions from Rep. Herbert H. Bateman and responses from Sherri W. Goodman, Deputy Under Sec’y of Def. (Envtl. Sec.)).

<sup>226</sup> In response to how the environmental impacts were affecting the closure and realignment process, the executive branch stated:

<sup>Ms</sup> GOODMAN: ...Let me describe the circumstance. When we have contaminated property, we do a certain amount of work to understand the environmental condition. *Then, we can lease the property. We cannot sell it before the cleanup remedy is in place, but we can lease it earlier...We enter into leases.* Now, we have been challenged about the ability to even use leases as a vehicle for reuse. *One of the proposals that we have before you this year is a clarification of the law that enables us to lease today* or a confirmation, in effect, that leases, even long-term leases are available. These are needed by developers and others to get financing, because sometimes more than a 5-year lease is required to receive financing to come in and reuse the property. *Dep’t of Def. Authorization for Appropriations for Fiscal Year 1996 & the Future Years Def. Programs: Hearing on S. 1026 Before the S. Comm. on Armed Services*, 104th Cong. 182 (1995) (statement of Sherri W. Goodman, Deputy Under Sec’y of Def. (Envtl. Sec.)) (emphasis added).

<sup>227</sup> H.R. REP. NO. 104-450, at 904–05 (1996) (Conf. Rep.).

<sup>228</sup> *Id.*

Act's requirements were eased as they pertained to these military installations that were closing. Congress noted

that under current law[,] the Department of Defense [had] been reluctant to enter into limited term leases before an environmental review [had] been completed, pursuant to the National Environmental Policy Act. . . that would address the disposal of the entire installation. Such concerns...impeded private sector use of base closure property for short term capital investments.<sup>229</sup>

Congress's second purpose was to clarify and confirm that it actually intended the Department of Defense to enter into long-term leases while the realignment and closure process was happening.<sup>230</sup> The ability to enter into long-term leases had been challenged in 1991 in New Hampshire when the government tried to close Pease Air Force Base.<sup>231</sup> The plaintiffs in this case asserted the Department of Defense was trying to transfer parcels via long-term lease as opposed to a transfer by deed.<sup>232</sup> The district court accepted the plaintiffs' position and held that the proposed transfer by lease violated the Comprehensive Environmental Response, Compensation, and Liability Act and was a violation of law.<sup>233</sup> After this decision was appealed but before the opinion was announced, Congress amended the Leasing Statute to permit a military department to enter into long-term leases of the sort entered into at Pease Air Force Base.<sup>234</sup> On appeal, the First Circuit Court of Appeals acknowledged this fact and reversed the district court's decision.<sup>235</sup>

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<sup>229</sup> H.R. REP. NO. 104-450, at 904-05 (1996) (Conf. Rep.).

<sup>230</sup> See *Hearing on S. 1026 Before the S. Comm. on Armed Services*, 104th Cong. 346-47 (May 11, 1995) (advance questions from Sen. John McCain & responses by Sherri W. Goodman, Deputy Under Sec'y of Def. (Env'tl. Sec.)).

<sup>231</sup> *Conservation Law Found., Inc. v. Dep't of the Air Force*, 864 F. Supp. 265 (D.N.H. 1994). The plaintiffs challenged the Air Force on several bases, of which the department's long-term leases were only a part. As part of the closure process, the Air Force prepared an environmental impact statement which evaluated several of proposals for the development and reuse of the base. *Id.* at 270. Leasing part of the property was included in the Air Force's proposals. The Air Force's actions were challenged on several grounds, but the reason that this case was important in the context of the Leasing Statute was that it involved a military department trying to execute long-term leases of real property at Pease Air Force Base which was being cleaned up under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *Id.* at 271. Under section 120(h) of CERCLA, all deeds of transfer had to contain a covenant warranting that all remedial action has been taken prior to transfer. *Id.*

<sup>232</sup> *Id.* at 291.

<sup>233</sup> *Id.*

<sup>234</sup> Nat'l Def. Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2833, 110 Stat. 559.

<sup>235</sup> *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1272 (1st Cir. 1996). Senator Bob Smith of New Hampshire commented that there was a connection between these cases and the change to the Leasing Statute. See 141 CONG. REC. 22,373 (1995). Although the statement dealt with changes to the Comprehensive Environmental Response, Compensation, and Liability Act and not the leasing statute specifically, he said that [t]he language...was intended...to provide that the Department of Defense may enter into long-term or other leases while any phase of cleanup

## F. Stricter Congressional Oversight of Federal Property

In 1998, although there were no new substantive amendments to the Leasing Statute, Congress increased its oversight of Department of Defense leases. After a flurry of base realignments and closures, the Department determined that excess capacity still existed within the military and additional rounds were needed.<sup>236</sup> In response to this request, the Senate directed the executive branch to conduct an analysis of the Leasing Statute program.<sup>237</sup> While acknowledging the fact that excess capacity may exist, this shrewd maneuver essentially put a break on the base closures.<sup>238</sup> While the Department of Defense conducted this analysis, the Leasing Statute would still permit the Department to “put the excess capacity to beneficial use... while providing some revenue and savings to the Department and the military installations.”<sup>239</sup> This maneuver had an additional benefit: “[S]ince the property would be under a long-term lease, the [military departments] would have it available for future expansion or surge capacity.”<sup>240</sup> In other words, the same benefit used to justify the Leasing Statute in the first place would continue to exist. The measure was adopted and a study of military leases was conducted.

### 1. Federal Real Property as an Asset to Be Leveraged for the Country’s Benefit

This collateral analysis of the Leasing Statute mandated by Congress in 1998 was not a direct amendment to the Statute itself, but the Department of Defense utilized this study during the next round of amendments, and the study represented a further evolution of the Leasing Act itself. Whereas the previous amendments kept Leasing Act changes within the relatively narrow areas of industrial production or environmental management, this series of amendments marked the point where military real property was viewed as an *asset* rather than a liability.<sup>241</sup>

Unfunded military construction and operation and maintenance requirements have been a constant struggle with the Department of Defense. During its

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is ongoing. The amendment... clarifies... that not only are existing leases appropriate, but future leases may be entered into after consultation between the [Environmental Protection Agency] and [the Department of Defense]... The amendment will not only eliminate a significant obstacle to the expedited redevelopment of these bases, but it will give the Department of Defense more flexibility and creativity in placing these facilities back into productive use. *Id.*

<sup>236</sup> DEP’T OF DEF., THE REPORT OF THE DEPARTMENT OF DEFENSE ON BASE REALIGNMENT AND CLOSURE, 17 (1998). As a result of this excess capacity, the Department recommended additional commissions in 2001 and 2005. *See id.* app. G, at 123–28.

<sup>237</sup> 144 CONG. REC. 13,856-57 (1998) (statement of Sen. Strom Thurmond).

<sup>238</sup> *Id.*

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

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

<sup>241</sup> *See Hearings on Nat’l Def. Authorization Act for Fiscal Year 2001—H.R. 4205 & Oversight of Previously Authorized Programs: Before the Subcomm. on Military Installations & Facilities of the H. Comm. on Armed Services*, 106th Cong. 259–60 (2000) (statement of Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)).

review of military property, the Department determined that better utilization of its assets was one way to address funding shortfalls while also improving facilities and preserving historically significant structures.<sup>242</sup> It identified non-excess property and surplus capacity available for lease, and assessed the pros and cons associated such efforts.<sup>243</sup> The Department of Defense stated that the Leasing Statute provided it with the ability “to put a modest amount of its non-excess, but otherwise not fully utilized property, to productive use by allowing non-federal entities...to use it.”<sup>244</sup> The Leasing Statute permitted the proceeds from these leases to supplement underfunded maintenance, repair services, and environmental restoration accounts.<sup>245</sup> In sum, the Department determined that “the ability to lease non-excess but not fully utilized property under [the Leasing Statute was] beneficial to the Department and [was] in the public interest.”<sup>246</sup>

## 2. Leasing Statute Changes Allow Better Utilization of Federal Property

Even though the Leasing Statute could be used to benefit the Department of Defense and the public, it also had limitations which the Department felt prevented even greater utilization and more effective use of its property.<sup>247</sup> With this in mind, the Department requested “modest adjustments” to the Leasing Statute which, if adopted, would “incentive[ize . . .] installations commanders to reward best business practices,”<sup>248</sup> and which could “realize, on average, a tenfold increase in cash and in-kind services within five years.”<sup>249</sup>

The first proposed change to the Leasing Statute would give the Department of Defense “authority to indemnify lessees of real property against liability if contamination is discovered on leased property that was a result of military activi-

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<sup>242</sup> *Dep’t of Def. Authorization for Appropriations for Fiscal Year 2001 & the Future Years Def. Programs: Hearing on S. 2549 Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services*, 106th Cong. 148 (2000) (prepared statement of Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)) [hereinafter “statement of Sec’y Yim”].

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* “Non-federal entities” were state and local governments and private sector firms. *See id.*

<sup>245</sup> *Id.*

<sup>246</sup> Letter from Douglas A. Dworkin, Acting Gen. Counsel, Dep’t of Def., to the Honorable J. Dennis Hastert, Speaker of the House of Representatives, and the Honorable Al Gore, President of the Senate (Feb. 22, 2000), available at <http://www.dod.mil/dodgc/olc/docs/February29.pdf> [hereinafter “2000 Dworkin letter”].

<sup>247</sup> *Id.*

<sup>248</sup> *Hearings on Nat’l Def. Authorization Act for Fiscal Year 2001—H.R. 4205 & Oversight of Previously Authorized Programs: Before the Subcomm. on Military Installations & Facilities of the H. Comm. on Armed Services*, 106th Cong. 259–60 (2000) (statement of Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)).

<sup>249</sup> *Hearings on Nat’l Def. Authorization Act for Fiscal Year 2001—H.R. 4205 & Oversight of Previously Authorized Programs: Before the Subcomm. on Military Installations & Facilities of the H. Comm. on Armed Services*, 106th Cong. 341–60 (2000) (prepared statement of Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)).

ties prior to the lease period.”<sup>250</sup> The second proposed change clarified that in-kind consideration, rather than cash payment associated with leases of military property, was authorized and explained what forms such “in-kind consideration” could take.<sup>251</sup> The third proposed change would permit the Department to apply cash proceeds from leases “to facility[-]related requirements without additional appropriation.”<sup>252</sup> The final proposed change would allow construction from the lease proceeds.<sup>253</sup>

Only the third and fourth proposed changes triggered a response from Congress. In response to a concern that passage of these amendments would allow construction of facilities without congressional oversight and authorization, the Department stated that the proposed amendments were an attempt “to keep [lease] revenue down at the installation level [to] give an incentive to [the] installation commanders to reward best business practices.”<sup>254</sup> In addition, the Department clarified that construction that would occur under this proposed amendment “could further reduce installation support costs by providing cash or in-kind consideration to renovate and repair facilities.”<sup>255</sup> Congress appeared satisfied with these explanations, and the Leasing Statute amendments were adopted in 2000.<sup>256</sup> The next series of amendments to the Leasing Statute were minor, noncontroversial changes that did not materially affect the overall law. Specifically, in 2001, the Statute was amended to permit the leasing of federally-owned ships to university researchers for use in support of federally-supported and selected non-federal research programs.<sup>257</sup>

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<sup>250</sup> Statement of Sec’y Yim, *supra* note 242, at 148.

<sup>251</sup> 2000 Dworkin letter, *supra* note 246. In its analysis of the proposed amendment, the Department of Defense stated: The amendment would clarify that in-kind consideration may be applied at any military installation and that it may take the following forms: maintenance, protection, alteration, repair, improvement, or restoration of any property; construction of new facilities for the military departments; provision of facilities for use by the military departments; base operating support services; and other services related to the activity that will occur on the leased property. *Id.* With a few minor alterations, this language was adopted in statute in substantially the same form as proposed. *See* Act of Oct. 20, 2000, Pub. L. No. 106-398-App., § 2812(b)(3)(c)(1), 114 Stat. 1654A-416.

<sup>252</sup> 2000 Dworkin letter, *supra* note 246.

<sup>253</sup> *Id.*

<sup>254</sup> *Hearings on Nat’l Def. Authorization Act for Fiscal Year 2001—H.R. 4205 & Oversight of Previously Authorized Programs: Before the Subcomm. on Military Installations & Facilities of the H. Comm. on Armed Services*, 106th Cong. 259–60 (2000) (statement of Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)).

<sup>255</sup> *Dep’t of Def. Authorization for Appropriations for Fiscal Year 2001 & the Future Years Def. Programs: Hearing on S. 2549 Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services*, 106th Cong. 260 (2000) (advance questions from Sen. Charles S. Robb and responses by Randall A. Yim, Deputy Under Sec’y of Def. (Installations & Env’t)).

<sup>256</sup> Act of Oct. 20, 2000, Pub. L. No. 106-398-App., §§ 2812(a)–(e), 114 Stat. 1654A-416 to 1654A-418.

<sup>257</sup> Nat’l Def. Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1013, 115 Stat. 1212 (2001).

### 3. Further Congressional Scrutiny of Newly-Granted Authority to the Military

Following the 2000 and 2001 amendments, the General Accounting Office investigated whether the changes to the Leasing Statute had resulted in increased utilization of leases by the Department of Defense and whether any other factors limited the Department from utilizing its new authority.<sup>258</sup> The investigation determined that the military departments had continued to enter into traditional leases, but they had “made limited efforts to use the expanded lease authority enacted by Congress.”<sup>259</sup> The resulting report acknowledged that “[t]he services... identified a number of factors that have limited the use of the expanded leasing authority and that could adversely affect the program in the future.”<sup>260</sup> The report specifically addressed the factors that could limit expanded use of the lease authority and acknowledged the difficulties these factors could pose to the military departments, but it also provided several recommendations that addressed these concerns.<sup>261</sup> The Department of Defense partially concurred with one recommendation and concurred with another,<sup>262</sup> but no further congressional action was immediately taken following this report.

In 2002, the Statute was amended twice, but these amendments were not related to the General Accounting Office’s report. The first amendment was a technical change to make sure the Statute cited the correct sections in other parts of federal law.<sup>263</sup> The second amendment was part of a broader request from the Department of Defense to limit the number of obsolete or superseded reports which it was required

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<sup>258</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-02-475, DEFENSE INFRASTRUCTURE: GREATER MANAGEMENT EMPHASIS NEEDED TO INCREASE SERVICES’ USE OF EXPANDED LEASE AUTHORITY 4 (2002).

<sup>259</sup> *Id.* At the time of this report, the Department of the Army had signed one lease for 50 years with a developer who would restore and sublease several buildings at Fort Sam Houston in San Antonio, Texas. *Id.* at 6. It had also signed a 33-year lease with the University of Missouri to develop and sublease a 62-acre technology park at Fort Leonard Wood, Missouri. *Id.* Neither the Department of the Navy nor the Department of the Air Force had successfully completed any leases under the expanded grant of authority. *Id.*

<sup>260</sup> *Id.* at 7. At the time of this report, the 2005 round of base realignments and closures was still planned, but it was later canceled. This was one of the factors which the military departments identified as factors which limited their ability to use their expanded lease authority. *See id.* Other factors included “force protection issues resulting from the events of September 11[, 2001,...] mission compatibility, budget implications, legal requirements, and resource availability.” *Id.* One concern is worth particular mention. The GAO noted the following department concerns: [F]inding projects [related to expanded leasing] that are mission related could be difficult. [One military department] has turned down proposals to lease and develop naval property because the leases would have conflicted with [its] mission. According to [an] official, the [military department] is concerned that the more involved it becomes with a community through leasing projects, the less flexibility and control it has over its installation. *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Letter from Raymond F. Dubois, Jr. to Barry W. Holman (May 28, 2002), in U.S. GEN. ACCOUNTING OFFICE, *supra* note 258, app. 4, at 20–21.

<sup>263</sup> Act of Aug. 21, 2002, Pub. L. No. 107-217, § 3(b)(12), 116 Stat. 1296.

to submit under statute.<sup>264</sup> In 2003, the Leasing Statute was amended to streamline it to conform to other sections of federal law.<sup>265</sup>

#### 4. Efficiency in Government Initiative Leads to Leasing Statute Changes

The next significant changes to the Leasing Statute occurred as a result of two Executive Orders signed by the President of the United States to promote efficient and economical use of federal resources. Before the first Executive Order was signed, the Department of Defense emphasized efforts to “reduc[e its] footprint and better utiliz[e] existing facilities.”<sup>266</sup> Enhanced use leases was one of the specific programs which the Department identified in this effort.<sup>267</sup> In 2004, the President of the United States issued an Executive Order that “promote[d] the efficient and economical use of federal real property resources in accordance with their value as national assets and in the best interests of the Nation.”<sup>268</sup> The President directed that “executive branch departments and agencies... recognize the importance of real property resources through increased management attention, the establishment of

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<sup>264</sup> Bob Stump Nat’l Def. Authorization Act for Fiscal Year 2003, Pub. L. 107-314, § 1041(a) (18), 116 Stat. 2645 (2002). The Department’s initial request was that Congress adopt a policy to “reduce the administrative burden placed on the Department of Defense by requirements for reports, studies, and notifications to be submitted to Congress through the elimination of outdated, redundant, or otherwise unnecessary reporting requirements.” Letter from William J. Haynes II, Gen. Counsel, Dep’t of Def., to the Honorable J. Dennis Hastert, Speaker of the House of Representatives, and the Honorable Richard B. Cheney, President of the Senate (Aug. 16, 2001), available at <http://www.dod.mil/dodgc/olc/docs/August16-Reports.pdf>. While sympathetic to this request, Congress did not appear to want to lose all oversight and agreed to repeal or modify twenty-two reports which the Department of Defense was required to submit. See H.R. REP. NO. 107-772, at 691 (2002) (Conf. Rep.).

<sup>265</sup> Nat’l Def. Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, §§ 1043(b)(15) and (c) (3), 117 Stat. 1611–12 (2003).

