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RELIGION IN THE MILITARY: NAVIGATING THE CHANNEL BETWEEN THE RELIGION CLAUSES

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I. INTRODUCTION

Religion in the military[1] has reached headline proportions: *Air Force Sued Over Religion*,[2] *Air Force Academy Staff Found Promoting Religion*,[3] *Evangelicals Protest New Air Force Religion Policy*,[4] and *Naval Academy Urged to Drop Prayer*.[5] Behind all the headlines, commanders and military attorneys wrestle with a complex array of constitutional tests in an attempt to navigate the narrow channel between the free exercise of religion[6] by military members and establishment of religion by the military—a feat compared to navigating the narrow channel between the Scylla and Charybdis in Greek mythology.[7]

The narrowness of this channel is striking given the simplicity of the text of the First Amendment's Religion Clauses, which provide that "Congress shall make no law . . . respecting an establishment of religion, or prohibiting the free exercise thereof."[8] The simplicity of the language quickly erodes, however, when one considers that in the past ten years[9] the U.S. Supreme Court has decided no fewer than thirteen

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[1] This article addresses religion *in the military*. Many, but not all, of the principles in this article apply also to Department of Defense civilian employees. But because the military is "a specialized society separate from civilian society," Parker v. Levy, 417 U.S. 733, 743 (1974), the law pertaining to military members is different in some contexts from that applying to civilian employees. Practitioners encountering religion issues involving civilian governmental employees should consult civilian personnel attorneys and specialists.

[2] *Air Force Sued Over Religion*, CBS NEWS, Oct. 6, 2005.

[3] Laurie Goodstein, *Air Force Academy Staff Found Promoting Religion*, N.Y. TIMES, June 23, 2005, at A12.

[4] Alan Cooperman, *Evangelicals Protest New Air Force Religion Policy*, SEATTLE TIMES, Nov. 1, 2005, at A4.

[5] David A. Fahrenthold, *Naval Academy Urged to Drop Prayer*, WASH. POST, June 25, 2005, at B5.

[6] Freedom of religious speech is closely related to the free exercise of religion. *See infra* notes 202-203 and accompanying text.

[7] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting) ("By broadly construing both [Religion] Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny."). In Greek mythology, Scylla, a sea monster, lived underneath a dangerous rock on one side of the Strait of Messia and opposite the whirlpool Charybdis. Scylla threatened passing ships and in the *Odyssey* ate six of Odysseus' companions. Micha F. Lindemans, Scylla (Mar. 3, 1997), http://www.pantheon.org/articles/s/syclla.html.

[8] U.S. CONST. amend. I. These provisions extend also to the states and their sub-divisions by incorporation into the Due Process Clause of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The Religion Clauses also apply to the military and its members. *See, e.g.,* Goldman v. Weinberger, 475 U.S. 503 (1986) (Free Exercise Clause); Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (per curiam) (Establishment Clause).

[9] The cases were decided from June 1995 through June 2005.

cases under the Establishment and Free Exercise Clauses.[10] This number of cases is hardly surprising given the profound importance of religion to many people in the United States.[11]

The importance of religion to Americans and the influence that religion can have on people's behavior and attitudes concerning important social issues may explain why the U.S. Supreme Court's cases on religion in the past decade have addressed socially significant or controversial issues. These issues include religious displays (Ten Commandments and a cross) on governmental property;[12] the recital of the Pledge of Allegiance (containing the words "one nation under God") in public elementary schools;[13] governmental provision of "school vouchers" or tuition assistance for children's use at private schools (including religious schools);[14] private organizations' use of governmental property for religious purposes (such as Bible study or worship) when other private organizations are permitted to use the property for non-religious purposes;[15] student-led invocations before football games at public high schools;[16] governmental provision of equipment or other funding to private elementary and secondary

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[10] *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507 (1997) (limiting congressional authority to prescribe standard of judicial review of state religion-neutral laws limiting free exercise of religion); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) (reviewing interplay between free speech and Establishment Clause in public university's funding of religious students' newspaper). Another case involving religious speech was decided on free speech grounds. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150 (2002) (invalidating local ordinance requiring religious group to get a permit before conducting door-to-door proselytizing).

[11] A Gallup poll conducted in May 2005 found that eighty-three percent of Americans polled asserted that religion is either "very important" (55%) or "fairly important" (28%) to them. Linda Lyons, *Faith Accompanies Most Americans Through Life*, THE GALLUP ORGANIZATION, May 31, 2005, http://poll.gallup.com/content/default.aspx?CI=16522 (last visited Nov. 20, 2006). Religious beliefs can affect adherents' behavior in a variety of ways, such as what they eat, when they eat (or when they fast), what they wear, how they wear their hair, when they worship, and when they pray. *See generally* MERRIAM-WEBSTER'S ENCYCLOPEDIA OF WORLD RELIGIONS (Wendy Doniger ed., 1999). Religious beliefs can also influence believers' attitude towards such important social issues as abortion, the role of women in society, how much education children should have, same-sex marriage, and physician-assisted suicide. *See generally* WILLIAM A. YOUNG, THE WORLD'S RELIGIONS: WORLDVIEWS AND CONTEMPORARY ISSUES (2nd ed. 2005) (broad perspective on the world view of major religions).

[12] Van Orden v. Perry, 545 U.S. 677 (2005) (Ten Commandments); McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (Ten Commandments); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (cross).

[13] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (decided on "standing" grounds).

[14] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[15] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

[16] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

schools, including religious schools;[17] federal authority to require accommodation of prisoners' religious practices;[18] and state authority to exempt scholarship money to public university students pursuing studies to become a pastor.[19] In addition to dealing with governmental action that directly or indirectly aids, endorses, or encourages religion, these cases illustrate the four other general contexts in which most religion issues arise: (1) governmental regulation of religious speech, (2) government-sponsored prayer, (3) religious displays on governmental property, and (4) governmental limitation or accommodation of religious practices.

Religious issues in the military also arise in these same four contexts. As difficult as these issues are in American society as a whole, they may be even more difficult in the military. One important reason for this increased difficulty is that the military must not only honor its members' First Amendment religious rights, it must do so in a way that does not materially denigrate its profound first obligation to the nation: "defend[ing] our national interests by preparing for, and when necessary, waging war."[20] Sometimes the military's desire to honor a soldier's request to freely exercise religious rights (e.g., attending a worship service) may conflict with the military's need to accomplish a mission (e.g., participating in an important combat operation).

Ironically, however, the military's real or perceived failure to properly respect its members' religious rights may also detract from the military unit's ability to carry out its mission by marginalizing some members of the unit.[21] A unit is a team with each member having an important role. Top-performing units rely on all their members, but members of the unit who feel marginalized, perhaps due to their

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[17] Mitchell v. Helms, 530 U.S. 793 (2000) (funds for equipment); Agostini v. Felton, 521 U.S. 203 (1997) (funds for remedial instruction).

[18] Cutter v. Wilkerson, 544 U.S. 709 (2005).

[19] Locke v. Davey, 540 U.S. 712 (2004).

[20] Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994). There are other reasons why religious issues may be more difficult in the military. The close living and working conditions in the military (particularly during deployments) force members with potentially diverse and deep religious convictions into close, prolonged contact. This close contact exacerbates differences in religious practices among military members and increases the possibility of religiously based conflicts. Another complicating factor is that, due to hierarchy of rank and the need for obedience and discipline in the military, senior officers' religious expressions may be perceived by subordinates as endorsing religion or being coercive, raising Establishment Clause issues. *See infra* notes 279-280 and accompanying text.

[21] Marginalization of citizens due to the government's violation of the Religion Clauses is not unique to the military. Indeed, the Court has noted that one primary purpose of the Religion Clauses is "to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate." McCreary County v. ACLU, 125 S. Ct. 2722, 2742 (2005). Marginalization in the military may have a greater impact, however, due to its potential adverse effect on mission accomplishment.

perception of their leaders' or fellow soldiers' views toward their religion, will not feel fully a part of the team, and the team's ability to accomplish its mission can suffer.[22] In addition, the military's real or perceived failure to honor its members' rights can result in unfavorable national media attention and even litigation.[23]

For military leaders and organizations to avoid these adverse effects, they must comply with the Religion Clauses and other laws concerning religion. To facilitate such compliance, this article analyzes the law concerning religious issues in the military in four general recurring contexts. Part II provides an overview of the Establishment Clause, the Free Exercise Clause, and Free Speech Clause (particularly as it pertains to religious speech), including the interplay among these clauses. Parts III through VI focus on how these clauses apply in the military in the four common contexts: Part III analyzes general religious speech issues by military members;[24] Part IV specifically analyzes government-sponsored prayer in the military; Part V examines religious displays on military property; and Part VI reviews religious accommodation in the military. Part VII concludes the article.

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[22] This kind of marginalization occurred in 2004 at the U.S. Air Force Academy when some military members, primarily cadets, claimed that some other military members did not fully comply with the requirements of the Religion Clauses and other applicable laws, such as improperly using their official positions to promote Christianity. *See* ROGER A. BRADY, THE REPORT OF THE HEADQUARTERS REVIEW GROUP CONCERNING THE RELIGIOUS CLIMATE AT THE U.S. AIR FORCE ACADEMY 4-13, 35-39 (2005), *available at* http://www.af.mil/pdf/HQ_Review_Group_Report.pdf (last visited Nov. 20, 2006) (providing the background and chronology of events at the Air Force Academy, with specific findings and recommendations). These allegations and the events that gave rise to them, widely reported in the media, resulted in unfavorable national attention. *See, e.g.,* Patrick O'Driscoll, *Air Force Academy Wrestles with Alleged Religious Bias,* USA TODAY, May 4, 2005, at 2A; Alan Cooperman, *Air Force to Probe Religious Climate at Colorado Academy*, WASH. POST, May 4, 2005, at A3; David Kelly, *Non-Christian Air Force Cadets Cite Harassment*, L.A. TIMES, Apr. 20, 2005, at A18. As an initial step to address these issues, the Air Force Academy established a 50-minute class on Respecting the Spiritual Values of All People—team-taught by commanders, lawyers, and chaplains—taught to all Academy personnel in Spring 2005. *See* T.R. Reid, *Religious Differences Part of Cadet Training; Air Force Academy's Program Urges Respect*, WASH. POST, June 1, 2005, at A3.

[23] *See supra* notes 2-5 and accompanying text and note 22.

[24] One general context in which cases arise under the Religion Clause broadly includes all other governmental action that aids or endorses religion. In the civilian context, this aid is usually in the form of money or resources. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Agostini v. Felton, 521 U.S. 203 (1997). In the military, the issue arises more commonly in the context of religious speech by military members. Part III of the article will focus on that issue. This article does not address in detail governmental funding of chaplains and their programs. *But see infra* notes 286 and 471 (commenting on chaplaincy).

While all military services have some existing official guidance on religious issues,[25] the guidance may be rather general,[26] be scattered among several regulations or policy statements,[27] fail to address important issues,[28] or even be of questionable accuracy on some points.[29] This article fills those gaps, provides detailed background and the authors' analysis of key issues of law and religion in the military, and thereby assists military attorneys as they advise commanders and other military members in navigating the narrow channel of religion in the military.

II. OVERVIEW OF THE ESTABLISHMENT, FREE EXERCISE, AND FREE SPEECH CLAUSES

Military attorneys providing advice on religion issues must possess a firm grasp of key principles of the U.S. Supreme Court's jurisprudence concerning the Establishment, Free Exercise, and Free Speech Clauses, as well as key statutory law. Moreover, they must understand the tension between the Free Exercise and Free Speech Clauses on one hand and the Establishment Clause on the other. This Part provides that crucial background.

A. The Establishment Clause

The Establishment Clause by its terms would prevent the government from establishing an official religion, as existed in England with the Church of England in the 1600s[30] and in some American states

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[25] *See infra* note 469. For an earlier legal analysis of religion issues in the Army, see Major Michael J. Benjamin, *Justice, Justice Shall You Pursue: Legal Analysis of Religion Issues in the Army*, ARMY LAW., Nov. 1998, at 1.

[26] For example, in August 2005 the Air Force published interim religious guidelines, consisting of four pages, which were necessarily rather general. *See* Message from Headquarters U.S. Air Force (Personnel Division) regarding Interim Guidelines Concerning Free Exercise of Religion in the Air Force (Aug. 2005) [hereinafter Air Force Interim Guidelines], *available at* http://www.usafa.af.mil/superintendent/pa/religious.cfm (last visited Nov. 20, 2006). In February 2006, the Air Force guidelines became even more general and less useful when the Air Force published its revised interim guidelines, consisting of a single page. *See* Memorandum from the Secretary of the Air Force and the Chief of Staff of the Air Force to All Major Commands on Revised Interim Guidelines Concerning Free Exercise of Religion in the Air Force (Feb. 2006) [hereinafter Air Force Revised Interim Guidelines], *available at* http://www.af.mil/library/guidelines.pdf (last visited Nov. 20, 2006).

[27] *See infra* note 469.

[28] For example, most service regulations or guidelines entirely fail to address religious displays on military property or religious speech by military members.

[29] *See, e.g., infra* Part IV (analyzing the jurisprudence of governmental prayer and comparing it the Air Force Interim Guidelines).

[30] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990).

at the time of the American Revolution.[31] The Establishment Clause, however, provides more protection by prohibiting any governmental action *respecting* an establishment of religion. Thus, the Court has recognized that a "given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[32]

Establishment Clause challenges typically arise as a result of the government having taken some action perceived to *help* religion, sometimes even if the governmental help is also conferred on non-religious organizations.[33] Courts have struggled with determining when governmental action that confers some benefit on religion becomes an unconstitutional "law respecting an establishment of religion." But the over-arching general principle is this: the government must be neutral toward religion, neither favoring a particular religion over other religions nor favoring religion generally over non-religion.[34]

In 1971, the U.S. Supreme Court in *Lemon v. Kurtzman* announced and applied a three-part test for determining the constitutionality of governmental action challenged under the Establishment Clause.[35] First, the governmental action at issue must have a secular purpose.[36] Second, "its principal or primary effect must be one that neither advances nor inhibits religion."[37] Third, the governmental action "must not foster 'an excessive government entanglement with religion.'"[38] When courts use the so-called "*Lemon*

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[31] *Id.* at 1436-37.
[32] Lemon v. Kutzman, 403 U.S. 602, 612 (1971).
[33] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (unsuccessfully challenging government's lending equipment such as computers to both public and private schools, including religious schools).
[34] *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2733 (2005) ("The touchstone for our [Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). Some disagreement exists on the Court, however, concerning even this general principle. There appears to be consensus that government may not favor a particular sect over other religions. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). At least some Justices believe—based on historical statutes, proclamations, and practices—that the Establishment Clause permits the government to favor religion generally over non-religion. *See, e.g.*, *McCreary*, 125 S. Ct. at 2748-57 (2005) (Scalia, J., dissenting).
[35] *Lemon*, 403 U.S. 602.
[36] *Id.* at 612.
[37] *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
[38] *Id.* at 613 (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 674 (1970)).

test," the governmental action must pass all three parts of the test to be consistent with the Establishment Clause.[39]

The "purpose prong" of the test requires that the governmental action at issue must have been done for a legitimate non-religious purpose, such as to promote education, health, or safety. Courts determine purpose by looking as an "objective observer" at the text of the statute or governmental action and all the surrounding circumstances, including its history, context, logical effect, and how it was implemented.[40] If there is more than one arguable purpose, the *primary* purpose must be secular.[41] Courts normally demonstrate a degree of deference to the government's statement of its secular purpose—provided that the stated purpose is "sincere and not a sham."[42] Courts do not presume an intent to advance religion simply because the governmental action is consistent with a particular religion.[43]

When governmental action is taken with the intent (purpose) to promote religion in general or a particular religious belief, however, courts will strike down such action as violating the Establishment Clause. Improper governmental purpose is relatively rare in this context; the U.S. Supreme Court has invalidated governmental action for improper purpose in only five cases since *Lemon* was decided in 1971.[44] In all these cases, the Court determined that "openly available data supported a commonsense conclusion that a religious objective permeated the government's action."[45] The Court views the "purpose prong" as necessary to ensure the "essential Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides."[46]

The "effects prong" is the most significant part of the *Lemon* test: it is the prong most often at the crux of the issue. This prong

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[39] *See, e.g.*, *Lemon*, 403 U.S. at 613-14.
[40] McCreary County v. ACLU, 125 S. Ct. 2722, 2734 (2005).
[41] *See, e.g.*, *id.* at 2735 (noting that governmental acts unconstitutionally when it acts "with the predominant purpose of advancing religion").
[42] Edwards v. Aguillard, 482 U.S. 578, 586 (1987).
[43] Harris v. McRae, 448 U.S. 297, 319 (1980).
[44] *McCreary*, 125 S. Ct. at 2733 n.9. *See* Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (Ten Commandments posted in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (period of silence at the beginning of the school day in public schools for meditation or voluntary prayer); Edwards v. Aguillard, 482 U.S. 578 (1987) (prohibition against teaching evolution in public schools unless accompanied by teaching of creation science); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer before public school football game); McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (Ten Commandments posted in a courthouse). Before *Lemon*, the Court invalidated statutes due to an improper purpose in two other cases. *See* Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (Bible readings in public schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (prohibition against teaching evolution in public schools).
[45] *McCreary*, 125 S. Ct. at 2735.
[46] *Id*. at 2733.

recognizes that even though a law was not intended to promote religion (thereby satisfying the "purpose prong"), it may nevertheless have that effect. If the law's "principal or primary effect" advances or inhibits religion, the law is unconstitutional.[47] A mere secondary effect that promotes religion is permissible. Indeed, many laws that provide aid to religious organizations for otherwise valid reasons have an indirect or secondary effect of promoting religion.[48] But such indirect assistance is permissible under the "effects prong," as long as the primary effect of the law is to further some legitimate governmental interest.[49] The primary effect of the law is paramount.

The third and final prong of the *Lemon* test is that the governmental action at issue "must not foster 'an excessive government entanglement with religion.'"[50] To determine whether entanglement is excessive, courts look to "the nature and character of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[51] This prong may be violated either when government intrudes excessively into church matters[52] or when the government allows the church to intrude excessively into governmental matters.[53]

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[47] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Although the language of the effects prong of the *Lemon* test is "neither advances nor inhibits religion," laws that *inhibit* religion are more appropriately challenged under the Free Exercise Clause; those that *advance* religion fall more squarely under the Establishment Clause.

[48] For example, a law that provides computers to all schools (including private religious schools) based on student enrollment may indirectly promote religion by allowing religious schools to spend money on religious materials that they otherwise would have spent on computers. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[49] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (finding a legitimate governmental interest in furthering education and computer literacy).

[50] *Lemon*, 403 U.S. at 613 (1971) (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 674 (1970)).

[51] *Id.* at 615.

[52] *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (invalidating a state law authorizing salary supplements to teachers in private schools, including religious schools, due to excessive entanglement). The Court found the following restrictions of the law amounted to excessive governmental entanglement in religious affairs: (1) requirement that private school spend less per pupil on secular education than the average spent per pupil in public schools, *id*. at 607-08; (2) requirement that teachers receiving the salary supplements could teach only courses taught at public schools, could use only book titles also used in public schools, and could not teach any religious course, *id*. at 607-08; (3) requirement for governmental examination of the church's finances to determine eligibility for salary supplements, *id*. at 615-20; and (4) requirement for continual governmental surveillance to ensure compliance with the limitations on teachers, *id*. at 615-20.

[53] *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (finding a state statute permitting the governing body of any church within 500 feet of a place applying for a liquor license to essentially deny the application as violating the excessive entanglement prong of *Lemon*).

Although the *Lemon* test has been criticized by some members of the Court[54] and some writers,[55] the Court has declined to overrule it.[56] Nevertheless, in some Establishment Clause cases the U.S. Supreme Court has not focused on the *Lemon* test, even totally ignoring it at times[57] or applying other tests.[58] Two of the significant alternative tests used by the Court are the endorsement test and the coercion test.

In *County of Allegheny v. ACLU*,[59] the Court recognized the endorsement test as a means of analysis for the Establishment Clause. The fundamental question in the endorsement test is whether a reasonable and informed observer would view governmental action or practices as endorsing religion.[60] The reasonable observer embodies "a community ideal of social judgment, as well as rational judgment . . . [and] must be deemed aware of the history of the conduct in question,

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[54] *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting); Santa Fe. Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (Rehnquist, C.J., dissenting); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 718-21 (1994) (O'Connor, J., concurring); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (collecting criticisms of *Lemon* test).

[55] *See, e.g.*, Thomas C. Marks, Jr. & Michael Bertolini, *Lemon Is a Lemon: Toward a Rational Interpretation of the Establishment Clause*, 12 BYU J. PUB. L. 1 (1997); Kristin M. Engstrom, *Establishment Clause Jurisprudence: The Souring of Lemon and the Search for a New Test*, 27 PAC. L.J. 121 (1995); Paul Brickner, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061 (1988).

[56] *See* McCreary County v. ACLU, 125 S. Ct. 2722 (2005). In *McCreary*, the Court had an opportunity to jettison *Lemon* and develop a new test. Indeed, two of the questions on which the Court granted certiorari were "[w]hether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence" and "[w]hether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion." *Id*. Nevertheless, the Court cited and applied *Lemon* (particularly the "purpose prong") to uphold an injunction ordering the removal of a display of the Ten Commandments from a courthouse. Yet on the same day, in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the Court in a plurality opinion—consisting of the four dissenters in *McCreary*—upheld the display of a monument containing the text of the Ten Commandments on public property, but specifically declined to apply *Lemon*, writing, "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument" at issue in this case. *Van Orden*, 125 S. Ct. at 2861. Although the Court in *McCreary* and *Van Orden* declined to overrule *Lemon*, significant questions about the *Lemon* test remain. The future of *Lemon* is likely to depend on the future composition of the Court.

[57] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Zobrest v. Catalina Foothills Sch. Dist. 509 U.S. 1 (1993); Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783 (1983); Larson v. Valente, 456 U.S. 228 (1982).

[58] *See infra* notes 59-71 and accompanying text.

[59] 492 U.S. 573 (1989).

[60] *See* Lynch v. Donnelly, 465 U.S. 668, 690-93 (1984) (O'Connor, J., concurring). This test was adopted by the majority in *Allegheny*, 492 U.S. at 592-94.

and must understand its place in our Nation's cultural landscape."[61] Endorsement "preclude[s] the government from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."[62] Endorsement is also "closely linked to the term 'promotion.'"[63] Although some courts have questioned whether or not the endorsement test is just a part of *Lemon* analysis,[64] courts of appeals usually treat the endorsement test as a separate test altogether.[65]

In addition to the endorsement test, the Court has also utilized the coercion test, most often in the context of prayer in school.[66] When analyzing whether governmental action amounts to coercion, the Court looks at whether the government has coerced "anyone to support or participate in religion or its exercise."[67] In striking down government-sanctioned student-led prayer at an extracurricular high school football game, the Court emphasized adolescents' susceptibility to social pressure to conform when evaluating whether the governmental action was coercive in nature.[68] Thus, courts may find governmental action to be coercive, even if it falls well short of the government mandating a religious practice.[69] The lower courts' concern over coercion lessens as the age and maturity of students increase.[70] The Court of Appeals for the Fourth Circuit transferred this concern for governmental coercion to a military context when holding "voluntary" prayer at the noon meal at the Virginia Military Institute unconstitutional.[71] Although these decisions have been in the prayer context, the coercion test serves as a

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[61] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring).
[62] *Allegheny*, 492 U.S. at 593 (emphasis added) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment)).
[63] *Id.* (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)).
[64] *See* ACLU v. Black Horse Pike Reg'l Bd. of Ed., 84 F.3d 1471, 1486-87 (3d Cir. 1996); *see also infra* notes 72-74 and accompanying text.
[65] *See, e.g.*, Ingebretsen v. Jackson Pub. Sch. Dist., 88 F.3d 274, 280 (5th Cir. 1996); Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003).
[66] *See, e.g.,* Lee v. Weisman, 505 U.S. 577, 587 (1992) (finding nonsectarian prayer at secondary school graduation ceremony unconstitutional). The Court in *Lee* specifically declined to reconsider the *Lemon* test and instead used the coercion analysis to strike down the prayer. *Id*. at 587, 592.
[67] *Id.; See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).
[68] *Santa Fe*, 530 U.S. at 312.
[69] An example of a government-mandated religious practice would be a law requiring people to attend church. *See* Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (per curiam) (invalidating mandatory chapel attendance at U.S. military academies). Some members of the Court have advocated requiring "actual legal coercion" before finding that the Establishment Clause has been violated. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (Thomas, J., concurring); *Lee*, 505 U.S. at 642 (Scalia, J., dissenting). But this view is not shared by a majority of the Court.
[70] *See* Chaudhuri v. Tennessee, 130 F.3d 232, 238-39 (6th Cir. 1997).
[71] Mellen v. Bunting, 327 F.3d 355, 371-72 (4th Cir. 2003).

useful analysis for dealing with the implication of military chain of command issues and the potentially coercive environment for subordinates.

The Court's failure to provide clear guidance on when each of the three tests—*Lemon*, endorsement, and coercion—should be used makes Establishment Clause cases particularly difficult for practitioners and courts.[72] Because *Lemon* is still valid precedent (at least as guiding "the general nature of the inquiry in this area"[73]), thorough analysis of Establishment Clause issues should start with applying the *Lemon* test and then considering the other two tests as necessary.[74]

B. The Free Exercise Clause

The Free Exercise Clause becomes an issue whenever governmental action *burdens* the free exercise of religion,[75] even if the action falls short of completely "prohibiting the free exercise" of religion.[76] The clause protects both religious beliefs and religious practices[77] ("acts prompted by religious beliefs").[78] The right to hold religious beliefs is absolute, but the right to engage in religious practices is not.[79]

When determining whether the Free Exercise Clause protects a particular religious practice, a threshold question is whether the governmental action has imposed a "burden" on "religion." If not, no issue exists under the Free Exercise Clause. The Court has suggested, however, that both terms should be construed broadly.[80] A law clearly burdens religion if it imposes criminal or civil sanctions on a religious

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[72] *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 861 (1995) (Thomas, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray"). Indeed, the Court's inconsistent application of the *Lemon* test and its use of other tests has given rise to the criticism that the Court is manipulating Establishment Clause jurisprudence to reach the results it wants in any particular case. *See* McCreary County v. ACLU, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting) ("*Lemon[']s* . . . seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve.").

[73] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)).

[74] Governmental action that endorses or coerces religion is unlikely to pass the effects prong of the *Lemon* test, because government endorsement or coercion likely will have a principal effect of advancing religion.

[75] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.").

[76] U.S. CONST. amend. I.

[77] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[78] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[79] *See Cantwell*, 310 U.S. at 303-04.

[80] *See infra* text accompanying notes 81-86.

practice.[81] A law also burdens religion when it forces people "to choose between [practicing] their religious beliefs and receiving a government benefit."[82]

Religious beliefs are "based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."[83] They must be sincere, but need not be traditional as long they "occup[y] in the life of its possessor a place parallel to that filled by the God" of traditional religions.[84] A person claiming the protections of the Free Exercise Clause need not be a member of an organized religious denomination or "be responding to the commands of a particular organization."[85] In view of these broad parameters, it may be very difficult to determine whether a particular claim is based on a religious or secular belief and whether the claim is sincere.[86]

If there is doubt about the threshold question of whether a particular governmental action burdens the free exercise of religion, the conservative approach is to give the person claiming the free exercise protection the benefit of the doubt and to proceed with the free exercise analysis. The Court has developed two different tests for evaluating governmental action burdening the free exercise of religion, depending on whether the burdening action targets religion or is neutral toward religion.[87]

1. *Laws Aimed at Religion*

Governmental action targeting religion is generally prohibited.[88] Governmental action targets religion if its purpose is to suppress

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[81] *See* Locke v. Davey, 540 U.S. 712, 720 (2004).
[82] *Locke*, 540 U.S. at 720-21 (citing, *inter alia*, Sherbert v. Verner, 374 U.S. 398 (1963)).
[83] United States v. Seeger, 380 U.S. 163, 176 (1965) (interpreting a provision of a selective service act that granted an exemption from military service persons who were conscientiously opposed to war because of "their religious training and belief"). In its regulation requiring certain accommodation of religion, the Air Force defines religion as "[a] personal set or institutionalized system of attitudes, moral or ethical beliefs and practices held with the strength of traditional religious views, characterized by ardor and faith and generally evidenced through specific religious observances." U.S. DEP'T OF AIR FORCE, INSTR. 36-2706, MILITARY EQUAL OPPORTUNITY PROGRAM Attachment 1, at 69-70 (29 July 2004) [hereinafter AFI 36-2706].
[84] *Seeger*, 380 U.S. at 176; *see also* United States v. Ballard, 322 U.S. 78 (1944) (noting that while juries should not inquire into the truth or falsity of a criminal defendant's religious claim, inquiry into to whether the defendant honestly and in good faith believed the claim is permissible).
[85] Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 834 (1989).
[86] *Id.*
[87] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law targeting religion); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877-78 (1990) (law neutral toward religion).
[88] *See infra* notes 96-101 and accompanying text.

religion or religious practice.[89] An example would be a statute prohibiting "the casting of statues that are to be used for worship purposes."[90] To determine whether a law targets religion, courts look first to the language of the statute to ensure that it is neutral on its face with regard to religion.[91] A statute referring to a religious practice, for example, would lack facial neutrality unless the statute also had a clear secular meaning.[92] In determining a governmental intent to discriminate against religion, courts might also look to "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body."[93] In addition, governmental intent to suppress religion or religious practice might be inferred from the actual operation of the statute: a law that does not specifically refer to a religion or religious practice, but in effect serves to regulate that practice exclusively, would evidence such prohibited intent.[94] Courts would view such a law as an improper "religious gerrymander."[95]

Such cases are rare[96] and easy to decide.[97] Governmental action targeting religion is presumptively invalid:[98] it violates the Free Exercise Clause unless it survives the court's strict scrutiny, the most demanding scrutiny known in law.[99] Strict scrutiny requires that the law

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[89] *Lukumi Babalu Aye*, 508 U.S. at 533.

[90] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877-78 (1990) (dicta).

[91] *See Lukumi Babalu Aye*, 508 U.S. at 533. But even a law that is not neutral on its face could pass muster if it does not evince "hostility toward religion." *See* Locke v. Davey, 540 U.S. 712, 724 (2004) (upholding a state program refusing college scholarship money to students seeking a degree in theology, based on the state's interest under the Establishment Clause in not using taxpayer money to educate people in theology). Laws that single out religion, yet evince no hostility toward religion, will be very rare.

[92] *Lukumi Babalu Aye*, 508 U.S. at 533.

[93] *Id.* at 540 (opinion of Kennedy, J.).

[94] *Id.* at 535 (majority opinion).

[95] *Id.* (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

[96] *Id.* at 564 (1993) (Souter, J., concurring in part and in the judgment) ("[T]he Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise . . . ."); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 894 (1990) (O'Conner, J., concurring in the judgment) ("[F]ew States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such.").

[97] *Lukumi Babalu Aye*, 508 U.S. at 580 (1993) (Blackmun, J., concurring in the judgment) ("Because respondent here does single out religion in this way, the present case is an easy one to decide.").

[98] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 888 (1990) (declining to apply strict scrutiny to religion-neutral laws, which would make them "presumptively invalid").

[99] *Lukumi Babalu Aye*, 508 U.S. at 546 ("the most rigorous of scrutiny"); City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling

"must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[100] Courts also use a similar formulation: the law must be "the least restrictive means of achieving some compelling [governmental] interest."[101]

Compelling governmental interests are "interests of the highest order"[102] or vital interests.[103] To be narrowly tailored, the law at issue must be neither underinclusive nor overbroad.[104] A statute is underinclusive when it regulates religious practice but does not regulate other (non-religious) conduct that produces the same harm.[105] Indeed, in a double whammy to the government, courts may view the underinclusiveness of the statute to indicate that the governmental interest is not compelling because "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[106] A statute is overbroad when it limits religion or religious conduct more than is necessary to achieve the compelling governmental interest.[107] Once a court determines that the law targets religion, the court almost certainly will find that the law fails strict scrutiny and will invalidate it.[108]

2. *Religion-Neutral Laws*

Governmental action, even though not directed at religion, might nevertheless incidentally limit people's ability to practice their religion by either prohibiting conduct that is required by a religion or

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interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

[100] *Lukumi Babalu Aye*, 508 U.S. at 531-32.

[101] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); *see also* United States v. Lee, 455 U.S. 252, 257 (1982) ("essential to accomplish an overriding governmental interest").

[102] *Lukumi Babalu Aye*, 508 U.S. at 546 (1993) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[103] *See*, *e.g.,* Cutter v. Wilkinson, 544 U.S. 709, 725 n.13 (2005) (prison security); United States v. Lee, 455 U.S. 252, 258-59 (1982) (maintaining a system of social security); Hernandez v. Commissioner, 490 U.S. 680, 699-700 (1989) (collecting income tax).

[104] *See Lukumi Babalu Aye*, 508 U.S. at 546.

[105] *Id.* at 546-47.

[106] *Id.* at 547 (quoting Florida Star v. B.J.F., 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment)).

[107] *See id.* at 546.

[108] The United States Supreme Court has never upheld a law, against a Free Exercise challenge, that discriminated against religion. Indeed, some Justices have argued that a law that discriminates against religion automatically fails strict scrutiny "because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest." *Id.* at 579 (Blackmun, J., concurring in the judgment).

compelling conduct that is prohibited by a religion.[109] As long as the law at issue is truly religion-neutral and generally applicable, courts are highly likely to uphold the law.[110] A law is "religion-neutral" when it is not targeted at religion but advances some other legitimate governmental interest.[111] A law is generally applicable when its burden is not limited to only those who engage in the regulated conduct for religious purposes.[112] Although "neutrality" and "general applicability" are technically two separate requirements, they are closely related with substantial overlap.[113] It is difficult to imagine a law that is religion-neutral without being generally applicable and vice-versa.

Once a court determines a law to be religion-neutral and generally applicable, courts will find that the law does not offend the Free Exercise Clause and will uphold it as long as it is "otherwise valid."[114] The "otherwise valid" requirement is unrelated to the First Amendment and would come into issue only rarely. Examples include laws that are not enacted pursuant to proper procedure,[115] those that exceed the legislature's authority,[116] and those that are not rationally related to a legitimate governmental interest.[117]

a. Employment Division v. Smith

The U.S. Supreme Court announced this standard of review regarding religion-neutral laws that nevertheless incidentally burden religious practice in *Employment Division, Department of Human Resources v. Smith*.[118] Smith, a member of the Native-American Church, used peyote as a sacrament at a church ceremony despite an

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[109] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990). For example, a law *prohibiting* polygamy limits the religious practice of those whose religion commands polygamy. *See* United States v. Reynolds, 98 U.S. 145 (1879). Similarly, a law *requiring* payment of Social Security taxes limits the religious practice of those whose religion eschews participation in such governmentally-sponsored support programs. *See* United States v. Lee, 455 U.S. 252 (1982).
[110] *See infra* notes 114-117 and accompanying text.
[111] *See supra* notes 89-95 and accompanying text.
[112] *See Lukumi Babalu Aye*, 508 U.S. at 542-43.
[113] *Id.* at 557 (Scalia, J., concurring in part and concurring in the judgment).
[114] *Smith*, 494 U.S. at 878.
[115] *See, e.g.*, Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) (invalidating "legislative veto" that violated constitutionally-mandated "bicameralism" and "presentment" requirements).
[116] *See, e.g.,* City of Boerne v. Flores, 521 U.S. 507 (1997) (discussed *infra* at text accompanying notes 149-166).
[117] *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating zoning ordinance that was not rationally related to any legitimate governmental interest).
[118] 494 U.S. 872 (1990).

Oregon criminal law prohibiting use of peyote.[119] Sacramental use of peyote is essential to members of that church.[120] As a result, he was fired from his job at a drug rehabilitation organization.[121] His request to the state for unemployment compensation was denied because he was fired for work-related misconduct.[122] He challenged the denial as a violation of his free exercise rights. The Court upheld the denial.

The Court declined Smith's invitation to apply the strict scrutiny standard of review despite a line of cases applying strict scrutiny to even religion-neutral laws that limited the free exercise of religion.[123] This line of cases also included three cases similar to *Smith* involving the government's denial of unemployment compensation after a person lost his job for reasons of religion.[124] The Court carefully distinguished those precedents applying strict scrutiny. Regarding the unemployment compensation cases, the Court noted that these cases "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[125] *Smith*, however, did not involve such a system of individual exemptions but rather a neutral, generally applicable criminal prohibition against use of peyote. The Court thus found those precedents inapplicable.[126]

The Court also distinguished other (non-unemployment compensation) cases in which it had used strict scrutiny to invalidate laws limiting the free exercise of religion.[127] The Court noted that these cases involved not only free exercise rights but also some other constitutional right, such as freedom of speech and the press or of the parental right to direct their children's education.[128] *Smith*, however, involved solely a free exercise claim. The Court's unwillingness to apply strict scrutiny resulted from its fear that doing so "would open the

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[119] *Id.* at 874. The federal Controlled Substance Act classifies peyote as a Schedule I controlled substance. 21 U.S.C.S. § 812(c)(12) (2006). Possession of peyote, a hallucinogen, was prohibited by Oregon statute. *Smith,* 494 U.S. at 874.

[120] *Smith,* 494 U.S. at 903 (O'Connor, J., concurring in the judgment) (citing O. STEWART, PEYOTE RELIGION: A HISTORY 327-36 (1987) and other sources).

[121] *Id.* at 874 (majority opinion).

[122] *Id.*

[123] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); *but see* Reynolds v. United States, 98 U.S. 145, 167 (1879).

[124] *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

[125] *Smith*, 494 U.S. at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[126] *Id.*

[127] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating a state law requiring school attendance until a particular age, as applied to Amish parents who objected on religious grounds to their children attending school past a certain grade).

[128] *Smith*, 494 U.S. at 881.

prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"[129] and would permit each person, "by virtue of his beliefs, 'to become a law unto himself.'"[130]

Smith was decided by a bare majority, with five Justices joining the opinion of the Court. The other four Justices would have applied strict scrutiny even though the law was religion-neutral.[131] These Justices believed that the majority misread and inappropriately distinguished the free exercise precedents involving strict scrutiny.[132] More significantly, they believed that strict scrutiny was necessary to give meaning to the First Amendment's guarantee of the right to freely exercise one's religion.[133] Generally applicable criminal laws can limit one's ability to practice religion at least as severely as laws targeting religion;[134] there is no reason to limit strict scrutiny to the relatively few cases where the government enacts a law for the purpose of suppressing religious practice.[135] Furthermore, neutral laws leave accommodation of minority religions to the political process: a religious majority decides whether to prohibit conduct in the first instance and whether to grant an exemption from the law for religious minorities.[136] Such laws impose particular burdens on adherents of minority religions,[137] who must choose between obeying the law or their religion. Leaving such matters to the political process is contrary to the purpose of the Bill of Rights, which removes certain topics—including the free exercise of religion—from the will of the majority.[138] These dissenting Justices

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[129] *Id.* at 888.
[130] *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).
[131] Justice O'Connor, concurring in the judgment, argued that strict scrutiny was required, but satisfied. She found the law was essential to achieve Oregon's compelling interest in preventing the physical harm and health effects from use of a Schedule I controlled substance such as peyote. *Id.* at 891-907 (O'Connor, J., concurring in the judgment). Justice Blackmun, along with Justices Brennan and Marshall, joined parts of Justice O'Connor's concurrence, agreeing that strict scrutiny was required, *id*. at 909 (Blackmun, J., dissenting), but wrote a separate dissent to voice his view that strict scrutiny was not satisfied. He felt Oregon failed to demonstrate a compelling interest in refusing a religious exemption from the law prohibiting peyote use, evidenced by its lack of interest in prosecuting religious use of peyote. *Id*. at 907-21.
[132] *Smith,* 494 U.S. at 892-903 (O'Connor, J., concurring in the judgment).
[133] *Id.* at 893-903.
[134] *Id.* at 901. Indeed, a religion-neutral criminal law can burden religious practice "in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" *Id.* at 898 (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion)).
[135] *Id.* at 894 ("If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.").
[136] *Id.* at 890 (majority opinion).
[137] *Id.* at 902 (O'Connor, J., concurring in the judgment) (noting that an effect of religion-neutral laws can be "the disfavoring of minority religions").
[138] *Id.* at 902-03.

would have required the state to grant Smith a religious exemption from the law prohibiting peyote use,[139] just as the federal government and many states have done,[140] unless the state could demonstrate that such an exemption would "unduly interfere with fulfillment of the [compelling] governmental interest."[141]

b. The Religious Freedom Restoration Act of 1993 and Challenges

With *Smith*, the lines were drawn in the battle concerning the level of scrutiny to be applied in cases where generally applicable, religion-neutral laws burden some religious practice. Congress joined this battle with the passage of the Religious Freedom Restoration Act of 1993 (RFRA).[142] RFRA, enacted as a direct result of *Smith*,[143] reflects Congress's dissatisfaction with the majority decision in *Smith* and its intent that courts return to the strict scrutiny standard of review reflected in certain pre-*Smith* cases.[144] Finding that even religion-neutral laws can substantially burden religious exercise, Congress prohibited the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability"[145] unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[146] By authorizing individuals to assert a claim or defense for governmental violation of RFRA,[147] Congress required courts to apply the very standard of strict scrutiny rejected by the majority in *Smith*. When it first enacted RFRA, Congress defined "government" to include both the federal government—including its branches, departments, agencies and

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[139] *See id.* at 905.