<sup>266</sup> *Hearings on Nat’l Def. Authorization Act for Fiscal Year 2004—S. 1050 to Authorize Appropriations For Fiscal Year 2004 for Military Activities of the Dep’t of Def., for Military Construction, & For Def. Activities of the Dep’t of Energy, to Prescribe Personnel Strengths For Such Fiscal Year For the Armed Forces, & For Other Purposes: Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services*, 108th Cong. 13 (2003) (prepared statement of Raymond F. DuBois, Deputy Under Sec’y of Def. (Installations & Env’t)) [hereinafter “DuBois statement to Senate”].

<sup>267</sup> *Id.* Secretary DuBois articulated specific benefits associated with enhanced use leases: [T]he enhanced-use lease program enables us to make better use of underutilized facilities. As we transform the way we do business, the Department remains committed to promoting enhanced-use leasing where viable. This type of lease activity allows us to transform underutilized buildings, with private sector participation, into productive facilities.... Additional benefits can accrue by accepting base operating support or demolition services as in-kind consideration; thereby, reducing the appropriations needed to fund these activities. Finally, enhanced-use leasing provides opportunities to make better use of historic facilities and improve their preservation as both cash and in-kind consideration may be used for these purposes. *Id.*

<sup>268</sup> Exec. Order No. 13,327, 69 Fed. Reg. 5897 (Feb. 4, 2004).



clear goals and objectives, improved policies and levels of accountability, and other appropriate action.”<sup>269</sup>

In 2007, the President issued another Executive Order “to strengthen the environmental, energy, and transportation management of [f]ederal agencies.”<sup>270</sup> In this Executive Order, the President directed “[f]ederal agencies [to] conduct their environmental, transportation, and energy-related activities under the law in support of their respective missions in an environmentally, economically and fiscally sound, integrated, continuously improving, efficient, and sustainable manner.”<sup>271</sup> The President also directed each federal agency to set goals in eight specific areas to implement this policy.<sup>272</sup> The Leasing Statute was not directly implicated in these Executive Orders, but it is reasonable to suggest that the emphasis on “efficient and economical use of [f]ederal real property” exerted some influence on the Leasing Statute amendments in 2006.

The next substantive changes to the Leasing Statute occurred in 2006, but the origins of this amendment can be traced back to 2003. In May 2003, the Deputy Secretary of Defense issued a memorandum in which he concluded that the military exchanges could be consolidated, and a task force was organized to facilitate this consolidation.<sup>273</sup> This task force came to Congress’ attention in 2004. The task force made several recommendations to consolidate back end functions of the military exchanges, but it ultimately concluded that consolidation was not cost effective and, therefore, unnecessary. However, the House of Representatives appeared to be especially concerned about the possibility that exchanges could be altered in a way that revenue could decrease or that exchanges could even close.<sup>274</sup> There was

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<sup>269</sup> *Id.*

<sup>270</sup> Exec. Order No. 13,423, 48 C.F.R. § 970.5223-6 (Jan. 24, 2007).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 3919–20.

<sup>273</sup> As a result, the “Unified Exchange Task Force” was created to study the existing Army and Air Force Exchange Service, the Navy Exchange Service, and Marine Corps Exchange, and create a roadmap that would result in the consolidation of these exchanges by 2006. This was a controversial proposal. In the first place, there were different cultures represented by the separate military departments, and the different exchanges generally conformed to these cultures. The biggest controversy was the fact that a portion of the profits generated by the exchanges went directly to the morale, welfare, and recreation programs of each of the services. Not only were these programs among the most popular in the military community, but the profits that were collected at the exchanges represented funds that did not have to be appropriated by Congress. Therefore, these funds were an important component of the morale, welfare, and recreation budget. Ultimately, Congress determined that consolidation of the exchange services was not cost effective, but the amendments to the Leasing Statute remained. See *Overview of Military Resale Programs: Hearing Before the H. Comm. on Armed Services*, 110th Cong. 2–3 (2007) (statement of Michael L. Dominguez, Principal Deputy Under Sec’y of Def. (Personnel & Readiness); 110th Cong. 22 – 25 (questions from Rep. John McHugh and responses by Michael L. Dominguez, Principal Deputy Under Sec’y of Def. (Personnel & Readiness)).

<sup>274</sup> H.R. REP. NO. 109-452, at 340 (2006).

enough concern about the future viability of the exchanges that the House adopted a new amendment to the Leasing Statute.<sup>275</sup>

Because of their important role in providing services to the military, Congress prohibited the lease of real property to private entities where those entities offered “ancillary services [that were] in direct competition with exchanges, commissaries, and morale, welfare, and recreation activities.”<sup>276</sup> This amendment was not an outright prohibition and some provisions were made where leases could be authorized, but this change established “that the military exchanges, commissaries, and morale, welfare and recreation activities have primacy in providing ancillary services and merchandise over the interests of private sector entities leasing government property if the facilities on the leased property will directly compete with the exchanges, commissaries, and morale, welfare, and recreation activities.”<sup>277</sup> The Senate concurred with the House amendment<sup>278</sup> and the Leasing Statute was amended.<sup>279</sup>

## 5. Heightened Scrutiny Reveals Inappropriate Action on Real Property Leases

The next substantive amendment occurred in 2007 as a result of an audit conducted by the Department of Defense’s Inspector General.<sup>280</sup> The National Defense Authorization Act for Fiscal Year 2006<sup>281</sup> directed the Inspector General to review the procurement policies, procedures, and internal controls of a non-defense agency<sup>282</sup> that were applicable to property and services procured on behalf of the Department of Defense.<sup>283</sup> The Inspector General was directed to evaluate whether the actions complied with Department of Defense procurement requirements.<sup>284</sup> The Inspector General determined that office space had been obtained on behalf of the Department in violation of law.<sup>285</sup>

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> H.R. REP. NO. 109-702, at 749 (2006) (Conf. Rep.).

<sup>279</sup> John Warner Nat’l Def. Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 662, 120 Stat. 2263 (2006).

<sup>280</sup> DEP’T OF DEF. INSPECTOR GEN., REP. NO. D-2007-044, FY 2005 DoD PURCHASES MADE THROUGH THE DEPARTMENT OF THE INTERIOR (2007).

<sup>281</sup> Pub. L. No. 109-163, § 811, 119 Stat. 3374 (codified at 10 U.S.C. § 2304 (2000 & Supp. V 2005)).

<sup>282</sup> Although the statute authorized the investigation of other several agencies, the non-defense agency that was the subject of this report was the Department of the Interior. DEP’T OF DEF. INSPECTOR GEN., *supra* note 280, at 1.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 49–65.

The Inspector General's report triggered congressional scrutiny of the Department of Defense.<sup>286</sup> Congress was concerned that the Department's actions under the Leasing Statute were being used for services beyond what Congress intended.<sup>287</sup> Even after Department clarified its practice of entering into property leases by using service contracts,<sup>288</sup> Congress was still concerned that the Department was acting beyond the scope of the law. Therefore, the Leasing Statute was amended to require competitive bids which were authorized by the statute.<sup>289</sup> Congress also eliminated authority for the military departments "to receive in-kind consideration or use rental and other proceeds for facility operation support."<sup>290</sup> In addition, Congress stated that "proceeds gained in transactions carried out [under the Leasing Statute's authority should be used] prudently to address military facility requirements *directly related to maintenance, repair, improvements, and construction*."<sup>291</sup> Finally, Congress expressed its intent that "the definition of real property maintenance services used in the provision [was] limited to pavement clearance, refuse collection and disposal, grounds and landscape maintenance, and pest control."<sup>292</sup> With these changes, the Leasing Statute was amended once more.<sup>293</sup>

#### G. The Leasing Statute and Federal Energy Policy

The final phase of amendments to the Leasing Statute brought it to its current form. In 2005, Congress passed the Energy Policy Act of 2005,<sup>294</sup> which established renewable energy priorities for the entire federal government. Under this law, renewable energy consisted of "electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric

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<sup>286</sup> See *Dep't of Def. Authorization for Appropriations for Fiscal Year 2008: Hearing on S. 1547 Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services*, 110th Cong. 75-76 (2007) (questions from Sen. John Ensign and responses by Philip W. Grone, Deputy Under Sec'y of Def. (Installations & Env't); & Keith E. Eastin, Assistant Sec'y of the Army (Installations & Env't)).

<sup>287</sup> S. REP. NO. 110-77, at 578 (2007).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* (emphasis added).

<sup>292</sup> H.R. REP. NO. 110-477, at 1248 (2007) (Conf. Rep.).

<sup>293</sup> Nat'l Def. Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 2823, 122 Stat. 544.

<sup>294</sup> Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. §§ 15801 to 16524 (2000 & Supp. V 2005)); see also Jeremy S. Scholtes, *On Point for the Nation: Army and Renewable Energy*, 34 ENERGY L.J. 55 (2013).

project.”<sup>295</sup> The law also set renewable energy purchase targets but did not specify how those targets would be allocated.<sup>296</sup>

As previously mentioned, the President of the United States issued Executive Order 13,423 on January 24, 2007.<sup>297</sup> By directing the executive branch agencies to “conduct their . . . respective missions in an environmentally, economically and fiscally sound, integrated, continuously improving, efficient, and sustainable manner,”<sup>298</sup> the President also “reiterated many of the new requirements from Energy Policy Act of 1992 and the Energy Policy Act of 2005.”<sup>299</sup> He “required that the percentage requirements for renewables . . . actually come from new (put into service after January 1, 1999) renewable sources.”<sup>300</sup> The Department of Defense later issued a memorandum directing the implementation of this part of this Executive Order.<sup>301</sup>

## 1. Changes to the Leasing Statute to Achieve Federal Energy Objectives

The Leasing Statute became a tool to achieve these objectives. More specifically, enhanced use leases, which the Leasing Statute permitted, were identified as a tool to leverage the value of military property.<sup>302</sup> In 2008, two different amendments

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<sup>295</sup> Pub. L. No. 109-58, § 203, 119 Stat. 594 (codified at 42 U.S.C. § 15852 (2000 & Supp. V 2005)).

<sup>296</sup> Major Scholtes stated that “[s]ection 203 provided federal purchase requirements for the percentage of electric energy consumption that the federal government must derive from renewable energy: 1) [FY]2007 through FY2009, not less than 3%; 2) FY2010 through FY2012, not less than 5%; and 3) FY2013 and each year thereafter, not less than 7.5%.” Scholtes, *supra* note 294, at 62 (internal citations omitted).

<sup>297</sup> Exec. Order No. 13,423, *supra* note 270.

<sup>298</sup> *Id.*

<sup>299</sup> Scholtes, *supra* note 294, at 62.

<sup>300</sup> *Id.* at 64.

<sup>301</sup> Memorandum from Deputy Sec’y of Def. to Sec’ys of the Military Dep’ts on Strengthening America’s Security and Improving the Environment (Feb. 16, 2007), *available at* [http://www.denix.osd.mil/sustainability/upload/DSD-Memorandum-for-Senior-Officials\\_0.pdf](http://www.denix.osd.mil/sustainability/upload/DSD-Memorandum-for-Senior-Officials_0.pdf).

<sup>302</sup> Assistant Secretary William C. Anderson stated:

[The enhanced use lease (“EUL”)] constitutes a rapidly growing segment of our efforts to leverage the value of our property assets. EUL allows the Air Force to lease military property that is currently underutilized, but that is still needed for future mission needs, to private industry and public entities in exchange for cash or in-kind consideration that will provide certain services facilities or property repair and renovation to the Air Force. EULs are win-win scenarios for all involved. Through EUL projects, developers can establish long-term relationships with private and government partners who are potential tenants with specific real estate needs. Additionally, developers can receive market rates of return on design, construction, maintenance, tenant leases and property management activities. The Air Force EUL Program is active with [twenty-one] projects undergoing feasibility studies across the Nation.

*Dep’t of Def. Authorization for Appropriations for Fiscal Year 2009: Hearing on S. 3001 Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services*, 110th Cong. 63–64

to the statute were made. The first amendment clarified that leases “may be entered into if [they are] advantageous to the United States, [if they] will promote the national defense or be in the public interest[, and if] the lessee’s intended use of the property [is] compatible with the installation mission.”<sup>303</sup> In a sense, this amendment was a case of the Leasing Statute coming full circle, because “promoting the national defense” and “being in the public interest” were justifications originally identified for its adoption in 1947.<sup>304</sup> By 2008, the economic advantages of “optimiz[ing] resources and obtaining value from...underutilized or excess capacity”<sup>305</sup> became a focus of this congressional action.<sup>306</sup> Congress adopted this change to the Leasing Statute.<sup>307</sup>

The second amendment related specifically to leases entered into for energy development. This amendment was an important change from existing policy, because the military departments felt that energy-related leases were a “force multiplier.”<sup>308</sup> Prior to this amendment, there had been little connection between leases of land and energy development within the Department of Defense. For example, although the Department testified before Congress in 2003 that it could “better utilize existing facilities” through private sector participation in such multiple ventures, including energy generation plants,<sup>309</sup> no action to amend the Leasing Statute occurred until 2008. The proposed amendment required the Department of Defense to notify Congress if a proposed enhanced use lease exceeded twenty years and if the lease was for energy development. If a proposed lease met these two criteria, the Department of Defense had to wait thirty days after certifying to Congress that the lease

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(2008) (prepared statement by William C. Anderson, Assistant Sec’y of the Air Force, Installations, & Logistics) [hereinafter “Anderson statement to the Senate”].

<sup>303</sup> *Inherently Governmental—What Is the Proper Role of Gov’t? Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, 110th Cong. 111–12 (2008) (questions by Rep. Solomon P. Ortiz and answers provided by P. Jackson Bell, Deputy Under Sec’y of Def. (Logistics & Materiel Readiness)).

<sup>304</sup> See Kenney Statement before Congress, *supra* note 106, at 2336.

<sup>305</sup> Anderson statement to the Senate, *supra* note 302, at 57–58.

<sup>306</sup> In addition, leases of real property were recognized as a means of reducing infrastructure and base operating costs. See *Inherently Governmental—What Is the Proper Role of Gov’t? Hearing Before the Subcomm. on Readiness of the H. Comm. on Armed Services*, 110th Cong. 57–58 (2008) (prepared statement by David M. Walker, Comptroller Gen. of the U.S.).

<sup>307</sup> Duncan Hunter Nat’l Def. Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, §§ 2812(a)–(d), (f)(1), 2831, 122 Stat. 4725–26, 4728, 4732 (2008).

<sup>308</sup> In a prepared remarks before the Subcommittee on Readiness and Management Support, Secretary William C. Anderson articulated the benefit of enhanced use leases to his military department: Finally, we have initiated a focused effort to identify opportunities where [e]nhanced [u]se [l]ease (“EUL”) authority can help us find ways to leverage our physical plant value while providing a mechanism to offset facilities and utilities operations and maintenance costs, especially energy costs. As a force multiplier, we are...identifying and acting upon EUL opportunities across the Air Force. Anderson statement to the Senate, *supra* note 302, at 57–58.

<sup>309</sup> DuBois statement to Senate, *supra* note 266, at 13.

is consistent with the Department's energy performance goals before it could be ratified.<sup>310</sup> Congress also adopted this change to the Leasing Statute.<sup>311</sup>

## 2. Increased Use of the Leasing Statute by the Military Departments

The next several years were marked by little change to the text of the Leasing Statute other than technical amendments.<sup>312</sup> This period also saw increased efforts by the military departments to enter into various land use arrangements, with the Leasing Statute being used the most frequently.<sup>313</sup> The majority of leases were traditional, non-enhanced use leases,<sup>314</sup> but more enhanced use leases were also signed during this same period.<sup>315</sup>

In its role of overseeing the executive branch agencies, Congress directed several reviews of land use that examined these leases. In 2009, the General Accounting Office released a report about excess and underutilized property held by various federal agencies, including the Department of Defense.<sup>316</sup> The report found that the Department of Defense was favorably disposed toward enhanced use leases because of their potential to support the department's mission.<sup>317</sup> Enhanced use leases also had the potential to "maximize the utility and value of its real property."<sup>318</sup> The report specifically noted the value which the Air Force places on leases as opposed to selling property. Every enhanced use lease agreement contains a clause that the lease may be terminated for a national emergency, so the Air Force has greater flexibility, because it could not reacquire land it sold as excess during such a period.<sup>319</sup>

The military departments' increased use of enhanced use leases was not without controversy. In 2010, the House of Representatives recognized that enhanced

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<sup>310</sup> H. COMM. ON ARMED SERVICES, 110TH CONG., REPORT ON DUNCAN HUNTER NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2009 783–84 (Comm. Print 2008).

<sup>311</sup> Duncan Hunter Nat'l Def. Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, §§ 2812(a)–(d), (f)(1), 2831, 122 Stat. 4725–26, 4728, 4732 (2008).

<sup>312</sup> Nat'l Def. Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1073(a)(26), 123 Stat. 2474 (2009); Act of Jan. 4, 2011, Pub. L. 111-350, § 5(b)(44), 124 Stat. 3846; Ike Skelton Nat'l Def. Authorization Act for Fiscal Year 2011, Pub. L. 111-383, §§ 1075(b)(41), 2811(g)–2813(a), 124 Stat. 4371, 4463.

<sup>313</sup> During fiscal year 2005 through fiscal year 2007, the military departments "reported using [the Leasing Statute] a total of 744 times...for both traditional leases as well as longer-term, more financially complex enhanced use leases." U.S. GEN. ACCOUNTING OFFICE, GAO-08-850, DEFENSE INFRASTRUCTURE: SERVICES' USE OF LAND USE PLANNING AUTHORITIES 9 (2008).

<sup>314</sup> *Id.* at 10–11.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> See U.S. GEN. ACCOUNTING OFFICE, GAO-09-283R, FEDERAL REAL PROPERTY: AUTHORITIES AND ACTIONS REGARDING ENHANCED USE LEASES AND SALE OF UNNEEDED REAL PROPERTY 13 (2009).

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 14.

use leases were a tool which the Department of Defense was using “to address challenges associated with a large inventory of deteriorating facilities and excess and underutilized property.”<sup>320</sup> It also recognized that authority granted under the Leasing Statute allowed the military departments “to gain additional resources for the maintenance and repair of existing facilities or the construction of new facilities... [thereby] reduc[ing] infrastructure and base operating costs.”<sup>321</sup> However, Congress was concerned about enhanced use leases and directed a review of the Department of Defense’s program.<sup>322</sup>

The concern appears to be well-founded. In 2011, the General Accounting Office reported findings after examining nine of the seventeen enhanced use lease projects in place at the end of fiscal year 2010.<sup>323</sup> The report identified deficiencies with several of the projects.<sup>324</sup> Most notable of these was the failure of several projects to comply with the Leasing Statute’s statutory requirements.<sup>325</sup> In addition, the military departments did not realize expected financial benefits in several projects, and the financial benefits were “markedly less... than initially estimated.”<sup>326</sup> The report’s ultimate conclusion was that additional oversight was needed for this program, and six recommendations for improvement were made.<sup>327</sup> Enhanced use leases remain an item of intense interest, but following this report, no additional amendments have been made to the Leasing Statute.

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<sup>320</sup> H.R. REP. NO. 111-491, at 507 (2010).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 507–08.

<sup>323</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-11-574, DEFENSE INFRASTRUCTURE: THE ENHANCED USE LEASE PROGRAM REQUIRES MANAGEMENT ATTENTION 2 (2011).

<sup>324</sup> *See id.* at 12–16.

<sup>325</sup> *Id.* at 12.

<sup>326</sup> *Id.* at 17.

<sup>327</sup> *Id.* at 32. With regard to the nine projects which the General Accounting Office (GAO) reviewed, the report recommended the Secretaries of the Army and Air Force take the following three actions: 1) Review all enhanced use leases to determine if the terms and conditions of the leases were inconsistent with existing law; determine what steps needed to be taken to bring the leases into conformity with the law; and then implement those steps; 2) Ensure that all leases contain terms, consistent with the Leasing Statute, that if the land later becomes subject to taxation by state or local governments under an act of Congress, the leases shall be renegotiated; and 3) review and clarify guidance that describes how fair-market value of the lease interest is determined and how to obtain fair-market value. *See id.* In addition, the GAO recommended that the Secretaries of all three services: 1) Issue guidance on how to determine and document that the Leasing Statute provisions were met *prior* to entering into a lease, including the required secretarial determinations and the basis for those determinations; 2) Issue guidance on the analyses or documentation needed to show that future leases executed under the Leasing Statute do not include property needed for public use (as is now required by the Statute); and 3) Develop procedures to regularly monitor and analyze enhanced use lease program administration costs to help ensure that the costs are in line with program benefits. *Id.*

#### IV. ENHANCED USE LEASE SUCCESSES

Enhanced use leases remain a relatively little-used tool for the military departments to use in managing their real property. The General Accounting Office's 2011 report highlighted some of the challenges that have occurred as this tool has been used, and it alluded to at least one instance where a proposed project was canceled.<sup>328</sup> However, enhanced use leases have also been successfully utilized in other instances. The following sections describe three examples where the Air Force entered into successful enhanced use leases for its property.

##### A. Nellis Air Force and North Las Vegas' Wastewater Treatment Plant

###### 1. Nellis Air Force Base – Background

Nellis Air Force Base is located in the city of North Las Vegas, approximately eight miles northeast of downtown Las Vegas in Clark County, Nevada.<sup>329</sup> Between 1929 and 1940, the site consisted of dirt runways which were used for private air service.<sup>330</sup> In 1940, the Army Air Corps began scouting locations in the southwestern United States for an aerial gunnery school.<sup>331</sup> The City of Las Vegas acquired land from private owners in 1941 and offered it to the Army Air Corps for use as the gunnery school.<sup>332</sup> Las Vegas Air Field was established in 1941, and was later named Las Vegas Army Air Field.<sup>333</sup> The Las Vegas Army Gunnery School was established in 1942 and trained Army gunners throughout World War II.<sup>334</sup> At the end of World War II, the installation was deactivated, but it reopened in 1948 as Las Vegas Air Force Base.<sup>335</sup> In 1950, it was renamed after First Lieutenant William H. Nellis, a native of Nevada who was killed during World War II on his seventieth combat mission while flying a P-47 Thunderbolt in support of ground forces near Bastogne, Belgium.<sup>336</sup> Since its inception, Nellis Air Force Base has trained Airmen in air combat tactics, and it is currently home to the Air Force Warfare Center.<sup>337</sup>

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<sup>328</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 323, at 10 n.26.

<sup>329</sup> AIR COMBAT COMMAND, INSTALLATION SUSTAINABILITY ASSESSMENT REPORT: NELLIS AND CREECH AIR FORCE BASES, NEVADA 14 (rev. 2012).

<sup>330</sup> *Id.*

<sup>331</sup> U.S. ARMY CORPS OF ENGINEERS, FINAL REPORT: COMPREHENSIVE SITE EVALUATION PHASE II, NELLIS AIR FORCE BASE, NEVADA at 2-1(2010).

<sup>332</sup> AIR COMBAT COMMAND, *supra* note 329, at 14.

<sup>333</sup> ROBERT MUELLER, 1 AIR FORCE BASES: ACTIVE AIR FORCE BASES WITHIN THE UNITED STATES OF AMERICA ON 17 SEPTEMBER 1982 439 (1989).

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

<sup>335</sup> AIR COMBAT COMMAND, *supra* note 329, at 14.

<sup>336</sup> MUELLER, *supra* note 333, at 439.

<sup>337</sup> AIR COMBAT COMMAND, *supra* note 329, at 14–15.



The base consists of approximately 11,300 acres of which over seven thousand are undeveloped.<sup>338</sup>

## 2. North Las Vegas' Wastewater Treatment Project

In 1952, Las Vegas and North Las Vegas entered into an interlocal agreement by which Las Vegas agreed to allow North Las Vegas to connect with Las Vegas' wastewater treatment system, and Las Vegas agreed to accept and treat all wastewater collected by North Las Vegas.<sup>339</sup> For the last several years, Nevada has been one of the fastest growing states in the United States, and Las Vegas and North Las Vegas have been among the fastest growing municipalities within Nevada. In 2003, the Las Vegas City Council became concerned that the city was spending more money to maintain the wastewater treatment plant than it was collecting in fees.<sup>340</sup> The City Council proposed raising wastewater fees for all users in the system to finance improvements.<sup>341</sup> Since Las Vegas provided North Las Vegas with wastewater treatment services, this proposal would affect North Las Vegas residents who were reliant on their larger neighbor for sewage treatment.<sup>342</sup> These proposed rate increases propelled North Las Vegas to look at other options.<sup>343</sup>

In January 2004, the North Las Vegas City Council authorized an in-depth study of wastewater treatment options for the city.<sup>344</sup> In October 2004, the City Council approved the construction of a new wastewater plant and directed the city manager to find a suitable location for the facility.<sup>345</sup> By the summer of 2005, the city moved ahead with construction plans. The City Council authorized \$140 million in bonds to fund the treatment plant and sought another \$30 million in low-interest loans from the State of Nevada to fund the project.<sup>346</sup> In addition, the city sought Clark County sales tax revenue to augment funding.<sup>347</sup> At this point, no specific sites had been considered because a study was underway, but the “[s]outhern and southeastern portions of [the city were] the likely targets for a treatment plant because

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<sup>338</sup> U.S. ARMY CORPS OF ENGINEERS, *supra* note 331, at 2-1.

<sup>339</sup> CITY OF LAS VEGAS, PUBLIC SERVICES AND FACILITIES ELEMENT, LAS VEGAS 2020 MASTER PLAN 26 (2008), available at [http://www.lasvegasnevada.gov/files/PublicServices\\_FacilitiesElement.pdf](http://www.lasvegasnevada.gov/files/PublicServices_FacilitiesElement.pdf).

<sup>340</sup> Michael Squires, *Las Vegas City Council: Sewer Fee Hikes Planned*, LAS VEGAS REV.-J., Oct. 2, 2003, at 1B.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> Lynette Curtis, *Wastewater Plan Clogged*, LAS VEGAS REV.-J., Feb. 15, 2011, at 1B.

<sup>344</sup> Bob Foerster, *Featured Facility: City of North Las Vegas Wastewater Reclamation Facility*, WATER LINES (Nev. Water and Wastewater Operator's Forum, Carson City, Nev.), Winter 2012, at 1.

<sup>345</sup> *Id.*

<sup>346</sup> Brian Wargo, *City Prepares to Build Wastewater Treatment Plant*, LAS VEGAS SUN, Aug. 18, 2005, at B5.

<sup>347</sup> *Id.*

the waste needs to flow downhill by gravity flow to lessen the cost of moving the waste through sewer lines.”<sup>348</sup>

By 2006, nine different sites had been identified as possible locations for the wastewater treatment plant, including a site on Nellis Air Force Base property.<sup>349</sup> Several of these sites generated controversy, because they were located near parks, recreational facilities, and residential areas.<sup>350</sup> However, the Nellis Air Force Base site did not generate the same level of controversy. Nellis Air Force Base is located south of North Las Vegas and has undeveloped land in the general area where the proposed wastewater treatment plant could be located. In 2008, the North Las Vegas and the Air Force reached an agreement whereby the Air Force would lease undeveloped land for the city to construct a new wastewater treatment facility.<sup>351</sup> Construction began in 2009 and was completed in 2011.

## B. Hill Air Force Base and Falcon Hill

### 1. Hill Air Force Base – Background

Hill Air Force Base is located near the city of Ogden approximately thirty miles north of Salt Lake City in Davis County, Utah. In 1934, the Army Air Corps sought a suitable location in the Salt Lake City area for a permanent station or depot of strategic importance.<sup>352</sup> However, there was no money to acquire any land because of the Great Depression. In 1936, the Ogden Chamber of Commerce exercised options to acquire approximately 4,200 acres of land in Davis County, renewing the options twice and holding the land in escrow until the federal government could purchase the land for the Ogden Defense Depot.<sup>353</sup> By 1939, the federal government appropriated sufficient funds and acquired land for a new military installation.<sup>354</sup> In 1940, Hill Field was activated.<sup>355</sup> It was named after Major Ployer P. “Pete” Hill, who had died in 1935 while testing the Boeing Model 299, which became the B-17 Flying Fortress.<sup>356</sup> Hill Field remained a major supply and maintenance depot throughout World War II, and that remains its primary mission. Since 1975, it has

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<sup>348</sup> *Id.*

<sup>349</sup> Brian Wargo, *Plant Plans Already Drawing Opposition, North Las Vegas Considering Sites for Sewage Treatment*, LAS VEGAS SUN, Mar. 13, 2006, at A1.

<sup>350</sup> *Id.*

<sup>351</sup> *North Las Vegas’ Council to Lease Land for Sewage Treatment Project*, LAS VEGAS REV.-J., Sept. 18, 2008, at 3B.

<sup>352</sup> HIST. OFFICE, OGDEN AIR LOGISTICS CTR., HILL A.F.B., UTAH, HISTORY OF HILL AIR FORCE BASE 1 (1988).

<sup>353</sup> *Id.* at 2. Apparently the Chamber of Commerce also acquired land outright, because “[r]ecords credit the Ogden Chamber of Commerce with eventually deeding outright to the government a total of 386.17 acres as a start for the new depot.” *Id.*

<sup>354</sup> *Id.* at 3.

<sup>355</sup> *Id.* at 9–11.

<sup>356</sup> MUELLER, *supra* note 333, at 237.

been home to the 388th Fighter Wing, the first fully-operational F-16 fighter wing. The base consists of approximately 6,700 acres, and the main cantonment area is located on a comparatively flat plateau 300 feet above the surrounding valley.<sup>357</sup>

Hill Air Force Base was constructed on this plateau, but the base boundary extends west several miles, and Interstate 15 skirts the western edge of the base. Many buildings had been constructed on this part of the base, but it was not as developed due in part to its distance from the runways. In the 1990s and 2000s, military planners conducted several assessments of the facilities at Hill Air Force Base. These evaluations revealed that the buildings in the western portion of the base had deteriorated and were in need of replacement. However, the replacement cost of these facilities through congressional appropriation was prohibitive, so other means were sought to replace these obsolete and outdated facilities.

## 2. Development of Hill Air Force Base's Underutilized Property

Over the next few years, events converged that would eventually lead to the replacement of these facilities. The first event occurred during the 2005 General Session. The Utah Legislature appropriated \$5 million to be used for “military installation projects that have a strong probability of increasing the expansion and development of a military installation in the state, thereby providing significant economic benefits to the state.”<sup>358</sup> The second event came through actions by many of Utah’s public officials, including the newly-elected governor who had been elected on a platform of economic growth and development. In 2005, the state announced that it would focus economic development efforts on “nurtur[ing] six economic ‘clusters’ around which...the state [would] develop an integrated, focused approach” on job creation.<sup>359</sup> The state defined a “cluster [as a] ‘group[] of related businesses and organizations within industry sectors whose collective excellence and collaboration provides sustainable and competitive advantages.”<sup>360</sup> The state would “synergize research universities, technology commercialization catalysts,... and industry with [its] own efforts to foster and recruit top talent” around these clusters.<sup>361</sup> One of these clusters was “defense and homeland security,”<sup>362</sup> which had long been an important part of the economy of northern Utah because of Hill Air Force Base.

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<sup>357</sup> HIST. OFFICE, OGDEN AIR LOGISTICS CTR., *supra* note 352, at 2.

<sup>358</sup> S.B. 141, 56th Leg., Gen. Sess., 2005 Utah Laws 1277 (codified at UTAH CODE ANN. § 63M-1-1901 (LexisNexis 2011)).

<sup>359</sup> Jenifer K. Nii, *Huntsman Picks 6 ‘Clusters’*, DESERET MORNING NEWS (Salt Lake City, Utah), Jun. 25, 2005, at D12.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

Money appropriated by the Utah Legislature during the 2005 Legislative Session did not go to entities who replaced obsolete facilities at Hill Air Force Base, but it signaled the Legislature's willingness to act on behalf of the military to further state interests. In 2006, Hill Air Force Base officials announced a plan to develop 550 "underutilized" acres of land on the west side of the base.<sup>363</sup> In the 2007 General Session, the Utah Legislature created the Military Installations Development Authority.<sup>364</sup> The purpose of the authority was "to create a board of state and local officials to facilitate commercial development...[to act] as a liaison among the federal government, private entities and area cities to guide planned commercial development on 600 acres of federally owned land [on the west side of Hill Air Force Base]."<sup>365</sup>

This new authority was no paper tiger. It was "an independent, nonprofit separate body corporate and politic, with perpetual succession and statewide jurisdiction, whose purpose [was] to facilitate the development of military land in a project area."<sup>366</sup> To develop military land in a designated project, the authority was permitted to receive and use tax increment funding<sup>367</sup> and issue bonds<sup>368</sup> in furtherance of its project objectives. Revenue from tax increment funding may be used to pay for publicly-owned buildings or other improvements in the project area,<sup>369</sup> make infrastructure improvements outside the project area if the board determines it would benefit the project area,<sup>370</sup> or pay principal and interest on bonds issued by the authority.<sup>371</sup>

Hill Air Force Base officials used a competitive bid process instead of a "sole source" process for the development, which added additional months to the project's start date.<sup>372</sup> In 2007, Hill Air Force Base selected the highest bidder for the redevelopment project, and the bidder entered into exclusive negotiations to enter into a lease with the Air Force.<sup>373</sup> The Utah Legislature appropriated \$10 million to

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<sup>363</sup> Joseph M. Dougherty & Stephen Speckman, *Work to Begin on Hill Air Force Base Business Park*, DESERET MORNING NEWS (Salt Lake City, Utah), Sept. 7, 2006, at B8.

<sup>364</sup> S.B. 232, 57th Leg., Gen. Sess., 2007 Utah Laws 125 (codified at UTAH CODE ANN. §§ 63H-1-101 to 801 (LexisNexis 2011)).

<sup>365</sup> Jeff Demoss, *Hill Liaison Bill Passes in Committee*, STANDARD-EXAMINER (Ogden, Utah), Feb. 15, 2007, available at 2007 WLNR 3138573.

<sup>366</sup> UTAH CODE ANN. § 63H-1-201(2)(a) (LexisNexis 2011).

<sup>367</sup> UTAH CODE ANN. §§ 63H-1-501 to 504 (LexisNexis 2011).

<sup>368</sup> UTAH CODE ANN. §§ 63H-1-601 to 606 (LexisNexis 2011).

<sup>369</sup> UTAH CODE ANN. § 63H-1-502(1)(d) (LexisNexis 2011).

<sup>370</sup> UTAH CODE ANN. § 63H-1-502(1)(e) (LexisNexis 2011).

<sup>371</sup> UTAH CODE ANN. § 63H-1-502(1)(f) (LexisNexis 2011).

<sup>372</sup> *Bid Process to Delay Hill Air Force Base Development*, DESERET MORNING NEWS (Salt Lake City, Utah), Dec. 17, 2006, at B2.

<sup>373</sup> Mitch Shaw, *Hill Chooses Builder for West Side Development*, STANDARD-EXAMINER (Ogden, Utah), Aug. 18, 2007, available at 2007 WLNR 16258306 See also Stephen Speckman, *Hill Air Force Base Enters 'Exclusive Negotiations' With Developer*, DESERET MORNING NEWS (Salt Lake

the Military Installations Development Authority to facilitate the development of the Hill Air Force Base project.<sup>374</sup> On August 13, 2008, the Air Force and the private developer signed the Master Lease and Master Development Agreement,<sup>375</sup> and on October 11, 2008, the ceremonial first shovelfuls of dirt were turned over and the project officially began.<sup>376</sup> Construction began in 2009 and the first commercial tenants began occupying the new building in 2012.<sup>377</sup>

## C. Eglin Air Force Base and Development in Northwest Florida

### 1. Eglin Air Force Base – Background

Eglin Air Force Base is located adjacent to Valparaiso and Fort Walton Beach approximately thirty miles east of Pensacola in Okaloosa county in Florida.<sup>378</sup> In the 1930s, local businessman James Plew acquired 1,460 acres of land in Valparaiso to build two landing strips for use by civilian and military pilots.<sup>379</sup> In 1934, he donated this land to the federal government for use as a training facility by student pilots at Maxwell Field, an Army Air Corps base in Montgomery, Alabama. On June 14, 1935, the Army Air Corps formally recognized it as the Valparaiso Bombing and Gunnery Range.<sup>380</sup> In 1937, the name was changed to Eglin Field in honor of Lieutenant Colonel Frederick I. Eglin, an American aviator who had flown in World War I and was killed when his Northrup A-17 crashed en route from Langley Field, Virginia, to Maxwell Field.<sup>381</sup> In 1940, Eglin Field expanded beyond its original mission as a bombing and gunnery range when over 380 thousand acres of the Choctawhatchee National Forest were transferred to the military.<sup>382</sup> By the end of 1944, Eglin Field grew to include over thirty miles of runways scattered across ten auxiliary fields and 882 buildings across over 500 thousand acres.<sup>383</sup> Today, Eglin Air Force Base is a major installation in northwest Florida. At 724 square miles, Eglin Air Force Base is the largest Air Force installation in the United States with thirty-five land and water ranges. It is home to the 96th Test Wing, a component of the Air Force

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City, Utah), Aug. 19, 2007, at B4.