[140] *See id.* at 890 (majority opinion) (citing several state statutes granting a statutory exemption for religious use peyote); *id.* at 912 n.5 (Blackmun, J., dissenting) (citing 21 C.F.R. § 1307.31 (1989)) (excluding peyote from the list of controlled substances when used in religious ceremonies of the Native American Church).

[141] *Id.* at 905 (O'Connor, J., concurring in the judgment); *id.* at 909 (Blackmun, J., dissenting) (both quoting United States v. Lee, 455 U.S. 252, 259 (1982)).

[142] 42 U.S.C.S. § 2000bb (LEXIS 2005).

[143] *See* City of Boerne v. Flores, 521 U.S. 507, 512 (1997).

[144] 42 U.S.C.S. §2000bb(a) (LEXIS 2005). RFRA specifically mentions *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) as examples of cases applying proper strict scrutiny. 42 U.S.C.S. § 2000bb(b) (LEXIS 2005) .

[145] 42 U.S.C.S. § 2000bb-1(a) (LEXIS 2005). Congress prohibited a "substantial burden" but failed to define the term. The Court has not yet construed the phrase. If the Court found that a governmental action imposed some burden or religion, but not a substantial one, in a case where RFRA would have otherwise applied, presumably the Court would decline to apply RFRA and would instead apply the tests from its free exercise jurisprudence.

[146] 42 U.S.C.S. § 2000bb-1(b) (LEXIS 2005).

[147] *Id.* § 2000bb-1(c).

individuals acting in an official capacity—and state governments including subdivisions.[148]

The issue of RFRA's constitutionality reached the U.S. Supreme Court in 1997 with *City of Boerne v. Flores*.[149] A church in Boerne, Texas had applied to the city for a permit allowing the church to expand.[150] The city disapproved the church's application because the church was in a historical district protected for preservation by a city ordinance.[151] The church sued asserting that the ordinance violated RFRA.[152] The city countered that RFRA was unconstitutional.[153] The issue before the Court was whether Congress had the authority to make RFRA applicable to the states.[154]

In making RFRA applicable to the states, Congress relied on its power under § 5 of the Fourteenth Amendment[155] "to enforce, by appropriate legislation, the provisions of" that Amendment.[156] The part of the Fourteenth Amendment that Congress purported to enforce with RFRA was § 1.[157] Section 1 of the Fourteenth Amendment—which prohibits states from depriving "any person of life, liberty or property, without due process of law"[158]—is the provision the Court has relied on to make the Free Exercise Clause applicable to the states.[159] Congress thus attempted to use the Fourteenth Amendment to give people and entities in states greater free exercise protections than the Court had done in *Smith*.

In deciding the scope of Congress's enforcement power under § 5 of the Fourteenth Amendment, the Court distinguished between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law."[160] Congress has the power to take remedial or preventive measures but not to change or

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[148] *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (citing 42 U.S.C. § 2000bb-2(1) (1994)). After *City of Boerne*, Congress amended the definition of "government" to exclude *state* governments and their subdivisions. *See* 42 U.S.C.S. § 2000bb-2(1) (LEXIS 2005).
[149] 521 U.S. 507 (1997).
[150] *Id*. at 512.
[151] *Id*.
[152] Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996). Although not disclosed in any of the opinions in the case, the church's argument likely was that RFRA required the city to grant an exemption from the ordinance unless denying the exemption was the least restrictive means for the city to further a compelling interest.
[153] *Id*.
[154] *City of Boerne,* 521 U.S. at 511.
[155] *Id.* at 516 (1997) (relying upon S. REP. NO. 103-111, at. 13-14 (1993) and H. R. REP. NO. 103-88, at 9 (1993)).
[156] U.S. CONST. amend. XIV, § 5.
[157] *See City of Boerne,* 521 U.S. at 517.
[158] U.S. CONST. amend. XIV, § 1.
[159] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying Religion Clauses to states).
[160] *City of Boerne,* 521 U.S. at 519.

determine the scope of constitutional protections.[161] The Court concluded that, in enacting RFRA, Congress had changed the meaning of the Free Exercise Clause rather than merely enforcing it.[162] Such congressional determination of the constitutional protection of the Free Exercise Clause exceeded Congress's power under § 5 of the Fourteenth Amendment.[163] Given that Congress lacked authority under § 5 of the Fourteenth Amendment, the Court also suggested that Congress' action impermissibly intruded into the province of the judicial branch and offended the separation of powers among the legislative and judicial branches.[164] The Court therefore invalidated RFRA[165] *as it applies to states and their subdivisions*.[166]

The issue of RFRA's constitutionality as applied to actions by the *federal* government reached the Court in 2006 in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegeta,*[167] a case, like *Smith,*[168]

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[161] *Id.*
[162] *Id.* at 532.
[163] *Id.* at 536.
[164] *See id.* ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").
[165] *See id.*
[166] Three years after the Court in *City of Boerne* invalidated RFRA as applied to state governments and their subdivisions, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C.S. § 2000cc (LEXIS 2005). RLUIPA is similar to RFRA in that it prevents governmental action that substantially burdens the free exercise of religion of certain persons unless the governmental action passes strict scrutiny: it is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C.S. §§ 2000cc and 2000cc-1 (LEXIS 2005). RLUIPA differs from RFRA in three aspects. First, it limits primarily state governments. 42 U.S.C.S. § 2000cc-5(4) (LEXIS 2005) (defining "government"). Second, it confers rights only upon two categories of people or organizations whose free exercise of religion has been substantially burdened by state government: (a) persons or organizations (e.g., churches) burdened by a land use regulation (e.g., zoning law) and (b) institutionalized persons (e.g., prisoners). 42 U.S.C.S. §§ 2000cc and 2000cc-1 (LEXIS 2005). Third, and most significantly, it was enacted pursuant to Congress's powers under the Spending Clause, U.S. CONST. art. I, § 8, cl. 1., and Commerce Clause, U.S. CONST. art. I, § 8, cl. 3., meaning that its application is limited to state activities receiving federal funds or to state-imposed burdens on religion that affect interstate commerce or commerce with foreign nations or Indian tribes. 42 U.S.C.S. §§ 2000cc(a)(2) and 2000cc-1(b) (LEXIS 2005). This third difference circumvents the infirmity that led to the Court's invalidation of RFRA as it applies to state governments in *City of Boerne*. The Court noted this difference approvingly in *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005), upholding section 3 of RLUIPA (pertaining to institutionalized persons) against a challenge by the state that it violated the Establishment Clause by impermissibly advancing religion. The defendant prison officials in *Cutter* also argued in lower courts that in enacting RLUIPA Congress exceeded its authority under the Spending and Commerce Clause, and that RLUIPA violates the Tenth Amendment. The Supreme Court, however, declined to address these arguments. *Id.* at 718, n.7. The claim that accommodation of religion under the Free Exercise Clause may violate the Establishment Clause will be addressed in the Part VI of this article.
[167] 126 S. Ct. 1211, 163 L.Ed.2d 1017 (2006).

involving religious use of a prohibited hallucinogen. Members of the small O Centro Espirita Beneficente Uniao do Vegeta church (UDV), with origins in Brazil, take communion through a special tea made with two plants from the Amazon region.[169] One of the plants contains a hallucinogen prohibited by Schedule 1 of the federal Controlled Substance Act,[170] a religion-neutral law. Citing RFRA, UDV sought and won an injunction preventing the federal government from enforcing the statute against the church.[171] The U.S. Supreme Court upheld the injunction, holding that the government failed to meet its heavy burden under RFRA.[172]

Gonzales provides insight into how the Court will apply RFRA to the federal government in the future. First, a prima facie case under RFRA exists when a party establishes that the governmental action would "(1) substantially burden (2) a sincere (3) religious exercise."[173] Second, once the challenging party establishes its prima facie case, the government bears the burden both of providing evidence and persuading the court that the law's burden is justified as the least restrictive means of achieving a compelling governmental interest.[174] Third, the government cannot satisfy its burden by arguing the general interests underlying the law, but must demonstrate that it has a compelling interest in not "granting specific exceptions to particular religious claimants."[175] The government in *Gonzales* asserted that it had a compelling interest in uniform application of the Controlled Substances Act[176] and that no exceptions could be permitted except as provided in that statute.[177] The Court rejected this "categorical approach"[178] and ruled that RFRA requires a "more focused inquiry"[179] into whether the government had a compelling reason for not granting a requested religious exception to the law. The fact that the executive and legislative branches have granted exceptions to the Controlled Substances Act for certain religious use of peyote[180] fatally undercut the

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[168] *See supra* notes 118-141 and accompanying text.
[169] *Gonzales*, 163 L.Ed.2d at 1028.
[170] *Id*. (citing 21 U.S.C.S. § 812(c) (LEXIS 2005) (prohibiting the hallucinogen dimethyltryptamine)).
[171] *Id*. at 1028-29.
[172] *Id*. at 1037.
[173] *Id*. at 1030. In *Gonzales*, the government conceded UDV's prima facie case. *Id*.
[174] *Id*. at 1030-31. The government's burden applies not only at the trial on the merits, but also at any preliminary injunction hearing. *Id*.
[175] *Id*. at 1031.
[176] *Id*. at 1027.
[177] *Id*. at 1031.
[178] *Id*.
[179] *Id*. at 1032.
[180] *Id*. at 1033 (citing 21 C.F.R. § 1307.31 (2005) (exempting use of peyote by members of the Native American Church in religious ceremonies) and 42 U.S.C. § 1996a(b)(1)

government's argument that it had a compelling interest in uniform application of that statute.[181]

Gonzales is thus significant as establishing that RFRA does indeed apply to actions by the federal government that substantially burden a person's free exercise of religion. Courts will apply strict scrutiny to such actions. RFRA applies to the military,[182] as part of the federal government.

3. *Free Exercise Clause Summary*

The Free Exercise Clause generally prohibits any governmental action aimed at burdening religion. Courts will almost certainly invalidate those rare governmental actions aimed at suppressing religion. Courts apply strict scrutiny to such targeted actions, and it is difficult or impossible to imagine a scenario in which such targeting is the least restrictive means to further a compelling governmental interest. The legal landscape regarding laws that are *not* aimed at religion—but burden religion only incidentally—is more nuanced. Courts will apply a different standard of review depending primarily on whether the governmental action at issue is federal or state. If *federal* (including military), courts will apply RFRA's strict scrutiny standard, which in effect requires a religious exemption from the neutral law substantially burdening religion, unless denial of the exemption is the least restrictive means to achieve a compelling governmental interest. If *state* religion-

(2005) (extending peyote exemption to any Indian during any traditional Indian religious ceremony)).

[181] The government in *Gonzales* apparently did not dispute RFRA's applicability to the federal government, so the Court did not explain why it believed RFRA was constitutional as to the federal government, despite *City of Boerne's* ruling that it was unconstitutional as to state governments. Federal Courts of Appeal addressing the issue have explained the distinction. *See* O'Bryan v. Bureau of Prisons, 349 F.3d 399, 400-01 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1220-22 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 958-60 (10th Cir. 2001); Henderson v. Kennedy, 265 F.3d 1072, 1073 (D.C. Cir. 2001); In re Young, 141 F.3d 854, 858-63 (8th Cir. 1998). These courts have held that Congress has authority, under the Constitution's "necessary and proper clause," U.S. CONST. art. I, § 8, cl. 18, to enact laws concerning the federal government's operations. This power is distinct from Congress's power under § 5 of the Fourteenth Amendment, upon which Congress relied to make RFRA applicable to the states and which the Court ruled in *City of Boerne* that Congress had exceeded. The separation of powers concerns the Court raised in *City of Boerne* do not apply when Congress is acting pursuant to its constitutional authority. *See* Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001).

[182] *See, e.g.*, Air Force Interim Guidelines, *supra* note 26, para. 2B (citing RFRA in context of the guideline to accommodate religious practices and free speech, except as limited by military necessity).

neutral action is at issue, courts usually[183] will apply *Smith's* standard, which requires only that the law be "otherwise valid."

C. Tension between the Establishment Clause and the Free Exercise Clause

The Establishment Clause requires governmental neutrality toward religion and a degree of "separation of church and state."[184] The Free Exercise Clause requires that the government respect a person's religious beliefs and practices and not unduly interfere with religious practice.[185] The Court has noted that both clauses "are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[186] Thus, while both clauses are complementary in protecting freedom of religion,[187] they can create a tension: by attempting to honor one clause, the government may risk violating the other.

This tension sometimes is reflected when the government, attempting to mitigate the effect that even a religion-neutral law may have on a religious practice, accommodates religion by granting an exemption from the law. Accommodation may be legislative in a whole class of cases, as in RFRA's requirement that religion be accommodated (in circumstances to which it applies) unless denial of the accommodation meets strict scrutiny. Accommodation may also occur by legislative grant of a religious exemption to a particular law, such as some state legislatures creating an exemption from controlled substances laws for religious use of peyote.[188] The judiciary may also find that the Free Exercise Clause requires a religious exemption from a

[183] If the state religion-neutral law falls under RLUIPA courts will again apply the same strict scrutiny standard reflected in RFRA and RLUIPA. RLUIPA applies to state action substantially burdening the religion of institutionalized person and state land use regulation that substantially burdens religion, provided the state action is federally funded or the burden (or its removal) affects certain commerce. *See supra* note 166.
[184] *See* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005).
[185] *See id*.
[186] Walz v. Tax Comm'n of New York City, 397 U.S. 664, 668-69 (1970).
[187] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 313 (2000) ("Indeed, the common purpose of the Religion Clauses is 'to secure religious liberty.'") (quoting Engel v. Vitale, 370, U.S. 421, 430 (1962)).
[188] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 917 (1990) (Blackmun, J., dissenting) ("Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use . . . .").

law.[189] Finally, the executive branch might grant a religious exemption to requirements imposed by rule or policy.[190]

Governmental accommodations of religion have been challenged on the basis that the accommodation gives preference to religion thereby violating the Establishment Clause.[191] These challenges have been generally unsuccessful.[192] The Court's "decisions recognize that 'there is room for play in the joints' between the Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[193] Thus, as a general principle, the government may accommodate religion by removing burdens on the practice of religion, even when the Free Exercise Clause does not require it, without running afoul of the Establishment Clause.[194]

Under two circumstances, however, governmental accommodation can go so far as to endorse or foster religion and thereby offend the Establishment Clause. The first is if the law favors religion over non-religion by providing an exemption for *only* religious organizations even though the law does not impose unique burdens on those organizations.[195] An example would be the government exempting only religious organizations from the payment of sales taxes on publications.[196] Such an exemption is not truly an accommodation because the government is not alleviating a special burden that a law imposes on religion. Rather, the government is exempting only religious organizations from a burden that falls on everyone else. Such special treatment impermissibly advances religion by preferring religion over non-religion.

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[189] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting Amish children from a portion of a state compulsory-education law). Such judicially recognized exemptions will be rare since the Court in *Smith* decided to apply only minimum scrutiny to religion-neutral laws burdening religion in cases to which RFRA does not apply.

[190] *See, e.g.*, U.S. DEP'T OF DEFENSE, DIR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (21 Nov. 2003) [hereinafter DOD DIR. 1300.17] (authorizing greater accommodation of religious practices in the military than required by the Constitution or statute).

[191] *See, e.g.,* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (Establishment Clause does not prevent federal government from exempting religious organizations from statutory prohibition against religious discrimination in employment); Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (Section 3 of RLUIPA "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.") (emphasis omitted).

[192] *See, e.g., Cutter*, 544 U.S. at 720; Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

[193] *Cutter*, 544 U.S. 709 at 719 (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 669 (1970) (internal citation omitted)).

[194] *See* County of Allegheny v. ACLU, 492 U.S. 573, 601 n.51 (citing *Presiding Bishop*, 483 U.S. at 348 (1987).

[195] *See, e.g.,* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[196] *See id.*

The second suspect circumstance is when governmental accommodations are given or administered in a non-neutral way to some faiths but not others.[197] An example would be the government gerrymandering a school district to correspond to where members of a particular religious sect lived when there was no assurance that the government would do likewise for other school districts.[198] This special treatment violates the Establishment Clause by favoring a particular religion.

In both of these circumstances, the government has violated the Establishment Clause's underlying principle of neutrality toward religion. Governmental accommodations of religion that do not violate the principle of neutrality, however, are permissible even when such accommodations are not required by the Free Exercise Clause.

D. The Free Speech Clause, Religious Speech, and Interplay with the Establishment Clause

The First Amendment's Free Speech Clause guarantees that government will not abridge "the freedom of speech."[199] This protection, although "not absolute,"[200] certainly covers religious speech, such as religious discussion or profession of religious belief, to the same extent as other speech.[201] The freedom of speech also protects expressive conduct (symbolic speech) when the actor intends to convey a message and viewers would likely understand the message,[202] such as wearing visible religious jewelry. Legal analysis under the Free Speech Clause is appropriate when religious speech (*speech* prompted by religious beliefs, or other discussions about religion) is at issue. Legal analysis under the Free Exercise Clause and, if applicable, RFRA is appropriate when a religious practice (*acts* prompted by religious

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[197] *See Cutter*, 544 U.S. at 720 (citing Bd. of Ed. of Kiryas Joel School Dist. v. Grumet, 512 U.S. 687 (1994)); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("The statute [impermissibly] singles out Sabbath observers for special . . . protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.").

[198] *See* Bd. of Ed. of Kiryas Joel School Dist. v. Grumet, 512 U.S. 687 (1994).

[199] U.S. CONST. amend. I. The First Amendment's language limits only Congress, but the Supreme Court has applied the prohibition against the federal government as a whole and against the States. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming Free Speech Clause applies to state governments).

[200] Virginia v. Black, 538 U.S. 343, 358 (2003) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

[201] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment.").

[202] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing Spence v. Washington, 418 U.S. 405, 409 (1974)) (burning a U.S. flag during a political demonstration was expressive conduct).

beliefs) is at issue. The analysis under both clauses is similar, but not identical.[203]

Several "well-defined and narrowly limited classes of speech"[204]—including obscenity,[205] defamation,[206] and speech that is an incitement to imminent lawlessness[207]—are considered unprotected by the Free Speech Clause. Speech in these categories is considered unprotected because "such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[208] The significance of speech being unprotected is that the government may limit, prohibit, or punish it or allow civil liability.[209] Unprotected speech is particularly important in the context of regulation of speech in the military as discussed in Part III of this article.

Governmental restrictions on speech fall into two general categories: content-based and content-neutral.[210] Content-based restrictions are aimed at the content of the message.[211] An example in the context of religious speech would be a law that prohibited professing any religious belief generally or professing a particular religious belief. Like governmental action targeting religion,[212] content-based restrictions on protected speech are subject to strict scrutiny[213] and are

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[203] For example, both clauses distinguish between laws aimed at either religion (Free Exercise Clause) or the content of the speech (Free Speech Clause), and laws that are neutral toward either religion or the content of the speech, providing much greater latitude to the government in regulating the latter. Legal analysis of neutral laws involves different tests under the Free Exercise Clause, RFRA, and the Free Speech Clause. For further details, compare the analysis in Part II.B to the analysis in Part II.D. Some expressive conduct (symbolic speech), such as worship or religious displays, could be protected under both clauses.

[204] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[205] Miller v. California, 413 U.S. 15 (1973).

[206] Gertz v. Robert Welch, 418 U.S. 323 (1974); New York Times v. Sullivan, 376 U.S. 254 (1964).

[207] Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[208] *Chaplinsky*, 315 U.S. at 572.

[209] See cases cited *supra* notes 204-207.

[210] *See, e.g.*, Boos v. Barry, 485 U.S. 312 (1988) (content-based law prohibiting displaying signs critical of a foreign government within 500 feet of a foreign embassy violates Free Speech Clause); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (content-neutral law limiting speech by prohibiting certain activities in a particular public park upheld).

[211] *See Boos*, 485 U.S. at 321.

[212] *See supra* notes 88-108 and accompanying text.

[213] *See, e.g.*, *Boos*, 485 U.S. at 321 ("[A] content-based restriction . . . must be subjected to the most exacting scrutiny."); Widmar v. Vincent, 454 U.S. 263, 270 (1981) (noting that content-based restrictions require "a compelling state interest and . . . [must be] narrowly drawn to achieve that end").

"presumptively invalid."[214] This treatment is consistent with the Free Speech Clause's "bedrock principle . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[215]

Content-neutral laws are not aimed at any particular message but instead may incidentally restrict speech as the government pursues other important interests unrelated to the content of the speech.[216] They are sometimes referred to as "time, place, or manner restrictions"[217] because they often limit when, where, and how speech is conducted. For example, the government could have a safety prohibition against wearing jewelry or loose clothing on the jobsite while working with machinery. The law, intended to promote safety, also incidentally limits religious symbolic speech (e.g., wearing of religious jewelry). Content-neutral laws limiting speech in a public forum[218] are subjected to a lower degree of judicial scrutiny than content-based laws and are typically upheld.[219] Content-neutral restrictions in a non-public forum, such as a military base, are subjected to even a lower degree of scrutiny and are even more likely to be upheld: such restrictions are valid as long as they are "reasonable in light of the purpose served by the forum." [220] Thus, the government certainly could impose reasonable content-neutral restrictions on its employees' speech in the governmental workplace during work hours.

Governmental employees do not automatically relinquish their free speech rights,[221] but under certain circumstances the Establishment

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[214] R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (citing Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991)).

[215] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[216] Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (defining content-neutral restrictions as those "justified without reference to the content of the regulated speech").

[217] *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("place" restriction).

[218] Public forums are "places which by long tradition or by government fiat have been devoted to assembly and debate" such as public parks and streets. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[219] Courts will uphold content-neutral laws restricting speech in a public forum provided "that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293. The Religious Freedom Restoration Act, discussed *supra* at notes 142-146 and accompanying text, requires strict scrutiny of religion-neutral laws that substantially burden the free *exercise* of religion. *See* 42 U.S.C.S. § 2000bb-1(a) (LEXIS 2005). Its provisions do not apply to content-neutral laws that limit religious *speech*.

[220] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).

[221] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (holding that a governmental employee has a right as a citizen to comment on matters of public concern, which must be balanced against the government's interest in "promoting the efficiency of the public service it performs through its employees").

Clause limits the right of governmental employees to engage in religious speech. The Establishment Clause limits only the government, including governmental employees acting in an official capacity.[222] Private individuals (including governmental employees acting in a private capacity) have the right—conferred by the Free Exercise and Free Speech Clauses, and unconstrained by the Establishment Clause—to endorse and favor one religion (or non-religion) over another.[223] Thus, the question of whether the Establishment Clause trumps the Free Speech Clause in a particular situation depends on whether the employee endorsing religion by engaging in the religious speech is reasonably perceived by an objective listener[224] as acting in an individual, private capacity or in an official capacity.[225] The Establishment Clause is violated if it appears to the reasonable observer[226] that the government, through its employee's speech, is coercing or endorsing religion.[227]

The interplay between the Free Speech and Establishment Clauses can also arise in the context of private religious speech by private parties (not working for the government) on governmental property. These cases may involve a private person or organization seeking to place a religious display on governmental property.[228] They may also involve an organization seeking access to governmental facilities, open to non-religious groups, for religious use or speech.[229] Detailed discussion of religious speech on governmental property by private parties is beyond the scope of this article.

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[222] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 587 (1992) (attributing actions of a high school principal to the state).

[223] *See* Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 682 (2001).

[224] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (noting the importance of the perceptions of an objective observer).

[225] *See* Bd. of Ed. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

[226] *See supra* note 61 and accompanying text.

[227] The Court has applied the endorsement test or the coercion test most frequently in the context of prayer and religious displays, both forms of religious speech. *See supra* text accompanying notes 59-71. The Court therefore would likely apply one of those tests to other religious speech by governmental employees, although the Court has not had occasion to do so yet.

[228] *See, e.g.*, Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

[229] *See, e.g.*, Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

III. RELIGIOUS SPEECH IN THE MILITARY

Religious speech is not exempt from the Free Speech Clause's protections.[230] Military members also have free speech rights, although it is well established that the government has greater latitude in restricting military members' speech than would be permissible in the civilian sector.[231] This Part examines the extent to which the military may regulate military members' religious speech, including discussions about religion, expressions of religious belief (or absence of belief), and proselytizing.[232] Prayer in the military and religious displays on governmental property, although usually forms of religious speech, are discussed separately in Parts IV and V. The separate body of case law pertaining to those topics warrants separate discussion, although similar themes apply to all three.

Limitations on military members' religious speech may be justified on one of two grounds: judicial interpretations of either the Free Speech Clause or the Establishment Clause.[233] The military may regulate religious speech that is not protected by the Free Speech Clause ("unprotected speech")[234] and may regulate even "protected speech" if the limitation meets the applicable requirements.[235] Even if religious speech is otherwise protected by the Free Speech Clause, the Establishment Clause may nevertheless limit it.[236] The Establishment Clause is a limitation only when the military member is reasonably perceived as speaking as a representative of the government,[237] but the

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[230] *See, e.g.*, *Mergens*, 496 U.S. at 250 (plurality opinion) ("[P]rivate speech endorsing religion … [is protected by] the Free Speech and Free Exercise Clauses . . . .").

[231] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."). For an excellent overview of free speech in the military, see Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303 (1998).

[232] "Proselytizing" is used in the sense of inducing or recruiting (*attempting* to induce) someone to convert to one's religious faith. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 937 (10th ed. 1998). Proselytizing is a form of religious speech that is protected to the same degree as other religious speech. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) ("[W]e have not excluded from free-speech protections religious proselytizing . . . .") (citing Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640, 647 (1981)).

[233] *See infra* Part III.A-B.

[234] *See infra* notes 245-252 and accompanying text.

[235] *See supra* notes 210-220 and accompanying text.

[236] *See infra* Part III.B.

[237] *See infra* notes 223-227 and accompanying text.

free speech limitation may apply to any speech whether done in a private or official capacity.[238]

A. Religious Speech and the Free Speech Clause

Judicial interpretations of the Free Speech Clause are one possible source of military authority to limit its members' free speech.[239] Although the Uniform Code of Military Justice (UCMJ) imposes some prohibitions on military members' speech,[240] no specific provision targets religious speech. But Article 134 includes a general prohibition against all conduct by military members, including speech,[241] that is prejudicial to good order and discipline or that is discrediting to the service.[242] Article 133 also contains a general prohibition against all officers' conduct, including speech,[243] that is unbecoming an officer.[244]

The leading U.S. Supreme Court case pertaining to speech in the military is *Parker v. Levy*.[245] Captain Levy was charged with violating UCMJ Articles 133 (conduct unbecoming an officer) and 134 (conduct prejudicial to good order and discipline) for certain provoking and disloyal statements (non-religious) he made to enlisted soldiers in the course of his duties while the Vietnam War was ongoing.[246] On appeal from his conviction, Levy argued that the First Amendment shielded him from prosecution for his statements. The U.S. Supreme Court disagreed stating: "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command.

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[238] *See infra* note 251 and accompanying text.
[239] *See, e.g.,* Parker v. Levy, 417 U.S 733 (1974).
[240] *See, e.g.*, UNIFORM CODE OF MILITARY JUSTICE (UCMJ) arts. 89, 91 (2005) (prohibiting use of disrespectful language to military superiors) and UCMJ art. 88 (2005) (prohibiting commissioned officers from using contemptuous words toward certain civil officials).
[241] *See generally* Parker v. Levy, 417 U.S 733 (1974).
[242] UCMJ art. 134 (2005).
[243] *See generally* Parker v. Levy, 417 U.S 733 (1974).
[244] UCMJ art. 133 (2005).
[245] *See generally* Parker v. Levy, 417 U.S 733 (1974).
[246] Among the statements that Captain Levy was charged with making are the following: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children." *Id.* at 736-37. Captain Levy was also charged under Article 90, UCMJ for disobeying a superior's order to establish a training program.

If it does, it is constitutionally unprotected."[247] The Court of Appeals for the Armed Forces has since clarified that speech that "undermine[s] the effectiveness of response to command"[248] is speech that "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops."[249] This speech is unprotected,[250] meaning that the military may take adverse action against its members based on the content of the speech no matter where or when the speech occurs, even if off-duty away from a military installation.[251]

This formulation of unprotected speech in the military suggests that most religious speech by military members would be protected under the Free Speech Clause because rarely would the *content* of such speech interfere with the orderly accomplishment of the mission or present a clear danger to loyalty, discipline, mission, or morale of the troops. A clear example of unprotected religious speech would be a military member inciting other military members to adopt a radical form of Islam calling for traitorous actions against the United States in the name of jihad. Another example would be a military member attempting to persuade other military members to adopt a strictly pacifist religion and immediately refuse to perform any military duties.[252]

Even protected speech (that is, speech that does not fall into any category of "unprotected speech") may be regulated, however. The government's ability to limit protected speech depends on whether its

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[247] *Levy*, 417 U.S. at 759 (quoting United States v. Gray, 42 C.M.R. 255 (1970)).
[248] *Id.*
[249] United States v. Brown, 45 M.J. 389, 395 (1996).
[250] Analytically, unprotected speech in military is similar to the "dangerous speech" civilian category of unprotected speech. *See* Schenck v. United States, 249 U.S. 47 (1919); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). In the civilian sector, dangerous speech means "speech that is directed to inciting or producing imminent lawless action . . . [and that] is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). Due to the military's responsibility for the nation's security, dangerous speech in the military has a lower threshold than in the civilian sector, requiring neither "intent to incite" nor "imminent" danger. *See* United States v. Brown, 45 M.J. 389, 395 (1996). Another possible analytical model—not adopted by the courts—to reach the same result (allowing prosecution in the military for words that present a clear danger to loyalty, discipline, mission, or morale of the troops) would be to view these as compelling governmental interests justifying narrowly tailored means to achieve them. The advantage to the military in the courts' current approach (unprotected speech) versus the alternative (compelling governmental interest) is that under the current approach the military does not have to prove that its action was the least restrictive means to achieve the compelling governmental interest.
[251] Solorio v. United States, 483 U.S. 435 (1987) (holding that military jurisdiction depends only on military status of accused).
[252] All branches within the Department of Defense have provisions by which members can apply for conscientious objector status, but members must continue to perform military duties until their application is processed. *See infra* notes 472-473.

regulation is content-based or content-neutral.[253] Content-based regulations must survive strict scrutiny and are presumptively invalid.[254] Content-neutral laws are subject to a much lower standard of review and are likely to be upheld.[255]

Particularly among willing peers,[256] voluntary private discussions about religion, including proselytizing, are permissible off-duty and on-duty (e.g., during breaks) to the extent that non-religious private speech is permitted.[257] Military superiors certainly have the authority to issue a content-neutral prohibition on all on-duty speech that does not pertain to official business.[258] As a practical matter, however, many military leaders permit some non-duty-related conversations while on duty, so long as those conversations do not unduly interfere with the performance of the mission. Such conversations often contribute to unit effectiveness by fostering interpersonal relationships leading to increased teamwork and

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[253] *See supra* notes 210-220 and accompanying text.
[254] *See supra* notes 213-214 and accompanying text.
[255] *See supra* notes 218-220 and accompanying text.
[256] Truly voluntary religious discussions between a superior and subordinate may also be protected under the Free Exercise Clause, but the disparity in rank and position may raise Establishment Clause issues. *See infra* notes 279-280 and accompanying text.
[257] *See* Air Force Interim Guidelines, *supra* note 26, ¶ 3C(3) ("Nothing in this guidance should be understood to limit voluntary, peer to peer discussions."); *see also* OFFICE OF THE WHITE HOUSE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE, §§ 1A(2)-(3) (Aug. 14, 1997), *available at* http://clinton2.nara.gov/WH/New/html/19970819-3275.html (last visited Dec. 8, 2006). President Clinton directed federal executive departments and agencies to comply with the guidelines. William J. Clinton, *Memorandum on Religious Exercise and Religious Expression in the Federal Workplace, Public Papers of the Presidents*, 33 WEEKLY COMP. PRES. DOC. 1246 (Aug. 14, 1997). The authors have found no evidence that the guidelines currently have force of law. The Clinton guidelines by their terms applied only to "civilian executive branch agencies," specifically excluding "uniformed military personnel." OFFICE OF THE WHITE HOUSE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE 1 (Aug. 14, 1997). Moreover, they were not intended to create any new rights. *Id*. Rather, they apparently were intended to serve as a summary of how existing law applies to religious exercise and expression the federal workplace. Nevertheless, although the guidelines are not law and were never intended to apply to military personnel, they may serve as at least persuasive authority for religious exercise and speech (including prayer and religious displays) in the military, to the extent that uniquely military considerations do not suggest a different result in a particular circumstance. For example, § 1A(2), pertaining to religious expression among fellow employees, and § 1A(3), pertaining to proselytizing of fellow employees, could be accurately applied to military personnel.
[258] A content-neutral order prohibiting all non-duty-related speech while on duty would almost certainly survive judicial scrutiny: the order likely would be reasonably related to purpose of the governmental workplace, a non-public forum. Even if the workplace were considered a public forum, the content-neutral restriction would likely be upheld as being narrowly tailored to furthering an important governmental interest (military efficiency) and would leave open alternatives for military members to discuss religion (off duty). *See supra* notes 218-220.

cohesiveness. If a supervisor permits some non-duty-related conversations on duty, the supervisor should not single out religion as a prohibited topic.[259] This would be a content-based prohibition targeting religious speech that probably would not survive strict scrutiny if challenged. The justification for the supervisor's excluding religious conversation on duty likely would be that it detracts from military efficiency, which a court likely would view as a compelling governmental interest. But excluding *only* religious conversation is not closely enough related to achieving that interest if other topics of permitted conversation equally detract from military efficiency. The prohibition of religious speech would be underinclusive.[260]

Unwanted proselytizing of another military member, even when it occurs among peers,[261] can create delicate issues when it continues after the listener has expressed the desire not to hear any more invitations to adopt the speaker's religion. As a general principle, of course, the Free Speech Clause does not require a speaker to cease speaking a message just because others do not like hearing it.[262] A military member complaining to the chain of command about another member's off-duty proselytizing might be advised to avoid, if possible, spending off-duty time with the proselytizer.

When the listener realistically cannot avoid the proselytizer, however, the situation is different. Examples include if the two are assigned as roommates or must work closely together or if the proselytizer is "stalking" the listener. Because of the repeated, unwanted nature of the proselytizing and the listener's inability to avoid it, the proselytizing can affect the listener's morale and ability to do his job and thus interfere with mission accomplishment and unit effectiveness. If it does, the religious speech becomes "unprotected,"

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[259] *See* OFFICE OF THE WHITE HOUSE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE § 1A(2) (Aug. 14, 1997).

[260] *See supra* notes 104-108 and accompanying text (free exercise context). The same analysis would apply under the Free Speech Clause. The military could restrict on-duty religious speech if, under the particular circumstances of that workplace, the religious speech detracted *more* from military efficiency than other kinds of on-duty speech. Religious speech in the workplace under these circumstances, which would be very rare, could be prohibited as unprotected speech. *See supra* notes 247-251 and accompanying text. Any such prohibition should not discriminate among religions. *See supra* notes 88-108 and accompanying text.

[261] This paragraph presumes peer-to-peer proselytizing with no governmental coercion (e.g., rank or position). *Coercive* proselytizing would implicate the Establishment Clause. *See infra* Part III.B.

[262] *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

and superiors should act to stop these adverse effects.[263] Typically this would begin with counseling the proselytizer, emphasizing the religious speech's effect on military efficiency due to its repeated, unwanted nature rather than the content of the speech.

Some religious speech by military members could also be limited under the Free Speech Clause not because of its content but because it violates some valid content-neutral law or order.[264] For example, a regulation prohibiting the routine use of slogans and quotes on official e-mails[265] would also prohibit religious quotations. Similarly, a lawful order to maintain "radio silence" during a mission would also prohibit religious speech. These limitations are certainly permissible, despite their incidental impact on religious speech, because they are not aimed at any particular message and directly further important military interests.[266] Finally, the Joint Ethics Regulation's provision on "misuse of position" prohibits governmental employees, including military members, from using their official position for "endorsement of any . . . enterprise"[267] or "in a manner that could reasonably be construed to imply that . . . the Government sanctions or endorses [their] personal activities."[268] This content-neutral regulation limits religious speech in a way similar to the Establishment Clause's limitation on religious speech.

B. Religious Speech and the Establishment Clause

The Establishment Clause is a second, independent limitation on religious speech: speech that may be protected by the Free Speech Clause might nevertheless be prohibited by the Establishment Clause.[269] Although courts often apply the *Lemon* test to analyze Establishment Clause issues, in the context of religious speech courts are more likely to apply the coercion test or the endorsement test.[270] Under these three

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[263] *See* Air Force Interim Guidelines, *supra* note 26, ¶ 3F ("Nothing in these guidelines relieves commanders of the responsibility to maintain good order and discipline in their commands.").
[264] *See supra* notes 216-220 and accompanying text.
[265] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTR. 33-119, ¶ 3.7, AIR FORCE MESSAGING (24 Jan. 2005) ("Users will not add slogans, quotes, special backgrounds, special stationeries, digital images, unusual fonts, etc., routinely to their official or individual electronic messages. Users must consider professional image and conservation of Air Force network resources (bandwidth).").
[266] *See supra* notes 218-220 and accompanying text.
[267] 5 C.F.R. § 2635.702 (2005). *See infra* note 404 for additional explanation of this Joint Ethics Regulation (J.E.R.) provision.
[268] 5 C.F.R. § 2635.702(b) (2005).
[269] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (invalidating official speech that would have been permitted by the Free Speech Clause if it had been private speech).
[270] *See supra* notes 59-71.

tests, religious speech that amounts to *governmental action* would be unconstitutional if its purpose or primary effect is to advance religion,[271] if it results in excessive entanglement between government and religion,[272] or if it coerces or even endorses (as reasonably viewed by the objective observer) a particular religion or religion generally (over non-religion).[273]

The Establishment Clause does not limit private religious speech.[274] This rule is more easily stated than applied: there is a fuzzy line between permitted private religious speech and prohibited official speech advancing religion. In determining whether religious speech has crossed that line, one must look at the totality of the circumstances surrounding the speech.[275] Three general factors are the status of the speaker, the status of the listener, and the context and characteristics of the speech itself.[276] In attempting to determine whether the actions of a private association are fairly attributable to the government in a context other than religious speech, the U.S. Supreme Court has aptly noted:

> What is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.[277]

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[271] *See supra* notes 40-49 and accompanying text.
[272] *See supra* notes 50-53 and accompanying text.
[273] *See supra* notes 59-71 and accompanying text.
[274] *See supra* notes 223-225 and accompanying text.
[275] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310 (2000) (looking at the entire context before concluding that "[t]he delivery of such a message [prayer]—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech"). Courts have not formally announced a "totality of the circumstances" test in this context.
[276] These factors represent the authors' judgment on appropriate general factors to consider in attempting to distinguish private from official religious speech in contexts other than prayer or official displays. *See infra* text accompanying note 277. There is no Court precedent on point. The case law distinguishing private from governmental religious speech arises in the contexts of prayer and religious displays on governmental property. *See infra* Parts IV and V. Prayers and displays may be pursuant to official government policy permitting them, while religious speech by military members typically is not. Thus, the considerations in prayer and display cases may be somewhat different. Other religious speech is apparently more likely to be challenged through an official complaint. *See, e.g.*, BRADY, *supra* note 22.
[277] Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295-96 (2001) (citing Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193, 196 (1988);

The Establishment Clause analysis theoretically follows two steps: (1) determining whether the military member's speech is private or official; and (2) only if the speech is official, determining whether it coerced or endorsed religion or otherwise violated the Establishment Clause. As a practical matter, however, the questions are closely related: the same factors bearing on whether the speech is official are also likely to be relevant to whether the speech coerced or endorsed religion.[278]

The speaker's status at the time of the speech—including rank and position—is important in determining whether the speech is official. The speaker's status in relation to the listener's status is also important in determining whether the religious speech is coercive. Coercion exists when the speaker reasonably appears to be using his superior rank or position over the listener to promote religion.[279] Positions of authority are characterized by the authority of the position-holder to make or influence decisions directly affecting subordinates. Such decisions typically include performance reports and recommendations for promotion but could involve an instructor awarding grades in a military academic setting or a coach awarding "playing time" in a military athletic setting. The higher the speaker's rank—and the greater the

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Polk County v. Dodson, 454 U.S. 312 (1981) (private athletic association's actions amounted to governmental actions for purposes of suit under 42 U.S.C. § 1983)).