<sup>374</sup> Joseph M. Dougherty, *Hill Air Force Base to Start Developing Underused West Side*, DESERET MORNING NEWS (Salt Lake City, Utah), Aug. 14, 2008, available at 2008 WLNR 15191856.

<sup>375</sup> Press Release, U.S. Air Force, Falcon Hill Enhanced Use Lease Agreement Announced (Aug. 15, 2008) (on file with author).

<sup>376</sup> Joseph M. Dougherty, *Falcon Hill Breaks Ground at Hill Air Force Base*, DESERET MORNING NEWS (Salt Lake City, Utah), Oct. 11, 2008, available at 2008 WLNR 19403147.

<sup>377</sup> *Loss of Coveted Aerospace Tenant Jolts Falcon Hill*, STANDARD-EXAMINER (Ogden, Utah), Feb. 1, 2014, available at 2014 WLNR 2918166.

<sup>378</sup> MUELLER, *supra* note 333, at 133.

<sup>379</sup> Mona Moore, *75 Proud Years*, NW. FLA. DAILY NEWS, Dec. 25, 2010, available at 2010 WLNR 25402727.

<sup>380</sup> MUELLER, *supra* note 333, at 133.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 136.

<sup>383</sup> *Id.*

Test Center and part of Air Force Materiel Command. Major tenants also include the Thirty-Third Fighter Wing, which trains the first joint and coalition F-35 Joint Strike Fighter pilots and maintainers; the Fifty-Third Wing, a major Air Force test and evaluation wing; and the Seventh Special Forces Group (Airborne), an Army Special Forces unit with extensive operations in Central and South America.

## 2. Okaloosa County's Airport Lease and Wastewater Treatment Plant Lease

Eglin Air Force Base has been and continues to be an important part of the communities of northwest Florida. Not only is it a significant employer in the region, but its sheer size means that it also plays other important roles. Several of these roles have involved leases of federal land. Leases at Eglin Air Force Base are not new.<sup>384</sup> It has a significant forestry program which has been leased for many years.<sup>385</sup> Even though commercial flights had occurred since the 1930s, Eglin Air Force Base started leasing property to Okaloosa County in the mid-1970s for the county to operate a commercial airport, the Northwest Florida Regional Airport.<sup>386</sup> The original lease has been renewed, and in subsequent renewals, the county agreed to pay \$318,000 over the twenty-five year term of the lease. The county has also constructed an aircraft rescue and firefighting station manned by Air Force personnel who respond to both military and civil rescues.<sup>387</sup>

Eglin Air Force Base has also entered into a lease with Okaloosa County for a new wastewater treatment plant to replace an existing facility. Okaloosa County and the Air Force identified a site on military property as a potential site for the new plant. Okaloosa County and Eglin Air Force Base spent several years negotiating details of the lease, and the deal was nearly derailed due to a disagreement about the value of the lease.<sup>388</sup> Air Force officials even requested that the fee be waived, suggesting that the new facility was needed to accommodate “additional sewage

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<sup>384</sup> In 1981, the General Accounting Office released a report in which it recommended ways that the Department of Defense could improve its natural resources management plan and increase revenue to the federal government. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 165. And though strictly not a lease, Eglin Air Force Base's large size was the inspiration for the Sikes Act, named after Representative Robert L.F. “Bob” Sikes whose district contained Eglin Air Force Base. This statute that required the federal Department of Defense and the Department of the Interior to coordinate with state agencies in planning, developing, and managing fish and wildlife resources on military property. See 16 U.S.C. §§ 670a–670o (2010).

<sup>385</sup> *Id.* at 7.

<sup>386</sup> Jeff Ayres, *Airport to Expand: Plan to Lure New Carriers Includes More Aircraft Parking Space, Terminal Gates*, NW. FLA. DAILY NEWS, Apr. 24, 2006, available at 2006 WLNR 6839210.

<sup>387</sup> Kari C. Barlow, *New Fire Station to Serve Airport and Eglin*, NW. FLA. DAILY NEWS, Sept. 14, 2013, available at <http://www.nwfdailynews.com/local/new-fire-station-to-serve-airport-and-eglin-document-1.202975> (last accessed Apr. 18, 2014).

<sup>388</sup> The county's appraisal valued the lease at \$193,000 annually, but the Air Force's appraisal estimated the fee to be \$513,000. Jeff Ayres, *Lease Fee 'Almost a Deal-killer': Pricier Terms on New Wastewater Treatment Plant Could Result in Higher Water and Sewer Rates, Say Officials*, NW. FLA. DAILY NEWS, Jun. 25, 2006, available at 2006 WLNR 11008709.

capacity for anticipated growth from base realignment and Eglin's privatized housing initiative.<sup>389</sup> The fee was not waived, and Okaloosa County eventually agreed to initially pay \$325,000 with a two-percent increase each year.<sup>390</sup> Okaloosa County selected a contractor<sup>391</sup> and construction began in 2007.<sup>392</sup>

### 3. Okaloosa Island Hotel Project Lease

Santa Rosa Island is a forty-mile barrier island between Choctawhatchee Bay and the Gulf of Mexico. In 1945, the Department of the Interior conveyed fourteen miles of Santa Rosa Island to the Army Air Corps, and this parcel became known as "Okaloosa Island."<sup>393</sup> Okaloosa Island is not a separate island from Santa Rosa Island; instead, it is connected to Fort Walton Beach by the Brooks Bridge on the west and to Destin by the Destin Bridge on the east. The eastern portion of the island remains largely undeveloped, but the western portion has several beach resorts, condominiums, and residences. On the west end between two resorts on the Gulf-side of the island is Test Area A-5, a seventeen-acre parcel that houses receivers and sensors used by Eglin Air Force Base to monitor activity over the installation's 128,957 square-mile, over-water test range.<sup>394</sup> Other than a small storage building, antennae, and other utility buildings, the seventeen acres are undeveloped.<sup>395</sup> In 2009, the installation commander stated that Test Area A-5 was "essential to current and future missions," but he also stated that it was "underutilized."<sup>396</sup> Based on these two determinations, Eglin Air Force Base began looking for opportunities to better utilize this asset and provide "a steady income stream."<sup>397</sup> Eglin Air Force Base initially looked at developing the property as an Armed Forces Recreation Center resort which was to be owned and operated by the Air Force.<sup>398</sup> This option was rejected as financially infeasible, so the Air Force turned to an enhanced use lease

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<sup>389</sup> *Id.*

<sup>390</sup> Jill Nolin, *Lease Signed for Sewage Plant: Construction on 10-million-gallon Facility May Begin Next Summer*, NW. FLA. DAILY NEWS, Oct. 4, 2006, available at 2006 WLNR 17181029.

<sup>391</sup> Patrick Mcdermott, *Okaloosa Oks Contract for Wastewater Plant*, NW. FLA. DAILY NEWS, Apr. 19, 2007, available at 2007 WLNR 7434443.

<sup>392</sup> Patrick Mcdermott, *'Big Day' Arrives for Arbennie Pritchett Water Reclamation Facility: Okaloosa Secured the Land North of Lewis Turner Boulevard From the Air Force in 2006*, NW. FLA. DAILY NEWS, May 22, 2007, available at 2007 WLNR 9604151.

<sup>393</sup> J. Earle Bowden, *Eglin AFB Putting Hotel on Land for the Public*, PENSACOLA NEWS J., Nov. 5, 2011, at C4.

<sup>394</sup> Andrew Gant, *Eglin Eyes Beach Site for Resort: Test Site A-5 on Okaloosa Island Could Become a Hotel for Military and Public*, NW. FLA. DAILY NEWS, Jan. 23, 2009, available at 2009 WLNR 1363387; see also Tom McLaughlin, *Okaloosa Approves Hotel on Air Force Property*, NW. FLA. DAILY NEWS, Aug. 24, 2012, available at 2012 WLNR 18048318.

<sup>395</sup> Gant, *supra* note 394.

<sup>396</sup> McLaughlin, *supra* note 394.

<sup>397</sup> Gant, *supra* note 394.

<sup>398</sup> Tom McLaughlin, *New Resort to Be Owned by Defense Department*, NW. FLA. DAILY NEWS, Oct. 24, 2011, available at 2011 WLNR 21787094.

to fund the project.<sup>399</sup> Under this option, private developers made offers to the Air Force on the proposed development. The Air Force scored the offers and selected the highest-ranked offer. The highest-ranking developer had the chance to enter into negotiations with the Air Force to negotiate terms, sign a lease, and build and manage the project. In 2009, the Air Force selected a group to build, develop, and manage the new resort.<sup>400</sup> In 2012, the project officially began.<sup>401</sup>

## V. CRITIQUE OF AIR FORCE ENHANCED USE LEASES

Nellis Air Force Base, Hill Air Force Base, and Eglin Air Force Base all provide both positive and negative examples of the use of enhanced use leases to the Air Force as well to the counterparts in these leases. These cases also presented potential problems with enhanced use leases that should be addressed in the future.

### A. Benefits of Enhanced Use Leases

At Nellis Air Force Base, North Las Vegas agreed to certain conditions in return for use of the Air Force property. Among other benefits, it agreed to pay the Air Force \$25 million over fifty years.<sup>402</sup> The city also agreed to renovate and expand the fitness center at Nellis Air Force Base.<sup>403</sup> In addition, North Las Vegas agreed to provide free water to the Nellis Air Force Base golf course for twenty-five years.<sup>404</sup> In return, the city would realize its own benefits. First, there was no opposition from existing wastewater treatment providers, because this new plant would increase treatment capacity in the overall community.<sup>405</sup> Second, the city estimated that it would save over \$140 million over the life of the project by handling its own waste rather than contracting with the Las Vegas.<sup>406</sup> Third, North Las Vegas would benefit from the latest technology at a new facility to treat its wastewater.<sup>407</sup> Finally,

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<sup>399</sup> Mona Moore, *Developer, Military Negotiating Hotel*, NW. FLA. DAILY NEWS, Aug. 31, 2010, available at 2010 WLNR 17305160.

<sup>400</sup> Kimberly Blair, *Innisfree to Serve Air Force*, PENSACOLA NEWS J., Dec. 28, 2009, at A2, available at 2009 WLNR 26071728.

<sup>401</sup> Tom McLaughlin, *Holiday Inn to Be Built on Air Force Land*, NW. FLA. DAILY NEWS, Nov. 16, 2012, available at 2012 WLNR 24394006.

<sup>402</sup> *Id.*

<sup>403</sup> Press Release No. 021108, U.S. Air Force, Air Force and City of North Las Vegas Agree on Deal at Nellis AFB (Oct. 17, 2008) (on file with author).

<sup>404</sup> *North Las Vegas' Council to Lease Land for Sewage Treatment Project*, *supra* note 351, at 3B.

<sup>405</sup> Wargo, *supra* note 346, at B5; *see also* Wargo, *supra* note 349, at A1 (“The new North Las Vegas facility could allow the city of Las Vegas to postpone a planned expansion of its own waste water treatment plant [which] is not expected to occur for at least six to eight years and may not be needed for as long as [eighteen] years if North Las Vegas begins treating its own sewage.”).

<sup>406</sup> Wargo, *supra* note 349, at A1.

<sup>407</sup> Foerster, *supra* note 344, at 1–3.



the Air Force location allowed the new wastewater facility to use gravity to move sewage instead of pumps.<sup>408</sup>

The same co-benefit situation existed for Hill Air Force Base. In this case, the private developer agreed to certain conditions in return for use of the Air Force property. Among other benefits, the developer built a new building to house Hill Air Force Base's Security Forces squadron.<sup>409</sup> The developer also built a new gate house and realigned the west gate entry, which improved traffic flow off Interstate 15 and increased security.<sup>410</sup> Hill Air Force Base will also share in the profits which are generated by the new commercial development.<sup>411</sup> For its part, the developer has access to prime, undeveloped, freeway-frontage real estate.<sup>412</sup> It also has the ability to recruit aerospace and aerospace research companies to locate adjacent to a major Air Force maintenance depot.<sup>413</sup>

In the case of the airport and the wastewater treatment facility, the Eglin Air Force Base was a direct beneficiary of the in-kind services provided by Okaloosa County—a new fire station and wastewater treatment. These two leases were negotiated between two governmental entities: Okaloosa County and the Air Force. The third enhanced use lease project at Eglin Air Force Base was more controversial because there were fewer obvious co-benefits. For its part, Eglin Air Force Base continued to have radar and test equipment on the roof of the new hotel to monitor its activities over the Gulf of Mexico.<sup>414</sup> In addition, the Air Force retained ownership of the property and collected rent from the developers.<sup>415</sup> Military members would have access to the new resort at “significant discounts.”<sup>416</sup> For its part, the developer was able to build a resort on prime real estate in a vacation destination.

## B. Potential Problems with Enhanced Use Leases

These cases are not without controversy. In Nevada, North Las Vegas had not secured a discharge permit for sewage effluent from its new plant once construction

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<sup>408</sup> *North Las Vegas' Council to Lease Land for Sewage Treatment Project*, *supra* note 351, at 3B.

<sup>409</sup> Mitch Shaw, *Contractor Worries Falcon Hill Will Favor Larger Firms*, STANDARD-EXAMINER (Ogden, Utah), Apr. 29, 2009, available at 2009 WLNR 8278608.

<sup>410</sup> *Id.*

<sup>411</sup> *Loss of Coveted Aerospace Tenant Jolts Falcon Hill*, *supra* note 377.

<sup>412</sup> Dougherty, *supra* note 374.

<sup>413</sup> *Id.*

<sup>414</sup> Tom McLaughlin, *Tax Questions Linger Over Proposed Hotel*, NW. FLA. DAILY NEWS, Jun. 20, 2012, available at 2012 WLNR 12870016. One Eglin Air Force Base official stated: “The [radar and monitoring] equipment, which will extend [ten] feet above the [seventy-five]-foot height limit for construction on the island, will be protected within a small rooftop out building and a large globe painted to resemble a beach ball.” *Id.*

<sup>415</sup> McLaughlin, *supra* note 401.

<sup>416</sup> Moore, *supra* note 399.

began on the wastewater treatment facility.<sup>417</sup> Clark County denied the city's request to discharge treated effluent into a flood control channel,<sup>418</sup> but North Las Vegas began discharging treated effluent anyway after the plant came online.<sup>419</sup> The city sued Clark County to force access to the flood control channel,<sup>420</sup> but the parties settled the matter before it proceeded to trial.<sup>421</sup> In addition, North Las Vegas faced severe budget problems, of which the wastewater treatment plant was a part.<sup>422</sup>

At Hill Air Force Base, budget issues did not conspire to thwart the project, but other factors were present that threatened it from even beginning. Unfortunately, evidence suggests that some of these factors involved the Air Force itself. In a congressional hearing before the groundbreaking, one member of Congress commented that intervention by a senior Air Force leader was needed for the project to be successfully completed.<sup>423</sup> At the project's groundbreaking, a Hill Air Force Base official commented on the way the Utah congressional delegation helped the project by bringing together “various stakeholders that sometimes have had very different opinions on what... could [be done] with this project.”<sup>424</sup> And a Utah senator stated that the law that permitted this project was new and it took time to work through a new federal-state-private bureaucracy.<sup>425</sup> He then quipped, “I think they were afraid the almighty federal government would renege on it—and so was I.”<sup>426</sup>

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<sup>417</sup> Lawrence Mower, *North Las Vegas, County Approve Deal on Pipeline*, LAS VEGAS REV.-J., Nov. 8, 2012, at 8B.

<sup>418</sup> Lynnette Curtis, *County Votes No to Effluent in Channel*, LAS VEGAS REV.-J., Mar. 16, 2011, at 1B.

<sup>419</sup> Lynnette Curtis, *Wastewater Flows Into Channel*, LAS VEGAS REV.-J., Jun. 10, 2011, at 1B.

<sup>420</sup> Lynnette Curtis, *North Las Vegas Files Federal Lawsuit for Right to Use Channel*, LAS VEGAS REV.-J., Jun. 11, 2011, at 3B.

<sup>421</sup> Mower, *supra* note 417.

<sup>422</sup> Lynnette Curtis, *North Las Vegas Mayor Says City Endures*, LAS VEGAS REV.-J., Jan. 3, 2012, at 1B.

<sup>423</sup> Representative Rob Bishop, whose district includes Hill Air Force Base, made the following statement to then-Air Force Chief of Staff General Norton A. Schwartz:

Gentlemen, I have good and bad. Let me do the good first. General, we spoke on the phone a while ago about the extended [sic] use lease problems at Falcon Hill and you said you would fix it. I want to thank you for doing that. You did. You orchestrated a situation where the people went out there, they saw those particular problems for moving forward, and I just want to thank you very much for following through on that issue. I think it is very positive. *And just keep the JAG attorneys away from the issue in the future.*

*Hearing on National Authorization Act for Fiscal Year 2011 & Oversight of Previously Authorized Programs Before the H. Comm. on Armed Services*, 111th Cong. 23–24 (2010) (statement by Rep. Rob Bishop) (emphasis added).