[278] The Court has developed tests and a body of case law for determining when an individual's action becomes governmental action. *See* Richard J. Ansson, Jr., *Drawing Lines in the Shifting Sand: Where Should the Establishment Wall Stand? Recent Developments in Establishment Clause Theory: Accommodation, State Action, The Public Forum, and Private Religious Speech*, 8 TEMP. POL. & CIV. RTS. L. REV. 1, 33-39 (1998) (explaining "nexus approach" and "public function doctrine" used by courts to determine whether private conduct constitutes state action). In most areas of constitutional law, the "governmental action" inquiry is viewed as a threshold question that courts address before reaching the substantive merits of the issue. John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 582 (2005). But in Establishment Clause cases, the Court does not use the typical "governmental action" threshold tests. *See id.* at 588. Instead, the Court essentially treats the "governmental action" issue as part of the substantive test. *Id.*

[279] Military courts have recognized "the effect of superior rank or official position upon one subject to military law" in the context of the requirement to provide rights advisements under Article 31, UCMJ before official questioning of a suspect or accused. United States v. Duga, 10 M.J. 206, 209 (C.M.A. 1981). The court in *Duga* also recognized that coercion to confess does not exist in voluntary "casual conversation between comrades." *Id.* at 211. The court's observations logically also apply to the context of religious speech; *see also* Air Force Interim Guidelines, *supra* note 26, ¶ 2E ("Supervisors, commanders, and leaders at every level, bear a special responsibility to ensure their words and actions cannot reasonably be construed as either official endorsement or disapproval of the decisions of individuals to hold particular religious beliefs or to hold no religious beliefs.").

disparity between that rank and the listener's rank—the more likely it is that the speech will be perceived as both official[280] and coercive.

The speaker's being in uniform and on duty in the workplace may also suggest the speech is official[281] and possibly coercive if the listener is also in uniform, on duty, and subordinate to the speaker. Related to this is whether the listener is voluntarily present during the religious speech.[282] Listeners who are involuntarily present are almost certainly on duty and are compelled to be present by a superior authority who is also likely on duty and in uniform. A military member required to be at an assembly, meeting, or regular place of duty where another military member (particularly a superior) discusses personal religious beliefs may reasonably perceive the speech as both official and an endorsement or even coercion of religion.[283] As an extreme example, requiring cadets or other military members to attend chapel would violate the Establishment Clause.[284]

Similarly, military members who go to a particular service organization for official purposes (e.g., for dental, personnel, medical, legal, financial, or recreational services) should not be subjected to religious speech while receiving the service. Even though military members may be receiving some of these services as their choice (e.g., recreational or legal services), they have a right to them. Government cannot subject people to practices prohibited by the Establishment Clause as a condition of receiving benefits to which they are entitled.[285] Religious speech is likely to be reasonably perceived as an official endorsement when it is made by military members in the course of their providing official services. An exception, of course, exists when military members voluntarily attend chapel services or seek religious guidance from a military chaplain. The members are voluntarily present with the chaplain for the very purpose of hearing religious speech. Religious speech under these circumstances does not offend the Establishment Clause.[286]

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[280] Air Force Interim Guidelines, *supra* note 26, ¶ 3C(2).

[281] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 n.13 (2000) (suggesting that speech in a public forum is more likely to be viewed as private, rather than governmental, speech).

[282] *See* Air Force Interim Guidelines, *supra* note 26, ¶ 3C(1) (noting the particular danger that religious speech will be perceived as official speech when listeners are obliged to hear the message as part of their duties); *see also infra* notes 322, 346 and accompanying text (elaborating on idea of voluntary presence).

[283] Air Force Interim Guidelines, *supra* note 26, ¶ 3C(1).

[284] Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972) (per curiam).

[285] Lee v. Weisman, 505 U.S. 577, 596 (1992) ("It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.").

[286] Although the constitutionality of the chaplaincy has not reached the Supreme Court, a Court of Appeals has upheld the chaplaincy, including its meeting of spiritual needs of military members, against an Establishment Clause challenge. Katcoff v. Marsh, 755

Due to their high rank and positions, some military members might reasonably be perceived as being representatives of the government whenever they speak in public.[287] Thus, even "off-duty" comments made by such military members might reasonably be perceived as official.[288] Indeed, any military member who has been asked to speak because of that person's military affiliation, rank, or position is likely to be perceived as speaking as a military representative, particularly if wearing a uniform. An example might be

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F.2d 223 (2d Cir. 1984). When chaplains engage in religious speech with people who have sought them for that purpose, they are meeting the spiritual needs of military members, as permitted by *Katcoff*. But chaplains' *uninvited* proselytizing religious speech to military members poses a different practical and legal issue. On one hand, persuading others to adopt their beliefs is central to some major religious. *See, e.g.*, *Matthew* 28:19 (quoting Jesus' exhortation to "go and make disciples of all nations") (New International Version). Chaplains of such religions likely would feel a strong calling to proselytize. On the other hand, the military's permitting its chaplains to proselytize members—without the members' explicit or implicit invitation—would likely violate the Establishment Clause. The court in *Katcoff* noted that "[n]o chaplain is authorized to proselytize soldiers or their families," *id.* at 228, and that "[t]he primary function of the military chaplain is to engage in activities designed to meet the religious needs of a pluralistic military community, including military personnel and their dependents," *id*. at 226. A chaplaincy that meets the religious need of military personnel, who may be deployed in remote locations away from their own churches, is permitted (and arguably mandated) by the Free Exercise Clause and does not violate the Establishment Clause. *See id.* at 232. Similarly, chaplains who provide spiritual insight to those who have sought it are also meeting the religious needs of military members. But chaplains who, without invitation, actively proselytize are not meeting the Free Exercise needs of military members. They are essentially creating new religious needs by promoting religion. Thus, attempts by chaplains in their capacity as governmental representatives to persuade military members to adopt a particular religion likely violate the Establishment Clause under *Katcoff's* rationale. Sometimes chaplains distinguish between evangelizing (attempting to convert people who have no religious affiliation) and proselytizing (attempting to convert people who already have religious beliefs), permitting the former but not the latter. *See* Laurie Goodstein, *Air Force Rule on Chaplains Was Revoked*, N.Y. TIMES, Oct. 12, 2005, at A16. This is a distinction without First Amendment significance. Under *Katcoff's* rationale, both activities by chaplains would be impermissible when applied to personnel not seeking to be converted. The Air Force's interim religious guidelines state that chaplains "should respect the rights of others to their own religious beliefs, including the right to hold no beliefs" and "must be as sensitive to those who do not welcome offerings of faith, as they are generous in sharing their faith with those who do." Air Force Interim Guidelines, *supra* note 26, ¶ 3D(2).

[287] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 36c(2) (2005) (certain commanders are constantly on duty for purposes of the Article 112, Uniform Code of Military Justice, prohibition against drunk on duty).

[288] *See* Air Force Interim Guidelines, *supra* note 26, ¶ 3C(2) ("The more senior the individual, the more likely that personal expressions may be perceived to be official statements."). In effect, one responsibility of senior leadership is accepting that one's free speech rights may be further constrained by the Establishment Clause.

a religious speech to a substantial crowd by a prominent in-uniform general officer, introduced by his rank and position.[289]

On the other hand, religious comments made by military members off-duty, out of uniform, in private places, to people over whom they hold no superiority in rank or position are likely to be considered permitted private speech. Furthermore, not every religious comment made on duty and in uniform is likely to be perceived as official speech, especially when not made to subordinates or customers. The context and circumstances surrounding the speech itself are a third general factor—in addition to the speaker's and listener's status—in determining whether a military member's religious speech is official and, if so, whether it coerces or endorses religion.

The speaker's intent to be speaking privately might be clear from the speech's context, even if in uniform and on duty. For example, a discussion about religion might occur during break in a designated break or dining area. An even stronger indication of private speech normally would be if the speech occurred completely off duty away from a military installation.[290] In addition, the speaker may purport to speak for himself by speaking in the first person.[291] If all the other topics of the conversation do not relate to duty, the religious speech may also be perceived as the speaker's private views. Conversely, if the entire rest of the discussion is about official matters, the religious portion is more likely to be perceived as official too, particularly if a superior is speaking.

Other circumstances surrounding the speech—such as the nature, extent, and occasion for the speech—may also affect the perception as to whether the religious speech is official or private and whether the speech coerces or endorses.[292] Infrequent, short,

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[289] Editorial, *The General Who Roared*, N.Y. TIMES, Oct. 22, 2003, at A22 (opining that a deputy under-secretary of defense for intelligence, a lieutenant general, who spoke in uniform from a church pulpit calling on the United States to defeat the terrorists "in the name of Jesus," "was not exercising the free speech rights of a private citizen"). For further details on the general's statements, see Reuters, *Rumsfeld Praises Army General Who Ridicules Islam as 'Satan*,' N.Y. TIMES, Oct. 17, 2003, at A7.

[290] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 303 n.13 (2000) (suggesting that speech in a public forum is more likely to be viewed as private speech, rather than governmental speech, than speech made on governmental property that was not a public forum).

[291] *See, e.g.*, Doe v. Sch. Dist. of Norfolk, 340 F.3d 605, 612-13 (8th Cir. 2003) (noting school board member's use of "I" in the religious part of his speech at a public high school graduation as one factor indicating that the speech was private).

[292] Some of these factors are adapted from Justice O'Connor's concurring opinion in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-43 (O'Connor, J., concurring in the judgment). Justice O'Connor would look to the following factors to determine whether religious speech constitutes "ceremonial deism," which she believes the Establishment Clause permits: the "history and ubiquity" of the practice or speech, the "absence of worship or prayer," the "absence of reference to particular religion," and "minimal religious content." *Id.*

nondenominational[293] religious comments made in the context of significant events[294] may be more likely to be viewed as the speaker's private speech, even if the speaker is superior in rank, on duty, and in uniform. An example might be a superior's comment to a subordinate, upon the death of the subordinate's child, that the superior has the subordinate and his family in his prayers. Even if such statements are viewed as official, they may be so innocuous as to not coerce or endorse religion. At the other extreme, repeated or lengthy religious speech—particularly with substantial religious content[295] or invoking beliefs not shared among world religions—during routine occasions is more likely to be viewed as official and as either coercive or an official endorsement of religion, especially if done on duty by a superior in uniform. Proselytizing speech by a superior to a subordinate is likely to be viewed as both official and coercive. But other factors—such as if the superior were merely responding to a subordinate's questions concerning the source of the superior's spirituality and inner strength—could mitigate even this seemingly bright line rule.

Application of these three general factors—the speaker's status, the listener's status, and circumstances and context surrounding the speech—to any particular instance of religious speech by a military member does not provide a flow chart leading inevitably to a conclusion that speech at issue was or was not "government speech" and did or did not violate the Establishment Clause. Rather, these factors provide guideposts for military attorneys and the members they advise. Indeed, not all factors are likely to point to the same conclusion in any given case.

The issue requires judgment, wisdom, maturity, and respect for others' religious beliefs from military members engaging in religious speech as well as careful analysis of the facts and application of complex case law, which is unlikely to be on point, from military

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[293] *Id.* at 42 ("While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances 'where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.'" (quoting Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting)). *See infra* notes 367-368 and accompanying text discussing non-sectarian prayer.

[294] Some courts have distinguished invocations at a "significant, once-in-a-lifetime event" such as a high school graduation. *See, e.g.,* Doe v. Duncanville Indep. Sch. Dist, 70 F.3d 402, 406-07 (5th Cir. 1995). Other courts have distinguished invocations at less significant, recurring events, such as before high school football games. *See, e.g.,* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 822-23 (5th Cir. 1999), *aff'd on other grounds,* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). For discussion on validity of "solemnization" argument for significant events, see *infra* notes 337-340 and accompanying text.

[295] *See Newdow*, 542 U.S. at 42-43 (O'Connor, J., concurring in the judgment) (arguing that "minimal religious content" is one factor negating governmental endorsement).

attorneys advising members. The U.S. Supreme Court has emphasized that its "Establishment Clause jurisprudence remains a delicate and fact-sensitive one,"[296] and this is certainly even more true with the interplay between the Free Speech and Establishment Clauses. If the religious speech, considering the all the circumstances, is more properly characterized as private, the issue should be analyzed under the Free Speech Clause as discussed above in Part IIIA. Conversely, if the speech is more appropriately characterized as official, the issue should be analyzed under the Establishment Clause as discussed in this Part.[297]

IV. PRAYER IN THE MILITARY

Official prayer[298] in the military can occur at a variety of functions from invocations in formal, solemn settings—such as graduations, change-of-command ceremonies, and dining-ins—to more routine functions such as meals[299] and staff meetings. The complexity of legal standards in this area is highlighted by the array of tests used by the U.S. Supreme Court when addressing the issue of prayer in a public setting. The Court has upheld an opening prayer for a legislative session relying on the historical exception[300] but has denied a moment of silence in public schools using the *Lemon* analysis.[301] In addition, the Court has struck down a high school graduation invocation on the basis of coercion[302] and has struck down a student-led high school football pre-game prayer using a multitude of tests to include: coercion, improper governmental endorsement, and failure under the *Lemon* test's secular purpose prong.[303] When facing the challenging question of prayer at an official military function, one must navigate through the array of legal opinions deliberately and with a full understanding of the particular context in which the prayer will be given.

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[296] Lee v. Weisman, 505 U.S. 577, 597 (1992).

[297] Theoretically, official religious speech could be analyzed under the Free Speech Clause too. But it is difficult to imagine official speech being prohibited by the Free Speech Clause if it was not prohibited by the Establishment Clause.

[298] This Part will focus only on official prayer at official functions. Private prayer by an individual would be analyzed using free speech and free exercise principles. *See supra* Part III. Prayer by chaplains during a worship service does not raise any Establishment Clause issues. *See supra* note 286 and accompanying text.

[299] The U.S. Naval Academy holds a nondenominational prayer led by a chaplain prior to lunch. David A. Fahrenthold, *Naval Academy Urged to Drop Prayer,* WASH. POST, June 25, 2005, at B5.

[300] Marsh v. Chambers, 463 U.S. 783 (1983).

[301] Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down mandatory time of silence in public schools, where unique facts indicated that the primary purpose was to promote prayer). Most "moments of silence" do not violate the Establishment Clause. *See infra* text accompanying notes 369-370.

[302] Lee v. Weisman, 505 U.S. 577, 587 (1992).

[303] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

A. Prayer at Solemn Military Events

1. *Deeply Embedded in History Exception*

The Air Force Interim Guidelines rely on a "long-standing military tradition" to authorize a "brief non-sectarian prayer" at "non-routine military ceremonies or events of special importance."[304] According to these guidelines, the purpose of such a prayer is to add a "heightened sense of seriousness or solemnity" to the events.[305] This reliance on a historical exception to authorize prayer at special military ceremonies stems from the U.S. Supreme Court's decision in *Marsh v. Chambers.*

The Court in *Marsh* upheld an opening prayer for the Nebraska legislative session because such a practice is "deeply embedded in the history and tradition of this country."[306] The Court noted that the same week Congress reached agreement on the Bill of Rights' language, the legislative body also authorized paid legislative chaplains,[307] who as part of their duties opened Congressional sessions with a prayer. The Court curtailed the use of this historical exception by noting in a subsequent case that the non-existence of free public education at the adoption of the Constitution prevented using a *Marsh*-based historical analysis in the context of prayer in public schools.[308] Thus, the Court has limited the historical exception to practices of prayer dating back to the late eighteenth century. In order for the practice of prayer at formal, solemn military events, such as change-of-command ceremonies and dining-ins, to prevail under the *Marsh* analysis the prayer or invocation at such functions must be "deeply embedded" in our military history.

The critical question about the use of *Marsh* as justification is this: must the military show specific evidence of prayer at formal military functions that have existed since the late 1700s *or* can the military rely on the general existence of chaplains and their role in leading prayer in the military? The existence of military chaplains

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[304] Air Force Interim Guidelines, *supra* note 26, ¶ 3B(3). The Air Force Revised Interim Guidelines also allow for non-denominational prayer at "military ceremonies or events of special importance" as long as its primary purpose is "not the advancement of religious beliefs." *Id.* ¶ 6.
[305] *Id.* ¶ 3B(3).
[306] Marsh v. Chambers, 463 U.S. 783, 786 (1983).
[307] *Id*. at 788.
[308] Edwards v. Aguillard, 484 U.S. 578, 583 n.4 (1987) (citing Wallace v. Jaffree, 472 U.S. 38, 80 (1985) (O'Connor, J. concurring in judgment)); *see also* Jager v. Douglas County Sch. Dist., 862 F.2d 824, 829 n.9 (11th Cir. 1989) (refusing to use *Marsh* historical exception in evaluating invocations at high school football games because the practice did not date from the time of the Constitution); *but see* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) (relying on *Marsh* historical exception in upholding prayer at university graduation when historical practice dated back 155 years).

began prior to the adoption of the Constitution.[309] The First Continental Congress authorized the numbers of military chaplains as well as their pay.[310] Military chaplains' duties in the late 1700s included leading prayer services, visiting the troops, and counseling commanders.[311] During the Revolutionary War, General Washington even issued a general order requiring all officers and soldiers to pray and fast on 17 May 1776.[312] This evidence shows that chaplains led troops in prayer since the very beginning of our nation's history.

If, on the other hand, the military must show very specific examples of prayer at formal military functions deeply embedded in our history, the support becomes weaker. For example, arguably a dining-in could be considered an event of special importance falling under the Air Force Interim Guidelines, yet various services differ over how long dining-ins have been a part of military history. The Navy credits the roots of its dining-in tradition to the Revolutionary War, which—if prayer was part thereof[313]—would likely qualify under *Marsh's* exception.[314] The Army, in contrast, states that the dining-in was not adopted from its British comrades until the World War I and II timeframe.[315] In *Marsh*, the Court commented that the tradition of prayer at the opening session of Congress has "continued without interruption" since 1789.[316] Given the narrowness of this rule, it remains unclear whether the military could utilize *Marsh's* deeply embedded historical exception to justify prayer at every non-routine military event or ceremony.

While it remains unclear whether the reliance on historical exception will support the military's continued use of prayer at formal ceremonies, this much does remain clear: the reliance on this historical exception should remain narrow. The U.S. Supreme Court has never relied on this historical exception outside the narrow factual setting of the *Marsh* case. In fact, the Court has specifically *rejected* an interpretation of *Marsh* that would hold "all accepted practices 200

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[309] Katcoff v. Marsh, 755 F.2d 223, 225 (2d Cir. 1984) (citations omitted).
[310] *Id*. (citations omitted).
[311] ROY J. HONEYWELL, COL (RET.) (USAR), CHAPLAINS OF THE UNITED STATES ARMY 21-23 (describing chaplains' role in the French-Indian War), 30-74 (describing chaplains' role in the Revolutionary War) (1958).
[312] JAMES P. MOORE, JR., ONE NATION UNDER GOD: THE HISTORY OF PRAYER IN AMERICA 51 (2005).
[313] Although the authors have found documented evidence of formal functions in the military dating from the 1700s, they have been unable to determine what, if any, role prayer played in such functions.
[314] *See* U.S. DEP'T OF NAVY, NAVAL HISTORICAL CENTER, DINING IN/DINING OUT: A NAVY TRADITION (10 Dec. 2002), *available at* http://www.history.navy.mil/faqs/faq89-1.htm (last visited Dec. 6, 2006).
[315] *See* U.S. DEP'T OF ARMY, RECRUITING COMMAND, PAM. 600-15, DINING-IN AND DINING-OUT HANDBOOK ¶ 4 (4 May 1994).
[316] Marsh v. Chambers, 463 U.S. 783, 788 (1983).

years old and their equivalents . . . constitutional today."[317] Given the narrowness of the *Marsh* decision, judge advocates should be wary of pushing the limits of this historical exception to justify non-sectarian prayer at solemn military events.

2. *Remaining Establishment Clause Analysis*

Without the historical *Marsh* exception, justifying prayer at solemn military events becomes much more difficult under the current case law. Although the vast majority of case law deals with prayer in the school setting, the principles and tests used by these cases can be used to analyze prayer at solemn military events. The two major U.S. Supreme Court cases in this regard are *Lee v. Weisman*[318] and *Santa Fe Independent School District v. Doe*.[319]

In *Lee*, a public school principal invited a clergy member to deliver a nonsectarian prayer at the annual graduation ceremony and provided the clergy member a pamphlet of guidelines to control the content of the prayer.[320] The Court held the practice unconstitutional largely under the coercion test because the state was in essence directing the performance of a religious exercise and compelling student attendance.[321] The Court found the school's argument that a high school graduation ceremony was technically voluntary for a student completely unpersuasive given the obligatory nature of such an event.[322]

In *Santa Fe*, the Court overturned a high school policy that authorized students to vote on whether to hold an invocation at football games.[323] Although the invocation was delivered by a student, the Court rejected the idea that the speech was private. The speech was on school property, at a school-sponsored event, using the school's public address system, under school supervision and "pursuant to a school policy that explicitly and implicitly encourages public prayer."[324] Then, under the Establishment Clause, the Court struck down the speech on three separate grounds. First, the Court found the policy of putting an invocation to a vote and allowing a student to deliver a prayer based on a majority vote involved both perceived and actual endorsement because an objective observer would view the pre-game prayer as possessing the school's seal of approval.[325] Second, the stated secular purpose of the policy was just a sham to continue the school's long practice of prayer

[317] County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989).
[318] 505 U.S. 577 (1992).
[319] 530 U.S. 290 (2000).
[320] *Lee*, 505 U.S. at 581.
[321] *Id*. at 586-88 (coercion holding limited to minors).
[322] *Id*. at 594-95.
[323] *Santa Fe*, 530 U.S. at 297-98.
[324] *Id*. at 310.
[325] *Id*. at 307-08.

before games,[326] thus violating the purpose prong of the *Lemon* test. Finally, the Court found the pre-game prayer unduly coercive given the "immense social pressure" to attend and the improper effect of the prayer to coerce those present to engage in religious worship.[327]

With *Lee* and *Santa Fe* as a backdrop, the determination that must be made is: can an invocation at a formal military event be considered private speech?[328] Since *Santa Fe*, several courts of appeals' cases have upheld prayer at graduation ceremonies on the basis that the prayer constituted private speech and thus was permissible under the Free Speech and Free Exercise Clauses.[329] In *Adler v. Duval*,[330] for example, the court upheld a school policy that allowed students to elect whether to have an opening and closing message at graduation given by a student.[331] The school had no role in reviewing the message content and nothing in the policy encouraged or suggested that the message be religious in nature.[332] The court found such student-initiated prayer to be private speech.[333]

Equating a chaplain-led or military member-led prayer to private speech would be difficult. Unlike a school environment, where students can vote on whether or not to have a message and decide what the content of the message should be,[334] the military does not put to a vote whether to have an "opening message" at a change-of-command or dining-in. Instead, a commander typically decides that there will be an invocation and routinely asks a chaplain to perform this duty. This overt governmental involvement, both in the decision making and delivery of an invocation, results in clear governmental speech, thereby compelling Establishment Clause analysis.

If the formal solemn event had both a public and private aspect to the ceremony, the possibility exists for private speech.[335] For example, in a retirement ceremony after the presentation of the orders and award, the remainder of the ceremony could constitute the private

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[326] *Id*. at 308-09.
[327] *Id*. at 310-12.
[328] *See supra* notes 274-278 and accompanying text.
[329] *See, e.g.,* Doe v. Sch. Dist. Of Norfolk, 340 F.3d 605 (8th Cir. 2003) (upholding school board member and parent's graduation message as private speech); Adler v. Duval County Sch. Bd., 250 F.3d 1330 (11th Cir. 2001); Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000) (finding genuinely initiated student prayer equates to private speech).
[330] 250 F.3d 1330 (11th Cir. 2001).
[331] *Id.* at 1331-32.
[332] *Id.* at 1332-33.
[333] *Id.* at 1333.
[334] The vote struck down by *Santa Fe* involved the school putting prayer to a vote by students, whereas the votes upheld by various Circuits allowed students to decide whether to have a student-led message with no governmental involvement as to the message's content. *See supra* notes 323-324 and 329-333 and accompanying text.
[335] *See supra* notes 274-278 and accompanying text.

part of the ceremony. The moderator could announce that the private portion of the ceremony is about to begin, and any prayer or religious speech that follows would constitute private speech protected under the Free Speech and Free Exercise Clauses.[336]

Next, the invocation at a solemn military event would need to pass the *Lemon* test. Although the purported purpose of "solemnizing" an event with a prayer was relied upon in two courts of appeals' cases following *Lee* to justify meeting the purpose and primary effect prongs,[337] such rationale is unlikely to pass muster after *Santa Fe*. The Court in *Santa Fe* recognized that the contexts of prayer at a football game differed radically from the graduation ceremony in *Lee* and indeed questioned the school's rationale for why solemnity was needed at all for a sporting event.[338] The Court, nevertheless, rejected the basis for solemnity arguments by stating that "the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school."[339] Although the Court in *Santa Fe* did not squarely decide whether the solemnity could ever be used successfully to support governmental prayer, courts of appeals' decisions following *Santa Fe* have shied away from solemnity arguments and instead relied on distinguishing private and official speech.[340] This analysis shows that the solemnizing justification is unlikely to exempt prayer from scrutiny if the prayer is in fact government-sponsored.

Without a solemnizing justification, the purpose of having an invocation at a formal, non-routine military event falls back to a non-

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[336] After the reading of the retirement order, it is clear from the circumstances that the retiree no longer holds any position of authority over his or her listeners. Further, a disclaimer that the private portion of the ceremony is about to begin makes clear to the audience that any religious statements thereafter are the retirees' personal beliefs and thus are less likely to be construed as official governmental speech. *See supra* notes 279-280, 291 and accompanying text.

[337] *See* Chaudhuri v. Tennessee, 130 F.3d 232 (6th Cir. 1997); Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992).

[338] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000).

[339] *Id*. at 309.

[340] *Compare* Tanford v. Brand, 104 F.3d 982, 986 (7th Cir. 1997) and *Chaudhuri*, 130 F.3d at 236 (both upholding university graduation prayer in part on its purpose of solemnizing the ceremony in a case pre-*Santa Fe*) *with* Cole v. Oroville Union High Sch., 228 F.3d 1092 (9th Cir. 2000) and Doe v. Sch. Dist. of Norfolk, 340 F.3d 605 (8th Cir. 2003) (analyzing high school graduation prayer based on private speech grounds versus solemnizing arguments in a case post-*Santa Fe*). Further support for the decrease in validity of the "solemnizing justification" is apparent from the 11th Circuit's handling of *Adler v. Duval County School Board* upon remand from the Supreme Court in light of its *Santa Fe* decision. *Compare* Adler v. Duval County Sch. Bd., 206 F.3d 1070, 1085 (11th Cir. 2000) (finding high school graduation prayer passed *Lemon's* secular purpose prong based on purpose of solemnizing the graduation ceremony) *with* Adler v. Duval County Sch. Bd., 250 F.3d 1330, 1342 (11th Cir. 2001) (minimizing its prior reliance on the solemnization argument and distinguishing *Santa Fe* because it dealt with school sponsored prayer versus the private speech in *Adler*).

secular and impermissible one.[341] The primary effect of including invocation transforms into conveying a message favoring religion, which clearly violates the effects prong of *Lemon*.[342] In addition, prayer at formal military functions fails the excessive entanglement prong because typically a governmental representative, such as a commander, decides whether to have an invocation and who will deliver it while another governmental representative, such as a chaplain, determines the content and gives the prayer. Courts have found similar levels of involvement in a school or school board setting excessive and in violation of *Lemon's* third prong.[343] Even if the solemnization argument could be made post-*Santa Fe*, when so many other aspects of a formal military ceremony can be used to promote the solemnity of the ceremony (e.g., special uniform requirements, posting of colors, standing at attention for various aspects, a speech by a commander), it becomes difficult to justify how the purpose of adding a prayer is truly for solemnity vice religious purposes.

Even if a justification could be made under *Lemon* supporting prayer at formal military events, the prayer at a formal non-routine military ceremony would have to satisfy the Court's concern of governmental coercion. The Court has made clear that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."[344] Despite the fact that military members are mature adults and the Court has evaluated coercion only in the context of minors,[345] several aspects of the military environment raise serious coercion concerns paralleling the Court's demonstrated concerns of coercion in the public school system. First, all formal military events are hosted by a superior officer. In addition, during an invocation all military members are expected to stand quietly and demonstrate respect toward the speaker. Finally, attendance at formal military events such as dining-ins and change-of-command ceremonies is essentially obligatory.[346] The Court in *Engel v. Vitale*[347] likely said it best in its observation that "when the power, prestige and financial support of government is placed behind a particular religious

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[341] *See* Mellen v. Bunting, 327 F.3d 355, 373 (4th Cir. 2003) ("When a state-sponsored activity has an overtly religious character, courts have consistently rejected efforts to assert a secular purpose for that activity.").
[342] *See* Coles v. Cleveland Bd. of Ed., 171 F.3d 369, 384 (6th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Ed., 84 F.3d 1471, 1484-85 (3d Cir. 1996).
[343] *See Coles*, 171 F.3d at 385; Ingebretson v. Jackson Pub. Sch. Dist., 88 F.3d 274, 279 (5th Cir. 1996).
[344] Lee v. Weisman, 505 U.S. 577, 587 (1992).
[345] *Id*. at 593; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 310-11 (2000).
[346] Although one could argue that such events are "technically" voluntary, the Court has shot down such an argument where the social or peer pressure to attend an event essentially makes attendance obligatory. *See supra* note 322 and accompanying text.
[347] 370 U.S. 421 (1962).

belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[348]

Finally, even if the prayer at a non-routine event was not coercive, such prayer is unlikely to pass scrutiny under the endorsement test.[349] A reasonable observer viewing a formal military function—where the moderator asks the audience to remain standing during the invocation followed by a uniformed member, possibly a chaplain, leading the audience in a nonsectarian prayer—would likely perceive governmental endorsement of religion. The perception of military endorsement of religion would be similar to the stamp of endorsement by the school policy on *Santa Fe's* student-led invocation.[350]

B. Prayer at Routine Military Events

Consistent with executive guidance and case law, judge advocates should strongly advise against prayer at routine military events, such as staff meetings or meals. Both the Air Force Interim Guidelines[351] and *Guidelines on Religious Freedom in the Federal Workplace*[352] issued under President William J. Clinton (hereinafter Clinton's Guidelines) advise against the use of prayer or invocation at routine events. The only noted exception is prayer during extraordinary circumstances such as circumstances involving mass casualties, preparation for imminent combat or natural disasters.[353] Such guidance conforms to case law analyzing prayer at more routine events.

In *Warnock v. Archer*,[354] a public school teacher was required to attend staff meetings at which prayer was conducted and attend in-service training meetings that opened its meetings with prayer.[355] Using the endorsement test, the court held such prayer unconstitutional because the routine prayer in an official, mandatory meeting decisively conveyed the message that the governmental endorsed religion.[356] Similarly, a routine staff meeting that begins with the commander asking a chaplain to pray conveys the same such decisive endorsement of religion. In contrast, a prayer during extraordinary circumstances is

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[348] *Id*. at 430-32 (striking down a law prescribing that public school students begin each school day with a "denominationally neutral" prayer to "Almighty God").
[349] *See supra* notes 384-385 and accompanying text (explaining endorsement test).
[350] *See supra* note 325 and accompanying text.
[351] Air Force Interim Guidelines, *supra* note 26, ¶ 3B(1); *see accord* OP. THE AIR FORCE JUDGE ADVOCATE GENERAL, PRAYER AT STAFF MEETINGS, NO. 1998/76 (14 July 1998).
[352] OFFICE OF THE WHITE HOUSE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE § 1(D)(a) (Aug. 14, 1997).
[353] Air Force Interim Guidelines, *supra* note 26, ¶ 3B(2).
[354] 380 F.3d 1076 (8th Cir. 2004).
[355] *Id*. at 1079 (public school employee being forced to attend training held at a denominational college posed an Establishment Clause problem).
[356] *Id*. at 1080-81.

more likely to be infrequent and spontaneous, leading an objective observer to reject the idea of governmental endorsement.[357] Thus, the endorsement test confirms executive guidance rejecting prayer at routine events in all but the most extraordinary of circumstances.

In addition to the endorsement test, judge advocates must also analyze the proposed prayer at routine events under a coercion analysis. Although the *Warnock* decision found that the coercion test was not violated due to the strong-willed nature of the plaintiff and his status as a contractual employee,[358] the result is likely different in a military environment. In *Mellen v. Bunting*,[359] the court struck down the daily prayer at the Virginia Military Institute's (VMI) evening meal based on both the *Lemon* and coercion tests. The court emphasized that, even though the students of VMI were mature adults, VMI's military environment still resulted in violation of the coercion test.[360] The court particularly noted that VMI's coercive educational method emphasized "detailed regulation of conduct and indoctrination of a strict moral code."[361] Clearly, the military academies and enlisted basic cadet training environments would fall squarely within this coercion test analysis—thus negating the use of prayer at any routine events in these forums.[362] Even outside of these environments, however, the mere presence of chain-of-command involvement in prayer at routine events leads to inherent concerns of potential coercion.[363] In sum, the coercion test counsels against prayer at routine military events.

Finally, judge advocates' advice should not be swayed by the argument that "no one is actually offended" by prayer at routine events. First and foremost, it is irrelevant to Establishment Clause analysis

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[357] *See id*. at 1081 (comparing facts of routine prayer at staff meetings to those sporadic and spontaneous prayers upheld in *Brown v. Polk County*, 61 F.2d. 650 (8th Cir. 1995)). The Air Force Interim Guidelines allow for application of "common sense" in extraordinary circumstances, such as mass casualties, preparation for imminent combat, and natural disasters, to enable prayer to occur in informal settings. Air Force Interim Guidelines, *supra* note 26, ¶ 3B(2). The Air Force Revised Interim Guidelines allow for the consideration of "unusual circumstances and the needs of the command." *Id.* ¶ 6. This policy appears to empower commanders to direct prayer in extraordinary or unusual circumstances. Such direction may not equate to the spontaneous prayer upheld in *Brown*. No case law exists on this point and courts may give deference to the military, especially in a time of national crisis. *See infra* notes 432-433 and accompanying text. Legal practitioners should be aware of the fine line commanders tread with respect to the endorsement test even during times of "extraordinary" or "unusual" circumstances.

[358] *Warnock*, 380 F.3d at 1080.

[359] 327 F.3d 355 (4th Cir. 2003).

[360] *Id*. at 371-72.

[361] *Id*. at 371.

[362] *See, e.g.*, *supra* note 299 (referencing article citing U.S. Naval Academy officials' decision to continue prayer prior to each lunch).

[363] *See supra* notes 344-348 and accompanying text.

whether any persons in attendance are actually offended.[364] The impermissible endorsement of religion or coercion by the government does not change just because no one in attendance is offended.[365] In addition, it would be difficult to imagine how such information could be gathered without raising endorsement or coercion issues. Much like the *Santa Fe* school policy of putting "invocations" at high school football games to a vote led to governmental endorsement of religion,[366] a military policy of asking those in attendance if they are offended or informing those offended that they can leave prior to the prayer would also be impermissible.

C. Prayer or Invocation Guidance if Allowable

If prayer or an invocation is allowed at a military function, the prayer must be non-sectarian and non-proselytizing.[367] In other words, the invocation should not reference or attempt to promote a particular deity or belief system. This stems from the overarching requirement that the government remain neutral between religions.[368] To err on the safe side, judge advocates may advise that a moment of silence be used in place of prayer. A moment of silence does not implicate the same Establishment Clause concerns and is likely constitutional in any setting[369] unless the primary purpose behind using the moment of silence is to promote religion.[370]

V. RELIGIOUS DISPLAYS IN THE MILITARY

Like prayer, religious displays are a form of free speech[371] that the Establishment Clause may nevertheless limit under certain circumstances. As when analyzing governmental prayer, the U.S. Supreme Court has applied an array of tests when determining the constitutionality of various religious displays on governmental property. Although the Court has most often applied the entire *Lemon* analysis,[372]

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[364] Warnock v. Archer, 380 F.3d 1076, 1081-82 (8th Cir. 2004).
[365] *Id*. at 1081.
[366] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 295, 305 (2000).
[367] *See* Marsh v. Chambers, 463 U.S. 783, 794 (1983).
[368] *See infra* notes 382-383 and accompanying text (outlining neutrality principles); *but see* Engel v. Vitale, 370 U.S. 421, 422 (1962) (striking down a non-denominational prayer to "Almighty God").
[369] *See* Chaudhuri v. Tennessee, 130 F.3d 232, 240 (6th Cir. 1997).
[370] *See* Wallace v. Jaffree, 472 U.S. 38, 59-60 (1985) (holding a moment of silence unconstitutional based on the statute's clear religious purpose).
[371] Religious displays are expressive conduct (symbolic speech) when the display is intended to convey a message and viewers would likely understand the message. *See supra* note 202.
[372] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980).

the Court has also decided the fate of various displays based only on *Lemon's* purpose prong[373] and on just the endorsement test.[374] The variety of establishment "tests" stems from the Court's "unwillingness to be confined to any single test or criterion in this sensitive area."[375] Instead, the Court scrutinizes the context of the display and then draws upon the most applicable test for analysis.

Similarly, when deciding whether a particular display passes constitutional muster, military attorneys should pay special attention to where the display is located. Religious displays in the military can be categorized generally as falling into three distinct areas: a common area such as a squadron break area or conference room; a "personal" governmental work area such as an office; and a private area where little governmental work occurs, such as a dorm room. The constitutional analysis will vary depending in which of these three areas the religious display resides because the location of the display strongly influences whether the display will be viewed as governmental or private.

A. Common Areas

Common areas in the military require the closest scrutiny when evaluating the validity of a religious display because the perception of governmental action is the highest. Any location of common access considered the "unit's" or "base's" would constitute a common area. Typical examples include customer service areas, squadron break rooms, conference rooms, front offices, and the outdoors.[376] Forms of religious displays in these areas could include the posting of a written document such as the Ten Commandments, a three-dimensional display such as a crèche or menorah, or a religious symbol such as a cross.[377]

The first question to resolve when confronted with a display issue is "Is this a religious display at all?" Some objects, such as a

[373] *See* McCreary County v. ACLU, 125 S. Ct. 2722 (2005) (utilizing only the purpose prong of the *Lemon* test to reject religious display).
[374] *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); *see also supra* notes 59-65 and accompanying text.
[375] *Lynch*, 465 U.S. at 679. Justice Breyer used an altogether different test when casting the deciding vote in the plurality decision of *Van Orden,* focusing on whether the display passed "legal judgment." Van Orden v. Perry, 125 S. Ct. 2854, 2869 (2005) (Breyer, J. concurring).
[376] Note that a restricted or classified location does not lose its "common area" classification just because of its decreased public or military access.
[377] When discussing the permissibility of religious displays, this article excludes any displays within a military chapel itself. Given that the courts have recognized the constitutionality of chaplaincy programs, a reasonable person would not consider displays within a chapel as the government's endorsement of a particular religion, but rather as the beliefs of the members/participants of that chapel. *See* Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).

crèche[378] and the textual display of the Ten Commandments,[379] have been held to clearly communicate a religious message. The message or purpose of a lit "Christmas" tree, however, often depends on the context of the display. A lit tree by itself, with no religious ornaments, may be viewed as a secular depiction of the Christmas holiday.[380] In contrast, the same tree placed next to a menorah may associate the display with the religious connotations of the very same holiday.[381] Thus, although the lighting of a tree on a military installation around the December holiday season will not, by itself, raise Establishment Clause issues, a tree in a more complex setting requires additional analysis. When in doubt as to whether a display communicates a religious message, practitioners should assume such a message and continue with thorough legal analysis.

Although the Court utilizes a variety of tests for religious displays on governmental property, some rules remain constant. First and foremost, the government must remain neutral not only between various religions but also between religion and non-religion.[382] To that end, the government "may not promote or affiliate itself with any religious doctrine or organization."[383] Applying these steadfast principles and then overlaying an appropriate Establishment Clause test will serve military practitioners well when evaluating religious displays in common areas.

Given the steadfast requirement of government neutrality towards religion in combination with the *Lemon* and endorsement tests, it is difficult to see how the placement of a single distinctively religious item in a common area would meet the Establishment Clause requirements for permissibility. In *County of Allegheny v. ACLU*, the U.S. Supreme Court held that a crèche placed on the "Grand Staircase" of the county courthouse sent a message to any reasonable viewer that the government supported, indeed endorsed, the Christian message of the crèche.[384] Surrounding floral decorations and a sign disclosing the ownership of the crèche by a Roman Catholic organization did not alter the overriding fact that the crèche was the "single element of the

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[378] *See Allegheny*, 492 U.S. at 598 (citing *Lynch*, 465 U.S. at 685).
[379] *See* Stone v. Graham, 449 U.S. 39, 41 (1980); *McCreary*, 125 S. Ct. at 2737.
[380] *See Allegheny*, 492 U.S. at 616 (Blackmun, J.) (opining that a Christmas tree is not itself a religious symbol); *Id.* at 633 (O'Connor, J., concurring) (finding a Christmas tree is not regarded as a religious symbol regardless of origin); *id.* at 655 (Kennedy, Rehnquist, White, Scalia, dissenting in part, concurring in judgment in part) (finding that none of the displays at issue violated the Establishment Clause).
[381] *See Allegheny*, 492 U.S. at 617 n.66 (Blackmun, J.) (agreeing with concurrence by Brennan and Stevens that association of Christmas tree with menorah may impact whether tree viewed as religious display).
[382] *McCreary*, 125 S. Ct. at 2733.
[383] *Allegheny*, 492 U.S. at 591.
[384] *Id*. at 600.

display" and thus a clear endorsement by the government of a particular religious belief.[385]

In contrast, a display containing a mixture of religious and non-religious items meets constitutional muster as long as the purpose of the display is secular. For example, a block from the Allegheny County courthouse stood a different display in front of Pittsburgh's city-county building showcasing a Christmas tree, a Chanukah menorah, and a sign saluting liberty, and, although the Court did not reach consensus as to *why* this mixture of displays did not violate the Establishment Clause, six Justices agreed that no such constitutional problem existed.[386] Similarly, in *Lynch v. Donnelly*, a city-sponsored holiday display that included (inter alia) a crèche, a Santa Claus house, reindeer pulling a sleigh, carolers, a Christmas tree, hundreds of colored lights, and a banner declaring "Seasons Greetings" passed Establishment Clause scrutiny under *Lemon*.[387] Looking at the display in context, the Court found a secular purpose by the city in celebrating the Christmas holiday and depicting various origins of the holiday while finding no primary effect of aiding religion or fostering an excessive entanglement between religion and the state.[388] Thus, a display in a common area with a clear secular purpose[389]—such as a display depicting how various religions celebrate important cultural holidays along with a focus on how the military protects Americans' liberty to celebrate various holidays—would likely meet the requirements of the Establishment Clause.

In sum, in common areas, both indoors and outdoors, the military should avoid erecting or allowing private groups to erect solitary religious displays affiliated with one particular religion, as the government would violate the clear Establishment Clause principle of neutrality and would be perceived as endorsing religion. Further, when dealing with displays with a mixture of religious items or displays of religious and non-religious items, the military should exercise extreme caution, ensuring that a reasonable person would not view the display as

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[385] *Id*. at 598-601; *see also McCreary*, 125 S. Ct. at 2745 (holding that a display that evolved from a single display of the Ten Commandments to a multitude of documents highlighting religion's role in government violated the purpose prong of Lemon).

[386] *See Allegheny*, 492 U.S. at 620 (Blackmun, J.) (finding menorah and Christmas tree display to not have effect of endorsing religious faith); *id.* at 632-33 (O'Connor, J., concurring) (finding for different reasons than Blackmun that combined display did not convey endorsement of religion); *id.* at 655 (Kennedy, Rehnquist, White, Scalia, dissenting in part, concurring in judgment in part) (finding that none of the displays at issue violated the Establishment Clause).

[387] Lynch v. Donnelly, 465 U.S. 668, 671 (1984).

[388] *Id*. at 681-84; *see also* Van Orden v. Perry, 125 S. Ct. 2854, 2858 (2005) (holding, via plurality opinion, statue depicting Ten Commandments among seventeen other monuments and twenty-one historical markers on twenty-two acres surrounding the Texas state capital constitutional).

[389] For clear example of case violating purpose prong, see *McCreary*, *supra* note 385, at 2745.

a governmental endorsement of religion[390] and that the purpose for the display is a secular one.[391]

B. Private Areas

On the opposite end of the spectrum from common areas are private areas owned by the government, yet not associated with governmental work. Dormitory rooms and military housing are the quintessential examples of a private areas owned by the government, yet principally associated with a single person or family where the primary function within the area is not related to governmental work. Examples of religious displays in such private areas include religious posters or pictures, religious books such as the Koran or Bible, and religious symbols such as a cross or Star of David.

In private areas, free exercise and free speech issues, vice establishment concerns, reign supreme for two reasons.[392] First, a reasonable person would not believe that the government is endorsing religion based on religious displays in a private residence just because the government owns the property;[393] thus, Establishment Clause issues are unlikely to be implicated in this setting. Second, when expression by a private individual is made on governmental property where non-religious speech is generally allowed, the government cannot deny private religious speech under the color of Establishment Clause concern.[394] Although the government does place some content-based limitations on the type of speech and displays permitted in governmental housing and dorm rooms based on good order and discipline concerns,[395] such restrictions are very narrow in scope and would unlikely alter the general prohibition against the military making content-based restrictions on religious speech in such a private setting.[396]

Given the predominance of free exercise and free speech rules in this private area context, any content-based restrictions of religious

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[390] *See supra* notes 59-65 and accompanying text.
[391] *See supra* notes 40-46 and accompanying text.
[392] *See supra* Part III for general analysis of religious speech issues in the military.
[393] *See Allegheny,* 492 U.S. at 600.
[394] *See* Capital Square v. Pinette, 515 U.S. 753, 762-63 (1995) (holding Establishment clause concerns did not justify Ohio's denial of Ku Klux Klan's request to place a cross on public property routinely used for public speech); *see also* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
[395] *See, e.g.*, U.S. DEP'T OF AIR FORCE, INSTR. 51-902, POLITICAL ACTIVITIES BY MEMBERS OF THE U.S. AIR FORCE (1 Jan. 2006) (prohibiting some types of political speech); U.S. DEP'T OF AIR FORCE, INSTR. 51-903, DISSIDENT AND PROTEST ACTIVITIES (1 Feb. 1998) (prohibiting various dissident activities such as active membership in hate groups).
[396] *See supra* note 254 and accompanying text.

displays in a dorm room or housing area should be looked upon warily. For example, suppose one roommate in a two-person dormitory room mounts a large atheist (or other religious poster)[397] above her bed advocating her beliefs and the other roommate complains to her first sergeant. The first sergeant should *not* force the atheist military member to remove the poster unless there is a neutral, consistently applied rule stating that no posters are allowed in dorm rooms. If the first sergeant were to remove the religious display, the government would not be acting neutrally towards matters of religion, in clear contradiction of case law.[398] The government's action would be based on the content of the religious display and likely would violate the atheist member's free exercise and free speech rights.[399] The first sergeant could, however, counsel both members on respecting the other's spiritual values.[400]

In sum, while the military may consistently enforce content-neutral restrictions on religious displays in private governmental areas, the military should stay away from content-based restrictions on such religious displays unless a commander has a compelling governmental reason for such restriction. In addition, when advising military commanders with respect to religious displays in private areas, remember to ensure the government's actions remain neutral between different types of religion and between religion and non-religion.

C. Personal Governmental Work Areas

The Establishment and Free Exercise Clauses begin to converge when evaluating religious displays in a personal governmental work area. By "personal" governmental work area, this article refers to those areas associated with a single person but where the principal activity is governmental work. An office, cubicle, or work station used principally by one military member falls within this category. Religious displays in this area mirror those in the private area discussed earlier such as religious signs, books, or symbols. Both Religion Clauses are raised in

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[397] *See* AFI 36-2706, *supra* note 83, attachment 1 (defining religion as "[a] personal set or institutionalized system of attitudes, moral or ethical beliefs and practices held with the strength of traditional religious views, characterized by ardor and faith and generally evidenced through specific religious observances"). This expansive definition includes groups such as Atheists and Secular Humanists.

[398] *McCreary,* 125 S. Ct. at 2733 (2005); *see also supra* notes 382-383 and accompanying text.

[399] Content-based restrictions in the military would be justified only if the regulated speech was unprotected (e.g., interfered with the mission or presented a clear danger to loyalty, discipline, mission, or morale) or the restriction was necessary to achieve some other compelling governmental interest. *See supra* notes 247-254 and accompanying text.

[400] *See* Sight Picture, U.S. Air Force Chief of Staff, Airmen, Spiritual Strength and Core Values (28 June 2005).

this area because the work area generally has a mixture of both governmental work space, such as governmental equipment and furniture, and a member's personal belongings, such as pictures and certificates. Thus, when analyzing religious displays in this mixed area of governmental and personal space, one must examine both Establishment and Free Exercise Clause case law.

Within the Establishment Clause context, first look at the overall context of the display.[401] Such analysis will indicate whether the display is principally for personal private use.[402] If a display is used for purely personal use, the display would equate to private religious speech requiring an evaluation of whether this individual has the right to display a religious item in his or her personal area within governmental workspace under the Free Exercise Clause. Although the military respects military members' free exercise rights,[403] these rights are not unrestricted in the personal areas of a governmental workspace. For example, the Joint Ethics Regulation prohibits governmental employees from using their official position to promote a private agenda.[404] The Air Force Interim Guidelines specifically reinforce this ethics principle

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[401] *See*, *e.g.*, Van Orden, 125 S. Ct. at 2869 (2005) (Breyer, J., concurring) (determining the message of the Ten Commandment display by examining "how the text is *used*"). Justice Breyer cast the deciding vote in the case after determining that the Ten Commandment display conveyed a secular moral message in addition to a religious one. Justice Breyer analyzed the physical setting of the monument, the donating group and its purpose for selecting the display, the length of time the monument was standing, and how the text was chosen for the display. *Id*. at 2870. The overarching context of a display can make the difference in the outcome of the case under Establishment Clause analysis. *Compare Van Orden*, 125 S. Ct. at 2869-71 (Breyer, J., concurring) (upholding the long-standing Ten Commandments display on grounds of Texas State Capital given that the display focused on civic morality and was part of a larger grouping of monuments), *with McCreary*, 125 S. Ct. at 2737-41 (striking down Ten Commandments display where evolution of display clearly indicated government's religious purpose to promote religion).

[402] *See supra* notes 274-278 and accompanying text.

[403] DOD DIR. 1300.17, *supra* note 190, at 2.

[404] 5 C.F.R. § 2635.702(b) (2006) (stating "an employee shall not use or permit the use of his Government position or title or any authority associated with his public office in a manner that could reasonably be construed to imply that his agency or the Government sanctions or endorses his personal activities or those of another"); *see also* U.S. OFFICE OF GOVERNMENT ETHICS, LETTER TO THE ACTING DEPUTY DIRECTOR OF AN AGENCY, ETHICS LETTER 98 X 14 (31 Aug. 1998) (applying aforementioned J.E.R. provision to employee's use of Government title to advocate attendance at non-Federally sponsored meeting); U.S. OFFICE OF GOVERNMENT ETHICS, LETTER TO A DESIGNATED AGENCY ETHICS OFFICIAL, ETHICS LETTER 99 X 15 (28 July 1999) (clarifying that this J.E.R. provision includes improper use of public office to promote private gain of nonprofit organizations as well as use that could reasonably be construed to imply Government sanction or endorsement).

in the religious context by cautioning that personal expressions may appear to be official expressions of religion.[405]

If the display looks more like an official expression of religion, such as a display attempting to proselytize to others, Establishment Clause analysis is required. Using the endorsement test, determine if a reasonable observer would think the government is endorsing religion.[406] In addition, analyze whether the display raises any coercion concerns[407] based on who the individual is and the manner in which the display is placed. The more senior-ranking the individual, the more likely that a reasonable person would view the display as governmental endorsement of religion and the more likely coercion concerns would be implicated.[408] Analysis of these principles will help determine whether an Establishment Clause issue exists in the context of personal governmental work space.

The sentiments of these Establishment and Free Exercise principles are echoed in executive guidance discussing the propriety of religious displays in personal work areas. In stark contrast to the lack of executive guidance for religious displays in common areas, the executive branch has provided some guidance for religious displays in personal governmental work areas in both the Clinton Guidelines and the Air Force Interim Guidelines. While other military services have published various other forms of direction in this area,[409] this article will focus its analysis using the two aforementioned executive guidelines.

Under the Clinton Guidelines, an employee may keep a religious item, such as a Bible or Koran, on his or her private desk.[410] Such a display passes muster under the Establishment Clause because a reasonable observer would not interpret a religious book on a private desk facing its owner to equate to governmental endorsement of religion. Instead, the context of such a display would indicate a private religious display used for personal reflection with no implications under the Establishment Clause.[411]

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[405] Air Force Interim Guidelines, *supra* note 26, ¶ 3C(1); *see also* Air Force Revised Interim Guidelines, *supra* note 26, ¶ 4.

[406] County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989); *see also supra* note 384 and accompanying text.

[407] *See supra* notes 66-71 and accompanying text.

[408] Air Force Interim Guidelines, *supra* note 26, ¶ 3C(2); *see also* Air Force Revised Interim Guidelines, *supra* note 26, ¶ 4.

[409] *See, e.g.*, U.S. DEP'T OF ARMY, PAM. 600-75, ACCOMMODATING RELIGIOUS PRACTICES (22 Sep. 1993); U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.8A, ACCOMMODATION OF RELIGIOUS PRACTICES (31 Dec. 1997).

[410] OFFICE OF THE WHITE HOUSE PRESS SECRETARY, GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE § 1A(1)(a) (Aug. 14, 1997).

[411] See *supra* notes 275-277 and accompanying text for factors to consider when determining whether speech should be considered private or official. *See generally*, Brown v. Polk County, 61 F.3d 650, 658-59 (8th Cir. 1995) (upholding employee's right to display religious items on personal desk based on the Free Exercise Clause).

When a superior or commander has such a religious display, the analysis becomes more complex. The Air Force Interim Guidelines cautioned supervisors at every level about their special "responsibility to ensure their words and actions cannot reasonably be construed as . . . official endorsement" of religion.[412] Even with this guidance, a religious display within the personal workspace (e.g., desk area) of a leader used for personal reflection does not imply governmental endorsement of religion and thus is likely permissible. If, however, the religious display was outside the supervisor's personal space—for example a religious book on a table between two chairs used to hold conversations or a religious sign facing visitors but not the owner—the message would likely change from one of private expression to that of the superior attempting to share or promote his or her religious faith. This context leads to concerns of a superior's coercion of a subordinate who may be susceptible to pressure inherent in the rank disparity.[413] In addition, using one's official government position to promote one's private religious agenda likely violates the Joint Ethic Regulation.[414] Thus, whether a supervisor can place a religious display in his or her personal governmental workspace depends on the display's context and placement.

The dilemma comes when a low-ranking, non-supervisor places a religious display clearly intended to proselytize and not for personal reflection. For example, an airman in the customer service section at the Military Personal Flight places a cross on his desk facing his customers with a sign stating "Jesus is the Only Way." Under *Allegheny's* endorsement test,[415] a reasonable person is unlikely to find that a low-ranking airman's personal beliefs lead to governmental endorsement of religion. Further, the analogous concern of coercion falls flat when evaluating the religious display of a non-supervisor. Thus, the airman's free exercise rights will prevail and allow such a display unless content-neutral executive guidance exists to the contrary.

In this case, the Joint Ethics Regulation guidance concerning use of an official governmental position to promote a private agenda

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[412] Air Force Interim Guidelines, *supra* note 26, ¶ 2E; *see also* Air Force Revised Interim Guidelines, *supra* note 26, ¶ 4.

[413] *See supra* notes 344-348 and accompanying text.

[414] 5 C.F.R. § 2635.702(b) (2006). *See supra* note 404 explaining J.E.R. provision in more detail; *see also* Air Force Interim Guidelines, *supra* note 26, ¶ 3C(1-2) (cautioning superiors to be sensitive that personal expressions of religious faith may appear to be official expressions); Air Force Revised Interim Guidelines, *supra* note 26, ¶ 4.

[415] *See supra* notes 59-65 and accompanying text; *see also supra* notes 279-280 and 289 and accompanying text for discussion on how position, rank and expression of personal beliefs factor into an analysis of whether such speech is more likely private or official governmental speech.

may prevent such a display.[416] The critical question becomes: does this display attempt to use one's official position to proselytize? On one hand, when analyzing the context of the display, the commander may not desire customers of this airman to be subjected to a display directed at them.[417] On the other hand, the commander may find that one small sign does not cross the line of using one's official position to promote a private cause. As long as the commander consistently applies this ethics provision in a content-neutral manner,[418] the commander's decision will likely avoid successful challenge.[419] If the military prohibits religious expression under this ethics provision but allows another airman to promote a private organization of his or her choosing, then the military moves from a content-neutral minimum scrutiny test to a content-based strict scrutiny test.[420] Finding a military necessity to prevent such a religious display in a low-ranking, non-supervisor's personal area to justify such content-based restrictions on free exercise of religion would prove extremely challenging.

When analyzing religious displays in personal governmental work areas, one should focus on the context and purpose of the display in combination with the status of the owner to determine if the Establishment Clause prohibits the display. Otherwise, the employee's free exercise and free speech rights will likely validate the religious display unless it runs afoul of the Joint Ethics Regulation.

VI. ACCOMMODATION OF RELIGION IN THE MILITARY

A variety of military laws or activities might limit military members' practice of their religion. For example, a particular mission or routine duty day might fall on a day when a member's religion requires worship, rest, or other religious activity precluded by the duty. Military uniform and appearance regulations might prohibit the wear of articles of clothing (e.g., yarmulke or turban) that are required by certain religions, or might limit how hair (head or facial) is worn in a way inconsistent with certain religions. The military might not consistently serve food that is required by certain religions, might serve food that is prohibited by certain religions, or might not prepare food in the manner prescribed by certain religions. The military might require medical treatments, such as inoculations, that are prohibited by certain religions. In the military, conflicts between military requirements and a service member's religious practices are resolved on a case-by-case basis. The

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[416] 5 C.F.R. § 2635.702 (2006). *See supra* note 404 explaining J.E.R. provision in more detail.
[417] *See supra* note 285 and accompanying text.
[418] *See supra* notes 264-268 and accompanying text.
[419] *See infra* notes 432-433 and accompanying text.
[420] *See supra* notes 253-255 and accompanying text.

general rule, however, is that the military should provide an exemption whenever possible unless accommodation will adversely affect military readiness.[421] This rule derives not from the Free Exercise Clause itself but from statutory and regulatory requirements described below.

A. The Free Exercise Standard

Goldman v. Weinberger[422] is the leading U.S. Supreme Court case concerning the extent to which the Free Exercise Clause requires the military to accommodate religion by providing an exemption to military regulations. Captain Goldman was an Air Force doctor serving as a clinical psychologist. As an Orthodox Jew and an ordained rabbi, he wore a yarmulke while in uniform, contrary to an Air Force regulation.[423] After Captain Goldman testified as a defense witness in a court-martial while wearing his yarmulke, the military prosecutor reported the uniform violation to Captain Goldman's commander. The commander ordered Captain Goldman to cease wearing the yarmulke in uniform, and Captain Goldman sued. He argued the Free Exercise Clause required the Air Force to grant him an accommodation by permitting him to wear a yarmulke in uniform despite the regulatory prohibition. The Court, in a 5-4 decision with strong dissents, held that no religious accommodation was required by the Free Exercise Clause.[424]

Captain Goldman asked the Court to apply strict scrutiny to the case.[425] The U.S. Supreme Court decided this case in 1986, four years before it decided *Employment Division, Department of Human Resources of Oregon v. Smith*,[426] at a time when it appeared that the Court was applying strict scrutiny even to free exercise challenges of religion-neutral laws.[427] Under this standard, Captain Goldman sought an exemption unless the yarmulke posed "a 'clear danger' of undermining discipline and esprit de corps."[428] The Court, however, declined to apply strict scrutiny because "the military is, by necessity, a

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[421] *See generally* DOD DIR. 1300.17, *supra* note 190 (discussed *infra* at text accompanying notes 443-468).
[422] 475 U.S. 503 (1986).
[423] *Id.* at 505 (citing U.S. DEP'T OF AIR FORCE, REGULATION 35-10, ¶ 1-6h(2)(f) (1980) (obsolete)). The regulation generally prohibited the wear of headgear indoors, subject to some exceptions that did not apply to Goldman. *Id*. at 508-09.
[424] *Goldman,* 475 U.S. at 510.
[425] *See id.* at 506.
[426] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990) (discussed *supra* at text accompanying notes 118-141).
[427] *See Smith*, 494 U.S. at 891-907 (O'Connor, J., concurring in the judgment) and at 907-921 (Blackmun, J., dissenting); *see also supra* notes 123-124 and accompanying text.
[428] *Goldman*, 475 U.S. at 509.

specialized society separate from civilian society."[429] Instead, the Court applied a highly deferential kind of minimum scrutiny, which looked only to whether the regulation was reasonably related to some legitimate military interest.[430]

The Air Force asserted a vital interest in uniformity, which "encourages the subordination of personal preferences and identities in favor of the overall group mission . . . [and] encourage[s] a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank."[431] The Court, noting a line of cases in which the Court gave "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest,"[432] concluded that the military, rather than the courts, must decide the need for uniform regulations.[433] The military's line between permissible and impermissible religious symbols —depending on whether the symbol was visible in uniform or not—was a reasonable way to further the military's stated need for uniformity.[434] The Court upheld the Air Force's regulation and its refusal to provide an exception for Captain Goldman despite the burden on his religious exercise.[435]

The Court's approach to evaluating religion-neutral laws in the military foreshadowed the approach it would take in *Employment Division, Department of Human Resources of Oregon v. Smith*[436] four years later when evaluating religion-neutral laws in the civilian sector. Courts will uphold such laws when they pass minimum scrutiny and are otherwise valid.[437] In the military context, however, the Court will give even greater deference to the governmental interest underlying the law.[438]

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[429] *Id.* at 506 (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)); *see also* Chappell v. Wallace, 462 U.S. 296, 300 (1983); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Orloff v. Willoughby, 345 U.S. 83, 94 (1953).
[430] *Goldman*, 475 U.S. at 508-10.
[431] *Id.* at 508.
[432] *Id.* at 507 (citing Chappell v. Wallace, 462 U.S. 296, 305 (1983); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953)); *see also* Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
[433] *Goldman*, 475 U.S. at 509. The great deference that the Court gave to the military, without requiring the military to demonstrate any harm likely to occur if it accommodated Goldman, prompted one dissenter to criticize the majority's approach as "a subrational-basis standard." *Id.* at 515 (Brennan, J., dissenting).
[434] *Id.* at 510 (majority opinion).
[435] *Id.*
[436] 494 U.S. 872 (1990).
[437] *See supra* notes 114-117 and accompanying text.
[438] *See supra* notes 432-433 and accompanying text.

B. Statutory and Regulatory Guidance

Congress reacted quickly to *Goldman*.[439] In 1987, the year after the Court decided *Goldman*, Congress enacted a statute generally authorizing military members to wear items of religious apparel while in uniform.[440] The statute authorized service secretaries to make exceptions prohibiting items that would interfere with the performance of duty or that are not neat and conservative.[441] Service secretaries were directed to enact regulations on the wearing of religious apparel in uniform.[442]

In February 1988, the Department of Defense promulgated directive number 1300.17 entitled *Accommodation of Religious Practices Within the Military Services*.[443] The directive concerns not only the wear of religious apparel in uniform but also certain other religious accommodation contexts. These other contexts include time off for worship, holy days, and observing the Sabbath;[444] dietary issues;[445] and waiver of required immunizations.[446] The overarching theme of the DoD Directive is reflected in its statement of policy:

> A basic principle of our nation is free exercise of religion. The Department of Defense places a high value on the rights of members of the Armed Forces to observe the tenets of their respective religions. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.[447]

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[439] *See* First Lieutenant Dwight Sullivan, *The Congressional Response To Goldman v. Weinberger*, 121 MIL. L. REV. 125, 140-47 (1988).
[440] 10 U.S.C. § 774(a) (2005). Congress's action in response to *Goldman* foreshadowed Congress's action—enactment of the Religious Freedom Restoration Act —in response to *Smith*. In both cases, the Court arguably interpreted the Free Exercise Clause in a narrow, restrictive way. In response to each of those decisions, Congress enacted a statute granting greater free exercise rights than the Court held was required by the Free Exercise Clause itself.
[441] 10 U.S.C. § 774(b) (2005).
[442] *Id.* § 774(c).
[443] DOD DIR. 1300.17, *supra* note 190.
[444] *Id.* ¶ 3.2.1.
[445] *Id.* ¶ 3.2.2.
[446] *Id.* ¶ 3.2.3.
[447] *Id.* ¶ 3.1.

The DoD Directive establishes goals for the military services in their development of regulations on religious accommodation but emphasizes that these goals do not create a guarantee that the military will always accommodate religion.[448] The military should accommodate requests regarding "[w]orship services, holy days, and Sabbath observances . . . except when precluded by military necessity."[449] The military should consider religious dietary limitations when considering military members' requests for separate rations or to bring their own food in a field or sea deployment.[450] The military "should consider religious beliefs as a factor for waiver of immunizations, subject to medical risks to the unit and military requirements."[451]

The directive establishes more guidance regarding wearing religious apparel with the uniform and distinguishes between apparel that is visible and not visible in uniform.[452] Religious apparel is defined as "clothing worn as part of the doctrinal or traditional observance of the religious faith practiced by the member" and explicitly excludes jewelry, hair, and grooming.[453] If visible, apparel must be "neat and conservative" and not interfere with the performance of duties.[454] If not visible, the "neat and conservative" requirement does not apply, but the "non-interference with duty" requirement still applies.[455] Interference with duty would occur when the apparel interferes with the operation of weapons or machinery, poses a health or safety risk, or interferes with the wear of special clothing or protective equipment (e.g., helmet, gas mask).[456] "Neat and conservative" items are those that are discreet, tidy and non-showy, do not replace or interfere with how the uniform is worn, and are not affixed to the uniform.[457] For example, a dark yarmulke would be permissible.[458] Even normally qualifying visible religious apparel may be prohibited when unique circumstances require absolute uniformity, as with an honor guard.[459]

The DoD Directive specifies five factors that military commanders should consider in deciding, on a case-by-case basis, whether to approve a request for religious accommodation. The factors are: (1) "The importance of military requirements in terms of individual

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[448] DOD DIR. 1300.17, *supra* note 190, ¶ 3.2.
[449] *Id.* ¶ 3.2.1.
[450] *Id.* ¶ 3.2.2.
[451] *Id.* ¶ 3.2.3.
[452] *Id.* ¶¶ 3.2.6, 3.2.7.
[453] *Id.* ¶ 3.2.7.1.
[454] *Id.* ¶ 3.2.7.
[455] *Id.* ¶ 3.2.6.
[456] DOD DIR. 1300.17, *supra* note 190, ¶ 3.2.7.5.
[457] *Id.* ¶ 3.2.7.2.
[458] *Id.* ¶ 3.2.7.3.
[459] *Id.* ¶ 3.2.7.6.

and unit readiness, health and safety, discipline, morale, and cohesion"; (2) "The religious importance of the accommodation to the requester"; (3) "The cumulative impact of repeated accommodation of a similar nature"; (4) "Alternative means available to meet the requested accommodation"; and (5) "Previous treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons."[460] The commander may consider other relevant factors as well.[461]

The weightiest factor arguably is the importance of the military requirement: the more important the requirement to be missed (e.g., critical combat operation), the stronger the justification for denying the accommodation. The potential cumulative impact of many people making similar requests also would be a factor against accommodation. The importance of the accommodation to the requester, however, cuts in favor of accommodation.[462] The fourth factor looks to whether the military might accommodate in some way that affects the mission less—for example, postponing a requester's scheduled duty as charge of quarters for one day until after a holy day has passed rather than just excusing the requester from the duty altogether.

The final factor—previous treatment of similar requests, including handling of requests for accommodation for non-religious reasons—bears special emphasis. This factors boils down to two related principles: non-discrimination against religion and consistency *in similar circumstances*. Non-discrimination and consistency are part of the overarching principle of governmental neutrality toward religion.[463] Denying a request for accommodation cannot be based on discrimination against the religion of the requester.[464] If a commander denies a request for accommodation (e.g., a request to bring supplemental food rations to a field or sea deployment due to dietary constraints) from a person of one religion after granting a similar request from someone of another religion, this could create the appearance of prohibited discrimination against the second religion. Important differences in circumstances, however, might justify

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[460] *Id.* ¶ 4.1.1-4.1.5.
[461] *Id.* ¶ 4.1.
[462] That this factor is even present is interesting. Courts have viewed consideration of the importance of religious practices to be outside the judicial realm. *See, e.g.*, Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 886-87 (1990) (refusing to apply strict scrutiny even when the requested accommodation is asserted to be "central" to a religion). Arguably, the executive or legislative branches might appropriately consider the importance of the requested accommodation in deciding whether to grant an accommodation that is not constitutionally required.
[463] *See supra* note 34 and accompanying text.
[464] *See supra* notes 88-108 and accompanying text.

accommodating one request while denying a similar one.[465] Similarly, if a commander denies a request for accommodation (e.g., excusal from a particular training) for a non-religious reason (e.g., to attend a wedding), the commander might be hard-pressed to justify denying a request for excusal from attending the same training for observing a holy day.[466] The disapproval—if not based on some difference in circumstance (e.g., differences between the two requesters in terms of their proficiency in the skill being trained)—could reasonably imply discrimination against religion in general or against the particular religion, both of which are prohibited.[467] Under the Court's precedents, discrimination against religion would be presumptively invalid and would almost certainly be invalidated by the courts as violating the Free Exercise Clause.[468]

Each of the military services has regulations (or portions thereof) providing additional guidance on religious accommodation implementing DoD Directive 1300.17.[469] Bonded by DoD Directive

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[465] For example, if one religious accommodation request required a large amount of perishable special food, while another required only a small amount of non-perishable food, the commander might be able to grant the latter request while denying the first, due, for example, to limited storage or refrigeration space.

[466] *See supra* note 125 and accompanying text.

[467] *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); *see also* U.S. DEP'T OF DEFENSE, DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM ¶ 4.2 (21 Nov. 2003) ("Unlawful discrimination against persons or groups based on race, color, religion, sex, or national origin is contrary to good order and discipline and is counterproductive to combat readiness and mission accomplishment. Unlawful discrimination shall not be condoned.").

[468] *See Lukumi Babalu Aye*, 508 U.S. at 520; *see also supra* notes 88-108 and accompanying text.

[469] The Navy and the Marine Corps share a Secretary of the Navy instruction. *See* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 1730.8A, ACCOMMODATION OF RELIGIOUS PRACTICES (31 Dec. 1997) [hereinafter SECNAVINST 1730.8A]. Unlike the Navy/Marine Corps, neither the Air Force nor the Army has a regulation solely dedicated to religious accommodation, but each has a section on religious accommodation in another regulation. Most of the Army's regulatory guidance is consolidated into a lengthy paragraph, entitled "Accommodating religious practices," of its "Army Command Policy" regulation. *See* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ¶ 5-6 (13 May 2002) [hereinafter AR 600-20]. Most of the Air Force's regulatory guidance is in Chapter 8 ("Accommodation of Religious Practices") of its instruction on "Military Equal Opportunity Program." *See* AFI 36-2706, *supra* note 83. But the Air Force instruction concerning dress and appearance also contains interspersed guidance concerning accommodation for religious items and apparel and personal grooming (e.g., hair). *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL tables 1-4, 2-6, 2-9 (2 Aug. 2006) [hereinafter AFI 36-2903]. Air Force policy regarding accommodation is summarized in the Air Force Revised Interim Guidelines, *supra* note 26. All the services share a joint regulation on "Immunizations and Chemoprophylaxis," which has a paragraph on requests for religious accommodation from required immunizations. *See* U.S. DEP'T OF AIR FORCE, JOINT INSTRUCTION 48-110, IMMUNIZATIONS AND CHEMOPROPHYLAXIS ¶ 13.5 (12 May 2004).

1300.17, all the religious accommodation regulations are generally similar in their policies; however, differences do exist among the service regulations.[470] A detailed discussion of the specifics of each service's regulations concerning religious accommodation is beyond the scope of this article. Military lawyers advising commanders on such issues should consult their service regulations.

In addition, other issues that arguably are a form of accommodation may be governed by separate laws.[471] For example, requests for discharge from the military or reassignment to noncombatant duties as a conscientious objector—when based on religious beliefs[472]—are a form of request for religious accommodation. Conscientious objection is governed by service regulations dedicated to that topic[473] rather than by other religious accommodation regulations.

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[470] For example, the Army regulation expressly precludes commanders from granting exceptions to their uniform regulations for religious apparel (subject to limited exceptions specified in the regulation). *See* AR 600-20, *supra* note 469, ¶ 5-6h(1). But the Air Force and the joint Navy/Marine Corps instructions allow such accommodations. *See* AFI 36-2903, *supra* note 469, table 2-9; SECNAVINST 1730.8A, *supra* note 469, ¶ 9.

[471] The military chaplaincy itself might be viewed as a form of accommodation. The military provides and pays for chaplains, who are required to hold religious services. The military also provides logistical support for chaplains, such as buildings, to help them perform their religious duties. *See* 10 U.S.C.S. § 3547 (LEXIS 2006). Arguably, this support advances religion generally (over non-religion) and therefore violates the Establishment Clause. This argument was made and rejected in *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985). The court noted that the chaplaincy might be seen as violating the Establishment Clause, since it violates one or more prongs of the *Lemon* test. Nevertheless, the court ruled that the chaplaincy is constitutional under the Free Exercise Clause: Congress deemed the chaplaincy necessary to respect the free exercise rights of service members who may be deployed to distant lands. The U.S. Supreme Court has never ruled on the constitutionality of the chaplaincy, although it noted *Katcoff* in *Cutter v. Wilkerson*, 544 U.S. 709, 722 (2005). For a note suggesting changes to the chaplaincy program to better avoid Establishment Clause issues, see Julie B. Kaplan, *Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy*, 95 YALE L.J. 1210 (1986).

[472] The governing DoD Directive defines conscientious objection as "A firm, fixed and sincere objection to participation in war in any form or the bearing of arms, *by reason of religious training and belief*." U.S. DEP'T OF DEFENSE, DIRECTIVE 1300.6, CONSCIENTIOUS OBJECTORS ¶ 3.1 (20 Aug. 1971) (emphasis added). But "religious training and belief" is broadly defined and includes not only traditional religious beliefs but also deeply held moral or ethical beliefs. *Id*. ¶ 3.2.

[473] *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 July 1994); U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006); U.S. DEP'T OF NAVY, NAVAL MILITARY PERSONNEL MANUAL art. 1900-020 (22 Aug. 2002); U.S. MARINE CORPS, ORDER 1306.16 E, CONSCIENTIOUS OBJECTORS (21 Nov. 1986). Detailed discussion of conscientious objection is beyond the scope of this article. For an overview of conscientious objector cases and an interesting argument that granting an accommodation for conscientious objectors violates the Establishment Clause, see Matthew G. Lindenbaum, *Religious Conscientious Objection and the Establishment*

Ultimately, commanders, rather than lawyers or chaplains, decide whether or not to accommodate.[474] Commanders should consider all the relevant factors from DoD Directive 1300.17.[475] Consistent with the DoD policy, the default presumption is to accommodate the request.[476] A commander may deny a request, however, when accommodation would have an adverse impact on readiness, unit cohesion, standards, discipline,[477] morale, safety, or health.[478] The directive's listing of the five factors strongly implies a balancing: not only must there be some adverse effect on one or more legitimate governmental interests, but the military necessity must be weighed against accommodation of the religious practice.[479] Virtually any accommodation is likely to have at least a small effect on the military, but under the DoD guidance, some *de minimis* adverse effect should not justify the refusal to accommodate a matter of great importance to the requester.

Military members denied accommodations might sue military officials, as Captain Goldman did. Reviewing courts would apply the "strict scrutiny" standard of the Religious Freedom Restoration Act for military action substantially burdening the free exercise of religion: such action is justified only when supported by a compelling governmental interest and is the least restrictive means to achieve that interest.[480] This is the same standard thought by some to be required in 1986 when *Goldman* was decided.[481] A reviewing court, however, would probably take an approach similar to the Court's in *Goldman*: uphold the commander's decision after giving substantial deference to the commander's determination that accommodation would have an adverse impact on valid military interests.[482] This outcome is unlikely to change

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Clause in the Rehnquist Court: Seeger, Welsh, Gillette, and § 6(j) Revisited, 36 COLUM. J.L. & SOC. PROBS. 237 (2003).

[474] *See* DoD DIR. 1300.17, *supra* note 190, ¶ 3.2.

[475] *See id.* ¶ 4.1. The Army regulation, unlike those of the other services, does not specifically mention the five factors from DOD DIR. 1300-17. *See* AR 600-20, *supra* note 469, ¶ 5-6. Army lawyers, however, can assist commanders in their decision-making by alerting them to these factors.

[476] *See* DoD DIR. 1300.17, *supra* note 190, ¶ 3.1.

[477] *See id.* ¶ 3.1.

[478] Although not specifically listed in DOD DIR. 1300.17, morale, safety, and health are specifically listed in AR 600-20, *supra* note 469, ¶ 5-6a and certainly could justify refusal of a requested accommodation.

[479] *See* AR 600-20, *supra* note 469, ¶ 5-6a ("Accommodation of a soldier's religion must be examined against military necessity . . . .").

[480] 42 U.S.C.S. § 2000bb(a)(3) (Lexis 2006); *see also* Air Force Interim Guidelines, *supra* note 26, ¶ 2B (restating RFRA's strict scrutiny standard pertaining to religious accommodation in the military).

[481] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 891-907 (1990) (O'Connor, J., concurring in the judgment); 907-21 (Blackmun, J., dissenting); *see also supra* notes 123-124 and accompanying text.

[482] *See supra* text accompanying notes 432-433.

as a result of either the federal statute pertaining to wear of religious apparel in uniform,[483] DoD Directive 1300.17, or individual service regulations.[484] None of those sources guarantees accommodation;[485] all make accommodation subordinate to military necessity.[486] For the military to get the full benefit of the courts' deferential review, commanders must consider accommodation requests in a consistent, balanced manner that does not discriminate against religion or religious practices.[487] Commanders refusing an accommodation must do so only for reasons that relate to military necessity and should consider documenting their reasons.[488]

VII. CONCLUSION

Legal issues concerning religion in the military are often difficult. One reason is that resolution of a religion issue may require an understanding of the jurisprudence interpreting three constitutional provisions—the Establishment, Free Exercise, and Free Speech Clauses —and their interplay. For many judge advocates, these clauses—unlike, for example, military justice and operational law—are not at the center of their daily practice and core competencies. Furthermore, the Court's decisions surrounding these three clauses are complex even to the point of near unintelligibility regarding the Establishment Clause.[489]

In addition, lines of demarcation may be blurred between what is permitted by the Free Exercise or Free Speech Clauses and what is prohibited by the Establishment Clause. In other legal contexts in which the law is uncertain or the case is close to the line, attorneys are often able to give conservative legal advice, thereby avoiding legal problems. Regarding religion issues, in which two or more constitutional provisions may be in tension with each other, legal advice that is very conservative on one provision may result in an action that runs afoul of another constitutional provision. Allowing a member too much free speech or free exercise latitude may result in a violation of the Establishment Clause. On the other hand, an overly cautious interpretation of the Establishment Clause may result in a violation of a

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[483] 10 U.S.C. § 774 (2005).
[484] *See supra* note 469.
[485] *See, e.g.*, DoD DIR. 1300.17, *supra* note 190, ¶ 3.2 ("Nothing in these goals or in the implementing rules of the Military Departments (except when expressly provided therein) shall be interpreted as requiring a specific form of accommodation in individual circumstances.").
[486] *See, e.g.*, *id.* ¶ 3.1.
[487] *See supra* notes 463-468 and accompanying text.
[488] Service regulations may require the commander refusing a requested accommodation to provide written reasons to the requester. *See, e.g.*, AR 600-20, *supra* note 469, ¶ 5-6f.
[489] *See supra* note 72 and accompanying text.

member's free speech or free exercise rights. Sometimes the channel between the clauses is narrow.[490]

Not only are religious issues difficult, they are often emotionally charged. Religion is central to the lives of many military members who often feel passionate about their religious beliefs and about their right or even duty to express and practice them and to bring others to their religious beliefs. Military members may not understand the complexity of the law and may not be receptive to hearing about what they perceive as limits on their religious rights or duties. Into this volatile mix is thrown the overriding and potentially conflicting ingredient of the military's need to preserve good order and discipline and to accomplish the mission.

Despite these challenges, it is imperative that judge advocates and military leaders demonstrate an understanding of legal issues concerning religion in the military. Failure to do so may result in adverse publicity and lawsuits and may even compromise unit effectiveness as some members' morale and sense of belonging to the team are degraded. Ultimately, the result may be an unacceptable denial of important constitutional rights to our military members.

[490] *See supra* note 7 and accompanying text.

THE INTERCEPTION OF CIVIL AIRCRAFT OVER THE HIGH SEAS IN THE GLOBAL WAR ON TERROR

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I. INTRODUCTION

The events of September 11, 2001, marked a new development in international terrorism, namely, the use of civil aircraft as a major weapon. This new threat is especially dangerous because the largest U.S. cities are located along the Pacific and the Atlantic coasts, providing easy access from the sea. In addition, the clandestine movement of weapons of mass destruction heightens the threat, because of the capacity of such weapons to inflict massive loss of life. These weapons, and the materials needed to make them, should be interdicted wherever possible:

> If they could obtain [highly enriched uranium], terrorists would face few obstacles to building a crude nuclear device capable of delivering a multiple-kiloton yield; a sophisticated implosion design would be unnecessary. Depending on the degree of enrichment and the design of the device, tens of kilograms of weapon-grade uranium are sufficient for one nuclear warhead. Highly enriched uranium is a particularly attractive target for theft because it emits low levels of radiation, which makes it difficult to detect at border crossings and checkpoints and less dangerous to handle than plutonium, qualities that make it easier to divert.[1]

The challenge posed by terrorists seeking to acquire weapons of mass destruction is exceedingly urgent and immediate. This article addresses a narrow but important facet of the war on terror: the interception of civil aircraft over the high seas without the consent of the state of registry, when such aircraft are suspected of transporting weapons of mass destruction or terrorists.