<sup>424</sup> Mitch Shaw, *Hill Air Force Base's Falcon Hill Construction Project Under Way*, STANDARD-EXAMINER (Ogden, Utah), Oct. 28, 2010, available at 2010 WLNR 21547276.

<sup>425</sup> Steve Fidel, *Hill Air Force Base's \$1.4 Billion Research Park Under Way: Hill to Gain \$1.4B Research Park*, DESERET MORNING NEWS (Salt Lake City, Utah), Oct. 28, 2010, at A10.

<sup>426</sup> *Id.*

At Eglin Air Force Base, the project at Northwest Florida Regional Airport appeared to be uncontroversial, but that may be due in large measure to the fact that the parties appeared to have come to an agreement as to the value of the lease. The same cannot be said for the wastewater treatment project. There was some dispute about the property's actual value even though the lease agreement was eventually signed and the parties agreed to the terms.<sup>427</sup> This was precisely at issue in the General Accounting Office's report, which faulted Eglin Air Force Base officials for relying on "negotiations with the lessee, rather than the appraisals, to determine the [fair market value] of the property."<sup>428</sup> In addition, Eglin Air Force Base failed to put the property up for competitive bid and negotiated with a single party to determine both the interest for the parcels and their value.<sup>429</sup> As a result, the General Accounting Office determined that the Elgin Air Force Base leases did not receive the income they should have.<sup>430</sup>

The final Eglin Air Force Base lease is the most difficult to assess. This enhanced use lease was the only one which the Air Force entered into with a private party. All other leases involved significant involvement of governmental entities. This had good and bad aspects. On the positive side, the Okaloosa Island project demonstrated that the private sector could be a partner in this process. This has ramifications for future projects, especially leases that may involve sophisticated private companies who are interested in using military lands. On the other hand, the fact that military land is involved necessarily brings into question tax issues. This issue came up when Department of Defense officials were discussing enhanced use leases with members of Congress, and there was no satisfactory answer provided.<sup>431</sup>

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<sup>427</sup> Ayres, *supra* note 388.

<sup>428</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 317, at 26. The General Accounting Office also disagreed with the Air Force's assertion that "a property's actual [fair market value] is the price a willing buyer could reasonably expect to pay a willing seller in a competitive market to acquire the property." *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* In a stinging criticism of the Eglin enhanced use leases, the General Accounting Office concluded by saying that "[s]uch cases raise questions about the extent to which the [enhanced use leases] will provide for receipt of the [fair market value] of the lease interest." *Id.* It did not state whether enhanced use leases of this nature should continue.

<sup>431</sup>

ENHANCED USE LEASES

60. Senator THUNE. Mr. Arny, enhanced use leases in the [Department of Defense ("DoD")] have proliferated in the past [three] years as the military Services learn to market under-utilized [f]ederal property to the private sector for commercial use in exchange for ground lease proceeds and/or in-kind consideration. While Congress originally intended this authority to be an innovative way to generate funds for chronically depleted facility repairs accounts, like many authorities, it has had unintended consequences. Many local communities have raised concerns that local developers prefer the use of [f]ederal land as a way to avoid [s]tate and local taxes. Private land owners are at a disadvantage competing against the [f]ederal Government for development. Also, local communities have little or no control over development and are saddled with increased costs for traffic, schools, and infrastructure with no accompanying increase in local tax revenue. *How can DoD*

In fact, the Deputy Under Secretary of Defense responded that, while taxes must ultimately be paid by lessees of property, those taxes could reduce the overall value of the lease to the federal government.<sup>432</sup> That raises the possibility that a military department may not realize the full value of its lease.

Taxation was also an issue for local officials. The Okaloosa County Tax Collector commented, “That can’t be tax free,” after seeing the Okaloosa Island development.<sup>433</sup> The Leasing Statute expressly provides that state and local govern-

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*work with local communities to compensate for impacts to local conditions arising from enhanced use lease transactions?* Mr. ARNY. DoD will continue to ensure that the military departments fully coordinate with local and State governments regarding potential enhanced use leases (“EULs”) under [10 U.S.C. § 2667], to ensure that potential projects comply with zoning for adjacent parcels and are generally supported by the local government. However, *in all cases, compensation for any impacts to local conditions arising from EUL transactions is the sole responsibility of the lessee, to include resultant property taxes or impact fees.* Property taxes and impact fees assessed to EULs depend upon [s]tate and local tax authorities and the nature of the development. The military departments will continue to advise potential lessees that in the absence of clear written direction from [s]tate and local tax authorities that property taxes are not applicable, or are reduced, the lessee should assume that property taxes will be assessed on the project and include such costs in their financial projections.

61. Senator THUNE. Mr. Army, certain [s]tates are considering legislation that would tax improvements made to [f]ederal land, which are subsequently occupied by non-[f]ederal tenants. What would be the impact of this type of legislation on the [d]epartment’s enhanced use leasing program? Mr. ARNY. Legislation that would tax improvements made to [f]ederal land, which are subsequently occupied by non-[f]ederal tenants, would likely lower the fair market value of the property and reduce the potential lease consideration (ground rent) paid to the military departments. Section 2667(e) of title 10, U.S.C., specifies that [s]tate or local governments may tax the lessee’s interest in the property leased to it. It further provides that any leases under [10 U.S.C. §] 2667 include a provision that if and to the extent that the leased property is later made taxable by [s]tate or local governments under an Act of Congress, the lease shall be renegotiated. In all cases, the tax consequences of the enhanced use lease development are the sole responsibility of the lessee. When entering into enhanced use leases, DoD advises the lessee that in the absence of clear written direction from the [s]tate and local tax authorities that property taxes are not applicable, or are reduced, the lessee should assume that property taxes will be assessed on the project and include such costs in its financial projections. These lessees can seek agreements from the local authorities to limit their fees to the actual services provided by the [s]tate or locality.

*Dep’t of Def. Authorization for Appropriations for Fiscal Year 2009: Hearing on S. 3001 Before the Subcomm. on Readiness & Mgmt. Support of the S. Comm. on Armed Services, 110th Cong. 98–99 (2008)* (advance questions submitted by Sen. John Thune and answers provided by L. Wayne Army III, Deputy Under Sec’y of Def. (Installations & Env’t)) (emphasis added).

<sup>432</sup> *Id.*

<sup>433</sup> McLaughlin, *supra* note 414. Benjamin F. Anderson, Tax Collector of Okaloosa County, made this statement, and his opinion is significant, because the office of Tax Collector is an elected office under Florida law. *See* FLA. CONST. art. VIII, § 1(c).

ments may tax property subject to leases under the statute.<sup>434</sup> In addition, most states have reserved the right to collect taxes on land that has been ceded to the federal government. However, the language of the Leasing Statute regarding taxation is permissive and not mandatory. This situation also raises the additional challenge of assessing property values on land that has never been assessed and for which no assessment exists.<sup>435</sup>

The last issue the Eglin enhanced use lease raises is fairness of the competition. Other developers suggested that the Okaloosa Island lease provided competitive advantages that they were unable to meet.<sup>436</sup> All of these factors raise issues that require the military departments to have a high degree of sophistication and understanding of tax implications of enhanced use lease, an understanding of land use law, and a host of other legal issues, if only to prevent lessees from seeking a modification or reduction of fees to the federal government to offset taxes paid to state and local governments.

### C. Unique Issues with Energy Development and Enhanced Use Leases

These five projects are examples where the Air Force developed underutilized property through enhanced use leases. In each of these projects, the Air Force gained tangible benefits even though some benefits were more significant than others. While these projects were in development, energy development on Department of Defense property began to receive significant attention as an area where enhanced use leases could be used. Energy development presents unique challenges as the military departments attempt to lease their land in new projects. At the same time enhanced use leases were looked at as an opportunity to leverage military property as a means of improving infrastructure, they received congressional interest as possible tools to spur energy development.<sup>437</sup> Notwithstanding the positive results the Air Force has received in Florida, Nevada, and Utah through enhanced use lease projects, it may be in the area of energy development where the Leasing Statute will have its most significant impacts. However, in light of recent developments in the energy market, this is an area where success is far from a guarantee.

#### 1. Energy Development Project at Nellis Air Force Base

As stated above, the Energy Policy Act of 2005 established a renewable energy policy for the entire federal government, including the Department of

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<sup>434</sup> 10 U.S.C. § 2667(f) (2010).

<sup>435</sup> [Okaloosa County] Property Appraiser Pete Smith has said the Air Force land is exempt from taxation. He added though, that in cases in which the county can't tax the land itself, it typically taxes improvements on it. It remains unclear if Smith's plan for tax collection is one the Air Force and Emerald Breeze Resort Group are willing to get behind. McLaughlin, *supra* note 414.

<sup>436</sup> *Id.*

<sup>437</sup> Secretary William C. Anderson stated the following about Air Force enhanced use leases and energy development:

Defense.<sup>438</sup> Two years later, Congress passed the Energy Security and Independence Act.<sup>439</sup> In that law, Congress specifically tied energy use with national security by stating that “accelerated development and use of renewable energy technologies provide numerous benefits to the United States, including improved national security....”<sup>440</sup> With this statutory mandate, the military departments looked for opportunities to develop energy projects.

One of the Department of the Air Force’s first energy-related development projects occurred at Nellis Air Force Base, where a 140-acre photovoltaic system was constructed.<sup>441</sup> The project went online in 2007 and generates fourteen megawatts of electricity for the base.<sup>442</sup> As a result of this project, the Air Force began looking for other solar energy generation opportunities, and it pursued projects in the southwest deserts of California and Arizona.<sup>443</sup> The Air Force has now announced its desire to increase photovoltaic energy with a second solar array at the base.<sup>444</sup>

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[W]e have initiated a focused effort to identify opportunities where Enhanced Use Lease (EUL) authority can help us find ways to leverage our physical plant value while providing a mechanism to offset facilities and utilities operations and maintenance costs, especially energy costs. As a force multiplier, we are leveraging our [Air Force Real Property Agency] to be our center of excellence for identifying and acting upon EUL opportunities across the Air Force. Following on the tremendous success of the construction of the largest photovoltaic solar installation in the Americas at Nellis Air Force Base, [Nevada], we are pursuing five major energy-related EUL projects: solar energy at Edwards [Air Force Base, California]; Luke [Air Force Base, [Arizona]]; and Kirtland [Air Force Base, New Mexico]; and a prospective nuclear energy project at a location yet to be identified.

Anderson statement to the Senate, *supra* note 302, at 57–58.

<sup>438</sup> Pub. L. No. 109-58, § 203, 119 Stat. 594 (codified at 42 U.S.C. § 15852 (2000 & Supp. V 2005)).

<sup>439</sup> Pub. L. No. 110-140, 121 Stat. 1492 (2007) (codified as amended at 42 U.S.C. §§ 17001 to 17386 (2010)).

<sup>440</sup> 42 U.S.C. § 17285 (a)(3) (2010). This section also listed additional benefits, including: “improved balance of payments, healthier rural economies, improved environmental quality, and abundant, reliable, and affordable energy for all citizens of the United States.” *Id.*; see also Scholtes, *supra* note 294, at 64–65.

<sup>441</sup> John G. Edwards, *Nellis Air Force Base Closer to Landing Big Solar Project*, LAS VEGAS. REV.-J., Mar. 23, 2007, at 3D.

<sup>442</sup> *Id.*

<sup>443</sup> *Id.* In California, the Air Force has pursued a solar development project at Edwards Air Force Base in Kern County. See Weikel and Zahniser, *supra* note 75 at B1. In Arizona, the Air Force has pursued solar development projects at Davis-Monthan Air Force Base in Pima County. See David Wichner, *Huge D-M Solar Project Expected to Begin Soon*, ARIZ. DAILY STAR, Aug. 27, 2012, at A6. The Air Force has also pursued solar development projects at Luke Air Force Base in Maricopa County. See Rebekah L. Sanders, *2 Big Solar Projects Mullied for W. Valley*, ARIZ. REPUBLIC, May 12, 2010, at B2; Ryan Randazzo and Rebekah L. Sanders, *Luke Air Force Base May Become a SOLAR FORCE*, Jul. 24, 2010, at A1; Rebekah L. Sanders, *Artifacts at Luke Will Be Excavated*, ARIZ. REPUBLIC, Aug. 20, 2010, at B1.

<sup>444</sup> Steve Kanigher, *Nellis Wants to Double the Base’s Solar Energy Output*, LAS VEGAS SUN, Nov. 23, 2010, at 1.

Before using Nellis Air Force Base's photovoltaic array as the model for the rest of the Air Force to follow, it is important to note that this project was not an *enhanced use lease*.<sup>445</sup> It may be surprising that an energy-related enhanced use lease was not highlighted as an example, but the simple reason is that, to date, no such project has been successfully completed in the Air Force.<sup>446</sup> This is significant, because the decision to not use an enhanced use lease at Nellis Air Force Base was deliberate. In this case, the Air Force received the general benefit of lower electricity rates that were less than it had been paying because it was the sole user of power that was generated.<sup>447</sup> In addition, the option not to pursue an enhanced use lease saved time in completing the project.<sup>448</sup>

The decision not to pursue an enhanced use lease had other, less positive consequences. By not entering into an enhanced use lease, the military received no in-kind payments for projects at the base, and it received no direct payment of lease royalties for the use of Air Force property. Under the Leasing Statute, such benefits are required, and these benefits would have accrued directly to Nellis Air Force Base.<sup>449</sup> In contrast, North Las Vegas actually constructed a new fitness center for the benefit of Nellis Air Force Base. And while the savings from a lower power bill is a general benefit, the net savings do not necessarily go back to the base.

Highlighting this *non-enhanced* use lease project in discussing energy development possibilities on military property simply underscores the difficulties that exist under the current law in entering into these arrangements. For one thing, the Leasing Statute is silent on the topic of energy development.<sup>450</sup> Second, the Leasing Statute requires the federal government receive "fair market value" for the use of its land by a lessee,<sup>451</sup> but there has been no guidance provided to actually

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<sup>445</sup> Curtis D. Henley, Darius A. Phillips, & Shaun C. Hunt, *Nellis Air Force Base, Nevada Photovoltaic Project* 39-41 (Naval Postgraduate School, MBA Professional Report, 2008). Rather, Air Force property managers decided to pursue another lease arrangement for a variety of reasons. Some of these reasons include the fact that private financing was involved, the enhanced use lease process would take longer to approve, and that electricity generated by the new solar array would be consumed primarily by Nellis Air Force Base and not sold on the retail market. *Id.*

<sup>446</sup> *Projects in Development*, U.S. AIR FORCE CIVIL ENGINEER CTR., <http://www.afcec.af.mil/eul/eul/completedprojects/index.asp>.

<sup>447</sup> John G. Edwards, *Photovoltaic Installation Finished at Air Force Base*, LAS VEGAS REV.-J., Dec. 18, 2007, available at 2007 WLNR 25024009.

<sup>448</sup> *Id.*

<sup>449</sup> See 10 U.S.C. §§ 2667 (e)(1)(B)–(D) (2010 & Supp. 2014).

<sup>450</sup> The only guidance which the Leasing Statute contained regarding energy development came in 2008, when Congress required the specific action for energy-production projects whose lease terms exceeded twenty years. That section was later repealed in 2011. See Duncan Hunter Nat'l Def. Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 2831, 122 Stat. 4732 (2008) repealed by Ike Skelton Nat'l Def. Authorization Act for Fiscal Year 2011, Pub. L. 111-383, § 2811(g)(4)(A), 124 Stat. 4463.

<sup>451</sup> 10 U.S.C. § 2667 (b)(4) (2010). The Leasing Statute allows for less-than fair market value to be paid after the Secretary makes a determination under specific criteria set out in the law, but these

assess what the fair market value actually is. In Florida, the General Accounting Office faulted the Air Force for failing to collect fair market value on property leased to Okaloosa County,<sup>452</sup> going so far as questioning whether the fair market value is the price a willing buyer could reasonably expect to pay a willing seller in a competitive market to acquire the property.<sup>453</sup> With regard to electrical generation and transmission projects that are subject to oversight by multiple state and federal agencies, there remains no guidance from Congress how energy-related projects should be handled.<sup>454</sup>

## 2. Changes in the Energy Market

Another issue to address is that energy development has dramatically changed, and a confluence of factors has made alternative energy development more challenging. When Congress passed the Energy Policy Act, the Energy Information Administration projected a decrease in domestic crude production and only nominal increases in domestic gas production, mainly from Alaska.<sup>455</sup> By 2007, when the Energy Security and Independence Act passed and alternative energy projects like the Nellis Air Force Base project came online, the outlook for domestic crude production and domestic gas production started to improve.<sup>456</sup> In 2008, the outlook for alternative energy had changed even further due to economic and other factors.<sup>457</sup> By 2010, domestic crude production and domestic gas production increased significantly, due in part to the development of hydraulic fracturing and horizontal drilling techniques that unlocked previously inaccessible reserves.<sup>458</sup> As a result, natural gas has become a reliable source for electricity generation. This is significant because alternative energy sources like solar power have consistently been more expensive than more traditional energy sources like natural gas.<sup>459</sup>

One of the mechanisms that facilitated alternative energy development was generous tax incentives, loans, and grants from federal and state governments.<sup>460</sup>

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cases only apply to property affected by base realignment and closure. *See* 10 U.S.C. §§ 2667 (g) (1)–(2) (2010 & Supp. 2014).

<sup>452</sup> U.S. GEN. ACCOUNTING OFFICE, *supra* note 323, at 26.

<sup>453</sup> *Id.*

<sup>454</sup> This thesis does not explore the complexities of the electrical generation and transmission system, but these factors weigh in on how Air Force land is utilized.

<sup>455</sup> ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY PUB. NO. 0383, ANNUAL ENERGY OUTLOOK 2005 9 at Table 1 (2005).

<sup>456</sup> ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY PUB. NO. 0383, ANNUAL ENERGY OUTLOOK 2007 14 at Table 1 (2007).

<sup>457</sup> Clifford Krauss, *Alternative Energy Suddenly Faces Headwinds*, N.Y. TIMES, Oct. 21, 2008, at B1.

<sup>458</sup> ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY PUB. NO. 0383, ANNUAL ENERGY OUTLOOK 2010 41 (2010).