Section II of this article reviews some of the events triggering the war on terror, and the U.S. strategy in waging it, including the Bush Administration's stated intention to act preemptively, if necessary, to defend the United States. The Proliferation Security Initiative, a

[1] Morten Bremer Maerli & Lars van Dassan, *Europe, Carry Your Weight,* BULLETIN OF THE ATOMIC SCIENTISTS 1 (November/December 2004). Morten Bremer Maerli is a senior research fellow at the Norwegian Institute of International Affairs, Oslo, Norway. Lars van Dassan is the director of the Swedish Nuclear Nonproliferation Assistance Program of the Swedish Nuclear Power Inspectorate, Stockholm, Sweden.

cooperative effort by partner States to interdict the movement of weapons of mass destruction is also discussed.

Section III introduces the contemporary legal regime over the high seas, in particular the customary norms relating to freedom of overflight, jurisdiction over aircraft, and the Rules of the Air adopted by the International Civil Aviation Organization (ICAO). Section IV then examines the legal status of military aircraft in international law as a symbol of a State's sovereignty and prestige.

Section V addresses the legal grounds permitting a State to intercept foreign civil aircraft over the high seas without the consent of the state of registry. Section VI then discusses the legal obligation of States to have "due regard" for the safety of civil air navigation, an obligation recognized by the laws of armed conflict, the law of the sea, and public air law. The ICAO standards for the interception of civil aircraft and their applicability to State aircraft are also examined.

This article concludes in Section VI by focusing on the remedies an aggrieved State may pursue for violations of international law whenever another State intercepts its civil aircraft without a proper legal justification or in a manner that is incompatible with the concept of "due regard."

II. AMERICA AT WAR AGAINST INTERNATIONAL TERRORISM

On September 11, 2001, hijackers seized control of four commercial airliners shortly after their departure, two from Boston's Logan International Airport, one from Washington Dulles International Airport, and one from Newark (New Jersey) Liberty International Airport.[2] The hijackers intentionally crashed the first two aircraft—American Airlines Flight 11 and United Flight 175—into the Twin Towers of the World Trade Center in New York City.[3] With the third aircraft—American Airlines Flight 77—they struck the Pentagon.[4] The fourth aircraft—United Airlines Flight 93—crashed in the Pennsylvania countryside after the passengers unsuccessfully struggled with the hijackers. All 232 passengers and all thirty-three crew members on board the four aircraft died that day. Over 3,000 people perished at the World Trade Center, the Pentagon, and in the Pennsylvania countryside.

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[2] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES 1-15 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

[3] *Id.* at 1-2.

[4] *Id.* at 2-4.

The U.S. economy suffered heavy loss, and international civil aviation, major disruptions.

A. Pre- and Post-9/11 Attacks

Before September 11, 2001, the United States had been the target of several major attacks by the terrorist organization Al Qaeda. In August 1996, Osama bin Laden, the leader of Al Qaeda, published a fatwa, or Islamic order, in *Al Quds Al Arabi*, a London-based newspaper, entitled "Declaration of War against the Americans Occupying the Land of the Two Holy Places."[5] On February 23, 1998, Osama bin Laden published another fatwa, this time calling for the murder of every American—military or civilian—as the "individual duty for every Muslim who can do it in any country in which it is possible to do it."[6] In an interview three months later, bin Laden stated, "[w]e do not differentiate between military or civilian. As far as we are concerned, they are all targets."[7]

Al Qaeda is known or suspected to be responsible for several major incidents prior to 9/11, including the first attack on the World Trade Center on February 26, 1993, when a bomb exploded in the underground parking lot of the Center, killing five persons and injuring dozens more;[8] the bombing of the Khobar Towers complex on June 25, 1996, in Dhahran, Saudi Arabia, which housed U.S. Air Force personnel, killing nineteen airmen, and injuring hundreds more;[9] the bombings on August 7, 1998, of the U.S. Embassies in Nairobi, Kenya, and Dar es Salam, Tanzania, killing more than 200 persons and injuring more than 1,000;[10] and the attack on the *USS Cole* at Aden, Yemen, on

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[5] *Bin Laden's Fatwa,* PBS ONLINE NEWSHOUR, Aug. 1996, http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html.

[6] *Al Qaeda'a Fatwa*, PBS ONLINE NEWSHOUR, Feb. 23, 1998, http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html.

[7] *Hunting Bin Laden,* PBS FRONTLINE, May 1998, http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html.

[8] *On This Day, 26 February 1993,* BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/february/26/newsid_2516000/2516469.stm.

[9] Rebecca Grant, *Khobar Towers,* AIR FORCE ASSOCIATION MAGAZINE (June 1998), *available at* http://www.afa.org/magazine/june1998/0698khobar.asp.

[10] Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden,* 24 YALE J. INT'L L. 559, 560 (1999); *On This Day, 7 August 1998,* BBC NEWS, http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm; THE 9/11 COMMISSION REPORT, *supra* note 2, at 115-16 (linking Osama Bin Laden and Al Qaeda to the bombings).

October 12, 2000, killing seventeen members of the ship's crew and wounding thirty-nine others.[11]

Since 9/11, Al Qaeda is also believed to have orchestrated attacks on the mass transit systems of Madrid and London. On March 11, 2004, suicide bombers launched attacks on commuter trains in Madrid, killing 191 people and wounding 1,500 more.[12] On July 7, 2005, suicide bombers detonated bombs on three of London's Underground trains and on a bus, killing fifty-two people and injuring 700 others.[13]

B. The Response to 9/11

Immediately after the attacks of September 11, President George W. Bush issued Proclamation 7463, declaring a national emergency.[14] The President characterized the attacks "as an act of war," telling a joint session of Congress that the evidence pointed to "a collection of loosely affiliated terrorist organizations known as Al Qaeda."[15] Congress promptly authorized the President "to use all necessary and appropriate force" against those whom he determined had a role in the attacks, "in order to prevent any future acts of international terrorism against the United States."[16]

The international community also responded immediately. On September 11, the North Atlantic Treaty Organization (NATO) met in an emergency session and released a statement declaring its solidarity with the United States and condemning "these barbaric acts."[17] The statement deplored the "mindless slaughter of so many innocent

[11] *Terrorist Attack on USS Cole: Background and Issues for Congress,* CONGRESSIONAL RESEARCH SERVICE (2001), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs20010130.pdf.

[12] *Madrid Bombings: One Year On,* CNN NEWS, Mar. 11, 2005, http://edition.cnn.com/SPECIALS/2004/madrid.bombing/; *Al Qaeda Suspects Held in Spain,* CNN NEWS, May 19, 2004, http://edition.cnn.com/2004/WORLD/europe/05/19/madrid.arrests/.

[13] *7/7 Report Faults Terror Planning,* CNN NEWS, May 11, 2006, http://edition.cnn.com/2006/WORLD/europe/05/11/london.bombings/index.html.

[14] Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

[15] President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001).

[16] Authorization for the Use of United States Armed Forces, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [hereinafter Authorization for Use of US Armed Forces].

[17] NATO, Press Release, PR/CP (2001) 122, Statement by the North Atlantic Council (Sept. 11, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-122e.htm.

civilians," calling it "an unacceptable act of violence without precedent in the modern era."[18]

On the next day, September 12, NATO met again "in response to the appalling attacks perpetrated [the day before] against the United States,"[19] to invoke Article 5 of the North Atlantic Treaty,[20] declaring that, "if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5."[21] Article 5 of the North Atlantic Treaty states that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all."[22]

Never before in its history had NATO invoked Article 5 of the Treaty. In invoking Article 5 against a non-State actor (Al Qaeda), NATO took pains to note that the Alliance's commitment to self-defense was "first entered into in circumstances very different from those that exist now, but [the commitment] remains no less valid and no less essential today, in a world subject to the scourge of international terrorism."[23] NATO thus determined that the events of September 11 amounted to an "armed attack."

The United Nations (U.N.) Security Council also condemned the attacks of September 11 in two resolutions that contained language recognizing the inherent right of self-defense. The Security Council

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[18] *Id.*

[19] NATO, Press Release, PR/CP (2001) 124, Statement by the North Atlantic Council (Sept. 12, 2001), *available at* http://www.nato.int/docu/pr/2001/p01-124e.htm [hereinafter NATO Press Release of Sept. 12, 2001].

[20] North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[21] NATO Press Release of Sept. 12, 2001, *supra* note 19.

[22] The full text of Article 5 of the North Atlantic Treaty states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

[23] NATO Press Release of Sept. 12, 2001, *supra* note 19.

adopted Resolution 1368[24] on September 12, the same day as NATO's decision to invoke Article 5 of the North Atlantic Treaty. In this resolution, the Council condemned "the horrifying terrorist attacks" of September 11 as a "threat to international peace and security."[25] The Resolution called on all States "to work together urgently" to bring the perpetrators to justice and "to redouble their efforts . . . by increased cooperation" in suppressing and preventing terrorist acts.[26] The Resolution also expressed the Council's readiness "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[27]

The Security Council adopted the second resolution—Resolution 1373—on September 28, 2001.[28] In this resolution, the Council also decided that all States are to deny safe haven to those who support or commit terrorist acts and that they must prevent "the movement of terrorists or terrorist groups by effective border controls."[29] Significantly, the Security Council called upon States to intensify and accelerate the exchange of operational information concerning the "movements of terrorist persons," "traffic in arms," "explosives or sensitive materials," and "the threat posed by the possession of weapons of mass destruction by terrorist groups,"[30] noting "the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potential deadly materials."[31] In both resolutions, the Security Council in effect determined that the United States was a victim of several armed attacks on September 11.

The Organization of American States (OAS) also passed a resolution, declaring that the "terrorist attacks against the United States of America are attacks against all American States."[32] The OAS pledged the support of its members in using "all legally available

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[24] U.N. SCOR, 56th Sess., 4370th mtg., U.N. DOC. S/RES/1368 (2001), *available at* http://www.un.org/TMP/9798191.html [hereinafter U.N. S.C. Res. 1368].
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] U.N. SCOR, 56th Sess., 4385th mtg., U.N. DOC. S/RES/1373 (2001), *available at* http://daccess-ods.un.org/TMP/9542914.html [hereinafter U.N. S.C. Res. 1373].
[29] *Id.* ¶¶ 2(c), (g).
[30] *Id.* ¶ 3(a).
[31] *Id.* ¶. 4.
[32] OAS, Resolution on Terrorist Threat to the Americas (Sept. 12, 2001), *reprinted in* 40 I.L.M. 1273 (2001).

measures to pursue, capture, extradite, and punish" the perpetrators of the September 11 acts, and to render "assistance and support to the United States and to each other, as appropriate, to address the September 11 attacks and also to prevent future terrorist acts."[33]

On October 7, 2001, the United States notified the Security Council by letter that it had initiated action that day in Afghanistan in response to "the armed attacks carried out against the United States on 11 September 2001."[34] The letter stated that the United States, together with other States, was exercising "its inherent right of individual and collective self-defense . . . to prevent and deter further attacks on the United States."[35] The Security Council later adopted additional resolutions, reminding all States of their obligation to combat the Taliban and the Al Qaeda organizations.[36]

C. The U.S. National Security Strategy

In September 2002, the White House released *The National Security Strategy of the United States of America*[37] which included the announcement of the preemption doctrine (Bush Doctrine).[38] The Bush Doctrine provides for the use of "preemptive military strikes to address threats to the United States before they fully materialize."[39] Section III of the *2002 Strategy* states that the U.S. government will:

> defend[] the United States, the American People, and our interests at home and abroad by *identifying and destroying the threat before it reaches our borders*. While the United States will constantly strive to enlist the support of the international community, we will not

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[33] *Id.*
[34] Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. DOC. S/2001/946 (Oct. 7, 2001) [hereinafter Letter dated Oct. 7, 2001].
[35] *Id.*
[36] U.N. SCOR, 59th Sess., 4908th mtg., U.N. DOC. S/RES/1526 (2004) (calling for international cooperation in combating "the Taliban and the Al-Qaida organization"); U.N. SCOR, 59th Sess., 5053rd mtg., U.N. DOC. S/RES/1566 (2004) (referring to the "Al-Qaida/Taliban Sanctions Committee"); U.N. SCOR, 60th Sess., 5244th mtg., U.N. DOC. S/RES/1617 (2005) (reaffirming its unequivocal condemnation of Al-Qaida, Osama bin Laden, and the Taliban).
[37] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), http://www.whitehouse.gov/nsc/nss.pdf [hereinafter *2002 Strategy*].
[38] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 702 n.16 (6th ed. 2003).
[39] Thomas Graham, Jr., *National Self-Defense, International Law, and Weapons of Mass Destruction*, 4 CHI. J. INT'L L. 1 (2003).

> hesitate to act alone, if necessary, to exercise our right of self-defense by acting *preemptively* against such terrorists.[40]

The *2002 Strategy* asserted that for centuries international law has recognized that States need not suffer an attack but could act to defend themselves in the face of an imminent danger of attack.[41]

A notable instance involving a preemptive strike occurred in 1837 when British forces entered U.S. territory and destroyed the *Caroline,* a U.S.-registered steamboat. [42] The *Caroline* was used to ferry men and arms across the Niagara River to an island in Canada in support of an anti-British rebellion. Some rebels, who had fled to the United States, had also fired at British boats from the U.S. shore.[43] Despite repeated British requests for U.S. authorities to control the rebels on their side of the border, the rebels continued to roam freely on U.S. territory. In a surprise attack on December 29, 1837, British forces crossed the Niagara River and boarded the docked *Caroline*, killing two Americans. The British then cut the *Caroline* loose, set it on fire, and towed it into the current of the river, permitting it to descend the Niagara Falls. [44]

In a diplomatic protest, the U.S. Secretary of State, Daniel Webster, called on the British Government to justify its act by showing:

> *a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation*. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.[45]

Though Secretary Webster formulated this legal standard, the British accepted it—thereby creating a precedent for anticipatory self-

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[40] *2002 Strategy*, *supra* note 37, at 5 (emphasis added).
[41] *Id.* at 15.
[42] R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).
[43] *Id.* at 83.
[44] *Id.* at 84.
[45] *Id.* at 89 (emphasis added).

defense.[46] The *Caroline* case reflects an "exacting standard of customary law," according to which the expected attack includes so high a degree of imminence as to "preclude effective resort by the intended victim to non-violent modalities of response."[47]

Equally important, the British strike was not directed towards the United States but against insurgents operating within it. In a similar vein, interceptions of foreign civil aircraft over the high seas are not directed toward the aircraft's state of registry, but against the persons misusing them. As one commentator observes about the preemption doctrine:

> Furthermore, preemptive action [need] not entail overthrowing a government; the spectrum of possible options is substantially broader. Non-military as well as "semi-military" actions could include interrupting information streams, capturing ships, *intercepting aircraft*, establishing blockades, or acts of sabotage. Each of these options has a different level of acceptability and feasibility . . . . None of these actions can be justified unless the threat is exceedingly urgent and immediate.[48]

The *Caroline* case provides a powerful legal basis to justify the interception of foreign civil aircraft suspected of transporting weapons of mass destruction (WMD) or terrorists.

The U.S. *2002 Strategy* acknowledges that the legitimacy of preemption was specifically based on the existence of an imminent threat.[49] In the past, however, States could detect large scale mobilizations of conventional armies, navies, and air forces indicating preparations for attack.[50] By contrast, the danger posed by international terrorism is not subject to easy detection. Accordingly, the *2002 Strategy* argued for a modification to the concept of "imminent threat" to reflect the modern capabilities and objectives of today's adversaries:

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[46] *Id.* at 91-92.
[47] MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION AND INTERNATIONAL COERCION 231-32, 237 (1961).
[48] Karl-Heinz Kamp, *Preemption: Far From Forsaken*, BULLETIN OF THE ATOMIC SCIENTISTS 26, 64 (March/April 2005) (emphasis added).
[49] *2002 Strategy*, *supra* note 37, at 5.
[50] *Id.*

> Rogue States and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.[51]

The Bush Doctrine claims a right of preemptive action against any non-State actors (terrorists) who are seen as *potential* adversaries, regardless of any proof of an imminent attack.[52] The Bush Doctrine of preemption is controversial because the United States had never in its history taken a "preemptive" military strike against another nation until it invaded Iraq in 2003.[53] Several commentators have also noted that the doctrine is inconsistent with international law.[54]

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[51] *Id*.
[52] *Id.*
[53] *U.S. Use of Preemptive Military Force*, CONGRESSIONAL RESEARCH SERVICE (2002), *available at* http://fpc.state.gov/documents/organization/13841.pdf .
[54] *See, e.g*., BROWNLIE, *supra* note 38, at 702 (noting that "[t]his doctrine lacks a legal basis"); YORAM DINSTEIN, WAR, AGGRESSION & SELF-DEFENCE 183 (4th ed. 2005) (stating "to the extent that [the Bush Doctrine] will actually bring about a preventive use of force in response to sheer threats, it will not be in compliance with Article 51 of the Charter") (citation omitted); Graham, *supra* note 39, at 17 ("[T]he apparent intended implementation of the new strategy [against Iraq] is not consistent with international law."). The principal difficulty with the doctrine of preemption is in its regulation. Absent an imminent threat, the doctrine becomes a license for the unregulated use of force. A state should have powerful reasons for resorting to preemptive strikes. The potential adversary should have first demonstrated its willingness and its capacity to inflict great harm. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 522 (2005) (defining anticipatory self-defense as "an attack on a state that actively threatens violence and has the capacity to carry out that threat, but which has not yet materialized or actualized that threat through force"). In defending its vital interests, the United States should not be perceived as an aggressor state, and responsible for encouraging similar behavior by other states. There is no need to resort to the doctrine of preemption in the war against terror. The doctrine is by definition concerned only with potential adversaries and not declared enemies. The United States is already at war with Al Qaeda and its supporters, and the United States enjoys the full support of the international community in this conflict. As previously noted, the Security Council has authoritatively determined that the United States may legally exercise its inherent right of self-defense to prevent and deter future attacks by Al Qaeda. *See* text accompanying notes 24-27. The Security Council has also called upon all states to combat Al Qaeda and its supporters. *See* text accompanying notes 28-31. Hence, in this conflict, the United States is authorized to exercise its rights as a belligerent power. A belligerent can legally attack an enemy at any time, even when the enemy has temporarily retreated. *See infra* Section IV.A. In justifying the use of force in self-defense, a state should not assert a controversial reason when a generally accepted one is available.

In particular, some argue the Bush Doctrine conflicts with the U.N. Charter, which expressly limits the use of force to two circumstances, namely, in self-defense in case of an armed attack or if mandated by the U.N. Security Council.[55]

> But the U.N. Charter was written almost six decades ago when the main threats to international stability originated from conflicts *between* States. This has changed fundamentally: Today's security concerns mostly result from conflicts *within* States (civil war, genocide), from crumbling State authority, or from non-State actors. None of these threats is mentioned in the U.N. Charter—in fact, the written international law no longer reflects international realities . . . . Here lies the key to the further evolution of international law. The future will require interpretation and judgment as well as formal rules.[56]

Moreover, the current logic behind the preemption doctrine is the acknowledgement that:

> the threat situation has fundamentally changed as a result of three factors: the spread of weapons of mass destruction; the increasingly available means of their delivery by missile, unmanned aerial vehicle, and so on; and the technological progress that has been made in range and accuracy. Geographical distance is becoming less of a factor in threat analysis as more States and even non-State actors are achieving the ability to project power over long ranges. At the same time, the defender's reaction time is growing shorter. . . . Instead, in extreme cases, *threats must be countered before they become acute—and by military means if necessary* . . . .[57]

In March 2006, the U.S. Administration published an updated version of *The National Security Strategy of the United* States.[58] This version reaffirms the Bush Doctrine of preemption, but with the

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[55] U.N. Charter arts. 39, 42 & 51.
[56] Kamp, *supra* note 48, at 27.
[57] *Id*. at 26 (emphasis added).
[58] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf [hereinafter *2006 Strategy*].

assurance that preemptive strikes will conform to several traditional principles of international law regulating the use of force:

> [U]nder long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. *When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize*. This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.[59]

The references to deliberate action, clear reasons, just causes, and measured force reflect principles of customary international law, namely, military necessity and proportionality.[60]

In December 2002, two months after the *2002 Strategy* was published, a Spanish warship stopped and boarded the freighter *So San*, a North Korean commercial vessel, at the request of the United States.[61] The interception occurred about 600 miles off coast of Yemen in international waters.[62] U.S. intelligence had been tracking the ship for over a month after it departed North Korea, sailing without a flag or markings.[63] U.S. authorities arrived on the scene after the interception.[64] An inspection of the cargo resulted in the discovery of fifteen Scud missiles and rocket fuel.[65] The ship's manifest did not list any of these items.[66]

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[59] *Id.* at 23 (emphasis added).
[60] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at 94, ¶ 176 (stating that the principles of military necessary and proportionality are "well established in customary international law") [hereinafter *Nicaragua*]. For a discussion of these principles as they apply to the interception of civil aircraft, see Sections IV.A and V.A.
[61] *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft*, CONGRESSIONAL RESEARCH SERVICE 3 (2003), *available at* http://www.fas.org/spp/starwars/crs/RL32097.pdf [hereinafter *Weapons of Mass Destruction Counterproliferation*].
[62] *Spain: U.S. Apologizes over Scud Ship*, CNN.COM, Dec. 12, 2002, http://archives.cnn.com/2002/WORLD/asiapcf/east/12/12/missile.ship/index/html.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

Yemen protested the interception, demanding its release on the ground it had ordered the weapons from North Korea for its own defense.[67] After determining that it had no legal basis to arrest the vessel or seize its cargo, the United States released the crew and permitted the *So San* to sail to Yemen with its cargo.[68]

At about the same time as the *So San* incident, the White House published *The National Strategy to Combat Weapons of Mass Destruction*,[69] signaling a more activist approach to countering proliferation. The United States would not only work to enhance traditional nonproliferation measures through diplomacy, arms control, threat reduction assistance, and export controls, but it would make effective interdiction a critical part of its strategy to combat the flow of WMD and their delivery means to hostile States and terrorist organizations.[70]

D. The Proliferation Security Initiative

On May 31, 2003, in Krakow, Poland, President Bush unveiled the Proliferation Security Initiative (PSI), stating "[t]he greatest threat to peace is the spread of nuclear, chemical and biological weapons . . . . When weapons of mass destruction or their components are in transit, we must have the means and the authority to seize them."[71]

The purpose of the PSI is to improve cooperation among nations to allow for the search of ships and aircraft carrying suspected WMD-related cargo.[72] The PSI is not a treaty-based organization and it does not create any formal obligations. Rather, the PSI is described as a voluntary set of activities based on a commitment to adhere to the measures contained in the Statement of Interdiction Principles.[73] Over seventy nations have agreed to these measures.[74]

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[67] *Id.*
[68] *Weapons of Mass Destruction Counterproliferation*, *supra* note 61, at 3; *see also* Ari Fleisher, White House Press Briefing (Dec. 11, 2002).
[69] THE WHITE HOUSE, THE NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (2002), http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf.
[70] *Id.* at 2.
[71] George W. Bush, U.S. President, Remarks at Wawel Royal Castle in Krakow, Poland (May 31, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html.
[72] *Weapons of Mass Destruction Counterproliferation*, *supra* note 61, at 10.
[73] U.S. STATE DEPARTMENT, WHAT IS THE PROLIFERATION SECURITY INITIATIVE?, http://usinfo.state.gov/products/pubs/proliferation/proliferation.pdf.
[74] *2006 Strategy*, *supra* note 58, at 18.

The Statement of Interdiction Principles commits participating States to take action in three areas: (1) to facilitate the more rapid exchange of information concerning suspected proliferation;[75] (2) to review and strengthen national laws;[76] and (3) to undertake a number of interdiction measures within their jurisdiction.[77] The Statement of Interdiction Principles recommends specific activities regarding the illegal transport of WMD-related cargo to entities of proliferation concern, activities squarely within each PSI partner's sovereign prerogative. PSI partners commit to board and search any vessel flying their own flag that is reasonably suspected of transporting WMD-related cargo, either at their own initiative or at the request of another State;[78] they also commit to seriously consider giving consent to other States to board and search their own flag vessels;[79] and they agree to stop and search within their own territorial seas any vessel of whatever registry that is reasonably suspected of carrying such cargoes.[80]

The principles concerning the interception of aircraft are similar. PSI partners agree to require aircraft transiting their airspace to land for inspection if the aircraft are reasonably suspected of carrying WMD-related cargo to or from entities of proliferation concern.[81] Where possible, PSI partners should deny these aircraft transit rights through their own airspace in advance of such flights.[82] In this respect, States have greater flexibility under air law to prevent the transport of such cargo than they do under the law of the sea. The 1944 Convention on International Civil Aviation prohibits civil aircraft from carrying munitions or implements of war above the territory of a State without that State's permission.[83] On the other hand, the 1982 U.N. Convention

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[75] THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, THE PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES (Sept. 4, 2003), http://www.state.gov/t/isn/rls/fs/23764.htm [hereinafter STATEMENT OF INTERDICTION PRINCIPLES].

[76] *Id*. at princ. 3. The U.N. Security Council unanimously adopted Resolution 1540, which calls on all States to criminalize the proliferation of weapons of mass destruction, especially by non-State actors, and to implement effective controls on the export of such weapons. S.C. RES. 1540, U.N. SCOR, 59th Sess., 4956th mtg., U.N. Doc. S/RES/1540 (2004).

[77] STATEMENT OF INTERDICTION PRINCIPLES, *supra* note 75, at princs. 1 & 4 (a).

[78] *Id.* at princ. 4(b).

[79] *Id.* at princ. 4(c).

[80] *Id.* at princ. 4 (d).

[81] *Id.* at princ. 4(e).

[82] *Id.*

[83] Convention on International Civil Aviation art. 35, Dec. 7, 1944, 15 U.N.T.S. 295, T.I.A.S. 1591 [hereinafter Chicago Convention]. For nearly sixty years, the "Magna Carta" of public international air law has served two basic functions. First, it established a comprehensive framework for international civil aviation, carrying forward most of the

on the Law of the Sea provides that ships enjoy the right of innocent passage through the territorial seas of other States, even when those ships carry nuclear or other inherently dangerous or noxious substances.[84] In any case, PSI partners agree to actively ensure that their own ports, airfields, or other facilities are not being used as transshipment points for shipments of WMD-related cargoes to or from entities of proliferation concern. The PSI works with, rather than against, the consent of the state of nationality of aircraft and ships.[85] The U.S. initiative to defeat WMD proliferation through effective interdiction is thus firmly based in international law.

In addition to the PSI, the United States has also signed bilateral agreements with several countries, including Panama and Liberia, the two nations with the largest shipping registries.[86] These bilateral agreements grant each signatory a reciprocal right to board and inspect the other's ships on the high seas.[87] The combination of these bilateral agreements and commitments from PSI partners provides the United States with "rapid action consent procedures for boarding, search, and seizure" of over fifty percent of the world's shipping.[88] However, at this time a similar regime for the interception of aircraft is lacking.

1. *The* BBC China *and Egypt Air Flight MS 2843*

In late September 2003, the same month as the publication of the PSI Interdiction Principles, U.S. and British intelligence services notified Germany that the German-owned freighter *BBC China* was transporting suspected WMD cargo from Malaysia to Libya. Germany ordered the *BBC China* to divert to Italy where authorities searched it. The inspection resulted in the discovery of thousands of parts for gas

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customary norms initially codified within the Paris Convention of 1919. Secondly, the Chicago Convention created the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations. The Convention's provisions are thus universally binding because they reflect customary international law, and because they have been ratified by 189 states, or nearly the entire international community. *States Parties to the Convention on International Civil Aviation*, 30 ANNALS OF AIR & SPACE L. Part I, at 51 (1995).

[84] United Nations Convention on the Law of the Sea arts. 17, 21, 23, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

[85] Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, J. OF CONFL. & SEC. L. 125, 133 (2005); Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526, 529 (2004).

[86] Byers, *supra* note 85, at 530 n.30, 31.

[87] *Id.* at 530.

[88] Garvey, *supra* note 85, at 132.

centrifuges capable of enriching uranium. Significantly, none of these items were listed on the manifest. The successful interception of these materials is credited with convincing President Mu'ammar al-Quadhafi to abandon his WMD program.[89] More importantly, it also led to the dismantling in 2004 of the nuclear smuggling network of Dr. Abdul Qadeer Khan, considered the father of Pakistan's nuclear weapons program.[90]

Since the PSI program was announced in 2003, it has resulted in at least a dozen interdictions of WMD material bound for countries of concern.[91] One such interdiction occurred in December 2003 when the U.S. Navy intercepted a small vessel in the Strait of Hormuz in the Persian Gulf.[92] The inspection of the ship yielded two tons of illicit drugs and the capture of three Al Qaeda suspects.[93] Interdictions of this type confirm the Security Council's concern expressed in Resolution 1373 about the close connection between international terrorism and the illegal movement of arms and illicit drugs and other prohibited materials.[94]

There are no reported interceptions of civil aircraft on the basis of the PSI program, although two interceptions from the mid-1980s serve as important precedents. On October 10, 1985, U.S. Navy jets over the Mediterranean Sea intercepted Egypt Air Flight MS 2843, en route from Cairo to Tunis, and forced it to land in Sicily.[95] The flight was carrying four members of the Palestine Liberation Front who had hijacked the Italian cruise liner *Achille Lauro* in international waters near Egypt only three days earlier.[96] While in control of the ships, the hijackers killed Leon Klinghoffer, a sixty-nine-year-old United States citizen confined to a wheelchair, and threw him overboard.[97]

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[89] *2006 Strategy*, *supra* note 58, at 19.
[90] *Id.*; Joyner, *supra* note 54, at 539.
[91] *See*, *e.g.,* Condoleezza Rice, U.S. Sec'y of State, Remarks on the Second Anniversary of the Proliferation Security Initiative (May 31, 2005), http://www.state.gov/ secretary/rm/ 2005/46951.htm (noting 11 interdictions in nine months).
[92] Ian Patrick Barry, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas pursuant to Customary International Law: A Defense of the Proliferation Security Initiative*, 33 HOFSTRA L. REV. 299 (2004-2005).
[93] *Id.*
[94] U.N. S.C. Res. 1373*, supra* note 28, at para. 4.
[95] INT'L CIVIL AVIATION OR. [ICAO], SECRETARIAT STUDY ON "CIVIL/STATE AIRCRAFT," ATTACHMENT 1, ¶ 4.8.3, DOCUMENT, LC/29-WP/2-1 (Mar. 3, 1995) [CIVIL/STATE AIRCRAFT]; George M. Borkowski, *Use of Force: Interception of Aircraft—Interception of Egyptian Airliner by the United States*, *Oct. 10, 1985; Interception of Libyan Airplane by Israel, Feb. 3, 1986*, 27 HARV. INT'L L.J. 761 (1986).
[96] *Id.*
[97] *Id.* at 761 n.5.

Eventually, the hijackers surrendered to a representative of the Palestine Liberation Organization in Egypt.[98]

The pilot of the Egyptian aircraft reported that the U.S. Navy jets threatened to shoot down the aircraft unless he followed them to Italy.[99] Tunisia and Greece both refused permission for the Egypt Air flight to land in their territory after it was intercepted by the U.S. Navy jets.[100]

Publicly, at least, Egypt denounced the interception as an act of piracy "unheard of under any international law or code," and demanded that the United States make a public apology for the interception.[101] However, Egypt did not file a complaint with the International Civil Aviation Organization (ICAO). The United States in justification of its act claimed that the interception was directed against known terrorists and was based on highly reliable intelligence concerning their movements.[102] In a letter to the International Federation of Airline Pilots' Associations dated November 13, 1985, the U.S. government wrote:

> [I]t is our view that the aircraft was operating as a State aircraft at the time of the interception. The relevant factors—including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted—compel this conclusion.[103]

2. *Libyan Arab Airlines*

On February 4, 1986, four months after the interception of the Egypt Air aircraft, Israeli fighters diverted a Libyan Arab Airlines aircraft over the Mediterranean Sea, forcing it to land in Israel where it was searched for seven hours before being permitted to resume its journey.[104] The civil aircraft was on an unscheduled flight from Tripoli to Damascus when it was intercepted east of Cyprus, seventy miles from the coast of Israel.[105]

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[98] *Id.* at 761.
[99] *Id.* at 762 n.15.
[100] *Id.* at 762 n.9.
[101] *Id.* at 763.
[102] *Id.* at 762-63.
[103] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 4.8.3(1).
[104] *Id.* ¶ 4.8.3 (2); Borkowski, *supra* note 95, at 763.
[105] *Id.* at 763 n.28.

The Israelis believed the aircraft was carrying top Palestinian leaders, whereas the only passengers on board were seven Syrian politicians and two low-ranking Lebanese militia officials.[106] When Libya brought the matter before the ICAO, Israel attempted to justify the interception on the ground that the Palestinians thought to be on board the Libyan aircraft were involved in "planning" attacks against Israel; Israel did not defend the interception as an attempt to capture known perpetrators.[107] On February 28, 1986, the ICAO Council condemned Israel for intercepting and diverting the Libyan Arab Airlines aircraft in international airspace, after determining the action violated the Chicago Convention.[108]

III. THE LEGAL REGIME OVER THE HIGH SEAS

The contemporary law of the sea consists of a highly developed set of international rules that are binding on all nations. This law derives primarily from the extensive and generally uniform practice of States. These customary rules were codified in the 1982 U.N. Convention on the Law of the Sea (UNCLOS),[109] the most comprehensive and important codification to date in international law. The Convention not only reaffirms the traditional law and customs of the sea, but it also contains important elements of "progressive development of international law," envisioned under Article 13 of the U.N. Charter.[110] To date, the UNCLOS has been ratified by 149 States, including the major maritime nations, except the United States.[111]

Though the United States took an active role in the drafting of the Convention, it did not sign or ratify it, because it objected to the

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[106] *Id.* at 763.
[107] *Id.* at 764.
[108] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 4.8.3(2).
[109] UNCLOS, *supra* note 84. Efforts to codify the law of the sea took place in Geneva in 1958, which resulted in four conventions, one of which is the Convention on the High Seas. Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82 [hereinafter HSC]. In the Preamble, the High Seas Convention purports "to codify the rules of international law relating to the high seas." The United States has ratified it.
[110] For a summary of these developments, see Michael Milde, *United Nations Convention on the Law of the Sea—Possible Implications for International Air Law*, 8 ANNALS OF AIR & SPACE L. 167, 172-75 (1983) [hereinafter Milde, *U.N. Convention*].
[111] UNITED NATIONS, STATUS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, OF THE AGREEMENT RELATING TO THE IMPLEMENTATION OF PART XI OF THE CONVENTION AND OF THE AGREEMENT FOR THE IMPLEMENTATION OF THE PROVISIONS OF THE CONVENTION RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS (Apr. 28, 2006), http://www.un.org/depts/los/reference_files/status2006.pdf.

provisions concerning deep seabed mining in Part XI.[112] However, the United States accepts the remaining provisions as reflecting either customary international law or an appropriate "balance of interests" worthy of recognition.[113] The United States thus observes the UNCLOS, except for the provisions in Part XI, and it has worked "both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law."[114] The current law of the sea provides stability in international relations while meeting the needs of an increasingly interdependent world.[115]

Because the development of customary international law is a decentralized process, a State must in principle consent to a new norm to be bound by it. In practice, every State's consent is presumed during the formation of a new norm.[116] To avoid being bound by the new rule, a State must actively and persistently object to it.[117] Such opposition can be difficult and costly, politically and financially, prompting even a superpower like the United States to occasionally relent. For example, until at least 1980, the United States consistently refused to recognize territorial sea claims in excess of three miles when the overwhelming majority of other States claimed up to twelve miles.[118] By 1988, the United States publicly announced that every State could claim a twelve-mile territorial sea and accordingly extended its own territorial sea to twelve nautical miles from its baseline.[119]

The importance of customary rules to U.S. forces cannot be overstated. The legal regime of the high seas forms the legal foundation for the global mobility of U.S. forces and is, for this reason, of

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[112] THE WHITE HOUSE, UNITED STATES OCEAN POLICY (Mar. 10, 1983), *reprinted in* 22 I.L.M. 464.

[113] On March 10, 1983, President Ronald Reagan announced that the United States accepted the UNCLOS and would immediately adhere to it, except for the provisions in Part XI. *Id.* at 464.

[114] William H. Taft IV, Legal Advisor, U.S. Department of State, Written Statement Before the Senate Armed Services Committee on April 8, 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention (addressing national security aspects of the Convention), http://armed-services.senate.gov/statemnt/2004/April/Taft.pdf.

[115] U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M) 22 (October 1995) (stating that international law provides "expectations that certain acts or omissions will effect predictable consequences") [hereinafter COMMANDER'S HANDBOOK].

[116] R. R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 9 (3d ed. 1999); *see also* BROWNLIE, *supra* note 38, at 11 (discussing the persistent and subsequent objector).

[117] CHURCHILL & LOWE, *supra* note 116, at 8.

[118] *Id.*

[119] Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988).

paramount importance to U.S. national security.[120] The most important principle of the law of the sea is the principle of freedom of passage over the high seas, a principle that "applies in time of war or armed conflicts as well as time of peace."[121] This principle, however, was not always the rule.

In the 15th and 16th centuries, several States laid sovereign claims over vast areas of the oceans,[122] with some levying tolls as a condition of passage through the seas under their control.[123] In 1493, for example, Pope Alexander VI purported to divide the Atlantic Ocean between Spain and Portugal.[124] With the rise of international trade between States in the 17th century, maritime powers were unable to sustain their claims to sovereignty over the seas.[125] By the 18th and 19th centuries, a *laissez-faire* legal regime dominated the high seas.[126] However, in the past century, States have developed a capacity to exert more control over the oceans to enhance their security, to exploit the ocean's resources, and to control pollution and over-fishing.[127] The result has been an increase in the breadth of each State's territorial sea from three to twelve nautical miles,[128] and in the recognition of "exclusive economic zones" extending up to 200 nautical miles from shore.[129]

Nevertheless, the cornerstone of modern international law governing the high seas continues to be anchored in two fundamental principles, namely, that the high seas are "open" to all States[130] and that no State may validly purport to subject any part of it to its "sovereignty."[131] The practical consequence of these principles is that all States may freely use the high seas for any lawful purpose without interference from other States.[132] In effect, no State may prevent the

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[120] Byers, *supra* note 85, at 527.
[121] BROWNLIE, *supra* note 38, at 225.
[122] MYRES S. MCDOUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 766 (1962).
[123] CHURCHILL & LOWE, *supra* note 116, at 204.
[124] MCDOUGAL & BURKE, *supra* note 122, at 765; CHURCHILL & LOWE, *supra* note 116, at 204.
[125] CHURCHILL & LOWE, supra note 116, at 204-05.
[126] *Id.* at 2, 205.
[127] *Id.* at 205.
[128] UNCLOS, *supra* note 84, art. 3.
[129] *Id.* art. 57.
[130] *Id.* art. 87; HSC, *supra* note 109, art. 2.
[131] UNCLOS, *supra* note 84, art. 89; HSC, *supra* note 109, art. 2.
[132] CHURCHILL & LOWE, *supra* note 116, at 203.

ships and the aircraft of other States from using the high seas for any "lawful purpose".[133]

A. The Freedom of Overflight

The UNCLOS provides that all States may enjoy at least six freedoms on the high seas.[134] Along with the freedom of navigation,[135] the principal and most important freedom is that of overflight.[136] It is the least disputed freedom[137] and may be enjoyed anywhere above the high seas.

It is important to stress that the UNCLOS does not include the exclusive economic zone in its definition of the "high seas,"[138] but it does provide that all States may enjoy the freedoms of navigation and overflight in the exclusive economic zones of other States.[139] For purposes of these freedoms, the legal regime of the "high seas" applies to all parts of the sea not included in the territorial sea or in the internal waters of a State.[140] In keeping with this understanding, the U.S. *Commander's Handbook* defines "international waters" as "all ocean areas *not* subject to the territorial sovereignty of any nation," which include contiguous zones, exclusive economic zones, and the high seas.[141]

Some coastal states have claimed the right to establish security zones beyond their territorial sea in which they purport to exclude or regulate the activities of foreign warships and military aircraft in those zones.[142] International law does not recognize the right of coastal nations to restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea.[143] On the other hand, states may

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[133] *Id.* at 204.
[134] UNCLOS, *supra* note 84, art. 87.1.
[135] In the *Nicaragua* case, the International Court of Justice declared that the Convention's provisions regarding freedom of navigation in territorial waters, in the exclusive economic zones, and on the high seas were customary international law. *Nicaragua, supra* note 60, at 111-12, ¶¶ 213-14.
[136] MCDOUGAL & BURKE, *supra* note 122, at 782.
[137] *Id.* at 785; Milde, *U.N. Convention*, *supra* note 110, at 180 ("[T]here is no clear record of any fundamental international disagreement with respect to those provisions of the Convention which relate to the right of navigation and overflight in the different jurisdictional zones of the seas.").
[138] UNCLOS, *supra* note 84, art. 86.
[139] *Id.* arts 58, 86.
[140] *Id.*
[141] COMMANDER'S HANDBOOK, *supra* note 115, at 1-6.
[142] *Id.* ¶ 1.5.4.
[143] *Id.*

establish Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace for purposes of regulating the admission of aircraft into its territory in the interest of national security.[144] Aircraft intending to enter a state's territorial airspace may be required to file detailed flight plans and to identify themselves while in international airspace before penetrating the ADIZ.[145] International law permits states to establish reasonable conditions of entry into their territorial airspace, provided that the conditions are applied to the aircraft of all contracting states "without distinction" as to their nationality.[146] Foreign aircraft not intending to enter a state's territorial airspace need not comply with the coastal state's ADIZ requirements.[147]

B. The Exclusivity of Flag-State Jurisdiction

For centuries, states have had the exclusive competence to prescribe regulations for their own ships,[148] and, more recently, for their own aircraft.[149] But states could not, unless specially permitted by international law, exercise jurisdiction over the ships of other states.[150] Ships are thus generally subject to the exclusive jurisdiction of the state where they are registered.[151] For this reason, every ship must bear the nationality of some state and sail under the flag of that state only.[152] Each state in turn has certain obligations concerning its ships, including fixing the conditions under which a ship may acquire its nationality,[153] maintaining a register of ships,[154] and taking measures to ensure the seaworthiness and safety of its ships.[155]

The principle of exclusive jurisdiction of the state of nationality applies *mutatis mutandis* to aircraft. Every aircraft must be registered in some state and bear its nationality.[156] States must also ensure that their

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[144] *Id.* ¶ 2.5.2.3.
[145] *See, e.g.,* 14 C.F.R. §§ 99.11, 99.15 (2006) (requiring aircraft intending to enter U.S. airspace to identify themselves at least fifteen minutes before penetrating the U.S. ADIZ and to make position reports one to two hours cruising time from the United States).
[146] Chicago Convention*, supra* note 83, art. 11.
[147] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.5.2.3.
[148] MCDOUGAL & BURKE, *supra* note 122, at 798.
[149] *See, e.g.*, 18 U.S.C. § 7 (2006) (extending U.S. jurisdiction to U.S. aircraft and vessels).
[150] *Id.*
[151] UNCLOS, *supra* note 84, art. 92(1); HSC, *supra* note 109, art. 6(1).
[152] UNCLOS, *supra* note 84, art. 92(1); HSC, *supra* note 109, art. 6(1).
[153] UNCLOS, *supra* note 84, art. 91(1); HSC, *supra* note 109, art. 5.
[154] UNCLOS, *supra* note 84, art. 94(2).
[155] UNCLOS, *supra* note 84, art. 94(3); HSC, *supra* note 109, art. 10.
[156] Chicago Convention, *supra* note 83, arts. 17, 18.

aircraft will comply with the rules and regulations in force wherever the aircraft may be;[157] states are also required to issue certificates of airworthiness for their aircraft and to provide licenses for the crews of those aircraft.[158] The state of registry has jurisdiction over offenses committed on board its aircraft.[159] While on or over the high seas, both ships and aircraft are treated as a portion of the territory of the state whose nationality they have.

In this respect, the 1927 decision of the Permanent Court of International Justice in the *Lotus* case is instructive.[160] The French ship *Lotus* collided on the high seas with a Turkish vessel, sinking it. Although several shipwrecked Turkish nationals were rescued, including the captain, eight of the crew were lost at sea. After the *Lotus* arrived in Constantinople, Turkish authorities conducted an inquiry and arrested both the Turkish captain and the French officer of the watch at the time of the collision. Turkish authorities then prosecuted the Turkish captain and the French officer together for involuntary manslaughter. France objected to Turkey's assertion of penal jurisdiction over the French officer as being contrary to international law. Turkey agreed to submit the matter to the Permanent Court for its judgment.

Despite considerable evidence of state practice supporting the principle of exclusive flag-state jurisdiction, the Court upheld Turkey's assertion of concurrent penal jurisdiction. The Court acknowledged that, apart from certain special cases which are defined by international law, "vessels on the high seas are subject to no authority except that of the State whose flag they fly" and that "no State may exercise any kind of jurisdiction over foreign vessels upon them."[161] Because vessels are placed in the same position as national territory, "a ship on the high seas is assimilated to the territory of the State the flag of which it flies."[162] Under international law, the perpetrator of an offense is subject to the jurisdiction of the state where the offense is committed, even if the perpetrator was in the territory of a different state "at the moment of its commission:"[163]

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[157] *Id.* art. 12.
[158] *Id.* arts. 31, 32.
[159] Convention on Offenses and Certain Other Acts Committed on Board Aircraft art. 3, Sept. 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941 [hereinafter Tokyo Convention].
[160] S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 18-19.
[161] *Id.* at 25.
[162] *Id.*
[163] *Id.* at 23.

> If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting, accordingly, the delinquent.[164]

The Court's analysis is the same as would apply today in a non-maritime context; if, for example, a person in France had fired a weapon across the border with Germany, fatally wounding another individual, both Germany and France would have jurisdiction over the incident. Though it upheld Turkey's concurrent jurisdiction, the Court was careful to reinforce the principle of exclusive flag-state jurisdiction:

> Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.[165]

Turkish officials boarded the *Lotus* and arrested the French officer only after the *Lotus* had entered Turkey's territorial sea and docked in Constantinople. The *Lotus* decision is much criticized for permitting Turkey to exercise its jurisdiction over the French officer,[166] and it has since been superseded by the 1958 High Seas Convention and the UNCLOS.[167] Hence, even in cases involving a collision, crew members of a ship are today subject only to the exclusive jurisdiction of the ship's state of nationality.

Similarly, while the interception of foreign aircraft over the high seas may be legitimate, it nevertheless interferes with the integrity and political independence of the aircraft's state of registry. For this reason, the 1985 interception of Egypt Air Flight MS 2843 by the United States and the 1986 interception of the Libyan Air Flight by Israel each

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[164] *Id.* at 25.
[165] *Id.*
[166] CHURCHILL & LOWE, *supra* note 116, at 208.
[167] UNCLOS, *supra* note 84, art. 97(1), (3); HSC, *supra* note 109, arts. 11(1), (3).

impinged on the sovereignty of Egypt and Libya.[168] This conclusion follows from the reasoning employed by the Permanent Court of International Justice in the *Lotus* case where the Court stated that, for purposes of a state's assertion of criminal jurisdiction, its vessel on the high seas is assimilated to a portion of its territory. An aircraft is similarly assimilated to a portion of the territory of its state of registry. Any interference with the aircraft's flight is a violation of the sovereignty of its state of nationality.

The exclusivity of flag-state jurisdiction applies to some extent within the territorial waters and airspace of other nations. For example, the UNCLOS provides that the coastal state should not exercise its criminal jurisdiction on board a foreign ship over offenses committed on the foreign ship during its passage through the coastal state's territorial waters unless the consequences of the crime extend to the coastal state, or the offense disturbs the good order of the territorial sea, or in suppression of the illicit traffic of narcotic drugs.[169] The Tokyo Convention similarly prohibits the territorial state from interfering with a foreign civil aircraft in flight over its airspace unless the offense has an effect on the territorial state, or it has been committed by or against a national or a permanent resident of the territorial state, or it affects the good order of the territorial state's airspace.[170] Thus Article 4 of the Tokyo Convention restricts the "unencumbered sovereign power" a state may have traditionally exercised over its own airspace.[171] The Tokyo Convention implicitly recognizes that, unless an offense on board an aircraft affects the territorial state in some manner, the territorial state should have "little or no interest at all in exercising jurisdiction over an offence committed, perhaps at a height of 40,000 feet, on [a foreign] aircraft cruising at a speed of, perhaps, 500-600 miles per hour."[172]

However, all merchant ships entering ports and civil aircraft upon landing are subject to the laws of the state in whose territory they enter for purposes of safety, security, customs, immigration, and quarantine. They may be intercepted and boarded for inspection by local officials to ensure compliance with local law.[173]

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[168] Borkowski, *supra* note 95, at 765.
[169] UNCLOS, *supra* note 84, art. 27; Convention on the Territorial Sea and the Contiguous Zone art. 19, Apr. 29, 1958, 516 U.N.T.S. 205.
[170] Tokyo Convention, *supra* note 159, art. 4. For a discussion of the application of Article 4 of the Tokyo Convention over the high seas, see *infra* Section III.D.
[171] SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 86 n.128 (1973).
[172] *Id.* at 100.
[173] However, local officials have no such authority with respect to warships and military aircraft. *See infra* Section III.

C. The "Rules of the Air"

Whereas every state enjoys the freedom of overflight and navigation over the high seas, international law also requires that each state exercising its freedoms show "due regard" or "reasonable regard" for the interests of other states.[174] The rapid growth of international civil aviation and maritime shipping has created the need for international rules governing the safe use of the international airspace and the high seas. To this end, two specialized agencies of the United Nations have adopted basic highway codes to prevent collisions: one for the airspace over the high seas and the other for the surface and subsurface of the high seas.[175] The International Maritime Organization has adopted rules for the navigational safety of surface and subsurface vessels contained in the International Regulations for Preventing Collisions at Sea, known formally as the International Rules of the Road.[176] The ICAO has likewise adopted the Rules of the Air to promote the safety of air navigation.[177] Rules of the Air apply without exception to international airspace as well as to the "highest practicable degree" in the sovereign airspace above every state.[178]

The Rules of the Air have been eminently successful in facilitating the safe and orderly development of international civil aviation. Although the rules are not compulsory for state aircraft,[179] they have been a great benefit to U.S. forces overseas. The *Commander's Handbook* acknowledges their value to military aircraft:

> The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of

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[174] UNCLOS, *supra* note 84, art. 87(2) (due regard); HSC, *supra* note 109, art. 2 (reasonable regard).

[175] Michael Milde, Status of Military Aircraft in International Law, Lecture at the Third International Law Seminar 160-61 (Aug. 29, 1999) [hereinafter Milde, *Status of Military Aircraft*].

[176] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.7.1. These rules have been adopted as law by the United States. *See* 33 U.S.C. §§ 1601-1606 (2006).

[177] Rules of the Air, Annex 2 to the Convention on International Civil Aviation (July 1990) [hereinafter Annex 2].

[178] Chicago Convention, *supra* note 83, art. 37. For a discussion of a state's obligation to comply with a standard to the "highest practicable degree," see *infra* text accompanying notes 190-192.

[179] *See infra* Section IV.

> the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.[180]

For this reason, U.S. military aircraft follow ICAO flight procedures on routine point-to-point flights through international airspace as a matter of policy.[181]

The binding nature of these rules over the high seas is derived from Article 12 of the Chicago Convention: "Over the high seas, the rules in force shall be those established under this Convention."[182] The Convention assigns the responsibility of adopting international standards and recommended practices contained in the Rules of the Air to the organization's executive body—the ICAO Council.[183] The Council's power to adopt rules that are binding *erga omnes* necessarily corresponds to the surrender by every state of a nominal portion of its sovereignty over the exclusive control of its aircraft over the high seas. In the words of Professor Michael Milde:

> It is a unique feature in international law-making that an executive body of an international organization can legislate by a two-thirds majority vote with binding effect for all 156 [now 189] contracting States with respect to the Rules of the Air applicable over the high seas which cover some 70 percent of the surface of the earth.[184]

The ICAO Council has by and large succeeded in adopting the Rules of the Air without controversy, despite its plenary authority to do so over the objection of any contracting state.

In practice, a majority of states have never registered their disapproval of an Annex. This is not surprising in light of the frequent

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[180] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.7.3.

[181] U.S. DEP'T OF DEFENSE, DIR. 4540.1, USE OF AIRSPACE BY U.S. MILITARY AIRCRAFT AND FIRINGS OVER THE HIGH SEAS (13 Jan. 1981) [hereinafter DoDD 4540.1]; COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.5.2.2.

[182] Chicago Convention, *supra* note 83, art. 12 (providing that "[e]ach contracting state undertakes to ensure the prosecution of all persons violating the regulations applicable").

[183] *Id.* arts. 37(c), 54(l).

[184] Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2),* 11 ANNALS OF AIR & SPACE L. 105, 106 (1986) [hereinafter Milde, *Misuse of Civil Aviation*].

consultations between the ICAO's Air Navigation Commission, the Council, and other interested contracting states.[185] Though ICAO standards and recommended practices are not technically part of the Convention itself, they are annexes to it, and, hence, over the high seas they are binding without exception and in territorial airspace they are legally binding under the Convention to the "highest practicable degree."[186]

D. The Applicability of Standards Without Exception Over the High Seas

The Rules of the Air are contained in Annex 2. This Annex is unique in that it contains only standards and no recommended practices.[187] A *standard* is defined as any specification "the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation."[188] By contrast, a *recommended practice* means a specification "the uniform application

[185] For an appreciation of this phenomenon, a brief introduction into the ICAO organizational structure and lawmaking process would be instructive. The ICAO is composed of an Assembly, a Council, and other bodies. Chicago Convention, *supra* note 83, art. 43. All contracting states are represented in the Assembly and each state has one vote within it. *Id.* art. 48(b). The Assembly meets every three years to elect the Council, which consists of representatives from thirty-six of the contracting states. *Id.* arts. 49(b), 50 (a). The Council, in turn, appoints fifteen members of the Air Navigation Commission, all of whom must be experts in aeronautics. *Id.* art. 56. The experts on the Air Navigation Commission study the issues and propose international standards and recommended practices to the Council for its consideration. *Id.* arts. 54(m), 57. If a contracting state is not represented on the Council, it may still participate "without a vote" in the Council's consideration of "any question which especially affects its interests." *Id.* art. 53. The Council must vote to adopt or amend a standard or a recommended practice by a two-thirds vote at a meeting called for that purpose. *Id.* art. 90. This requirement of a two-thirds vote is the primary check on the Council's lawmaking power. For convenience, the adopted international standards and recommended practices are included in Annexes to the Convention. *Id.* art. 54(l). After the Council votes to adopt or modify a standard or recommended practice within an Annex, the Annex is then submitted to all ICAO member states to allow them the opportunity to register their disapproval with the Council. *Id.* art. 90. Unless a majority of the contracting states register their disapproval with the Council, the Annex will come into force within three months of its submission to them. *Id.* The Council may also grant member states a longer period of time in which to register their disapproval. *Id.* Hence, the contracting states collectively retain an important institutional check on the Council's lawmaking authority, though they may not be represented on the Council. BIN CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 115-16 (1962).

[186] *See* Chicago Convention, *supra* note 83, art. 37.

[187] Milde, *Status of Military Aircraft*, *supra* note 175, at 161.

[188] Annex 2, *supra* note 177, at *vi.*

of which is recognized as *desirable* in the interests of safety, regularity, or efficiency of international air navigation."[189] Every state has an obligation to comply with international standards to the "highest practicable degree."[190] Of course, this obligation depends upon the state's ability to do so. Some states lack the resources, the technology, or the expertise to comply with certain standards. When a regulation is beyond the power of a state to comply with it, international law does not require the state to do the impossible, or, as it is said, *ultra posse nemo tenetur*.

If a state "finds it impracticable to comply in all respects with any such international standards or procedure," the state shall immediately file a "difference" with the ICAO, notifying it of "the differences between its own practice and that established by the international standard."[191] The ICAO will then immediately notify the other states of this "difference." Thus, if uniformity of standards cannot be achieved over a state's territory, at least the other contracting states will know where the differences lie in that state's territory.

Though the Convention permits states to file a "difference" with respect to their own territorial airspace, no state may file a "difference" with respect to the Rules of the Air, because these rules apply over the high seas without exception.[192] If civil aircraft are unable to comply with the Rules of the Air, then those civil aircraft cannot legally use the airspace over the high seas. Hence, the ICAO Council's legislative authority to enact international standards which bind all 189 contracting states, and from which no "difference" can be filed in their application over the high seas, is a welcome innovation in public international law. Aviation, as an international enterprise, needs uniform standards to thrive. At the same time, uniform standards can make the interception of civil aircraft over the high seas safer and simpler.

E. The Criterion of Reasonableness

The two dominant principles of the legal regime over the high seas—the freedom of the high seas and exclusive flag-state jurisdiction—are each accompanied by their own separate problems. Every freedom, especially that of overflight, gives rise to competing

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[189] *Id.*
[190] Chicago Convention, *supra* note 83, art. 37.
[191] *Id.* art. 38. Because recommended practices are merely regarded as desirable, states are invited, but not required, to notify the ICAO of departures from recommended practices. CHENG, *supra* note 185, at 70.
[192] Annex 2, *supra* note 177, § 2.1.1 [explanatory note].

claims and conflicting uses, each demanding protection in the name of freedom of the high seas.[193] These claims and uses, in turn, create the need for rules governing the safe use of the international airspace. In general, decision-makers must, on a case-by-case basis, apply the criterion of reasonableness to ensure that the most deserving use of the high seas is realized.[194] For instance, not all areas over the ocean are of equal importance for international air transport.[195] International air transport should therefore almost always be accorded privileged status over certain parts of the high seas. Other parts of the high seas may occasionally, for limited periods of time, be used for military exercises to the exclusion of civil air transport. This limitation on the freedom of the high seas is at least a century old and has probably acquired the status of a customary rule.

However, the exclusivity of flag-state jurisdiction detracts from the public order of the oceans even as it contributes to it: "If a ship on the high seas can only be called to order by its own national authorities as regard the proper use of the high seas, the resulting situation is far from satisfactory and definitely prejudicial to the general interests."[196] Though the UNCLOS and the Chicago Convention are comprehensive, they are not all-encompassing;[197] the law of armed conflict and other norms of international law are also relevant when discussing the legal regime of the high seas. In addition, the application of the written rules is always subject to the test of reasonableness.

IV. THE LEGAL STATUS OF MILITARY AIRCRAFT UNDER INTERNATIONAL LAW

A. Sovereign Immunity of Military Aircraft

Warships enjoy a unique position in international law. In time of peace, warships of every nation are immune from the jurisdiction of all other states, even when they are in the territory of those other states.[198] Although all ships, including warships, must comply with certain rules regarding innocent passage,[199] police and port authorities

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[193] MCDOUGAL & BURKE, *supra* note 122, at 783.
[194] *Id.* at 784.
[195] *Id.*
[196] *Id.* at 797.
[197] *Id.*; Milde, *U.N. Convention*, *supra* note 110, at 181.
[198] UNCLOS, *supra* note 84, arts. 95, 110(4) (applying its provisions *mutatis mutandis* to military aircraft).
[199] *Id.* arts. 17-26.

of another state may not board or inspect a warship without the permission of the commanding officer.[200] A coastal state may also not seize or arrest a warship; it may only order the unwelcome warship to leave its territorial sea immediately.[201]

Military aircraft have the same legal status as warships. As Milde observes, states have always been "openly hostile to the idea that their military aircraft—tools and symbols of their military power, sovereignty, independence and prestige—should be subject to [foreign or] international regulation."[202] Local officials may not board the military aircraft of another state without the consent of the aircraft commander.[203] The territorial sovereign may not arrest or seize foreign military aircraft lawfully in its territory, but it may order it to promptly leave.[204] According to Professor John Cobbs Cooper, the chairman of the committee that drafted and reported Article 3 of the Chicago Convention:

> It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of international air law even though not restated in the Chicago Convention.[205]

Of course, different rules apply to military aircraft unlawfully in foreign sovereign airspace or territory.[206] Under international law, military aircraft are prohibited from flying in a foreign nation's airspace or landing in its territory without special permission.[207]

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[200] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.1.2.
[201] UNCLOS, *supra* note 84, art. 30; COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.1.2.
[202] Milde, *Status of Military Aircraft*, *supra* note 175, at 153.
[203] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.2.2.
[204] Milde, *Status of Military Aircraft*, *supra* note 175, at 156.
[205] John Cobb Cooper, *A Study on the Legal Status of Aircraft, in* EXPLORATIONS IN AEROSPACE LAW 205, 243 (Ivan A. Vlasic ed., 1968).
[206] *See, e.g.*, Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559 (1953).
[207] Chicago Convention, *supra* note 83, art. 3(c).

B. "Civil Aircraft" versus "State Aircraft"

Article 3(a) of the Chicago Convention declares that the Convention applies only to civil aircraft and not to state aircraft.[208] The main drawback for states of having their aircraft subject to the Chicago Convention is that foreign officials would have the right to board and search their aircraft on landing and departure, and could demand to see the aircraft's certificates and other documents required by the Convention.[209] However, states are not likely to submit their military aircraft to external control solely to permit them to benefit from the privileges afforded by the Chicago Convention.[210]

The only provision in the Chicago Convention to address the distinction between civil aircraft and state aircraft is contained in Article 3(b), which states, "[a]ircraft used in military, customs and police services shall be deemed to be state aircraft." As several commentators have observed, because of the word "deemed," Article 3(b) is not a definition of state aircraft.[211] It merely provides a rebuttable presumption that an aircraft *used* in certain activities at a particular time will be *deemed* to be a state aircraft.[212] According to the commentators,

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[208] *Id.* art. 3(a).

[209] *Id*. art. 16. For a list of required documents, and prohibited cargo and apparatus, see Articles 29–36 of the Chicago Convention.

[210] Civil aircraft enjoy significant rights under the Convention. Non-scheduled civil aircraft do not need permission from a contracting state to fly over or to make stops for non-traffic purposes in its territory. Chicago Convention, *supra* note 83, art. 5. State aircraft, on the other hand, are prohibited from flying over or landing in foreign territory without special permission. *Id.* art. 3(c). Contracting states must assist civil aircraft in distress in their territory, and they must permit the aircraft's owners or state of registry to do the same. *Id.* art. 25. States owe no such duty to foreign state aircraft. Civil aircraft enjoy protection against weapons recognized in Article 3 of the Convention, whereas state aircraft that stray over foreign territory can be shot down. Lissitzyn, *supra* note 206. If a civil aircraft has a mishap, the state of registry has a right to appoint observers to be present at the investigation of an accident and it has a right to receive a copy of the report and its findings. Chicago Convention, *supra* note 83, art. 26. There is no such right for state aircraft. None of the aviation security instruments apply to state aircraft. Hence, contracting states are not obligated to take appropriate measures to restore control of an unlawfully seized state aircraft to its commander, or to prosecute or extradite anyone who had tried to hijack or sabotage a state aircraft. *See* discussion *infra* Section IV.D.

[211] Milde, *Status of Military Aircraft*, *supra* note 175, at 161; Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 896 (2000-2001); Chester D. Taylor*, International Flight of Military Aircraft in Peacetime: A Legal Analysis,* 28 FED. B.J. 36, 48 (1968).

[212] CIVIL/STATE AIRCRAFT*, supra* note 95, ¶ 5.1.1; Milde, *Status of Military Aircraft*, *supra* note 175, at 163; Bourbonniere & Haeck, *supra* note 211, at 826; Taylor, *supra* note 211, at 48.

the presumption applies to the nature of the flight and not to the aircraft itself.[213] It is not based on the aircraft's design or technical characteristics, call sign, registration, or markings—all of which fall within the competence of its state of nationality. The Convention thus adopts a functional approach for the determination of its character as a state aircraft.[214] If an aircraft is used in any of three activities—military, customs, or police services—it will be deemed to be a state aircraft. No more precise definition of military aircraft is provided.[215]

C. Early Attempts to Define Military Aircraft

The Chicago Convention does not change the customary norms affecting the legal status of military aircraft.[216] Before the 1944 Convention was adopted, there were at least three efforts to define military aircraft in a written instrument. The first attempt was in 1910 at the Paris Conference.[217] Although the conference did not result in a convention, it produced several notable provisions. Article 40 defined public aircraft as "the aircraft employed in the service of the contracting State, and placed under the orders of a duly commissioned official of that State."[218] Article 41 required every military aircraft to bear the sovereign emblem of its state as its distinctive national mark.[219] In addition, Article 46 granted military aircraft the privilege of "extra-territoriality" if the aircraft was legitimately in or over the territory of a foreign state.[220] The crew members were also granted the same privileges, provided that they wore "uniforms while forming a distinct unit or carrying out their duties." The Paris Conference thus furnished clear definitions of public aircraft and military aircraft. If these provisions did not declare customary international law, then they helped form it.

The second effort to define military aircraft took place in 1919 with the signing of the Convention Relating to the Regulation of Aerial

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[213] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 5.3.2; Milde, *Status of Military Aircraft, supra* note 175 at 163; Bourbonniere & Haeck, *supra* note 211, at 904; Taylor, *supra* note 211, at 48.
[214] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 5.3.2; Milde, *Status of Military Aircraft, supra* note 175, at 163; Bourbonniere & Haeck, *supra* note 211, at 904; Taylor, *supra* note 211, at 48.
[215] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 2.2.1.
[216] Bourbonniere & Haeck, *supra* note 211, at 892.
[217] Taylor, *supra* note 211, at 39.
[218] *Id.*
[219] *Id.*
[220] *Id*.

Navigation (Paris Convention),[221] the forerunner to the Chicago Convention. The Paris Convention asserted that aircraft "exclusively employed in State service," to include military aircraft, would be "deemed" to be public aircraft[222] and "[e]very aircraft commanded by a person in military service detailed for that purpose shall be *deemed* to be a military aircraft."[223]

In 1923, a third attempt to define military aircraft was made in the Proposed Rules for the Regulation of Aerial Warfare, drafted by Commission of Jurists at the Hague.[224] Although the Hague Rules were never adopted in a convention, they "have always had great weight as a sound statement of the rules of international air law applicable in time of war."[225] While Article 2 of the Hague Rules holds that military aircraft are to be "considered" as public aircraft, Article 3 provides that "[a] military aircraft must carry an exterior mark indicating its nationality and its military character."

Several commentators have suggested that the reluctance to define military aircraft in a conclusive manner is attributable to "the ease in which a civil aircraft can be converted to military use and vice versa."[226] However, it is suggested that the fuller explanation can be traced back to the end of World War I, when the Allies in the Peace Treaties of 1919 prohibited Germany from acquiring a military or naval air force.[227] The Allies believed that a formal definition of military aircraft had to be rejected if they were to keep Germany from obtaining a military aviation. For two years the Allies kept confiscating aircraft which they ruled as "military" but which Germany claimed to be

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[221] Convention Relating to the Regulation of Aerial Navigation, 13 Oct. 1919, 11 L.N.T.S. 173 [hereinafter Paris Convention].
[222] *Id.* art. 30.
[223] *Id.* art. 31 (emphasis added).
[224] Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, art. 3, Feb. 17, 1923, [hereinafter Hague Rules of Aerial Warfare], *reprinted in* DIETRICH SCHINDLER & JIRI TOMAN EDS., THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 317 (4th ed. 2004).
[225] John C. Cooper, *National Status of Aircraft*, 17 J. AIR L. & COM. 292, 304 (1950); *see also* SCHINDLER & TOMAN, *supra* note 224, at 315 ("The rules were never adopted in legally binding form, but are of importance 'as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.").
[226] Milde, *Status of Military Aircraft*, *supra* note 175, at 155; Bourbonniere & Haeck, *supra* note 211, at 892.
[227] Milde, *Status of Military Aircraft*, *supra* note 175, at 154; Taylor, *supra* note 211, at 44.

"civil."[228] A commission was instructed to draw up rules to distinguish between the two types of aircraft. The commission originally reported that the task was impossible, "since civil aviation is very readily convertible to war purposes," but on further direction the commission drafted a set of regulations known as the "Nine Rules."[229] Eventually, the Allies recognized the manifest unfairness of imposing this set of regulations on German civil aviation, and the "Nine Rules" were abandoned as unworkable.[230]

The legal uncertainty concerning the definition of military aircraft (as well as other types of state aircraft) has since been perpetuated, at least in theory, by the inclusion of the definitional presumption in Article 3(b) of the Chicago Convention. The presumption was likely carried forward from the Paris Convention because the Chicago Convention was itself adopted near the end of World War II. Hence, the lack of a clear definition stems from a futile attempt to deny a former enemy a military aviation program.

D. The Need for Clarity

In 1993, the ICAO Council instructed the ICAO Secretariat to undertake a study on the interpretation of Article 3(b) on the subject of state and civil aircraft.[231] In its report, the ICAO Secretariat concluded that there are currently "no clearly generally accepted international rules, whether conventional or customary, as to what constitutes state aircraft and what constitute civil aircraft in the field of air law."[232] However, the Secretariat Study reaffirmed that "[t]he usage of the aircraft in question is the determining criterion [of a state aircraft]."[233]

The functional approach of Article 3 is unduly complicated. Professor Milde illustrates how the same aircraft under Article 3(b) may be a state/military aircraft in one situation and a civil aircraft in another:

> There is, e.g., an undocumented story of an unarmed F-18 piloted by a military officer cleared under a civil flight plan for flight to another country's civil airport to deliver a rare serum for a critically ill person—this

[228] Milde, *Status of Military Aircraft*, *supra* note 175, at 154; Taylor, *supra* note 211, at 44.
[229] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 2.1.3; Taylor, *supra* note 211, at 44.
[230] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 2.1.3; Taylor, *supra* note 211, at 44.
[231] ICAO, Doc. 9630-LC/189, LEGAL COMM., 29th SESS. REP., 4-15 ¶ 2.5 (July 1994).
[232] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 1.1.
[233] *Id*. ¶ 1.3.

> would be an example of a humanitarian "mercy flight" and the aircraft could claim civil status . . . . Another illustration of the possibly complicated status of the same aircraft is the case of USAF CT-43A (a military version of B-737-200), registration 31149 which crashed, on 3 April 1996, at Dubrovnik, Croatia; it carried VIP passengers and the Croatian accident investigation report expressly recognized the aircraft as "civil aircraft in accordance with Article 3 of the Convention" and not "as a flight for military purposes."[234]

Moreover, the transport of restricted cargo does not automatically transform a civil aircraft into a state aircraft under the Chicago Convention. The Convention implicitly recognizes that civil aircraft, with permission, may transport munitions and implements of war above the territory of a foreign state.[235]

The absence of a formal definition of state aircraft can be problematic, making it difficult to determine the Convention's scope for a particular flight, and it may also create uncertainty for the crew itself. Several countries frequently charter civil aircraft to carry military personnel and equipment for military purposes. When this occurs, the chartered plane still carries its civilian markings, but the decision on how to characterize the aircraft's flight varies by nation. For instance, Canada gives such flights a military call sign and issues "special identification cards to the civilian crew in order to offer the protection of the Geneva Conventions," without which "the opposing belligerent forces could treat the civilian personnel as spies if captured."[236] On the other hand, the United States as a matter of policy normally does not designate the chartered aircraft as a state aircraft.[237] If the chartered aircraft operates as a civil aircraft, it must follow the ICAO Rules of the Air.

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[234] Milde, *Status of Military Aircraft*, *supra* note 175, at 163 (footnote omitted).
[235] Chicago Convention, *supra* note 83, art. 35. In fact, Article 35 invites states to give due consideration to such recommendations as ICAO may make from time to time on what constitutes munitions and implements of war. *Id.*
[236] Bourbonnniere & Haeck, *supra* note 211, at 905 n.69.
[237] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 2.2.3.

E. Prevailing State Practice

The United States defines military aircraft as "all aircraft operated by commissioned units of the armed forces of a nation bearing the military marking of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline."[238] This same clear definition of a military aircraft appears verbatim in the *U.K Manual of the Law of Armed Conflict*.[239] The definition mirrors the definition of a *warship* contained in the UNCLOS.[240]

> For the purpose of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.[241]

The definition of military aircraft contained in the U.S. *Commander's Handbook* and the *U.K. Manual* also appears verbatim in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* published in 1994.[242] The *San Remo Manual* was prepared under the auspices of the International Institute of Humanitarian Law and is the most contemporary and comprehensive restatement of the law of warfare at sea.[243] It was produced by a group of international lawyers and naval experts in a series of roundtables from 1986 to 1994. The *San Remo Manual* "is based on treaty law of continuing validity and State practice and takes into account developments in related areas of international law, in particular, the effect of the U.N. Charter, the 1982 Law of the Sea Convention, air law

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[238] *Id.* ¶ 2.2.1.
[239] UNITED KINGDOM, MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 12.10 (2004) [hereinafter U.K. MANUAL].
[240] UNCLOS, *supra* note 84, art. 29.
[241] *Id.*
[242] INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 13(j) (1995) [hereinafter SAN REMO MANUAL].
[243] *Id.* at Preface; Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT'L LAW 192, 193 (1995); SCHINDLER & TOMAN, *supra* note 224, at 1154.

and environmental law."[244] In 2004, the United Kingdom incorporated the provisions of the *San Remo Manual* into its *Manual of the Law of Armed Conflict*.[245]

F. The Definition of a "Civil Aircraft"

Despite its ambivalence, the ICAO Secretariat Study reached an important conclusion with respect to the definition of "state aircraft": the three activities—military, customs, and police services—are the only types of activities that would qualify an aircraft to be deemed a state aircraft.[246] Aircraft performing other types of public services would likely be treated as civil aircraft. This conclusion is significant because civil aircraft do not enjoy the immunities of state aircraft.

In support of its conclusion, the ICAO Secretariat Study referred to the 1919 Paris Convention, which treated "all state aircraft other than military, customs and police aircraft" as "private aircraft."[247] Contemporary public air law instruments, such as the 1963 Tokyo Convention and the 1970 Hague Convention, each contain a provision stating that the conventions do not apply to aircraft used in "military, customs or police services."[248] These conventions do not refer to "state aircraft" as such.

In a 1949 article, two years after the Chicago Convention's entry into force, Professor John Cooper wrote:

> [The] . . . Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any other of the several attempts, which had been made in the past to define such classes as, for example, military aircraft. *The determining factor . . . is whether a particular aircraft is, at a particular time*, *actually used in* <u>*one of the three special*</u>

[244] SAN REMO MANUAL, *supra* note 242, at Preface.
[245] *See* U.K. MANUAL, *supra* note 239 (using citations to the SAN REMO MANUAL).
[246] STATE/CIVIL AIRCRAFT, *supra* note 95, ¶¶ 5.2.3 – 5.2.5; CHENG, *supra* note 185, at 112.
[247] Paris Convention, *supra* note 221, art. 30.
[248] Tokyo Convention, *supra* note 159, art. 1(4); Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 22 U.S.T. 1641, art. 3(2) [hereinafter Hague Convention].

> *types of services*. If so, it is a "state aircraft." Otherwise, it is a "civil aircraft."[249]

Of course, the Chicago Convention also does not define civil aircraft, but it is undisputed that all other aircraft, including state-owned aircraft in commercial service, are implicitly considered to be civil aircraft for purposes of the Chicago Convention.[250] For instance, Article 79 of the Chicago Convention expressly mentions state-owned and partly state-owned commercial air transport undertakings as falling within the ambit of international civil aviation.[251] The *San Remo Manual* uses a similar definition for civil aircraft for purposes of the law of armed conflict at sea.[252]

Because international law treats state and civil aircraft differently, the status of each type of aircraft should be easily ascertainable. In the event of an interception, the intercepting aircraft and the intercepted aircraft both have an interest in clear guidelines. Only certain types of state aircraft—military, customs, and police aircraft—may legally intercept civil aircraft over the high seas.[253] If the intercepting aircraft is not an appropriate state aircraft, then it is a pirate aircraft, and the aircraft being intercepted may justifiably ignore, resist, or flee the intercepting aircraft.[254] State aircraft used in military, customs, and police services are themselves immune from interceptions by other states.[255]

V. LAWFUL INTERCEPTIONS OVER THE HIGH SEAS

As mentioned in Section II, no state may prevent the aircraft of other states from using the high seas for any "lawful purpose."[256] However, the lawful use of the high seas presupposes adherence to the

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[249] John C. Cooper, *National Status of Aircraft*, 17 J. AIR L. & COM. 292, 309 (1950) (emphasis added).
[250] Bourbonniere & Haeck, *supra* note 211, at 901 n.63.
[251] *See also* CHENG, *supra* note 185, at 112.
[252] SAN REMO MANUAL, *supra* note 242, ¶ 13(l) (defining civil aircraft as all aircraft other than a military, customs, or police aircraft).
[253] *See* Chicago Convention, *supra* note 83, art. 3(b) (describing state aircraft as aircraft used in the military, customs, or police services); UNCLOS, *supra* note 84, arts. 107, 110(4), 110(5) (permitting seizure or the right of visit only by warships or military aircraft, or other duly authorized ships or aircraft "clearly marked and identifiable as being on government service").
[254] For a discussion of pirate aircraft, see *supra* Section IV.C.
[255] UNCLOS, *supra* note 84, arts. 95, 96, 110(4).
[256] CHURCHILL & LOWE, *supra* note 116, at 204.

obligations which international law places upon states.[257] The high seas are expressly reserved for "peaceful purposes."[258] Whenever civil aircraft over the high seas threaten the peace and security of any state or of the international community in general, international law justifies the use of force to prevent or remove the threat. Because interceptions are potentially hazardous in all cases, they may only occur in certain situations and according to specific norms. Here as elsewhere, the central problem remains the permissible use of force and its limits.[259]

A. Self-Defense under the United Nations Charter

Self-defense is the principal ground on which a state may justifiably use force. Article 51 of the U.N. Charter recognizes and preserves the customary right of every nation to defend itself: "Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . . ."[260]

As Article 51 acknowledges, every state may resort to the use of force in self-defense whenever an "armed attack" occurs.[261] In the

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[257] MCDOUGAL & BURKE, *supra* note 122, at 805.
[258] UNCLOS, *supra* note 84, art. 88.
[259] MCDOUGAL & FELICIANO, *supra* note 47, at 122.
[260] U.N. Charter art. 51 (emphasis added).
[261] The International Court of Justice left open the issue of whether a broader right of anticipatory self-defense exists under Article 51 of the U.N. Charter. Nicaragua, *supra* note 60, at 103, ¶ 194. There is considerable debate about whether Article 51 has modified—or can modify—the pre-existing customary right of self-defense. Philip Jessup interpreted Article 51 as limiting the right of self-defense to instances following an armed attack:

> This restriction in Article 51 very definitely narrows the freedom of action which states had under traditional law. A case could be made out for self-defense under traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.

PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1948). Dinstein similarly calls for a restrictive reading of Article 51, wondering "what may be the point of stating the obvious (i.e., that an armed attack gives rise to the right of self-defense) if not to apply the maxim *expressio unius est exclusion alterius*, latin for 'the expression of one thing is the exclusion of another.'" DINSTEIN, *supra* note 54, at 185. He doubts that "the right of self-defence may be classified as *jus cogens* (thus curtailing the freedom of States to contract out of it)," stating that a treaty like the Charter can modify the customary right of self-defense. *Id.* Brownlie similarly posits that Article 51 succeeded in changing

global war on terror, the existence of repeated armed attacks by Al Qaeda operatives against the United States and its allies is undisputed. In such circumstances, a state's right to use force against its attackers wherever they may be is similarly incontestable.

Although every state may legitimately act in self-defense, its use of force must comply with the laws of armed conflict and, in particular, with the principles of necessity and proportionality. The use of force in self-defense must be directed towards identifiable military objectives in repelling the armed attack or the continuing threat of an armed attack.[262] It must also be "limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat

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customary international law. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 274 (1963) [hereinafter BROWNLIE II]. On the other hand, Myres McDougal wrote that "it is common record in the preparatory work that Article 51 was not drafted for the purpose of deliberately narrowing the pre-existing customary-law permission of self-defense against imminent attacks." MCDOUGAL & FELICIANO, *supra* note 47, at 235. In urgent circumstances, a state may need to exercise the right of self-defense instead of bringing the matter before the Security Council. In such circumstances, "every State must be the judge in its own cause, since it would be impossible to await the decision of an international authority." JESSUP, *supra* note 261, at 164. It is here that the lines between preparation and attack become blurred and arbitrary. In exercising its right of self-defense, the state must necessarily make an independent judgment as to whether it is under attack and what kind of response is justified.

When the international community renounced aggressive war as an instrument of national policy in the ill-fated 1928 Treaty of Paris, also known as the Kellogg-Briand Pact, General Pact for the Renunciation of War, Aug. 27, 1928, *reprinted in* 22 AM. J. INT'L L. SUPP. 171-73 (1928), the United States declared the proposed Treaty would not in any way restrict or impair the right of self-defense:

> That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.