<sup>459</sup> Julie Cart, *The Solar Desert*, L.A. TIMES, Feb. 5, 2012, at A1.

<sup>460</sup> *Id.*



Another factor was the requirement that states acquire a certain percentage of energy from renewable sources. This standard was enacted to facilitate development of alternative energy projects like the ones contemplated on military property. However, these factors have changed. Many of the tax incentives and loan guarantees have ended, which make alternative energy projects less viable.<sup>461</sup> In addition, new sources of natural gas have made gas-fired generators more attractive and cost effective.<sup>462</sup> Consequently, alternative energy development has slowed, especially solar energy development.<sup>463</sup> Although Executive Order 13,423 remains in force, the military departments will face significant challenges to using their real property as an inducement to develop renewable energy project if there is little incentive or limited financial resources for private entities to develop the projects in the first place. The fact that land managers and energy developers were able to successfully place a photovoltaic array at Nellis Air Force Base demonstrates that the possibility exists for such projects to start. However, there is no indication that the incentives in existence when this project started will be as readily available in the future to see others take place around the Air Force. It remains to be seen how enhanced use leases will improve the chances of such projects beginning.

## VI. RECOMMENDATIONS

These cases lead to several recommendations about enhanced use lease projects in the future.

First, Congress should define what an “enhanced use lease” is in statute. There are important criteria that characterize enhanced use leases and distinguish them from all other leases. However, the fact that the term is not clearly defined may lead to potential difficulty in future cases. The history of the Leasing Statute has demonstrated that changes are possible, and a modification of the definition may be needed in the future. That should not dissuade legislative action to ensure that all parties are clear about what terms mean.

Second, Congress should clearly identify that enhanced use leases are a preferred method of granting use of military property. This is related to the first recommendation that Congress define what actually constitutes an enhanced use lease. One of the most important and attractive features of an enhanced use lease is that the federal government receives payment in cash or in kind for the property involved. This is important for several reasons. The most important reason is an issue of fundamental fairness. As owner of the potentially leasable property, the military should be compensated for its use. Because the property is deemed nonex-

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<sup>461</sup> Julie Cart, *Solar Power's Outlook Not as Sunny*, L.A. TIMES, Jan. 12, 2014, at A1.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* Three hundred sixty five federal solar applications have been filed since 2009, but only twenty are on pace to being built. In addition, several major projects have been canceled because of lack of funding. *See id.*

cess, it cannot be disposed of or otherwise given away by the federal government. Therefore, the government should be compensated for its use. The second reason is the additional benefits the government receives through cash or in-kind work. At Nellis Air Force Base, the Air Force received a new fitness center sooner than it otherwise would have because of its lease with North Las Vegas. At Hill Air Force Base, the Air Force not only received new office space, but it also received a new entry point that met updated security standards. At Eglin Air Force Base, the Air Force received a new fire station that coincided with the arrival of new aircraft and an expanded civilian airport. All of these benefits were provided at no cost to the federal government. Enhanced use leases will be an important way to upgrade and maintain existing facilities and construct new ones in the military.

This leads to the another reason why enhanced use leases should be preferred. Not only are cash or in-kind payments required, these payments must equal the fair market value of the real property involved in the transaction. This feature prevents a transaction from occurring which does not adequately calculate the value of the Air Force property. According to the General Accounting Office, that value is equal to the price that would be obtained in a competitive market. It prevents so-called “sweetheart” deals from occurring. The best way to ensure that these types of leases become the preferred method of business is to enshrine this preference in statute.

Third, the enhanced use lease process should become more open and transparent. This article has discussed several enhanced use leases that the Air Force has negotiated over several years, but it has not included much detail as to how the leases were entered. This is a problem. While understanding that leases are business transactions and acknowledging that they may involve sensitive business matters, a more open and transparent process would benefit the entire enhanced use lease program by providing a “template” of sorts to subsequent parties seeking leasing opportunities with the Air Force. The Air Force cannot offer money absent an appropriation from Congress. With very few exceptions—notably utilities—it cannot offer guaranteed use or consumption of a service or product. The Air Force has only one real asset which it can offer in a lease, and that asset is land.

By creating an open and transparent process which involves stakeholders at all levels, the Air Force shows potential partners what requirements exist for a successful enhanced use lease. An open and transparent process also ensures the “buy-in” needed for the project to ultimately succeed. The benefits of an open process are most evident in the Hill Air Force Base project. When land managers decided to go forward with the lease program, they initially wanted to select a developer through a “sole-source” contract. However, that decision was changed and the developer was ultimately selected through a competitive process. In so doing, Hill Air Force Base cemented legitimacy for the overall project, and this legitimacy will contribute to its long-term success.

Involvement of state and local officials is also important in order to ensure that the enhanced use lease process is open and transparent. This involvement has to be significant, and it must be sustained for the success of any potential project. This is important, because these leases may be offered and negotiated at local levels where the impact is greatest. To the extent possible, such involvement should occur in public forums and meetings. Once again, there are instances where sensitive discussions occur outside of a public setting, but such instances should be rare and minimized. As a part of the Department of Defense, the Air Force is a steward of the nation's resources, and it should take every effort to ensure that the public's business is conducted in public.

Such was the case with the North Las Vegas wastewater treatment proposal. When the city determined that a new plant was needed, the public was very concerned at the prospect of a facility in its neighborhoods. Although the negotiations between Nellis Air Force Base and the city were private, the option to build on Air Force property was a publicly-discussed possibility which was ultimately selected. This involvement does not necessarily require the creation of a new, quasi-official state agency like the intriguing Military Installation Development Authority in Utah, but significant involvement at that level signals several things. First, it signals a willingness to follow the project through over an extended period of time. Notwithstanding the desire of Air Force officials and state and local governments, the lease process has not been streamlined enough for these projects to be completed quickly. Moreover, lack of local governmental involvement may actually imperil projects, and this may damage and deter other potential reuse possibilities.<sup>464</sup> The leases highlighted in this article have demonstrated that this process is very complex. Strong local participation will enable enhanced use leases to weather unforeseen and unexpected problems. Ultimately, the Department of the Air Force is a member of the community where these installations exist. Participation in a public and transparent process demonstrates that the Air Force is a good neighbor.

The final recommendation is for the Air Force to continuously review and update the enhanced use process. It can do so through consistently updated guides and handbooks to the extent that it has not already done so. A formalized process replete with publicly-available aids and tools will benefit parties inside and outside the Air Force who want to be part of an enhanced use lease project on a particular project. In making this recommendation, it is obvious that offices and teams already

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<sup>464</sup> For a BRAC example where lack of local involvement thwarted a potential reuse opportunity:

[The p]ossibility of erosion of political consensus for reuse, along with the possibility of random litigation... may impede the reuse process. There are well known national examples (such as the former Hamilton Air Force Base, California) of bases where the lack of local political consensus or continued litigation thwarts the conversion process, and therefore makes investment in conversion projects unattractive.

Statement of the Installation Developers, *supra* note 214, at 226.

exist to facilitate enhanced use lease projects. However, this recommendation is made in light of the changes that occurred during the base realignment and closure process. As noted above, the Department of Defense identified excess capacity in the form of surplus bases and installations around the country. However, attempts to close, consolidate, or otherwise transfer these assets were unsuccessful until a formalized process was established by Congress. But even more important that the actual Base Realignment and Closure Act was the fact that Congress continued to monitor and refine the process through legislation as circumstances dictated. To this end, the Leasing Statute is an important tool in the enhanced use lease process. The key to the process is its flexibility. If current Air Force guides, handbooks, programs, and initiatives do not yield an increase in enhanced use lease projects, then these guides, handbooks, programs, and initiatives may not be effective and should be changed. This process must be dynamic and not static. The value of the Leasing Statute is that it has demonstrated dynamism over time. If the enhanced use lease program, which is merely a part of the Leasing Statute, is not also dynamic, then the program is not realizing its full potential to provide benefits to the Air Force specifically or to Department of Defense and to the nation generally.

## VII. CONCLUSION

Over its history, the Leasing Statute has very rarely been a prospective act; rather, it has usually been changed in response to a particular set of circumstances or challenges that existed at a particular moment. When the Department of War first requested congressional action in 1892, it did so because it needed a mechanism to convey rights to its property that did not previously exist. Congress enacted legislation which resulted in a proto-Leasing Statute. During World War II, new circumstances arose which called for a wholesale revision of this leasing authority, and the Leasing Statute came into existence. However, the purpose behind this action never appears to have been used. The first time that a court acted on the Leasing Statute was not in response to the federal government trying to reclaim a factory needed to produce war materiel. It occurred when the Army needed one of its warehouses in the buildup to the Korean War. Subsequent changes also occurred in response to the needs of the country at a particular time.

Changes in the Leasing Statute also reflect changes in what can be thought of as a philosophy of governance. During World War II, the federal government was responsible for organizing and prosecuting the war effort through instrumentalities of the government itself. The Leasing Statute provided a mechanism to have ready access to plants and machinery which would be needed to prepare and fight a war in the future. By the 1970s, when some of the excesses of executive power were curtailed, the Leasing Statute was also amended so that a presidential emergency declaration was not required for it to be enforced.

Ironically, this action may have actually expanded the Leasing Statute's usefulness, because leases were now possible in a variety of different settings.

Given the large land holdings of the Department of Defense, the now-expanded Leasing Statute permitted land managers to put land that was not immediately needed in support of the military mission to beneficial use. More specifically, the Leasing Statute allowed land managers not only to administer large holdings in environmentally conscious ways, but also to collect rents to support these efforts. By the 1980s, this development of the Leasing Statute corresponded to the federal government's overall effort to more effectively, efficiently, and prudently manage the nation's resources. The Department of Defense's real property was viewed as a resource to be managed.

Utilization of the Leasing Statute came into its most significant form when it became an important part of the base realignment and closure process. Congress and the executive branch used the Leasing Statute as a tool to facilitate several objectives of this process. When an installation was selected for closure, it allowed the impacted community to begin utilizing the property before the military formally transferred title. If a contaminated parcel were in need of cleanup, the Leasing Statute facilitated reuse while remediation occurred. As the realignment and closure phase came to a close, the Leasing Statute evolved to become a mechanism for using federal resources more efficiently. The Leasing Statute has been used to leverage underutilized property to the benefit of both the military and non-military communities. Subject to careful oversight and implementation, the Leasing Statute may be applied toward achieving national energy policies.

In a real sense, this brings the Leasing Statute full circle. When the proto-Leasing Statute was passed in 1892, it came into being with an eye toward achieving a specific objective for the Department of War, namely, to provide the Department with a lawful means of authorizing the use of lands under its control.<sup>465</sup> The length of lease may have changed over time, but for over 100 years, one of its primary criteria for granting leases on federal land has not changed. It remains a tool to be used "for the public good."<sup>466</sup>

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<sup>465</sup> 23 CONG. REC. 2187.

<sup>466</sup> *Id.*

OLD WINE INTO NEW BOTTLES:  
THE ARTICLE 32 PROCESS AFTER THE NATIONAL DEFENSE  
AUTHORIZATION ACT OF 2014

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*[A] preliminary hearing is used to determine if there is probable cause and if a case should go to trial.... These proceedings are very brief, and the scope of the hearing is limited to the question of probable cause.*

—Congresswoman Jackie Speier, November 14, 2013<sup>1</sup>

*I think the one important factor to keep in mind on this is that this is not the trial. It is merely the preliminary investigation to satisfy the officer investigating that there is probable cause that the man did commit the crime and there is enough evidence to warrant that he should be put on trial.*

—Congressman A. Walter Norblad, Jr., March 23, 1949<sup>2</sup>

## I. INTRODUCTION

Dissatisfaction with the military's handling of sexual assault cases led Congress to legislate changes to Article 32, Uniform Code of Military Justice (UCMJ), investigations to avoid retraumatizing victims and limit cross-examination tactics which were perceived to be unnecessarily invasive. The changes to Article 32 were thought by many to be highly transformative, ushering in a new world in which Article 32 hearings would become narrowly focused on the question of probable cause and become little more than a procedural formality. The history of Article 32, the language used in the new statute, and the requirement that probable cause be analyzed in an adversarial proceeding that must ultimately answer the question of what disposition should be made of a case, suggest that such a view is unwarranted.

## II. THE CHANGES TO ARTICLE 32, UCMJ

As part of the National Defense Authorization Act of 2014 (2014 NDAA), Congress altered the language of Article 32, UCMJ.<sup>3</sup> It did so in an effort to limit the scope of Article 32 hearings, which were deemed to be abusive and unnecessarily broad.<sup>4</sup> Comments on the Senate floor recounted recent high visibility cases and heart-wrenching anecdotes that illustrated the excessiveness of Article 32 hearings.<sup>5</sup>

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<sup>1</sup> 113 CONG. REC. H7059 (daily ed. Nov. 14, 2013) (statement of Sen. Speier).

<sup>2</sup> *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 997 (1949) [hereinafter Hearing on H.R. 2498] (statement of Mr. Norblad).

<sup>3</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702 (2013) [hereinafter 2014 NDAA].

<sup>4</sup> See generally 113 CONG. REC. H7059, *supra* note 3.

<sup>5</sup> 113 CONG. REC. S8095 (daily ed. Nov. 18, 2013) (statement of Sen. Boxer) (describing three accounts of sexual assault victims who suffered upsetting, intimidating and revictimizing questioning at Article 32 hearings).

These anecdotes echoed the public perception that in sexual assault cases, defense counsel were using the Article 32 process to intimidate and bully victims.<sup>6</sup> Media commentators assumed the cross-examination that occurred in these high-profile Article 32 hearings was well outside the scope of what was required for a probable cause determination and portrayed these excessive cross-examinations as a common defense tactic in sexual assault cases.<sup>7</sup> Legal scholars were quoted as supporting this narrative and calling for dramatic change: “If this is what Article 32 has come to be, then it is time to either get rid of it or put real restrictions on the conduct during them,”<sup>8</sup> and “An Article 32 is a needlessly complex and lengthy ‘trial before a trial.’ ... All that’s needed is a brief preliminary hearing, like those in civilian courts, to determine if there’s enough evidence to proceed to trial. ... [C]urrent procedures are a ‘barnacle’ on a military justice system that has modernized in other ways... ‘This can be cut way back.’”<sup>9</sup>

Congress found merit in these criticisms and rewrote Article 32. No longer would Article 32 hearings be mini-trials that often resulted in invasive and probing questioning of victims of crime, rather the hearings would be of limited inquiry.<sup>10</sup> The title itself was the first alteration; transforming “Art. 32. Investigation” into “Art. 32. Preliminary hearing.”<sup>11</sup> To understand all the changes to Article 32, it may be helpful to compare the new version with its predecessor. (See Appendix 1).

Previously, an Article 32 hearing was a “thorough and impartial investigation.”<sup>12</sup> There were four main purposes for this investigation: (1) inquiry into the truth of the matter set forth in the charges; (2) consideration of the form of charges; (3) recommendation as to the disposition of the case; and (4) a means of

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<sup>6</sup> Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 20, 2013, available at [http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?pagewanted=all&_r=0).

<sup>7</sup> Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS, Dec. 12, 2013, available at <http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125> (midshipman was subjected to 30 hours of invasive questioning that was only tangential to the case, including details about how wide she opened her mouth during oral sex and whether she wore underwear); Chris Carroll, *Lawmakers Urge [President] Obama to End Article 32 Investigation Grilling of Sex Assault Victims*, STARS AND STRIPES, Sept. 26, 2013, available at <http://www.stripes.com/news/lawmakers-urge-obama-to-end-article-32-grilling-of-sex-assault-victims-1.243519>.

<sup>8</sup> Steinhauer, *supra* note 8 (quoting Jonathan Lurie, professor emeritus of legal history at Rutgers University).

<sup>9</sup> Carroll, *supra*, note 9 (quoting Eugene Fidell, military legal scholar at Yale University).

<sup>10</sup> 113 CONG. REC. S8095, *supra* note 7 (Sen. Boxer speaking about reforms to Article 32 to be incorporated as an amendment to the 2014 NDAA); 113 CONG. REC. H7059, *supra* note 3 (Sen. Speier speaking about the introduction of the Article 32 Reform Act, which never passed, but was discussed during Congressional debates in November 2013 about reforms to the UCMJ).

<sup>11</sup> 2014 NDAA § 1702. .

<sup>12</sup> 10 U.S.C. § 832(a) (2012).



discovery.<sup>13</sup> Additionally, the accused was permitted “to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer [should] examine available witnesses requested by the accused.”<sup>14</sup>

The new Article 32 language in the 2014 NDAA attempts to narrow the focus of the hearing from what was perceived as a no-holds barred investigation to: (1) an inquiry into the existence of probable cause to believe an offense has been committed and the accused committed the offense; (2) that court-martial jurisdiction exists; (3) that the charges are in the appropriate form; and (4) a recommendation as to the disposition of the case.<sup>15</sup> It makes explicit Congress’s intent to orient the Article 32 hearing toward merely a probable cause hearing. Indeed, the new language of Article 32 uses the term “limited” in four instances to describe the purpose of the hearing and matters to be presented.<sup>16</sup>

To further truncate the hearing and reduce its invasive nature, Congress eliminated any requirement that victims testify in person by making them presumptively unavailable if they choose not to testify.<sup>17</sup> The hearing officer can instead consider prior qualifying sworn statements in lieu of live testimony, such as statements made to law enforcement during the initial complaint and investigation.<sup>18</sup> The purpose of this amendment was to “[m]ake the Article 32 process more like a grand jury proceeding,”<sup>19</sup> and exempt victims of sexual assault from having to endure rigorous and often humiliating cross-examination prior to trial.<sup>20</sup> Congress wanted to focus away from victims of crime and reorient to the question of probable cause.

Underlying the changes to Article 32 is an assumption that Article 32 hearings routinely went well beyond an inquiry into probable cause. Other than those few cited sexual assault cases that were putatively abusive, was the scope of the ordinary Article 32 hearing truly beyond a probable cause inquiry? If most hearings were generally limited to probable cause inquiries, then what will this amendment change? Has changing the title from “Art. 32 Investigation” to “Art. 32 Preliminary hearing” affected the dramatic change that reform proponents desired? To answer these questions, one must examine probable cause at civilian preliminary hearings and the standards previously applicable at Article 32 hearings.