U.S. STATE DEPARTMENT, IDENTIC NOTES OF THE GOVERNMENT OF THE UNITED STATES RELATING TO THE MULTILATERAL TREATY FOR THE RENUNCIATION OF WAR (1928), *reprinted in* 22 AM. J. INT'L L. SUPP. 109-110 (1928). The speed with which a decision to act must be made depends on the nature of the threat. For example, there is universal agreement that the definition of an armed attack includes "not simply the dropping of an atomic bomb, but also certain steps in themselves preliminary to such action." JESSUP, *supra* note 261, at 166-67. Because the speed of a modern aircraft is so great, the requirement that there be "imminence of danger in point of time" before a state resorts to self-defense "is no longer necessary to the doctrine of necessity." JOHN TAYLOR MURCHISON, THE CONTIGUOUS AIRSPACE ZONE IN INTERNATIONAL LAW 75 (1956).

[262] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 4.3.2(1).

of attack and to ensure the continued safety of U.S. forces."[263] In this respect, belligerents must distinguish between "combatants" and "noncombatants" to prevent unnecessary suffering, especially among innocent civilians.[264]

It is interesting to note that, following the September 11 attacks, the U.S. Congress authorized the President "to use all necessary and appropriate force" against those whom he determined had a role in the attacks, "in order to *prevent* any future acts of international terrorism against the United States."[265] The United States was also careful to inform the Security Council that it had initiated action in Afghanistan solely for the purpose of preventing and deterring "further attacks on the United States."[266] Hence, in this conflict, the United States assumed the role of a belligerent.

A belligerent can lawfully attack its enemy's military and economic assets, including enemy military aircraft.[267] Civil aircraft—especially civil airliners—are generally exempt from attack, even during an armed conflict.[268] Article 3 *bis* of the Chicago Convention declares that "every State must refrain from resorting to the use of weapons against civil aircraft in flight."[269] However, this same provision also makes clear that it must not be "interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."[270] The Chicago Convention implicitly recognizes the inherent right of every state to act in self-defense in accordance with Article 51 of the U.N. Charter; accordingly, "traditional belligerent rights are thereby also retained."[271] In any case, Article 89 of the Chicago Convention states, "[i]n case of war, the provisions of this Convention shall not affect the freedom of any of the contracting States affected, whether as belligerents or as neutrals."

Thus civil aircraft are not in all circumstances exempt from attack. They may lose their exemption if, "by their nature, location, purpose or use [they] make an effective contribution to military action" and their "total or partial destruction, capture or neutralization, . . .

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[263] *Id.* ¶ 4.3.2(2).
[264] *Id.* ¶ 5.3.
[265] Authorization for Use of US Armed Forces, *supra* note 16 (emphasis added).
[266] Letter dated 7 October 2001, *supra* note 34.
[267] SAN REMO MANUAL, *supra* note 242, ¶¶ 65-66.
[268] *Id.* ¶¶ 53(c), 62.
[269] Chicago Convention, *supra* note 83, art. 3 *bis* (a).
[270] *Id.*
[271] Doswald-Beck, *supra* note 243, at 205.

offers a definite military advantage."[272] Of course, a civil aircraft cannot lawfully be attacked if the expected loss of innocent life on board the aircraft "would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole." [273] It

[272] SAN REMO MANUAL, *supra* note 242, ¶ 40; *see also id.* ¶¶ 62-64. One commentator considers the issue of "whether the United States has a right to destroy a civil aircraft that ignores ADIZ requirements and eventually enters U.S. airspace." Major Stephen M. Shrewsbury, *September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty*, 68 J. AIR. L. & COM. 115, 140 (2003). While he suggests that it may be "difficult to imagine any circumstance that would warrant the destruction of a foreign civil aircraft in a U.S. ADIZ outside of U.S. national airspace," he also asserts "the use of force against an aircraft carrying a known weapon of mass destruction may be an exception under the doctrine of anticipatory self-defense." *Id.* at 140 n.135. Brownlie similarly allowed that, "in view of the destructive power of even a single nuclear weapon carried by an aircraft," a state could justifiably shoot down without warning an unidentified fast aircraft penetrating deeply into its airspace "although no actual attack has occurred." BROWNLIE II, *supra* note 261, at 373-74.

[273] SAN REMO MANUAL, *supra* note 242, ¶ 46(d). This provision is nearly identical to Article 57(2)(iii) of Protocol Additional to the Geneva Conventions of 12 August of 1949 and the Relation to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Additional Protocol I] (stating belligerents must refrain from launching an attack when the "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, . . . would be *excessive in relation to the concrete and direct military advantage anticipated*" (emphasis added)). Additional Protocol I reflects customary law, although the United States has chosen not to ratify it. COMMANDER'S HANDBOOK, *supra* note 115, ¶ 5.4.2; *see also* U.S. DEPARTMENT OF DEFENSE REPORT TO CONGRESS ON THE CONDUCT OF THE PERSIAN GULF WAR–APPENDIX ON THE ROLE OF THE LAW OF WAR (1992) [hereinafter REPORT TO CONGRESS], *reprinted in* 31 I.L.M. 612, 624-27 (1992) (confirming that many provisions of Additional Protocol I codify the customary practice of nations). In 1992, the U.S. Department of Defense denied that Article 52(3) of Additional Protocol I was such a codification. *Id.* at 627. Article 52(3) states, "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." Additional Protocol I, *supra* note 273, art. 52(3). The United States criticized the provision for shifting "the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts." REPORT TO CONGRESS, *supra* note 273, at 627. If Article 52(3) of Additional Protocol I or Article 3 *bis* of the Chicago Convention do not reflect customary international law, then they may cause a legal interoperability problem between the United States and its allies. For instance, Canada shares responsibility for the common defense of North America and, in particular, for the air approach to North America. *See, e.g.*, North American Aerospace Defense Command, *About Us*, http://www.norad.mil/about_us.htm (discussing the organization's bi-national missions of aerospace warning and aerospace control for North America). Aircraft going to the United States from Europe often fly through Canadian airspace. Canada has joined every major U.S. ally in ratifying Additional Protocol I and Article 3 *bis* of the Chicago Convention. *See* Canada Treaty Information on Protocol Additional to the

follows that civil aircraft can lawfully be attacked only to secure a greater military advantage or to prevent a greater loss of innocent life, and even then solely as a last resort, when all other measures have failed to deter the civil aircraft from its intended course.

Civil aircraft in flight become legitimate targets whenever they are converted into weapons, as the hijackers employed them in the September 11, 2001 attacks, or when they transport troops or munitions—or terrorists and WMD under their control.[274] During an armed conflict a civil aircraft may also be attacked if its refuses to obey an order "to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield."[275] The relevance of this last provision is illustrated by the destruction of a Libyan airliner by Israeli fighters on February 21, 1973, resulting in the death of 106 people.[276] The airliner had strayed over the Israeli-occupied Sinai Peninsula, flying over sensitive military installations and a key airfield.[277] The Israeli fighters initially approached the aircraft and repeatedly instructed it to land, but the airline pilot indicated that he was flying on and would not land.[278] In justifying its action, the Israeli government invoked security considerations, stating, "the more the pilot objected and tried to get away, the more suspicious he became."[279]

By contrast, Germany's constitutional court in 2006 struck down a law allowing the military to shoot down passenger planes suspected of being hijacked for terror attacks.[280] The German law was enacted following the attacks of September 11.[281] The judge found that the law infringed the right to life and human dignity, and violated the constitutional guarantee barring the military services from being used

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Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=102898 (listing parties to the treaty); Canada Treaty Information on Protocol Relating to Amendment to the Convention on International Civil Aviation (Article 3 *bis*), http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=103574. For an explanation of why the United States should ratify Additional Protocol I, see George H. Aldrich, *Prospects for United States Ratification of the Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1 (1991).

[274] SAN REMO MANUAL, *supra* note 242, ¶¶ 63(a), (b).

[275] *Id.* ¶ 63(e).

[276] Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 288 (1985).

[277] *Id.*

[278] *Id.*

[279] *Id.* at 289.

[280] *German Court Rejects Hijack Law*, BBC NEWS, Feb. 15, 2006, http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4715878.stm.

[281] *Id.*

for domestic security.[282] The German pilots' union was also against the law, saying it could lead to a tragic mistake.[283] Other critics of the law also argue that "the government has no right to kill those on the plane to try to save the lives of others."[284] This argument makes two assumptions. It denies that a government also has a duty to protect its citizens on the ground, and it presumes that government inaction would save the lives of those on board the aircraft. In exercising its right of self-defense, the government must necessarily make an independent judgment as to whether it is under attack and what kind of response is justified.

When a state exercises its right of self-defense, it must immediately notify the Security Council of this fact under Article 51 of the U.N. Charter. A state that fails to report its use of force to the Security Council assumes the risk of later being found not to have acted in self-defense.[285] In the *Nicaragua* case, the International Court of Justice rejected the U.S. claim that it had been acting in collective self-defense in providing arms and logistical support to the *contra* forces, partly because the United States had not reported its actions to the Security Council as required by Article 51. By contrast, the United States met this requirement when it reported to the Security Council on October 7, 2001, that it had "initiated action that day against the Taliban-led Afghanistan in response to the armed attack of 9/11."[286]

In any event, international terrorists do not openly carry weapons or fly in aircraft marked as "enemy aircraft." They are more likely to misuse aircraft registered in the state of an ally or fly a domestic aircraft, as was the case in the 9/11 attacks.

B. Enforcement Actions and Neutrality Under the United Nations Charter

The U.N. Charter creates a system of collective security. The Charter vests the Security Council with the responsibility to maintain or restore international peace and security.[287] To this end, the Council may render a decision about "the existence of any threat to peace, breach of the peace, or act of aggression."[288] It may therefore take sides in a

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[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Nicaragua*, *supra* note 60, at 121, ¶ 235.
[286] Letter dated 7 October 2001, *supra* note 34.
[287] *See generally*, U.N. Charter, Chapter VII.
[288] U.N. Charter art. 39.

dispute, and denounce the breach as well as the actor, as it has on numerous occasions.[289] The Security Council may also decide on a wide range of measures, including the interception of civil aircraft.[290]

The Security Council has occasionally authorized states to intercept ships on the high seas, as for example, when in 1966 it authorized Great Britain to enforce an oil embargo against Rhodesia.[291] In relying upon this authorization, Great Britain boarded or fired shots at two Greek merchant ships and one French tanker.[292] In 1990, the Security Council authorized member states to use "all necessary means" to compel Iraq to comply with its earlier resolutions with respect to Kuwait.[293] An earlier authorization permitted member states to intercept all shipping to and from Kuwait in the Persian Gulf "in order to inspect and verify their cargoes and destinations" to ensure their compliance with other resolutions.[294] In 1992, the Council adopted yet another resolution with respect to shipping destined for the Federal Republic of Yugoslavia.[295]

An enforcement action may also be taken under regional arrangements or by regional agencies, such as the Organization of American States. During the Cuban missile crisis in 1962, the Organization of American States authorized the blockade of Cuba under the authority of Chapter VIII of the U.N. Charter.[296]

In the current war on terror, the U.N. Security Council condemned the attacks of September 11 in two resolutions—Resolution

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[289] *See, e.g.,* U.N. SCOR, 28th Sess., 1740th mtg., U.N. DOC. S/RES/337 (1973), *available at* http://daccess-ods.un.org/TMP/5859179.html (condemning Israel for forcibly diverting from Lebanon's airspace a Lebanese airliner); U.N. SCOR, 51st Sess., 3683rd mtg., U.N. DOC. S/RES/1067 (1996), *available at* http://daccess-ods.un.org/TMP/958198.3 (condemning the shootdown of two U.S. civil aircraft by Cuba).

[290] U.N. Charter arts. 39, 41.

[291] U.N. SCOR, 21st Sess., 1277th mtg., U.N. DOC. S/RES/221 (1966), *available at* http://daccess-ods.un.org/TMP/3030737.html.

[292] CHURCHILL & LOWE, *supra* note 116, at 423.

[293] U.N. SCOR, 45th Sess., 2963rd mtg., U.N. DOC. S/RES/678 (1990), *available at* http://daccess-ods.un.org/TMP/4946161.html. Some commentators have stated that it is unclear whether Resolution 678 was the sole basis for the use of force against Iraq or whether it merely 'approved' the exercise of collective self-defense. CHURCHILL & LOWE, *supra* note 116, at 423.

[294] U.N. SCOR, 45th Sess., 2938th mtg., U.N. DOC. S/RES/665 (1990), *available at* http://daccess-ods.un.org/TMP/9961158.html.

[295] U.N. SCOR, 47th Sess., 3137th mtg., U.N. DOC. S/RES/787 (1992), *available at* http://daccess-ods.un.org/TMP/5071411.html [hereinafter U.N. S.C. Res. 787].

[296] CHURCHILL & LOWE, *supra* note 116, at 217, 425-26. However, the Security Council did not authorize the OAS to impose the quarantine on Cuba, leading two commentators to conclude that "[w]hen powerful States [like the United States] feel strongly enough, legal rules are unlikely to be effective constraints upon their actions." *Id.* at 425.

1368[297] and Resolution 1373.[298] These resolutions also called on all states to work together to prevent similar attacks in the future.[299] When the Security Council makes a decision as to a threat, breach of the peace, or an act of aggression, all U.N. member states have a legal obligation to act in accordance with the decision.[300] States may not rely on "the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council."[301] Hence, every state must refrain from giving any assistance or sanctuary to terrorists, and it must not permit them to operate from its territory.[302] Furthermore, every state should readily consent to the interception of its civil aircraft when those aircraft are reasonably suspected of transporting terrorists or WMD.

If a state is unable or unwilling to prevent terrorists from misusing civil aircraft bearing its nationality, international law should permit threatened states to take self-defensive action against the offending aircraft. The law of armed conflict permits a belligerent to intercept or attack neutral civil aircraft performing unneutral service to

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[297] UN S.C. Res. 1368, *supra* note 24.
[298] UN S.C. Res. 1373, *supra* note 28.
[299] *See* text accompanying notes 24–31.
[300] U.N. Charter art. 25.
[301] SAN REMO MANUAL, *supra* note 242, ¶ 8. When the Security Council fails to act, states may declare their neutrality and revert to the traditional law of neutrality. The traditional law of neutrality, which gives rise to concrete rights and duties for both neutrals and belligerents, developed during the 17th and 18th centuries. BROWNLIE II, *supra* note 261, at 402. The law emerged in an era when belligerents, retaining the practical ability to impose duties on non-participants, did not want to provoke the non-participants into closer ties with their enemy. Howard J. Taubenfeld, *International Actions and Neutrality*, 47 AM. J. INT'L L. 377 (1953). The non-participants, on the other hand, insisted on certain rights but also did not want to be seen as aiding the enemy in illegitimate ways. *Id.*

For example, during the Seven Years' War between Great Britain and France from 1756 to 1763, British war strategy partly depended on the interception of Dutch merchant ships on the high seas in search of contraband destined for France, without unduly alienating the Dutch who traded with France. Tara Helfman, *Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War*, 30 YALE J. INT'L L. 549, 572 (2005). Prize courts in the United Kingdom heard cases on whether Dutch vessels and cargo had been improperly seized on the high seas. In the process, these courts created and refined several important doctrines, such as the doctrine of "free ships, free goods" and the doctrine of "continuous voyage," *id.* at 550, 581-84, the latter doctrine having special relevance to the current global war on terror. *Id.* at 586. The doctrine of "continuous voyage" required a merchant ship to account for all intermediate stops during the course of its voyage, including to enemy ports not displayed on the bills of lading, thereby revealing the cargo's true origin and destination. *Id.* at 584.
[302] Hague Rules of Aerial Warfare, *supra* note 224, arts. 43-45.

the same extent and for the same reasons as enemy civil aircraft contributing to the war effort.[303]

C. Piracy and the Concept of *Hostes Humani Generis*

Every state has a right—indeed a duty—to act against pirates, even if not directly affected by the piratical act.[304] The basic idea behind the traditional law of piracy is that pirates disrupt trade and render the high seas unsafe. Pirate ships were historically stateless, operating outside the exclusive authority of any state.[305] Because piracy posed a serious threat, pirates became the enemy of all humanity, or *hostes humani generis*. Under customary international law, every state can punish individual pirates and seize their aircraft or ship, even if the aircraft or ship may have the nationality of a foreign state. This universal right is the only instance of such extensive competence granted in peacetime to every state and it marks a clear exception to the exclusivity of flag-state jurisdiction.[306]

The UNCLOS defines piracy as any illegal act of violence on the high seas or outside the jurisdiction of any state committed *for private ends* by the crew or the passengers of a private ship or aircraft against *another* ship or aircraft.[307] This definition conforms to the traditional law of piracy, which requires the involvement of at least two aircraft (or vessels)—pirate and victim.[308] Thus, piracy is different from a hijacking, which involves the attempt by persons already on board to gain control over the aircraft or vessel.

The *Santa Maria* incident highlights the requirement that the piracy be undertaken for private, and not political, ends. When the Portuguese liner *Santa Maria* with its 560 passengers disappeared in the Caribbean in January 1961, it was initially believed that pirates were responsible for its disappearance. But after learning that the ship had been hijacked by members of a rebel group engaged in an armed struggle with Portugal and Spain, several nations, including the United States, withdrew their earlier assertions that the *Santa Maria* had been the victim of piracy.[309] Some commentators have suggested that the

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[303] *See* SAN REMO MANUAL, *supra* note 242, ¶¶ 70, 125.
[304] CHURCHILL & LOWE, *supra* note 116, at 209.
[305] MCDOUGAL & BURKE, *supra* note 122, at 813.
[306] *Id.* at 876.
[307] UNCLOS, *supra* note 84, art. 101(a); *see also* HSC, *supra* note 109, art. 15.
[308] MCDOUGAL & BURKE, *supra* note 122, at 814; CHURCHILL & LOWE, *supra* note 116, at 210.
[309] MCDOUGAL & BURKE, *supra* note 122, at 821-22.

hijackings were undertaken for private, and not political, ends because the rebel leader did not hold a public office.[310] Yet the failure of a rebel leader to hold public office "has never been an accepted criterion for distinguishing private from political objectives."[311]

Nevertheless, "[p]erhaps it is time, definitional problems aside, to label the terrorist *hostes humani generis*—the enemy of all humanity—and allow any nation to capture and punish him or her in the interest of all."[312] An armed attack upon a state by terrorists "from an area outside the jurisdiction of all States, to wit, the high seas or outer space," should constitute piracy under international law.[313] A terrorist organization like Al Qaeda operates in many nations, making it difficult for any state, without the cooperation of all the others, to combat it. Such is the rationale under international law for permitting all nations to combat piracy.[314] As Philip Jessup observes:

> Accepting the hypothesis that individuals are directly bound by international law would result in the conclusion that the individual or individuals responsible for such an [armed] attack would themselves be liable to punishment under international law.[315]

In consequence, international law should recognize the competence of any state to punish the illegal act, as it does today in trials for piracy.[316]

The Security Council has, through its resolutions, in effect declared present-day terrorists *hostes humani generis*.[317] Every state is thus duty-bound to cooperate in the fight against terrorists and should permit the interception of its civil aircraft when they are reasonably suspected of transporting terrorists or WMD. If circumstances are such that the consent of the state of registry cannot be readily obtained, the state whose aircraft is intercepted would be hard pressed to complain if the interception turns out to be justified, as was the case when the

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[310] *See, e.g.*, C.G. Fenwick, *"Piracy" in the Caribbean*, 55 AM. J. INT'L L. 426, 428 (1961).
[311] MCDOUGAL & BURKE, *supra* note 122, at 822-23.
[312] Borkowski, *supra* note 95, at 770 (footnote omitted).
[313] DINSTEIN, *supra* note 54, at 205.
[314] Borkowski, *supra* note 95, at 770 n.80.
[315] JESSUP, *supra* note 261, at 168.
[316] *Id. Contra* Joyner, *supra* note 54, at 532 (describing the effort to equate WMD trafficking with piracy as it is defined in the UNCLOS, Article 101, as totally implausible).
[317] *See* U.N. S.C. Res. 1368, *supra* note 24; U.N. S.C. Res. 1373, *supra* note 28.

United States intercepted Egypt Air Flight MS 2843.[318] Although President Mubarak publicly condemned the interception as an act of piracy, Egypt did not bring the matter before the Security Council or ICAO; it could only complain if the interception had somehow unnecessarily endangered the lives of innocent passengers and crew on board the aircraft.

D. Hijacking and Other Crimes Committed on Board Aircraft

Public air law furnishes additional authority for states to intercept foreign civil aircraft over the high seas. The most prominent reason concerns hijacking, the method used by the September 11th terrorists. According to the Tokyo Convention, hijacking includes any unlawful interference, unlawful seizure, or wrongful control of an aircraft,[319] and provides universal jurisdiction for such offenses. Whenever a hijacking has occurred or is about to occur, contracting states have an obligation to take "all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."[320] Every contracting state is thus duty-bound to take "all appropriate measures," without regard to whether the state has any connection to the hijacked aircraft or to the crime itself. The state in whose territory the hijacked aircraft has landed has both the jurisdiction and the obligation, "without exception whatsoever" to prosecute the hijackers or to extradite them to a state willing to prosecute.[321] The same is true for any state where the alleged offenders may be present.[322]

In addition, the Tokyo Convention lists five circumstances in which a state may "interfere" with a foreign aircraft in flight.[323] Article 4 of the Convention provides:

> A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

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[318] *See* text accompanying notes 95–103.
[319] Tokyo Convention, *supra* note 159, art. 11(1); Hague Convention, *supra* note 248, art. 1.
[320] Tokyo Convention, *supra* note 159, art. 11(1); Hague Convention, *supra* note 248, art. 9.
[321] Hague Convention, *supra* note 248, arts 4, 7, 8.
[322] *Id.* art. 4(2).
[323] Tokyo Convention, *supra* note 159, art. 4.

> (a) the offense has an effect on the territory of such State;
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> (b) the offense has been committed by or against a national or a permanent resident of such State;
>
> (c) the offense is against the security of such State;
>
> (d) the offense consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
>
> (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

One commentator argues that this provision only permits interceptions by a state whose territory is actually being overflown by the foreign aircraft, noting that the jurisdictional bases listed in subparagraphs (a) and (d) can only be met if the foreign aircraft enters the territorial airspace of the state making the interception.[324] The commentator concludes that "on the high seas and *terra nullius*, ships and aircraft are subject to the exclusive jurisdiction of the flag States, and save in the case of piracy, self-defense or a treaty obligation, no other State can exercise jurisdiction over such ships and aircraft."[325] While this last statement accurately describes customary international law, it ignores the fact that an international agreement may confer additional rights and obligations on the contracting states.

Unlike Article 27 of the UNCLOS,[326] which addresses a foreign ship's passage through the coastal state's territorial waters, Article 4 of the Tokyo Convention does not specifically refer to the airspace of the intercepting state. Though the plain language of Article 4 would permit its application to foreign aircraft anywhere in the world, it would admittedly not allow interference with aircraft over a foreign state's territory because that would lead to a violation of the foreign state's airspace.

Subparagraphs (b) and (c) of Article 4 of the Tokyo Convention contain elements of general principles of international law which have enabled states to exercise their criminal jurisdiction over serious

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[324] SHUBBER, *supra* note 171, at 85-86.
[325] *Id.* at 85.
[326] UNCLOS, *supra* note 84, art. 27 (right of passage through territorial waters).

offenses committed beyond their territory. Subparagraph (b) would permit a state to intervene against a foreign aircraft in flight if the crime committed on board the aircraft was committed by or against a national or permanent resident of the intercepting state. This provision contains elements of both the "nationality" and the "passive personality" principles. The "nationality" principle is one in which states assert criminal jurisdiction over their own nationals or permanent residents who commit serious crimes abroad.[327] On the other hand, the "passive personality" principle is one in which states assert jurisdiction over aliens abroad for having harmed one of their nationals or permanent residents.[328] The latter principle is much criticized as an unlawful basis for the exercise of a state's extraterritorial jurisdiction.[329]

Subparagraph (c) of Article 4 reflects the "protective" or "security" principle, a well-recognized principle in which "[n]early all states assume jurisdiction over aliens for acts done abroad which affect the security of the state."[330] This principle is invoked in cases affecting a vital interest of the state, such as its credit or immigration. Thus, states invoke the "protective" or "security" principle to combat counterfeiting of currency or to halt illegal immigration on the high seas.[331]

As a practical matter, most states lack the ability to intercept foreign aircraft far from their territory. Only a few nations possess the means to intercept foreign aircraft anywhere in the world. In addition, it is unlikely that a state would decide to intercept a foreign aircraft over the high seas in the absence of a compelling reason, such as in self-defense or to protect a vital interest. Public air law adequately covers offenses such as hijacking, sabotage, and any other crimes on board aircraft. The Tokyo and the Hague Conventions supply a notable exception to the principle of exclusive flag-state jurisdiction over the high seas, at least as far as the interception of civil aircraft is concerned.

E. Misuse of Civil Aviation by States

Article 4 of the Chicago Convention declares that every contracting state "agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention." These aims are

[327] BROWNLIE, *supra* note 38, at 301-02; SHUBBER, *supra* note 171, at 77-79.
[328] BROWNLIE, *supra* note 38, at 302; SHUBBER, *supra* note 171, at 77-79.
[329] SHUBBER, *supra* note 171, at 79-80.
[330] BROWNLIE, *supra* note 38, at 302-03; *see also* SHUBBER, *supra* note 171, at 81-82.
[331] BROWNLIE, *supra* note 38, at 302-03.

succinctly stated in the Preamble to the Convention.[332] Professor Milde asserts, "Article 4 is of no relevance to the problem of criminal use of civil aviation (such as drug trafficking) since it refers only to the obligations . . . and . . . the acts of States."[333] Accordingly, a state may not invoke this provision as a justification for having interfered with a civil aircraft in flight because individuals acting in their private capacity misuse civil aviation.

However, nothing prevents a state from invoking Article 4 as a justification for interfering with a civil aircraft that has been misused by another state. Following the interception in 1985 of Egypt Air Flight MS 2843, the United States and the pilot of the Egyptian aircraft differed on whether the intercepted aircraft was a state aircraft or a civil aircraft.[334] The Egypt Air pilot considered the flight to be a civil flight, a "charter VIP flight,"[335] apparently in the mistaken belief that a civil aircraft could not be lawfully intercepted over high seas. On the other hand, the United States viewed the intercepted aircraft "as a state aircraft at the time of the interception."[336] Despite the Egyptian aircraft's exterior markings, the United States followed the functional analysis called for by Article 3(b) of the Chicago Convention,[337] referring to such factors as "the aircraft's exclusive state purpose and function of the mission, the presence of armed military personnel on

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[332] The Preamble states:

> WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world, yet its abuse can become a threat to the general security; and
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> WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;
>
> THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;
>
> Have accordingly concluded this Convention to that end.

Chicago Convention, *supra* note 83, at Preamble.

[333] Milde, *Misuse of Civil Aircraft*, *supra* note 184, at 122.

[334] *See* text accompanying footnotes 95-103.

[335] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 4.8.3 (1).

[336] *Id.*

[337] For a discussion of the difference between "state aircraft" and "civil aircraft," see *supra* Section III.B.

board, and the secrecy" surrounding the mission.[338] The refusal by Greece and Tunisia to permit the Egyptian aircraft to land in their territory suggested their belief that the aircraft was a state aircraft.[339]

Yet the interception of a foreign state aircraft over the high seas is a *per se* violation of international law. The U.S. position on the legal character of the Egypt Air flight is best understood as an effort to avoid having the dispute raised before the ICAO Council for resolution under the Chicago Convention.[340] Israel unsuccessfully attempted this same legal tactic following its interception of the Libyan Arab Airlines flight in 1986. When the matter was brought before the ICAO Council, Israel questioned the Council's competence to examine the issue on the basis that the Libyan aircraft was in fact a state aircraft.[341] The Council disagreed and voted to condemn Israel for committing "an act against international civil aviation in violation of the principles of the Chicago Convention."[342]

The essential difference between the U.S. and the Israeli interceptions is that the United States had successfully interdicted the transport of terrorists. Thus, even if the United States had been incorrect about the status of the Egyptian airliner, the attempt by Egypt to transport known terrorists was a rare instance in which a State had been caught misusing civil aviation in violation of Article 4 of the Chicago Convention. The transport of known terrorists on civil aircraft by any State is contrary to the fundamental purposes of the Chicago Convention.

F. Stateless Aircraft

The UNCLOS confers a universal right on all States to intercept Stateless aircraft over the high seas,[343] because such aircraft do not enjoy the protection of any State.[344] Similarly, an aircraft registered in

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[338] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 4.8.3 (1).
[339] Chicago Convention, *supra* note 83, art. 5 (permitting unscheduled flights to land for a non-commercial purpose without prior permission).
[340] For a discussion of dispute resolution before the ICAO Council, see *infra* Section VI.C.
[341] CIVIL/STATE AIRCRAFT, *supra* note 95, ¶ 4.8.3 (2).
[342] *Id.*
[343] UNCLOS, *supra* note 84, art. 110(1)(d).
[344] CHURCHILL & LOWE, *supra* note 116, at 214; COMMANDER'S HANDBOOK, *supra* note 115, ¶ 3.11.2.3 (noting that "because [stateless vessels] are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations").

more than one State may be treated as an aircraft without nationality.[345] The most obvious kind of aircraft that can be treated as Stateless is one without any markings or registration.[346] When an aircraft exhibits appropriate markings and is registered, the aircraft's registration is *prima facie* evidence of its nationality. Article 17 of the Chicago Convention states that "[a]ircraft have the nationality of the State in which they are registered."[347] However, an aircraft's registration may be changed from one State to another.[348] The Convention merely provides that an aircraft "cannot be validly registered in more than one State.[349] In the words of John Cobb Cooper: "Registration does not create nationality. It is simply an evidence of nationality, and nothing in the Chicago Convention should be read to the contrary."[350]

The UNCLOS requires the existence of a "genuine link" between the State of registration and the ship,[351] and, according to Brownlie, the same requirement applies to aircraft.[352] The requirement of a "genuine link" was recognized by the International Court of Justice in the *Nottebohm* judgment, where it declared that "nationality must correspond with the factual situation."[353] More recently, the Security Council decreed in Resolution 787, which permitted the interception of ships belonging to the Federal Republic of Yugoslavia, that any vessel owned or controlled by a Yugoslav national would be considered a Yugoslav vessel, "regardless of the flag under which the vessel sails."[354]

In the case of aircraft, the 1919 Paris Convention, which first codified public air law, provided that no aircraft could be registered in a State unless it belonged wholly to its nationals, with special provisions for aircraft owned by an incorporated company.[355] While a similar provision was not included in the Chicago Convention, nearly every

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[345] Chicago Convention, *supra* note 83, art. 18 (prohibiting dual registration of aircraft); *see also* UNCLOS, *supra* note 84, art. 92(2) (stating that a ship which sails under two or more flags may not claim the nationality of any of them).
[346] See Chicago Convention, *supra* note 83, art. 17 (linking the aircraft's nationality to its registration), art. 20 (requiring the display of marks).
[347] *Id*. art. 17.
[348] *Id.* art. 18.
[349] *Id.*
[350] Cooper, *supra* note 225, at 307.
[351] *See, e.g.,* UNCLOS, *supra* note 84, art. 91; *see also* HSC, *supra* note 109, art. 5(1).
[352] BROWNLIE, *supra* note 38, at 413, 472.
[353] Nottebohm, Second Phase (Liechtenstein v. Guatemala), 1955 I.C.J. Rep. 4 at 22. The Court denied Liechtenstein's attempt to assert a claim against Guatemala on behalf of a German national after hastily giving him citizenship. The Court held that there was no genuine connection between Liechtenstein and the German national.
[354] U.N. S.C. Res. 787, *supra* note 295, ¶ 10.
[355] Paris Convention, *supra* note 221, art. 7.

State requires that its aircraft be owned by its nationals.[356] As Ian Brownlie observes, "[*b*]*ona fide* national ownership, rather than registration or authority to fly the flag, provides the appropriate basis for protection of ships" and "aircraft."[357]

The UNCLOS also requires each State to "*effectively exercise its jurisdiction and control* in administrative, technical and social matters over ships flying its flag."[358] The same essentially applies to civil aircraft. The State of registry is thus the protector of its aircraft and the guarantor of their conduct.[359]

Some commentators object to the "genuine link" doctrine as undermining the exclusive competence of States to confer nationality on their vessels or aircraft.[360] The UNCLOS provides some support for this view. Article 94(6) of the Convention states:

> A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

The UNCLOS thus appears to leave the aggrieved State without a remedy. However, international law frowns upon the misuse of flags of convenience. Professor Bin Cheng suggests that the "genuine link" rule enunciated by International Court of Justice in the *Nottebohm* case should extend to ships and aircraft so as to exclude flags of convenience.[361] In fact, Article 21 of the Chicago Convention requires every contracting State "to supply to any other contracting State or to the International Civil Aviation Organization, *on demand*, information concerning the registration and ownership of any particular aircraft registered in that State."[362] Brownlie observes, "international law has a reserve power to guard against giving effect to ephemeral, abusive, and

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[356] *See, e.g.*, 49 U.S.C. § 44102 (2006) (requiring that all aircraft registered in the United States be owned by U.S. citizens or permanent residents, or by companies incorporated and doing business in the United States).
[357] BROWNLIE, *supra* note 38, at 398 n.167, 410, 472.
[358] UNCLOS, *supra* note 84, art. 94; *see also* HSC, *supra* note 109, art. 5(1) (emphasis added).
[359] Cooper, *supra* note 225, at 307.
[360] MCDOUGAL & BURKE, *supra* note 122, at 108-40.
[361] CHENG, *supra* note 185, at 131.
[362] Chicago Convention, *supra* note 83, art. 21 (emphasis added).

simulated creations."[363] Not surprisingly, the temptation to misuse flags of conveniences is greatest in time of war. While a civil aircraft bearing the marks of an enemy State is conclusive evidence of its enemy character,[364] a civil aircraft bearing the marks of a neutral State is only prima facie evidence of its neutral character.[365]

Any State may thus lawfully intercept foreign civil aircraft over the high seas when it has reasonable grounds to suspect its national character as displayed on the fuselage. In making the interception, it must comply with international norms derived from custom and treaties.

VI. THE REQUIREMENT OF "DUE REGARD" FOR THE SAFETY OF CIVIL AVIATION

States exercising their freedoms over the high seas must show "due regard" for the lawful interests of other States.[366] Article 3(d) of the Chicago Convention specifically requires that States, when issuing regulations for their State aircraft, will have "due regard" for the safety of navigation of civil aircraft.[367] Nowhere is the requirement for "due regard" more germane than when a State aircraft intercepts a civil aircraft over the high seas. The interception can occur during an armed conflict or in time of peace. In stating the requirement of "due regard," Article 3(d) both codifies an existing customary norm and creates a treaty obligation applicable in times of peace and during armed conflict.[368] However, international terrorism presents a new type of conflict in which "the concepts of both 'war' and 'peace' have become blurred and no longer lend themselves to clear definition."[369]

Whether the interception occurs during a combat operation or as part of a law enforcement measure, international law is undergoing a development in which the governing rules are converging into a single set of procedures. As this development has been underway for sometime, the emergence of a customary norm should not be surprising. Given the extraordinary sensitivity of the interception of civil aircraft over the high seas there is an obvious need for uniformity of standards.

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[363] BROWNLIE, *supra* note 38, at 467.
[364] SAN REMO MANUAL, *supra* note 242, ¶ 112.
[365] *Id.* ¶ 113.
[366] UNCLOS, *supra* note 84, art. 87(2); HSC, *supra* note 109, art. 2.
[367] Chicago Convention, *supra* note 83, art. 3(d).
[368] Bourbonniere & Haeck, *supra* note 211, at 912-13.
[369] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 4.1.

A. The Criterion of Reasonable Suspicion

Interceptions must be limited to particular aircraft reasonably suspected of engaging in a prohibited activity.[370] Traditionally, belligerents could systematically stop and search on the high seas all neutral ships and aircraft for contraband.[371] In the war on terror, however, the exercise of such a right on a global scale would be impractical, unnecessarily hazardous, and highly disruptive to international civil aviation.[372] The UNCLOS provides that a warship encountering a foreign ship on the high seas is not justified in boarding the ship unless the warship has *reasonable grounds* to suspect that the ship is engaged in a criminal activity or is a Stateless ship.[373] The UNCLOS also applies the same rule *mutatis mutandis* to a civil aircraft which may not be intercepted in the absence of *reasonable grounds* for suspecting its misuse. The *San Remo Manual* provides that in a conflict at sea a civil aircraft may be intercepted only when it is reasonably suspected of being subject to capture for engaging in prohibited activities.[374] Whatever the reason for the interception, it is now settled that the concept of "due regard" requires that the interception be based on reasonable grounds for suspicion.

The commentary to the *San Remo Manual* highlights a critical consideration:

> [T]hough there have to be reasons for suspicion they will, in general, have to be less compelling than in the case of vessels. An aircraft *per se* constitutes a considerable danger. If its character is not clearly established . . . the belligerent's interest in positive identification justifies the interception and/or diversion.[375]

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[370] Churchill and Lowe suggest that Article 51 of the U.N. Charter requires this result. CHURCHILL & LOWE, *supra* note 116, at 422-23.
[371] *Id.* at 422.
[372] In one year alone, France stopped and searched 4,775 ships on the high seas suspected of carrying arms to Algeria during the emergency of 1956-62, which triggered vigorous protests from affected states. *Id.* at 217.
[373] UNCLOS, *supra* note 84, art. 110(1).
[374] SAN REMO MANUAL, *supra* note 242, ¶ 125; *see also id.* ¶ 70 (prohibiting attacks on neutral civil aircraft unless they are "believed on reasonable grounds" to be carrying contraband).
[375] *Id.* ¶ 115.2 (explanation).

It is therefore imperative that the aircraft's true character (purpose) be firmly established.

The enemy character of a civil aircraft may be "determined by registration, ownership, charter or other criteria."[376] Most of this information is contained in the flight plan, which civil aircraft engaged in international navigation must be on file with the appropriate air traffic service. The flight plan must contain information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, cruising speed and level, the route to be followed, estimated travel time, and fuel endurance.[377] During flight, the aircraft must also provide periodic updates on its progress.[378] In addition, the civil aircraft must carry certificates as to registration, airworthiness, passengers, and cargo.[379]

While all of this information may be helpful in determining the character of an aircraft, it will not likely be sufficient to detect its true mission. Additional information may be needed, information that can only be obtained during an interception. Thereafter, the information thus acquired about the suspicious aircraft will determine how far the interception should proceed. It is important to stress that in all cases the principle of "due regard" for the safety of potentially innocent aircraft must be observed.

B. The Role of Article 3 *bis*

As discussed previously, Article 3 *bis* of the Chicago Convention generally prohibits the use of weapons against civil aircraft.[380] However, the article implicitly recognizes that States may lawfully intercept civil aircraft, provided that, "in case of interception, the lives of persons on board and the safety of aircraft must not be

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[376] *Id.* ¶ 117.
[377] Annex 2, *supra* note 177, § 3.3; SAN REMO MANUAL, *supra* note 242, ¶¶ 76, 129.
[378] Annex 2, *supra* note 177, § 3.3.2.
[379] Chicago Convention, *supra* note 83, art. 29.
[380] *See* text accompanying note 269. The ICAO Assembly voted in 1984 to amend the Chicago Convention by adopting Article 3 *bis*, which came into force on October 1, 1998, for the states that have ratified the new article. The vote came in response to the destruction of Korean Airline Flight 007 by Soviet fighters on August 31, 1983, resulting in the deaths of 269 passengers and its crew. The Korean airliner had innocently strayed into Soviet airspace and was mistaken for a U.S. military reconnaissance aircraft spotted earlier in the region. The investigation disclosed that the Korean airliner had its navigation lights on and its strobe lights on, but the Soviet fighter did not make any effort to identify the aircraft, to communicate with it, or to request it to land. MICHAEL MILDE, KE 007—"FINAL" TRUTH AND CONSEQUENCES, ABHANDLUGNEN 357, 358; BIN CHENG, THE DESTRUCTION OF KAL FLIGHT KE007 49, 54.

endangered."[381] States may also require civil aircraft to land at designated airports.[382] Naturally, these airports should be suitable for the type of aircraft involved.[383] Otherwise, the civil aircraft "may not be diverted from its declared destination."[384]

In forcing an intercepted aircraft to land, States may "resort to any appropriate means consistent with the relevant rules of international law, including the relevant provisions" of the Chicago Convention.[385] Article 3 *bis* does not identify the "appropriate means" that may be used during the interception. Nor does it identify "the relevant rules of international law" or "the relevant provisions of this Convention," except in subparagraph (a), where it prohibits the use of weapons against civil aircraft; it asserts that "the lives of persons on board and the safety of aircraft must not be endangered"; and it refers to the duties and obligations of States under the U.N. Charter. [386]

The relevant rules of international law would include fundamental principles governing the law of armed conflict, such as military objective, necessity, proportionality, and distinction. These principles would undoubtedly require that the interceptions of civil aircraft conform to "elementary considerations of humanity," which, according to the International Court of Justice, are "even more exacting in peace than in war."[387] Naturally, the use of force during an interception must be proportional to the threat and adequate to the situation; the loss of life to civilians or other protected persons must not be "disproportionate to the military advantage gained or anticipated."[388]

Subsection (b) of Article 3 *bis* requires each contracting State "to publish its regulations in force regarding the interception of civil aircraft."[389] The publication of these regulations affords pilots of civil aircraft an opportunity to familiarize themselves with them beforehand so that they will know how to respond if their aircraft is intercepted. Subsection (c) requires every civil aircraft to comply with an order given "in conformity" with subparagraph (b).[390] The importance of this

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[381] Chicago Convention, *supra* note 83, art. 3 *bis* (a); *see also* Chicago Convention, *supra* note 83, art. 3 *bis* (b).
[382] *Id.* art. 3 *bis* (b).
[383] SAN REMO MANUAL, *supra* note 242, ¶ 125.
[384] *Id.*
[385] Chicago Convention, *supra* note 83, art. 3 *bis*.
[386] Chicago Convention, *supra* note 83, art. 3 *bis* (a); *see also* Chicago Convention, *supra* note 83, art. 3 *bis* (b).
[387] The Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. Rep. 4 at 22.
[388] SAN REMO MANUAL, *supra* note 242, ¶ 57.
[389] Chicago Convention, *supra* note 83, art. 3 *bis* (b).
[390] Chicago Convention, *supra* note 83, art. 3 *bis* (c).

provision in facilitating successful interceptions cannot be overstated. The pilots of civil aircraft must follow the instructions of the intercepting aircraft, provided that the orders conform to the previously published regulations in force.