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<sup>13</sup> *Id.* See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rules for Courts-Martial [hereinafter R.C.M.] 405(a), discussion (2012).

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

<sup>15</sup> 2014 NDAA § 1702(a)(2).

<sup>16</sup> See 2014 NDAA § 1702(a)(2), (d)(2), (d)(4).

<sup>17</sup> 2014 NDAA § 1702(d)(3).

<sup>18</sup> R.C.M. 405(g)(4)(B).

<sup>19</sup> *National Defense Authorization Act for Fiscal Year 2014: Hearing on S. 1197 Before a Subcomm. on Armed Servs.*, 159th Cong. S8548 (Dec. 9, 2013) (statement of Sen. Levin).

<sup>20</sup> CONG. REC. S8095, *supra* note 7; CONG. REC. H7059, *supra* note 3 (giving examples from Art. 32 hearings in the Naval Academy rape cases).

### III. PROBABLE CAUSE AND PRELIMINARY HEARINGS UNDER FEDERAL LAW

Federal criminal law is the closest analogous system from which military courts-martial traditionally look for guidance in unfamiliar matters<sup>21</sup> and is the system Congress meant to emulate in the UCMJ. A preliminary hearing under federal criminal law is governed by Federal Rule of Criminal Procedure 5.1 [hereinafter Rule 5.1].<sup>22</sup> The primary purpose of the federal preliminary hearing is simply to determine whether or not there is probable cause to believe that a crime has been committed and the defendant committed it.<sup>23</sup>

“Probable cause” is not defined in the Federal Rules of Criminal Procedure or criminal code. The case law interpreting Rule 5.1 has defined “probable cause” in the context of a preliminary hearing as “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.”<sup>24</sup> Federal magistrate courts analyzing probable cause determinations look to the definitions applied by the United States Supreme Court in its Fourth Amendment arrest and search and seizure jurisprudence.<sup>25</sup> “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily or even usefully, reduced to a neat set of legal rules.”<sup>26</sup> In summarizing its rulings, the Supreme Court stated “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”<sup>27</sup>

The definition of “probable cause” under military law is no different than in its federal counterpart. Military courts of appeal utilize the same concepts as

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<sup>21</sup> See, e.g., Military Rules of Evidence [hereinafter M.R.E.] 101 (2012) (courts-martial shall apply the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts); M.R.E. 1102 (“Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.”); R.C.M. 1003(c)(1)(B)(ii) (“*Not included or related offenses.* An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code. . . .”).

<sup>22</sup> Fed. R. Crim. P. 5.1 [hereinafter Rule 5.1].

<sup>23</sup> *Id.*; 1 FED. PRAC. & PROC. CRIM § 91 (4th ed.) citing Rule 5.1(e); See also 1 FED. PRAC. & PROC. CRIM § 91 (4th ed.) (citing Rule 5.1(e)); *United States v. Hinkle*, 307 F. Supp. 117, 125 (D.D.C. 1969) (“The Government’s burden at the preliminary hearing begins and ends with the obligation of producing as much testimony as believed needed to establish probable cause for holding the accused for possible action of the Grand Jury.”).

<sup>24</sup> *United States v. Infante*, 782 F. Supp. 2d 815, 817–18 (D.Ariz. 2010) (quoting *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973)).

<sup>25</sup> See *United States v. Perez*, 17 F. Supp. 3d 586 (S.D. Tex. 2014); *United States v. Hardy*, 640 F. Supp. 2d 75 (memorandum decision) (D.Me. 2009); and *Infante*, 782 F. Supp. 2d at 817.

<sup>26</sup> *Infante*, 782 F. Supp. 2d at 818 (quoting *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983))) (alteration in original).

<sup>27</sup> *Pringle*, 540 U.S. at 371 (quoting *Brinegar v. United States*, 338 U.S. 160 (1949)).

federal courts when analyzing probable cause for search and seizure questions.<sup>28</sup> As Congress provided no separate definition of probable cause in the 2014 NDAA, it is safe to conclude that the definition of the term “probable cause” when injected into Article 32 of the UCMJ has the same meaning as the term used in Rule 5.1.

#### A. The Article 32 Investigation Was Always About Probable Cause

Given the intense rhetoric and shocking anecdotal accounts meant to illustrate its abuses, one might conclude the old Article 32 investigation was not a probable cause hearing but instead a mini-trial in favor of an accused used to screen undesirable cases rather than to ensure that baseless charges are not referred to trial. This conclusion presumes that Article 32 investigations were, in practice, going far beyond their intended scope.

When the Article 32 investigation was conceived in 1949, it was intended to be a probable cause hearing and not a sweeping mini-trial.<sup>29</sup> During Congressional hearings preceding the enactment of the UCMJ, in discussions about Article 32, Congressman Norblad reminded the subcommittee that:

“[O]ne important factor to keep in mind on this is that this is not the trial. It is merely the preliminary investigation to satisfy the officer investigating that there is probable cause that the man did commit the crime and there is enough evidence to warrant that he should be put on trial. They are not trying to decide whether he is guilty or innocent.

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Just like a hearing before a justice of the peace, to determine whether a man is being lawfully held or if there is enough evidence to try him.”<sup>30</sup>

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<sup>28</sup> See generally *United States v. Cowgill*, 68 M.J. 388 (C.A.A.F. 2010) (analyzing probable cause to authorize a search warrant based on *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007), where “[p]robable cause relies on a ‘common sense decision whether, given all the circumstances... there is a fair probability that contraband’ will be found.” (alteration in original)); *United States v. McMahon*, 58 M.J. 362 (C.A.A.F. 2003) (quoting *United States v. Powell*, 7 M.J. 435, 436 (C.M.A. 1979), for the definition of probable cause as a “reasonable ground for belief.”).

<sup>29</sup> Hearing on H.R. 2498, *supra* note 4 at 999 (statement of Mr. Larkin: “[T]his is an investigation for purposes of determining whether there is probable cause and it is an investigation to assist the accused.”).

<sup>30</sup> Hearing on H.R. 2498, *supra* note 4 at 997 (statement of Sen. Norblad). The proposed pertinent section was read to the subcommittee in its entirety in the same form in which it was passed before these comments were put forth.

Although the language of Article 32 calls for a “[t]horough and impartial investigation of all the matters set forth in the charges,”<sup>31</sup> which could be broadly interpreted, Congress’s original understanding of the Article 32 “preliminary investigation” was that it should be a probable cause hearing. Rules for Courts-Martial (R.C.M.) 405 implements Article 32. The discussion to R.C.M. 405 regarding pretrial investigations explains “[t]he primary purpose of the hearing is to inquire into the truth of the charges, the form of the charges and to secure information on which to determine what disposition should be made of the case.”<sup>32</sup> R.C.M. 405 informs practitioners what “thorough investigation” means by explaining what material should be included in the investigating officer’s report and what questions the report should answer.<sup>33</sup> The investigating officer’s report memorializes the investigatory steps, summarizes the witness statements and evidence, addresses the format of the charges, relates concerns about the mental capacity of the accused, states whether reasonable grounds exist to believe the accused committed a crime and recommends a disposition of the case.<sup>34</sup>

Congress’s intent for the Article 32 investigation was reflected in the 1984 Rules for Courts-Martial as the required penultimate inclusion in the investigating officer’s report: “The report of investigation shall include: \* \* \* (G) The investigating officer’s conclusion whether *reasonable grounds* [emphasis added] exist to believe that the accused committed the offense alleged.”<sup>35</sup> Further, R.C.M. 601 states the basis for a convening authority to refer a case to a general court-martial: “If the convening authority finds or is advised by a judge advocate that there are *reasonable grounds* [emphasis added] to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.”<sup>36</sup> The “thorough and impartial investigation of all matters” had always been directed toward the question of whether “reasonable grounds” existed to believe a crime occurred. “Reasonable grounds” and “probable cause” are synonymous.<sup>37</sup> Article 32 investigations by their own definitions and rules have always been focused on answering the question of whether probable cause exists.

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<sup>31</sup> 10 U.S.C. § 832.

<sup>32</sup> R.C.M. 405(A), discussion.

<sup>33</sup> R.C.M. 405(j)(2)(H).

<sup>34</sup> *Id.*

<sup>35</sup> R.C.M. 405 (j)(2) (1984) (emphasis added).

<sup>36</sup> R.C.M. 601(d)(1) (2012) (emphasis added).

<sup>37</sup> Pringle, 540 U.S. at 371 (“[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.” (alteration in original); BLACK’S LAW DICTIONARY, (7th ed.) (“Reasonable grounds. See PROBABLE CAUSE.”); The Air Force makes this same, common sense interpretation obvious in its implementation of the Rules For Courts-Martial. See Air Force Instruction 51-201, *Administration of Military Justice*, para. 4.1.12. (6 June 2013) (incorporating Air Force Guidance Memorandum 2013-01, dated 25 November 2013) (“Reasonable grounds exist when the evidence convinces a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it.”).

Amending the language of Article 32 from “investigation” to “preliminary hearing” will not change the complexion of Article 32 hearings in any substantive form. Although the text of Article 32 has superficially changed, the two most critical questions that were addressed at the Article 32 investigation, that of probable cause and what disposition should be made of the case, remain in the new Article 32 language. If Article 32 investigations have always been about probable cause, has the 2014 NDAA altered the Article 32 hearing process in any significant way other than removing victims of crime as testifying witnesses?

## B. Gathering and Considering Information That Might Address Probable Cause

If an Article 32 preliminary hearing was only about the existence of probable cause, such a hearing would still not be as bare bones as those promoters of change might have assumed. In the context of Rule 5.1, preliminary hearing magistrates may still consider evidence that negates or minimizes probable cause.<sup>38</sup> This could include evidence that might contradict or conflict with prosecution witnesses, evidence that affects the reliability<sup>39</sup> or competency of that presented by the government, and evidence that might call into question the plausibility of a witness’s account.

How evidence might fit into these parameters at an Article 32 preliminary hearing is limited only by the ingenuity and imagination of counsel. As probable cause in a given case is fact dependent, and a hearing officer’s interpretation of the standard is flexible, a thorough and judicious officer will typically err on hearing and gathering more information.

Consider the typical sexual assault case in which the primary evidence is the victim’s testimony. The defense may still cross examine the witness about prior inconsistent statements, actions which make the events implausible, the reliability of the victim’s memory and even prior sexual acts that reasonably bear on the issues in the case that could negate criminality.<sup>40</sup> All of these issues impact whether there are reasonable grounds to believe that a crime occurred and are not simply fine weights

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<sup>38</sup> See *Coleman*, 477 F.2d at 1187 (lack of production of a witness that could materially contribute to the accuracy of the probable cause determination undermined the hearing). In *Coleman*, the court noted that it was “as much the [accused’s] prerogative to endeavor to minimize probable cause as it is the Government’s to maximize it, and that both sides indulged must be reasonably in their respective efforts. *Id.* at 1204. “The magistrate must ‘listen to...[the] versions [of all witnesses] and observe their demeanor and provide an opportunity to defense counsel to explore their account on cross-examination’” and then “sift [through] all the evidence before resolving the probable cause issue.” *Id.*

<sup>39</sup> *Id.* at 1205 (the issue of reliability becomes more acute in the case of victims who have elected not to appear in person, whose complaints may simply be reiterated by law enforcement).

<sup>40</sup> Exec. Order 13,669, 70 Fed. Reg. 34,999 (June 13, 2014), amended R.C.M. 405(i)(3) to make the investigating officer comparable to a military judge for purposes of deciding the admissibility of M.R.E. 412 materials at Article 32 hearings. This rule was promulgated after the changes in the 2014 NDAA. This means that a victim’s prior sexual history is not presumptively excluded from Article 32 hearings and is admissible if it meets one of M.R.E. 412’s exceptions.

to be applied later at trial when weighing guilt based on the scales of reasonable doubt. If a victim lacks memory or is significantly contradicted by other evidence, a hearing officer could find there is no probable cause to believe a crime occurred and recommend that charges not be referred to trial. However, if the victim elects to not testify at the Article 32 hearing and cannot be questioned about the events in the case or any contradictory evidence, the preliminary hearing officer may potentially be deprived of highly probative evidence.<sup>41</sup>

This is not to suggest that some of the more egregious questions would be permissible under the new Article 32 preliminary hearing, such as the questioning that occurred in the 2013 Naval Academy Article 32 hearing, where the alleged victim testified for almost 30 hours and was questioned on topics such as her technique for oral sex.<sup>42</sup> Complaining witnesses cannot expect to be free from attacks relating to the reliability and plausibility of their accounts and their competency as witnesses and historians of the alleged criminal events. The standard for referral of charges has not changed, and so presumably most, if not all, of the cases in which the erstwhile investigating officer recommended not referring charges would have the same recommendation under the new Article 32.

#### IV. THE ARTICLE 32 HEARING WILL NO LONGER SERVE AS A VEHICLE FOR DISCOVERY

While the language of the old Article 32 does not explicitly state that the preliminary investigation was meant to be used as a discovery tool, discovery has always been part of its purpose. In describing the purposes of the Article 32 investigation, Mr. Larkin, an Assistant General Counsel at the Office of the Secretary of Defense and a drafter of the UCMJ who was present at the Congressional subcommittee hearing, explained to Congress:

“[An Article 32 investigation] is partially in nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to.”<sup>43</sup>

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<sup>41</sup> This point was remarked on by the court in *Coleman*: “To the extent that hearsay is employed, the effort to establish probable cause becomes more prone to attack since the reliability of the absent hearsay declarant always becomes an added factor to be reckoned with.... ‘A judicial officer engaged in a judicial determination of probable cause can hardly rest easy solely with the hearsay account of the policeman of what [the] eyewitnesses told him if the eyewitnesses can be available, so that he can listen to their versions and observe their demeanor, and provide an opportunity to defense counsel to explore their account on cross-examination.’” *Coleman*, 477 F.2d at 1206 (quoting *Ross v. Sirica*, 380 F.2d 557, 560 (D.C. Cir. 1967)).

<sup>42</sup> See Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, *supra* note 9.

<sup>43</sup> Hearing on H.R. 2498, *supra* note 4 at 997 (statement of Mr. Larkin).

The judicially recognized use of an Article 32 investigation as a means of facilitating defense discovery originated in the 1950's in the case of *United States v. Allen*.<sup>44</sup> In *Allen*, the court stated in dicta that “[t]he Article 32 investigation—among other served purposes—provides for the accused a form of discovery.”<sup>45</sup>

The court in *Allen* assumed that the views of Mr. Larkin were the views of Congress in enacting Article 32. This view, derived from dicta, was repeated by the Court of Military Appeals and imbedded in the discussion section of R.C.M. 405 when it was promulgated in 1984, becoming formalized as part of military justice practice.<sup>46</sup> The discovery role is specifically addressed in the analysis portion of the MCM in considering whether or not testimony given at an Article 32 investigation falls within the “former testimony” exception to the hearsay rule under M.R.E. 804(b)(1):

“Because Article 32 hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it was particularly difficult for the Committee to determine exactly how subdivision (b)(1) of the Federal Rule would apply to Article 32 hearings. The specific difficulty stems from the fact that Article 32 hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority.”<sup>47</sup>

Many courts have analyzed an accused's discovery rights at an Article 32 investigation as being a mere collateral consequence of the investigation by permitting the accused the right to cross-examination, request witnesses and present evidence in mitigation and extenuation.<sup>48</sup> In the final analysis, the highest military appellate court

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<sup>44</sup> 18 C.M.R. 250 (C.M.A. 1955).

<sup>45</sup> *Id.* at 256. The case revolved around the alleged failure of the Article 32 investigating officer to take adequate notes leading to a claim that the Article 32 was invalid for failing to substantially comply with the requirements that a summarized testimony of each witness be taken. As the holding of the court, that the accused was not prejudiced by any inadequacies in the statements because they were not offered in evidence, did not involve the right to discovery at an Article 32, any reference to the purpose of an Article 32 investigation as being to provide discovery to the defense was pure dicta. *Id.*

<sup>46</sup> See *Hutson v. United States*, 42 C.M.R. 39, 40 (1970) (“[I]t should be noted that the pretrial investigation to which these charges have been referred is the accused's only practicable means of discovering the case against him.”); *United States v. Samuels*, 27 C.M.R. 280, 286 (1959) (“It is apparent that the Article [32 investigation] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.”); *United States v. Tomaszewski*, 24 C.M.R. 76, 78 (1957) (“[T]he investigation operates as a discovery proceeding for the accused.”).

<sup>47</sup> Drafter's Analysis, MANUAL FOR COURTS-MARTIAL, UNITED STATES A22-58 (2012) (citing *Hutson*, 42 C.M.R. at 39; *Samuels*, 27 C.M.R. at 286). See generally Hearing on H.R. 2498, *supra* note 4; see also *MacDonald v. Hodson*, 42 C.M.R. 184, 185 (1970) (“The Article 32 investigation partakes of the nature both of a preliminary judicial hearing and of the proceedings of a grand jury.”).

<sup>48</sup> *United States v. Eggers*, 11 C.M.R. 191, 194 (1953) (“Discovery is not a prime object of the

can be read to view discovery as a valid objective of an Article 32 investigation, though not its primary purpose.<sup>49</sup>

The intent of disposing of any discovery right at the Article 32 investigation was made clear by the language of the 2014 NDAA, which states “[t]he presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).”<sup>50</sup> The role of defense counsel in seeking discovery at the preliminary investigation is now expressly limited. Senator Carl Levin described the 2014 NDAA change to the Article 32 process as follows:

“The bill will do the following ...: Make the Article 32 process more like a grand jury proceeding. Under the UCMJ, the Uniform Code of Military Justice, currently the proceeding that is taken under Article 32 is more like a discovery proceeding rather than a grand jury proceeding, and it has created all kinds of problems, including for victims of sexual assault who would have to appear and be subject to cross examination by the defense.”<sup>51</sup>

Senator Levin’s explanation that the 2014 NDAA changes will make Article 32 hearings more like a civilian grand jury proceeding, clearly indicates Congress’s

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pretrial investigation. At most it is a circumstantial by-product—and a right unguaranteed to defense counsel.”); *United States v. Roberts*, 10 M.J. 308, 311 (C.M.A. 1981) (“There is no doubt that a military accused has important pretrial discovery rights at an Article 32 investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin.”).

<sup>49</sup> *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004) (“The Article 32 investigation ‘operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.’” (quoting *Samuels*, 27 C.M.R. at 286)); *United States v. Arruza*, 26 M.J. 234 (C.M.A. 1988) (the appellant asserted that former testimony taken at an Article 32 hearing was not admissible at trial because his purpose in questioning the witness was for discovery and so he lacked similar motive, the court noted that “[it] has long held that ‘[d]iscovery is not a prime object of the pretrial investigation.’” (citing *Eggers*, 11 C.M.R. at 194)).

<sup>50</sup> 2014 NDAA §1702(a)(1) (revising the Article 32 process). Subsection (a)(2) of the revised 10 U.S.C. § 832 reads:

“The purpose of the preliminary hearing shall be limited to the following:

(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

(C) Considering the form of charges.

(D) Recommending the disposition that should be made of the case.”

<sup>51</sup> 159th Cong. 8548, *supra* note 21 (statement of Sen. Levin).



intent that Article 32 hearings no longer have as one of their ancillary purposes the acquisition of discovery by an accused.<sup>52</sup>

#### A. Discovery is Not a Purpose of a Preliminary Hearing under Rule 5.1

As noted above, several Congressmen and Congresswomen have compared the new Article 32 preliminary hearing to both a federal preliminary hearing and a grand jury. However, a federal preliminary hearing is separate and distinct from a federal grand jury.<sup>53</sup> A federal preliminary hearing is conducted before the case is presented to a grand jury for indictment to determine whether to continue with the case and whether to keep the defendant in pretrial confinement. A magistrate judge presides over the hearing and may dismiss the charges without prejudice if he/she determines the prosecutor lacks probable cause to move forward to a trial.<sup>54</sup> The preliminary hearing is open to the public, the defendant is present and his/her defense counsel may cross-examine the prosecutor's witness(es), call his/her own witnesses, and present evidence to show probable cause is lacking.<sup>55</sup>

By contrast, a grand jury is conducted by the prosecutor, not a judge.<sup>56</sup> The prosecutor presents their case to a panel of 16 to 23 jury members who decide whether there is probable cause to indict the defendant and proceed to a trial.<sup>57</sup> The defendant does not have the right to be present, and the hearing is private.<sup>58</sup> Only the government attorney, the grand jury members, the testifying witness, and the court reporter may be present.<sup>59</sup> The grand jury is mandatory for the prosecutor to continue prosecuting a serious offense, while the preliminary hearing is not.<sup>60</sup>

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<sup>52</sup> Note R.C.M. 405(a), discussion (“The investigation also serves as a means of discovery.”).

<sup>53</sup> Compare Rule 5.1, with Fed. R. Crim. P. 6 [hereinafter Rule 6].

<sup>54</sup> Rule 5.1(f).

<sup>55</sup> Rule 5.1(e); Coleman, 477 F.2d at 1204 (“Rule 5(c) made it clear that it is as much the [accused]’s prerogative to endeavor to minimize probable cause as it is the Government’s to undertake to maximize it, and that both sides must be indulged reasonably in their respective efforts. And the Government’s demonstration on probable cause must surmount not only difficulties of its own but also any attack the accused may be able to mount against it.”).

<sup>56</sup> See generally Rule 6.

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

<sup>58</sup> Rule 6. See *United States v. Williams*, 504 U.S. 36, 37 (1992) (“Because it has always been thought sufficient for the grand jury to hear only the prosecutor’s side, and, consequently that the suspect has no right to present, and the grand jury no obligation to consider, exculpatory evidence, it would be incompatible with the traditional system to impose upon the prosecutor a legal obligation to present such evidence.”).

<sup>59</sup> Rule 6(d)(1).

<sup>60</sup> Compare *Barrett v. United States*, 270 F.2d 772, 775 (8th Cir. 1959) (“The purpose of a preliminary hearing is to determine whether or not there is probable cause to believe that an offense has been committed and that defendant has committed it. There is, however, no requirement in the Constitution or otherwise that a defendant be given a preliminary hearing before he may be brought into a court already having jurisdiction of the charge against him.”), with U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on

The federal grand jury has a dual role; one in which it acts as accuser by determining whether probable cause exists to believe a crime has been committed, and in its other role acts as the protector of citizens against unfounded criminal allegations.<sup>61</sup> This is often times referred to as “the sword and shield” functions of the grand jury.

“Through its broad subpoena power, a grand jury has the authority to assist the prosecutor in investigating and gathering evidence of crimes by compelling the presence and testimony of witnesses, as well as the production of documents and other things—this is the ‘sword’ function. After the evidence is gathered, the grand jurors vote on whether the prosecutor has enough evidence to justify charging someone with a crime; in this capacity, it can act as a shield for the accused.”<sup>62</sup>

Neither the federal preliminary hearing nor the grand jury were created as a discovery method for defense. The limitation of presenting evidence for the sole purpose of showing probable cause may prevent the defense from being able to present all evidence and fully cross-examine witnesses as he/she may at trial.<sup>63</sup> For example, the defense may be limited at a federal preliminary hearing from cross-examining prosecution witnesses for impeachment purposes<sup>64</sup> or to inquiry into the identity

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a presentment or indictment of a Grand Jury....”).

<sup>61</sup> *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972) (“[T]he grand jury...has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.”). *See also* *United States v. Calandra*, 414 U.S. 338, 343 (1974) (“Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions.” (citing *Branzburg*, 408 U.S. at 686–87)).

<sup>62</sup> *Function of the Grand Jury*, 1 Fed. Prac. & Proc. Crim. § 101 (4th ed.). *See also* *United States v. Williams*, 504 U.S. 36, 47 (1992) (the grand jury “belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”); *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (“[T]he grand jury continues to function as a barrier to reckless or unfounded charges.”); *Wood v. Georgia*, 370 U.S. 375, 390 (1962) (“Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.”).

<sup>63</sup> *See* *Coleman*, 477 F.2d at 1201 (“The preliminary hearing is not a mini-trial of the issue of guilt, but is rather an investigation into the reasonableness of the bases for the charge, and examination of witnesses thereat does not enjoy the breadth it commands at trial.”).

<sup>64</sup> *United States v. Lynch*, 499 F.2d 1011, 1023 (D.C. Cir. 1974) (“[A] preliminary hearing is less likely to produce extensive cross-examination and impeachment of witnesses than a trial because of the different functions respectively of the trial, designed to determine guilt or innocence and the preliminary hearing, designed to determine only the existence *vel non* of probable cause to hold an accused to answer to the grand jury.”); *United States v. Perez*, 17 F. Supp. 3d at 594 (“In order to effectuate this right, defense counsel must be afforded the opportunity to cross-examine the government’s witnesses. It is as much the [accused]’s prerogative to endeavor to minimize

of other potential witnesses or confidential informants.<sup>65</sup> Although the preliminary hearing may have as a collateral consequence the benefit of at least some pretrial discovery, “its principal purpose [is] a determination of whether probable cause exists to bind an accused for action by a grand jury.”<sup>66</sup>

The actual language of the old or the new Article 32 says nothing about discovery rights at the Article 32 hearing. However the process for conducting the Article 32 hearing described in R.C.M. 405 is similar to the process of a federal preliminary hearing, which means discovery might still be a practical benefit derived from cross-examining witnesses and reviewing evidence.<sup>67</sup> The accused has the right to be present and represented by counsel at the preliminary hearing, cross-examine witnesses who testify, and present evidence in defense and mitigation.<sup>68</sup> This procedure will allow the defense counsel to lock-in witness testimony for future use at a court-martial. Further, the accused may still request relevant, noncumulative witnesses and documentary evidence be made available for the preliminary hearing.<sup>69</sup> In fact, counsel for the United States has the ability to issue subpoenas *duces tecum* for documents from non-government entities for use at the Article 32 hearing.<sup>70</sup> Although defense counsel may be restricted from going on a “fishing expedition” at the Article 32 preliminary hearing, similar to a federal preliminary hearing, it will still offer some collateral discovery benefits to the accused.

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the evidence in support of probable cause as it is the government’s to undertake to maximize it... Although the line with permissible refutation of probable cause is often thin, the preliminary hearing is not a discovery device.” (citations omitted)).

<sup>65</sup> *United States v. Hart*, 526 F.2d 344, 344 (5th Cir. 1976) (“[T]he magistrate was not required to permit [the accused] to elicit from government witness, by cross-examination [at preliminary hearing], the identity of the informer.”).

<sup>66</sup> *United States v. Chase*, 372 F.2d 453, 467 (4th Cir. 1967) (“A preliminary hearing, although it may serve as a vehicle of pretrial discovery for an accused, has as its principal purpose a determination of whether probable cause exists to bind an accused for action by a grand jury.”).

<sup>67</sup> *See United States v. Mulligan*, 520 F.2d 1327, 1330 (6th Cir. 1975) (“Rule 5(c), Fed.R.Crim.P. serves as a complement to the constitutionally necessary grand jury system. Although the preliminary hearing provided for in Rule 5(c) may be a practical tool for discovery by the accused, the only legal justification for its existence is to protect innocent persons from languishing in jail on totally baseless accusations.”); *Ross*, 380 F.2d at 559 (“We have recognized that the preliminary hearing is an important right of an accused affording him ‘(1) an opportunity to establish that there is no probable cause for his continued detention [ ] and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government’s case against him.’” (quoting *Blue v. United States*, 342 F.2d 894, 901 (D.C. Cir. 1964))).

<sup>68</sup> 2014 NDAA § 1702(d)(2).

<sup>69</sup> R.C.M. 405.

<sup>70</sup> Exec. Order 13,669, *supra* note 43.

## V. WHAT KIND OF EVIDENCE SHOULD BE CONSIDERED WHEN MAKING DISPOSITION RECOMMENDATIONS

A requirement of the preliminary hearing officer at an Article 32 hearing, in addition to making a probable cause determination, is to make a recommendation to the convening authority as to the disposition of the case.<sup>71</sup> This requirement exists in the 2014 NDAA and moves the Article 32 hearing beyond what is required at a federal preliminary hearing or a grand jury proceeding. In explicitly vesting this recommendation requirement to the hearing officer, Congress maintained much of Article 32's putatively sweeping role in collecting and analyzing information in a case. R.C.M. 601(d)(1) states the basis for which a convening authority may refer charges:

“If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by court-martial has been committed and that the accused committed it, and that the specification alleged an offense, the convening authority may refer it.”<sup>72</sup>

The Discussion section to R.C.M. 601(d)(1) refers the convening authority to “consider the options and considerations under R.C.M. 306” when deciding the appropriate disposition of the case, i.e., whether or not to refer the charges or pursue a lesser form of punishment.<sup>73</sup>

The Discussion section to R.C.M. 306(b) lists the factors a commander should consider when determining the disposition of a case:

“(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline; (B) when applicable, the views of the victim as to disposition; (C) existence of jurisdiction over the accused and the offense; (D) availability and admissibility of evidence; (E) the willingness of the victim or others to testify; (F) cooperation of the accused in the apprehension or conviction of others; (G) possible improper motives or biases of the person(s) making the allegation(s); (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; (I) appropriateness of

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<sup>71</sup> 2014 NDAA § 1702(a)(2); R.C.M. 405(e).

<sup>72</sup> R.C.M. 601(d)(1).

<sup>73</sup> R.C.M. 601(d)(1), discussion.

the authorized punishment to the particular accused or offense; ...  
(K) other likely issues.”<sup>74</sup>

R.C.M. 306 provides an extensive list of factors for the convening authority to consider. Since the Article 32 hearing officer has as one of his/her responsibilities to make a recommendation as to disposition to the convening authority,<sup>75</sup> the hearing officer should consider evidence presented by either party that addresses any of these factors. These factors allow the defense to present evidence and cross-examine witnesses to an extent beyond that of a pure probable cause determination. For example, R.C.M. 306(b)(G) lists as a factor to consider the “motives or biases of the person(s) making the allegation(s).”<sup>76</sup> Arguably, this would permit the defense counsel to impeach a witness or victim who testifies at the Article 32 hearing, which may not be permitted at a federal preliminary hearing.<sup>77</sup> In many instances, the defense should be able to question far beyond the existence of probable cause and seek evidence to help the hearing officer understand the big picture “nature and circumstances” of the offense.<sup>78</sup> This is by its very nature, a question of the severity of the offense with wide latitude for considering evidence that shows an effect or lack of an effect on morale and discipline and harm to the victim or the concerns of the military community. The hearing officer can, with some limitation, consider evidence about the appropriateness of the particular forum and charge, which could include considerations of the accused’s health, lack of education or life experience, or other mitigating or extenuating evidence.

In addition, at a federal preliminary hearing, all evidence, even evidence that may not be permitted at trial, is permitted at a preliminary hearing because the rules of evidence do not apply at a preliminary hearing.<sup>79</sup> At the Article 32 hearing, the hearing officer may opine as to the admissibility of evidence, which means defense counsel may call witnesses to show that the government may have seized evidence unlawfully.<sup>80</sup> This also goes beyond the typical scope of a federal preliminary hearing. R.C.M. 306(b)(K) provides a “catch-all” for the type of evidence the convening authority may consider. Any evidence a commander would logically want to consider when deciding the disposition of a case, such as unlawful pretrial punishment or confinement or unlawful command influence, may arguably be presented at the Article 32 hearing. This, again, seems to permit the Article 32

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<sup>74</sup> R.C.M. 306(b), discussion. Subsection (J) of this discussion portion previously allowed the commander to consider “the character and military service of the accused.” This subsection was deleted from the Discussion portion per the 2014 NDAA § 1708.

<sup>75</sup> 2014 NDAA § 1702(a)(2)(D).

<sup>76</sup> R.C.M. 306(b).

<sup>77</sup> See Lynch, 499 F.2d at 1011.

<sup>78</sup> R.C.M. 306(b), discussion, subsection (A).

<sup>79</sup> Rule 5.1(e).

<sup>80</sup> R.C.M. 306, discussion, subsection (D).

hearing officer to accept and consider evidence presented beyond the scope of what would traditionally be permitted at a federal preliminary hearing.

## VI. CONCLUSION

The changes to Article 32 are not revolutionary and will not significantly alter the nature of the Article 32 process. The Article 32 preliminary hearing is not neatly equated with a federal preliminary hearing under Rule 5.1, and it is not a grand jury. It is still a unique legal hybrid that attempts to make an informed recommendation about how a case should proceed. The standard that hearing officers are required to apply in their determination of whether a crime occurred and whether it is appropriate to refer charges to a court-martial are unchanged. The alterations to the form of the statute do little more than attempt to protect victims of crime from personal attack by reminding hearing officers to not get sidetracked with irrelevant considerations. The duties of an Article 32 hearing officer remain in that the hearing officer must still consider relevant evidence, including relevant evidence presented by the defense through direct and cross-examination of witnesses. The broad question of what disposition should be made of the case goes beyond the pure question of probable cause and invites greater inquiry into the facts and circumstances of the case. As long as Article 32 hearings remain adversarial proceedings and seek a disposition recommendation for the convening authority, those who anticipated greater changes are likely to be disappointed.

## Appendix A

A comparison of the previous and new Art. 32. Removed language from the previous Art. 32 has been struck through. New language appears in brackets. Language common to both is in italics.

### § 832 Art. 32. ~~Investigation~~ Preliminary hearing

(a) [PRELIMINARY HEARING REQUIRED.—(1)] *No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made [completion of a preliminary hearing.] This investigation shall include inquiry as to the truth of the matter set forth in the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline*

[(2) The purpose of the preliminary hearing shall be limited to the following:

(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

(B) Determining whether the convening authority has jurisdiction over the offense and the accused.

(C) Considering the form of the charges

(D) Recommending the disposition that should be made of the case.

(b) HEARING OFFICER.—(1) A preliminary hearing under subsection (a) shall be conducted by an impartial judge advocate certified under section 827(b) of this title (article 27(b)) whenever practicable or, in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. If the hearing officer is not a judge advocate, a judge advocate certified under section 827(b) of this title (article 27(b)) shall be available to provide legal advice to the hearing officer.

(2) Whenever practicable, when the judge advocate or other hearing officer is detailed to conduct the preliminary hearing, the officer shall be equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing.

(c) REPORT OF RESULTS.—After conducting a preliminary hearing under subsection (a), the judge advocate or other officer conducting the preliminary hearing shall prepare a report that addresses the matters specified in subsections (a)(2) and (f)]

~~(b)~~ [(d) RIGHTS OF ACCUSED AND VICTIM – (1) ] *The accused shall be advised of the charges against him [the accused] and of his [the accused's] right to be represented at that investigation by counsel [at the preliminary hearing under subsection (a).] The accused has the right to be represented at that investigation [the preliminary hearing] as provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.*

[(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).

(e) RECORDING OF PRELIMINARY HEARING.—A preliminary hearing under subsection (a) shall be recorded by a suitable recording device. The victim may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.]

~~(e) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.~~

~~(d)~~ [(f) EFFECT OF EVIDENCE OF UNCHARGED OFFENSE. —] *If evidence adduced in an investigation [a preliminary hearing] under this article [subsection (a)] indicates that the accused committed an uncharged offense, the investigating [hearing] officer may investigate [consider] the subject matter of that offense without the accused having first been charged with the offense if the accused—*



(1) *is present at the* ~~investigation~~ [preliminary hearing];

(2) *is informed of the nature of each uncharged offense* ~~investigated~~ [considered];  
*and*

(3) is afforded the opportunities for representation, cross-examination, and presentation ~~prescribed in~~ [consistent with ] *subsection* ~~(b)~~ [(d)].

~~(e)~~ [(g)] *The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.*

[(h) VICTIM DEFINED.—In this section, the term ‘victim’ means a person who—

(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and

(2) is named in one of the specifications.]