Although subsection (b) of the Article 3 *bis* specifically addresses the interception of civil aircraft over a State's territory, there is no reason why the same "appropriate means" and the same "relevant rules of international law" should not apply over the high seas. Interceptions of civil aircraft over the high seas would not occur in a vacuum. The same interests in the safety of air navigation over a State's territory are present over the high seas.

The *San Remo Manual* urges States to "promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organization."[391] There is only one such organization—the ICAO.[392] The U.S. *Commander's Handbook* states that, "[a]lthough there is a right of visit and search by military aircraft, *there is no established international practice as to how that right is to be exercised*."[393] This conclusion, however, is no longer correct. The ICAO has published standards governing on the interception of civil aircraft.

C. ICAO Standards on the Interception of Civil Aircraft

Annex 2 to the Chicago Convention contains standards relating to the interception of civil aircraft. These standards contain detailed procedures for interception, including approach, visual signals and maneuvering, and sample voice transmissions. The purpose of these standards is to facilitate communication between the intercepting aircraft and the intercepted aircraft, and to reduce misunderstandings. The benefit of these standards is that they provide uniform procedures with which pilots of civil aircraft are required to comply, especially when interpreting and responding to visual signals.[394] Accordingly, national regulations modeled on these standards will conform to the obligation of "due regard."[395]

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[391] *Id.* ¶ 128.
[392] *Id.* ¶ 128.1 (explanation).
[393] COMMANDER'S HANDBOOK, *supra* note 115, ¶ 7.6.2 (emphasis added).
[394] Annex 2, *supra* note 177, § 3.8.2. In fact, "[e]ach contracting state undertakes to ensure the prosecution of all persons violating the regulations applicable." Chicago Convention, *supra* note 83, art. 12.
[395] Annex 2, *supra* note 177, § 3.8.1.

1. *Procedures for Interception*

The prescribed methods are intended "to avoid any hazard to the intercepted aircraft" by taking "due account of the performance limitations of the civil aircraft," and by not "crossing the aircraft's flight path or performing any other maneuver that could cause hazardous turbulence for the intercepted aircraft, particularly if the intercepted aircraft is a light aircraft."[396]

a. Approach

In the initial phase of the interception, the intercepting aircraft should approach the intercepted aircraft from behind:

> The element leader [of more than one intercepting aircraft], or the single intercepting aircraft, should normally take up a position on the left (port) side, slightly above and ahead of the intercepted aircraft, within the field of view of the pilot of the intercepted aircraft, and initially not closer than 300 meters. Any other participating aircraft should stay well clear of the intercepted aircraft, preferably above and behind. After speed and position have been established, the aircraft should, if necessary, proceed with Phase II of the procedure.[397]

In the next phase, the element leader, or the single intercepting aircraft, will begin closing in on the intercepted aircraft at the same level until it comes as close as is necessary to obtain the information it needs.[398] If the intercepting aircraft is satisfied with this information, the element leader or single intercepting aircraft should break away in a shallow dive and the other participating aircraft should stay well clear of the intercepted aircraft and rejoin their leader.[399] When the intercepting aircraft must intervene in the navigation of the intercepted aircraft, it should do so from the same position—the left (port) side—unless other conditions or terrain make it necessary for the intercepting aircraft to

[396] Annex 2, *supra* note 177, at Attachment A, § 3.1.
[397] *Id.* § 3.2 (Phase I).
[398] *Id.* (Phase II).
[399] *Id.* (Phase III).

take up a similar position on the opposite side, i.e. slightly above and ahead of the intercepting aircraft, on the right side.[400]

b. Visual Signals and Maneuvering

Annex 2 provides three visual signals that the intercepting aircraft should initiate during the interception and the responses the intercepted civil aircraft must make indicating its understanding and its intent to comply: (1) "You have been intercepted. Follow me";[401] (2) "You may proceed";[402] and (3) "Land at this aerodrome."[403] The intercepted aircraft may also initiate three signals indicating its inability or unwillingness to comply: (1) "Aerodrome you have designated is inadequate";[404] (2) "Cannot comply";[405] and (3) "In distress."[406]

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[400] *Id.* § 3.3.1.

[401] *Id.* at Appendix 1, Table 2.1, Series 1 ("DAY or NIGHT - By rocking the aircraft and flashing navigational lights at irregular intervals . . . from a position slightly above and ahead of, and normally to the left of, the intercepted aircraft . . . and, after acknowledgement, a slow level turn, normally to the left . . . on the desired heading."). The intercepted aircraft signals the response "Understood, will comply" by "[r]ocking the aircraft, flashing navigational lights at irregular intervals and following." *Id.*

[402] *Id.* at Appendix 1, Table 2.1, Series 2 ("DAY or NIGHT - By an abrupt break-away maneuver from the intercepted aircraft consisting of a climbing turn of 90 degrees or more without crossing the line of flight of the intercepted aircraft." The intercepted aircraft signals the response "Understood, will comply" simply by "[r]ocking the aircraft." *Id.*

[403] *Id.* at Appendix 1, Table 2.1, Series 3 ("DAY or NIGHT – Lowering landing gear (if fitted), showing steady landing lights and overflying runway in use"). The intercepted aircraft signals the response "Understood, will comply" by "[l]owering landing gear (if fitted), showing steady landing lights and following the intercepted aircraft and if, after overflying the runway in use . . . landing is considered safe, proceeding to land." *Id.*

[404] *Id.* at Appendix 1, Table 2.2, Series 4 ("DAY or NIGHT – Raising landing gear (if fitted) and flashing landing lights while passing over runway in use . . . at a height exceeding 300 m (1 000 ft) but not exceeding 600m (2 000 ft) . . . above the aerodrome level, and continuing to circle runway in use . . . . If unable to flash landing lights, flash any other lights available."). The intercepting aircraft responds "Understood, follow me" by raising its landing gear and using the Series 1 signals prescribed for intercepting aircraft, if it desires to lead the intercepted aircraft to another aerodrome. *Id.* If the intercepting aircraft wishes to respond "Understood, you may proceed," then the intercepting aircraft uses the Series 2 signals prescribed for intercepting aircraft. *Id.*

[405] *Id.* at Appendix 1, Table 2.1, Series 5 ("DAY or NIGHT - Regular switching on and off of all available lights but in such a manner as to be distinct from flashing lights."). The intercepting aircraft responds "Understood" by using Series 2 signals prescribed for intercepting aircraft. *Id.*

[406] *Id.* at Appendix 1, Table 2.1, Series 6 ("DAY or NIGHT – Irregular flashing of all available lights."). The intercepting aircraft responds "Understood" by using Series 2 signals prescribed for intercepting aircraft. *Id.*

c. Sample Voice Transmissions

Annex 2 also provides five sample phrases for the intercepting aircraft, along with a pronunciation guide: (1) "CALL SIGN," meaning "What is your call sign?"; (2) "FOLLOW," meaning "Follow me"; (3) "DESCEND," meaning "Descend for landing"; (4) "YOU LAND," meaning "Land at this aerodrome"; and (5) "PROCEED," meaning "You may proceed."[407] The intercepted aircraft is provided nine sample phrases, along with a pronunciation guide: (1) "CALL SIGN (call sign)," meaning "My call sign is (call sign)"; (2) "WILCO," meaning "Will comply" or "Understood"; (3) "CANNOT," meaning "Unable to comply"; (4) "REPEAT," meaning "Repeat your instruction"; (5) "AM LOST," meaning "Position unknown"; (6) "MAYDAY," meaning "I am in distress"; (7) "HIJACK," meaning "I have been hijacked"; (8) "LAND (place name), meaning "I request to land at (place name)"; and (9) "DESCEND," meaning "I require descent."[408]

2. *Actions by Intercepted Aircraft*

As soon as the intercepted aircraft realizes it has been intercepted, it must *immediately* comply with the instructions given by the intercepting aircraft, interpreting and responding to visual signals in the prescribed manner.[409] The intercepted aircraft must also immediately notify the appropriate air traffic services unit and attempt to establish radio communication with the intercepting aircraft by making a general call on the emergency frequencies of 121.5 MHz or 243 MHz.[410]

If the intercepted aircraft receives any instructions by radio that conflict with those given by the intercepting aircraft by visual signals, the intercepted aircraft must request immediate clarification, while continuing to comply with the visual instructions given by the intercepting aircraft.[411] The reason for this requirement is that the intercepting aircraft may not be in radio communication with the source giving the conflicting instructions. Because interceptions in all cases are potentially hazardous, the intercepted aircraft must comply with the intercepting aircraft's instructions. For the same reason, the intercepted aircraft must give priority to radio instructions received from the

[407] *Id.* at Appendix 2, Table 2.1.
[408] *Id.*
[409] *Id.* at Appendix 2, § 2.1(a).
[410] *Id.* § 2.1(b)-(c).
[411] *Id.* § 2.2.

intercepting aircraft over instructions received by radio from any other source.[412] If radio contact is established during an interception but the pilots cannot communicate in a common language, the pilots should use the prescribed voice transmissions.[413]

The ICAO Council has also published the *Manual Concerning the Interception of Civil Aircraft*,[414] which "consolidates in a single document all of the ICAO provisions and special recommendations relevant to the interception of civil aircraft."[415] This manual provides a ready reference on the subject.[416]

D. Applicability to State Aircraft

When ICAO adopted the standards contained in Annex 2, the United States and the Russian Federation each expressed the view that the adoption of these standards "was *ultra vires* and would treat them accordingly."[417] It is therefore in order to ask whether these rules legally regulate the conduct of military aircraft during the interception.

The Chicago Convention does not apply to State aircraft and only the contracting States may issue regulations for their State aircraft.[418] Article 3(d) of the Convention declares, "[t]he contracting States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft."[419] Although the Convention does not declare the content of the obligation, the concept of "due regard" must be interpreted "in harmony with other norms of international law."[420] The obvious authority to promulgate rules to safeguard international civil aviation is ICAO. As Professor Milde observes, "[w]hile Article 3(d) of the Convention was not a source of legislative authority of the ICAO Council, it did not constitute an obstacle to adoption of Standards relating to the safety of civil aviation in the situations of interception."[421] The standards contained in Annex 2 are binding on

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[412] *Id.* § 2.3.
[413] *Id.* § 3.
[414] ICAO, Manual Concerning the Interception of Civil Aircraft, DOC. 9433-AN/926 (2nd ed. 1990).
[415] *Id.* at Foreword.
[416] *Id.*
[417] Milde, *Misuse of Civil Aviation*, *supra* note 184, at 120.
[418] Chicago Convention, *supra* note 83, art. 3(a), (d).
[419] *Id*. art. 3(d).
[420] Bourbonniere & Haeck, *supra* note 211, at 929.
[421] Milde, *Misuse of Civil Aviation*, *supra* note 184, at 109; *see also* Milde, *Misuse of Civil Aviation*, *supra* note 184, at 117.

civil aircraft. In the case of State aircraft, they are merely recommendations intended to protect the safety of civil aircraft and their occupants.[422] Annex 2 urges States to implement the standards in their national regulations, and it invites States to notify ICAO of any differences which may exist between their national regulations and the standards contained in Annex 2.[423]

State aircraft following the ICAO flight procedures satisfy the requirement of "due regard." As a matter of policy, U.S. military aircraft operating within international airspace will ordinarily comply with ICAO flight procedures.[424] The failure to follow the ICAO standards on interceptions entails unnecessary risk. These standards provide several distinct advantages. They help overcome potential language and cultural barriers, making interceptions simpler and safer. Although state aircraft are not bound to follow ICAO rules and procedures, the pilot of an intercepted civil aircraft must comply with these standards, and respond to visual signals in the prescribed manner.[425] Equally important, these standards meet the requirement of "due regard" and will, if followed, shield a State from criticism on its conduct during the interception.

The final section of this article will address the remedies an aggrieved State may pursue for violations of international law whenever its civil aircraft are intercepted without a proper legal justification or in a manner that is incompatible with the concept of "due regard."

VII. REMEDIES FOR THE ABUSE OF RIGHTS

Any interference with a foreign civil aircraft over the high seas may justifiably be regarded as a serious matter.[426] In all cases such interference is potentially hazardous and disruptive. While States may

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[422] Annex 2, *supra* note 177, at Attachment A, § 1.
[423] *Id.*
[424] DODD 4540.1*, supra* note 181, ¶¶ 4.2.1, 5.3.1. However, when U.S. military aircraft conduct classified missions or politically sensitive operations, aircraft flight commanders need not follow the ICAO flight procedures but may operate under the "due regard" option, in which they will be their own air traffic control agency for purposes of separating their aircraft from other air traffic. *Id.* ¶ 5.3.2.2. The U.S. Department of Defense thus employs the term "due regard" as a term of art, regarding it as a method to operate under when not following ICAO flight procedures. *See* U.S. DEP'T OF AIR FORCE, INSTR. 13-201, SPACE, MISSILE, COMMAND AND CONTROL ¶ 1.7.1 (20 Sept. 2001). The decision to operate under "due regard" is solely a command and aircraft commander prerogative. *Id.* ¶ 1.7.2.
[425] Annex 2, *supra* note 177, §. 3.8.2; *Id.* § 4.1.3.1.
[426] MCDOUGAL & BURKE, *supra* note 122, at 898 (asserting the same sentiments for ships).

lawfully intercept foreign civil aircraft over the high seas, they may do so only in exceptional circumstances, to protect their vital interests. If the current public order of the high seas is to remain viable, any infringement of the general principles of freedom of overflight and of exclusive flag-state jurisdiction should be subject to careful scrutiny. As Philip Jessup observed, since "under the law of the United States, the individual is protected against unreasonable searches and seizures, so the individual ship- or aircraft-owner would need like protection against an abuse of power by international forces."[427]

A. Interceptions Made on Inadequate Grounds

Under the UNCLOS, if the grounds for suspicion leading to the interception of a ship prove to be unfounded, the ship-owner must be "compensated for any loss or damage that may have been sustained."[428] This provision could reasonably apply to the interception of an aircraft. The UNCLOS also provides that, if "the seizure of a ship or *aircraft*" has been "effected without adequate grounds, the State making the seizure shall be liable . . . for any loss or damage caused by the seizure."[429] Placing the risk of an unwarranted interception on the State making the interception seems entirely appropriate.

However, in order to claim compensation, the intercepted aircraft must not have committed any act justifying its interception.[430] The aircraft cannot claim compensation if, by its failure to comply with ICAO rules and procedures, it provided reasonable grounds for suspicion on account of not having been registered, not bearing appropriate external markings, its failure to file a complete flight plan with the appropriate air traffic control service, or the pilot's refusal to respond appropriately to reasonable requests for information in accordance with ICAO rules. The decision to intercept the aircraft must be judged from the perspective of those who were "in the circumstances ruling at the time" of the interception.[431]

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[427] JESSUP, *supra* note 261, at 221.
[428] UNCLOS, *supra* note 84, art. 110(3).
[429] *Id.* art. 106 (emphasis added).
[430] *Id.* art. 110(3).
[431] SAN REMO MANUAL, *supra* note 242, ¶ 40 (on the determination of a military objective).

B. Disputes Between States

If the State making an unlawful interception does not make reparations to the aircraft-owner for loss or injury, the aircraft's state of registry may seek redress on behalf of the aircraft's owners:[432]

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law, committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.[433]

The State seeking compensation has the burden of proving the existence of an international obligation and its breach, while the responding State has the burden of establishing any justification or excuse for the violation.[434] A State charged with a violation of an obligation may offer an *ex gratia* payment without admitting liability.[435] Because no liability is conceded, "[t]he level of compensation paid on

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[432] The *Commander's Handbook* lists five possible remedies that an aggrieved nation may pursue "[i]n the event *of a clearly established violation of the law of armed conflict*":

> 1. Publicize the facts with a view toward influencing world public opinion against the offending nation.
> 2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid.
> 3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nations that have fallen under the control of the offending nation.
> 4. Execute a belligerent reprisal action [citation omitted].
> 5. Punish individual offenders either during the conflict or upon cessation of hostilities.

COMMANDER'S HANDBOOK, *supra* note 115, ¶ 6.2 (emphasis in original).

[433] Mavrommatis Palestine Concessions Case (Greece v. United Kingdom), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30, 1924).

[434] RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 902 (1989).

[435] *Id.* at cmt. h.

an *ex gratia* basis is essentially within the discretion of the State offering the payments."[436]

Most international disputes are settled by direct negotiations between the parties.[437] When direct negotiations fail, it is a remarkable feature of public international air law that aggrieved States may bring a dispute to a central authority for adjudication.

C. Dispute Resolution at the ICAO Council

The Chicago Convention not only grants to the ICAO Council quasi-lawmaking power, but it also assigns to the Council an important quasi-judicial function:[438]

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.[439]

The ICAO Council may thus authoritatively settle disputes regarding the interpretation and application of any provision in the Convention.

Despite its quasi-judicial role, the Council is essentially a political body and not a judicial organ.[440] The persons sitting on the Council do not act in their individual capacity, but as national representatives of their respective governments.[441] For this reason, they are neither independent nor judicially detached. They may seek instructions from their respective governments on how they should vote

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[436] U.S. STATE DEPARTMENT, BULLETIN 2138, at 38 (1988), *reprinted in* Marian Nash Leich, *The Downing of Iran Air Flight 655*, 83 AM. J. INT'L L. 319 (1989).
[437] RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF UNITED STATES § 902 cmt. d (1989).
[438] CHENG, *supra* note 185, at 52, 100-01
[439] Chicago Convention, *supra* note 83, art. 84.
[440] To assist it in the consideration of a dispute, the ICAO Council has adopted procedural "Rules for the Settlement of Differences." ICAO, RULES FOR THE SETTLEMENT OF DIFFERENCES, DOC. 7782/2 (Apr. 9. 1957) (amended Nov. 10, 1975). After deliberating, the Council may adopt a decision by a majority vote of its members, provided that no member of the Council may vote "in the consideration by the Council of any dispute to which it is a party. Chicago Convention, *supra* note 83, arts. 52, 84.
[441] Gerald F. Fitzgerald, *The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council*, 12 CAN. Y.B. INT'L L. 153, 168-69 (1974).

or if they should abstain from voting altogether.[442] The political aspect of the body is also reflected in the Council's composition, which is weighted in favor of certain States. Article 50(b) requires that the Assembly, in electing the Council, give "adequate representation to . . . the States of Chief importance in air transport . . . [and] the States . . . which make the largest contribution to the provision of facilities for international civil air navigation."[443]

None of this is to imply a criticism of the representatives who may be called upon to take a decision, but it is presented to "accurately reflect the realities and working methods well established in ICAO."[444] If a party to a dispute is dissatisfied with a decision of the Council, it may appeal it to the International Court of Justice.

D. Proceedings before the International Court of Justice

Article 84 of the Convention also provides a right of an appeal from a decision of the ICAO Council:

> Any contracting State, may, . . . appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.[445]

Two aspects of this provision need clarification. The reference to the Permanent Court of International Justice now means the International Court of Justice, which has assumed its duties.[446] In addition, an appeal to an *ad hoc* arbitral tribunal is available only to a contracting State which has not accepted the Statute of the International Court of Justice.[447] Because all members of the United Nations are *ipso*

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[442] Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization*, *in* SETTLEMENT OF SPACE LAW DISPUTES 87, 90 (Karl-Heinz Boeckstiegel ed., 1980) (citation omitted) [hereinafter Milde, *Dispute Settlement*]; Fitzgerald, *supra* note 441, at 169.
[443] Chicago Convention, *supra* note 83, art. 50(b).
[444] Milde, *Dispute Settlement*, *supra* note 442, at 90.
[445] Chicago Convention, *supra* note 83, art. 84.
[446] Statute of the International Court of Justice art. 37, June 26, 1945 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 [hereinafter I.C.J. Statute].
[447] Milde, *Dispute Settlement*, *supra* note 4422, at 89; *see also* CHENG, *supra* note 185, at 104.

facto parties to the Statute of the International Court of Justice,[448] the reference to an *ad hoc* arbitral tribunal is for them inoperative.[449]

Other air law treaties, such as the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[450] also contain a provision conferring appellate jurisdiction on the International Court of Justice from the decisions of the ICAO Council.[451] However, these treaties permit contracting States to enter reservations regarding the appellate jurisdiction of the International Court of Justice. The Chicago Convention does not allow reservations of any kind, and no reservations have been made to it. Accordingly, the appellate jurisdiction of the International Court of Justice for disputes under the Chicago Convention is compulsory for all 188 contracting States.[452]

1. *India v. Pakistan Dispute*

The broad scope of both types of jurisdiction—that of the ICAO Council and that of the International Court of Justice—are illustrated by the Court's 1972 judgment of an appeal filed by India from a decision of the ICAO Council.[453] The issue on appeal was whether the ICAO Council had jurisdiction to decide if the Chicago Convention applied in time of war to a dispute between India and Pakistan. Pakistan had filed a complaint with the Council in 1971, alleging that India violated the Chicago Convention when it abruptly suspended Pakistani flights over its territory.[454] India suspended the flights after one of its aircraft had been hijacked, flown to Pakistan, and blown up, "allegedly with the complicity of the Pakistani government."[455]

India responded to Pakistan's complaint by asserting that the Convention was no longer in force between them. According to India,

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[448] U.N. Charter art. 93(1).
[449] Milde, *Dispute Settlement, supra* note 442, at 89.
[450] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564 [hereinafter Montreal Convention].
[451] Tokyo Convention, *supra* note 159, art. 24(1); Hague Convention, *supra* note 248, art. 12(1); Montreal Convention, *supra* note 450, art. 14(1).
[452] I.C.J. Statute, *supra* note 446, art. 36(1) ("The jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties or conventions in force.").
[453] Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan) [1972] I.C.J. Rep. 46 [hereinafter India v. Pakistan].
[454] *Id.* at 51, ¶ 10.
[455] Paul S. Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation,* 32 GA. J. INT'L & COMP. L. 231, 272 (2004).

Pakistan had breached its obligations under the Convention in its conduct over the hijacking.[456] Moreover, the Convention had terminated or was suspended between them in 1965 when they were engaged in an armed conflict lasting nearly three weeks. Air traffic resumed after this conflict with the signing of the Tashkent Declaration, which permitted overflight but no landing rights.[457] India contended that the Chicago Convention had never been revived between it and Pakistan but was replaced by a "special régime" over which the Council could have no jurisdiction.[458] The ICAO Council rejected these preliminary objections and reaffirmed its competence to hear the dispute. India appealed this ruling.

The International Court of Justice voted 14-2 to uphold the ICAO Council's jurisdiction to decide the case.[459] The Court stated that the case was "one of mutual charges and counter-charges of breach of treaty which cannot . . . fail to involve questions of the interpretation and application of the treaty instruments in respect of which the breaches are alleged."[460] Moreover, the parties' differences on their freedom of action in time of war proved the existence of a disagreement relating to the interpretation or application of the Convention.[461] Accordingly, the Court held that the ICAO Council was vested with jurisdiction to decide disputes under the Chicago Convention in time of war or national emergency.

The Court also rejected Pakistan's objections to its appellate jurisdiction. Pakistan contended that, since India's principal contention is that the Convention did not apply between them, it could not invoke the jurisdictional clause of Article 84 for the purpose of appealing to the Court.[462] The Court answered that India had only contended that the Convention was suspended between herself and Pakistan,[463] and, "in the proceedings before the Court, it is the act of a third entity—the Council of ICAO—which one of the Parties is impugning and the other defending."[464] In reply to Pakistan's contention that the Court could not

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[456] India v. Pakistan, *supra* note 453, at 62, ¶ 29.
[457] Demspey, *supra* note 455, at 273.
[458] India v. Pakistan, *supra* note 453, at 62, ¶ 29.
[459] *Id.* at 70, ¶ 46.
[460] *Id.* at. 66, ¶ 37.
[461] *Id.* at 68-69, ¶¶ 40-43.
[462] *Id.* at 52, ¶ 14.
[463] *Id.* at 53, ¶ 16(a). The Court noted that Pakistan's argument precluding the appeal could be turned against her. Since Pakistan was asserting on the merits that the Convention was still in force, it might be questioned whether she could deny the application of the jurisdictional clause in Article 84. *Id.* at 54, ¶ 16(c).
[464] *Id.* at 60, ¶ 26.

hear the appeal because the Council's decision was not a final decision on the merits, the Court replied that the Chicago Convention gave member States, "and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions . . . for the good functioning of the Organization," by reassuring the Council that "means exist for determining whether a decision as to its own competence is in conformity . . . with the provisions" of the Convention.[465] The Court thus held that it had jurisdiction to hear appeals on preliminary matters as well as on the merits of a dispute. The dispute was later settled between the parties themselves.

The Court's appellate jurisdiction, coupled with uncertainty as to how it may rule, has been a catalyst for parties to enter negotiations and settle their disputes on mutually acceptable terms. This observation is borne out by two cases involving the United States.

2. *Iran v. United States Dispute*

On 3 July 1988, the US warship Vincennes shot down Iran Air Flight IR655 over the Persian Gulf by firing two surface-to-air missiles, killing everyone on board. As the ICAO investigation found, the warship launched the missiles in the mistaken belief that the civil aircraft was a military aircraft with hostile intentions.[466] The United States did not accept legal responsibility for the incident, but it stated that it would make *ex gratia* compensation directly to the families of the victims, without making any payments to or through the Government of Iran, with which it had no diplomatic relations.[467]

The U.S. State Department's legal advisor summarized the principles of international law governing the potential liability for injuries and property damage arising out of military operations as follows:

> *First,* indemnification is not required for injuries or damage incidental to the lawful use of force. *Second,* indemnification is required where the exercise of armed force is unlawful. *Third,* States may, nevertheless, pay

[465] *Id.*
[466] *See* ICAO, Report of ICAO Fact-Finding Investigation (November 1988), *reprinted in* 28 I.L.M. 896 (1989).
[467] Leich, *supra* note 436, at 321-22.

> compensation *ex gratia* without acknowledging, and irrespective of, legal liability.[468]

He also explained the rationale for the *ex gratia* payments:

> Offering compensation is especially appropriate where a civilian airliner has been shot down. The 1944 Convention on International Civil Aviation (the Chicago Convention) . . . constitutes a solemn undertaking to promote the safe and orderly development of international civil aviation. Indeed, the safety of international civil aviation is of the highest priority to the international community. When that safety is impaired and innocent lives are lost, nations should consider taking appropriate action to compensate those who suffer as a result.[469]

The government of Iran nonetheless applied to the ICAO Council seeking a declaration condemning the United States for breaches of international law and its legal duties under the Chicago Convention, as well as a declaration that the United States must pay

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[468] *Id.* at 322-24. In his testimony, the legal advisor recounted several instances where other countries had paid compensation on an *ex gratia* basis:

> In 1973 Israel shot down a Boeing 727 airliner that mistakenly flew over the Israeli-occupied Sinai, killing 106 passengers. . . . Israel made an ex gratia payment. . . . In 1954 the People's Republic of China (P.R.C.) shot down a U.K.-registered Cathay Pacific plane in the vicinity of Hainan Island, which was en route from Bangkok to Hong Kong. The P.R.C. apologized and indicated that its pilots had mistakenly identified the plane as a military aircraft from Taiwan. The P.R.C. paid compensation to the United Kingdom to be disbursed to the victims' families. Among the victims were six U.S. nationals. . . . Very few instances exist in which a nation responsible for shooting down a civilian airliner has refused to pay compensation. The two most notorious examples both involve the Soviet Union. In 1978 the Soviets fired upon and forced the crash landing of a Korean airline 707 airplane, killing two passengers. In 1983 a Soviet fighter pilot shot down Korean Air Lines #007, killing 269 passengers. The Soviets have refused to accept [U.S.] claims for the deaths of 60 U.S. nationals on that flight, which resulted from the Soviets' indefensible action, or to accept the claims of other governments.

Id. at 322-23.

[469] *Id.* at 323.

compensation for moral and financial damages.[470] In a resolution dated 7 December 1988, the Council stated only that it "*[d]eeply deplores* the tragic incident which occurred as a consequence of event and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives."[471]

Not satisfied with the ICAO action, Iran appealed to the International Court of Justice. In its memorial, the United States conceded that several treaties had conferred jurisdiction on the Court "to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied," but it denied that the applicable conditions had been satisfied, asserting, in particular, that the ICAO resolution was not a "decision" of the ICAO Council.[472] In any event, the United States and Iran entered into negotiations, and, in a joint letter dated 22 February 1996, they informed the Court that they had concluded an agreement in full and final settlement of the case.[473] If the parties had elected to continue the appeal, the International Court of Justice would likely have had to reach a decision on the merits probably on the basis of the law of armed conflict.[474]

3. *Libya v. United States Dispute*

The prospect of a Court decision motivated the United States and Libya to settle their differences relating to the destruction of Pan Am Flight 103 on 21 December 1988 by the explosion of a bomb over Lockerbie, Scotland. Following its investigation, the United States in 1991 indicted two Libyans and immediately demanded their extradition to the United States to stand trial.[475] Libya refused to comply with the request, whereupon the United States brought the matter to the U.N.

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[470] Application Instituting Proceedings at the International Court of Justice on the Aerial Incident of 3 July 1988, (Islamic Republic of Iran v. United States of America*)* (May 17, 1989), *reprinted in* 28 I.L.M. 843 (1989).

[471] ICAO, Resolution adopted by the Council of the International Civil Aviation Organization at the 20th Meeting of its 126th Session (Mar. 17 1989), *reprinted in* 28 I.L.M. 898 (1989).

[472] Preliminary Objections Submitted by the United States in the Case Concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America*)* (Mar. 4, 1991) 1991 I.C.J. Pleadings at 2-3.

[473] Case Concerning the Aerial Incident of 3 July 1988 (Iran v. United States), Order of Feb. 22, 1996, 1996 I.C.J. Rep. 9 at 10.

[474] David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 YALE J. OF INT'L L 245, 266 (1991).

[475] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), 1992 I.C.J. Rep. 114, ¶ 30 (Apr. 14) [hereinafter Libya v. United States].

Security Council, which eventually adopted Resolution 748 ordering Libya to extradite the two suspects.[476] The Court denied Libya's request for interim measures, expressly reserving for its final judgment its ruling on the legal effect of Resolution 748 or any other question raised in the proceedings.[477] Eventually the United States and Libya settled their dispute through negotiations,[478] leading to a trial by a Scottish tribunal at The Hague.

The International Court of Justice has not had any other occasion to hear an appeal on a dispute arising from a public air law treaty. Yet, as these cases show, an aggrieved State may always appeal to the Court for redress. Hence, every party to a dispute must be prepared to publicly justify its actions. If a State can justify an interception, it will not be held liable. Otherwise it must make full compensation for the damage caused.

VIII. CONCLUSION

The purpose of this study was to survey and determine the role of international law in the interception of foreign civil aircraft over the high seas. The events of September 11, 2001, marked a new development in international terrorism, namely, the misuse of civil aircraft as a major weapon. In addition, the clandestine movement of WMD by various means, including aircraft, heightens the threat to international peace and security. In 2002, the United States declared its intent to act preemptively, if necessary, to address threats to its security before they materialize. In 2003, the United States also unveiled the Proliferation Security Initiative, a cooperative effort by several States to interdict the movement of WMD. To underscore the seriousness of these threats, the U.N. Security Council has repeatedly called on states to cooperate in the war on terror and to exchange information relating to the movement of terrorists and of WMD by terrorist groups.

Under the current legal regime, the high seas are open to all nations as a public highway. Every State enjoys the freedom of overflight as well as exclusive jurisdiction over its own aircraft. To safeguard the safety of civil air navigation, the ICAO Council has adopted "Rules of the Air," binding over the high seas, an area covering some seventy percent of the earth's surface, for all 188 contracting

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[476] U.N. SCOR, 47th Sess., 3063rd mtg., U.N. DOC. S/RES/748 (1992), *available at* http://daccess-ods.un.org/TMP/2675065.html.

[477] Libya v. United States, *supra* note 475, at 127, ¶¶ 43, 45.

[478] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Order of Sept. 10, 2003, 2003 I.C.J. Rep. 149.

States. However, the freedom of the high seas and the exclusive flag-state jurisdiction over its aircraft are norms subject to the criterion of reasonableness.

Military aircraft—symbols of a nation's military power and prestige—are immune from most international regulations. In particular, they may not be boarded by foreign officials without the consent of the aircraft commander. Military, customs, and police aircraft may intercept foreign aircraft over the high seas. The identity of these aircraft is therefore critical. In this respect, State practice is well-developed and leaves little doubt as to what constitutes a military aircraft, despite the absence of a formal definition in a treaty, such as the Chicago Convention.

There can be no doubt that, in certain circumstances, States may lawfully intercept foreign civil aircraft over the high seas without the consent of its state of registry. The U.N. Security Council in its resolutions has effectively rendered international terrorists *hostes humanis generis*, thereby creating a virtual obligation for every State to cooperate in the war on terror. International law concerning piracy, hijacking of civil aircraft, as well as Stateless aircraft, provides additional grounds for the lawful interception of civil aircraft over the high seas. To make the interception lawful, the intercepting State must have reasonable grounds for suspecting that the particular aircraft is engaged in a prohibited activity.

International law also provides reasonably clear standards on how these interceptions may be carried out. The intercepting aircraft must exercise "due regard" for the safety of the intercepted civil aircraft and employ force only as a last resort. Although military aircraft are not bound by the Rules of the Air and other safety-related standards adopted by the ICAO, including standards governing the interception of civil aircraft, they should to the maximum extent possible act in accordance with them. If the ICAO standards are followed, they will shield a State from allegations that the interception itself was incompatible with the principle of "due regard."

Every interception is potentially subject to review by the ICAO Council, the U.N. Security Council, and the International Court of Justice. A State resorting to interception over the high seas must therefore always weigh the consequences of its actions and be prepared to justify its act.

OFFICIAL TIME AS A FORM OF UNION SECURITY IN FEDERAL SECTOR LABOR-MANAGEMENT RELATIONS

LIEUTENANT COLONEL KENNETH BULLOCK

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I. INTRODUCTION

Can a nationwide labor-management relations system based on the principle of exclusive representation operate effectively, even if the law requires unions to represent all bargaining-unit employees while depriving them of the ability to obtain adequate financial support? That question has been the subject of an unannounced experiment in the federal government since the 1960s, and there are indications that the experiment has not been successful.

The majority of federal workers are represented by unions that have the right and the duty to represent all employees, regardless of union membership. Since the unions are required to offer their basic services to all, incentives for employees to join and pay union dues are much weaker than they are in many private-sector and state government bargaining units. To make matters even more difficult, most federal-sector employees do not have bargaining representatives that are permitted to directly bargain with management over wages and economic benefits,[1] and thus the unions lack one of the primary recruiting tools enjoyed by non-federal unions. As a result, rates of union membership in the federal sector are low,[2] even though coverage of federal workers by union contracts is exceptionally high.[3]

How do federal-sector unions effectively represent all employees without a traditional system of "union security;" i.e., the means to compel financial support from the employees served? A system has gradually evolved in which "official time" (that is, paid federal time spent by union officials performing representational activities) has become a substitute for union dues. While the costs of official time are relatively minor in relation to the overall federal personnel budget, it has been the subject of controversy, especially

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[1] Several federal agencies, including the U.S. Postal Service and the Tennessee Valley Authority, operate under labor-management systems that allow bargaining for wages and benefits. RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 174 (2001). Even in the majority of federal agencies that are covered by the Federal Sector Labor-Management Relations Statute (5 U.S.C. § 7101-7135 (2006)), unions participate in the setting of wages for over 200,000 trade and blue-collar employees through their membership in national and regional wage committees and local wage survey committees. *Id.* at 172-73.

[2] In 2001, the three largest labor organizations specializing in federal employee representation had membership rates that varied between eleven and fifty-three percent of the eligible employees, and the largest of the three unions (the American Federation of Government Employees) had a membership rate of only thirty-four percent. Marick F. Masters, *Federal-Sector Unions: Current Status and Future Directions*, 25 J. LAB. RES. 55, 66 (2004).

[3] In 2001, sixty-one percent of federal non-postal employees were represented by unions, and ninety-seven percent of those employees were covered by a collective bargaining contract. *Id*. at 62.

when employees revealed questionable practices in the Social Security Administration during the 1990s.

This article will show that between 1962 and 1978, the Executive Branch and Congress allowed the official-time system to evolve haphazardly, disregarding sound advice and options on union security provided by government studies. There are substantial indications that official time is not an adequate substitute for more direct methods of union security, and moreover it causes problems and imposes costs that would not exist if other forms of union security were available to unions. While there is not yet sufficient information to permit the choice of a single alternative, Congress should authorize agencies to conduct test programs, so that arrangements that have proven themselves in the private and non-federal public sectors can be evaluated at the federal level. In the absence of Congressional action, union leaders and managers should be vigilant in controlling the use of official time, while taking advantage of its limited value to promote smooth labor-management relations.

II. EXCLUSIVE REPRESENTATION AND UNION SECURITY IN AMERICAN LABOR RELATIONS

A. Exclusive Representation

The principle of exclusive representation is one of the most distinctive features of the American collective bargaining system. Under the American rule, after a majority of workers in a bargaining unit choose a union as exclusive bargaining representative, that union has a duty to represent all employees in the bargaining unit, regardless of union membership.[4] Scholars have explained that this system evolved because of the peculiar history of organized labor in this country. Since governments and courts were initially hostile to organized labor, American unions were unable to pursue the "top-down," government-sanctioned form of collective bargaining that prevails in many European nations. Instead, they focused on exerting economic pressure on individual employers and industries, a method that gave rise to the exclusive contract as the primary goal of bargaining.[5]

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[4] 29 U.S.C. § 159(a) (2006) (exclusive representation under the National Labor Relations Act); 5 U.S.C. § 7114 (2006) (exclusive representation under the Federal Sector Labor-Management Relations Statute).

[5] Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 783-840 (1992); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1426-27 (1971).

Exclusive representation requires employees who desire collective bargaining to choose one union for the life of an agreement, minimizing inter-union conflict. When employers are forced by the law or economic circumstances to deal with unions, there are advantages to dealing with a single union. Having a single, unified bargaining partner can promote orderly bargaining, and exclusive unions tend to promote labor peace, since they suppress the disruption and unrest that can result from competition among unions.[6] In the absence of the exclusive representation principle, employees are free to refrain from union membership, if they are also willing to forego the benefits of collective bargaining. However, in the absence of an exclusive representation rule, employers could be forced to bargain with multiple employee groups, ensuring considerable confusion and additional expense in labor-management relations.

There are two obvious weaknesses to a labor-management system that relies on exclusive representation. First, in the absence of a majority vote in favor of a particular union, even a large minority of workers who desire representation will be frustrated, unless the law or economic forces oblige the employer to bargain or consult with a minority union. Second, exclusive representation creates the potential for the "free rider," an employee who enjoys the benefits negotiated and protected by the exclusive bargaining representative without providing financial support. In response to this problem, unions and employers have developed several types of arrangements collectively dubbed "union security."

B. Types of Union Security Arrangements

1. *The Closed Shop*

The closed shop allows the employer to hire only employees who are members of the union at the time of hiring, and membership in the union remains a condition of employment after hiring. The closed shop was permitted under the original version of the National Labor Relations Act (NLRA),[7] but since each employee's job was to subject to the vagaries of internal union discipline, even if the employee diligently paid dues, abuses occurred. Negative publicity about abuses of the closed shop led to its prohibition in the Taft-Hartley Amendments to the

[6] KEARNEY, *supra* note 1, at 73; Carlson, *supra* note 5, at 788. On the other hand, before the principle of exclusive representation was established, private employers often exploited divisions among unions to obtain more favorable results at the bargaining table. Carlson, *supra* note 5, at 789, 813.

[7] National Labor Relations (Wagner) Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (2000)).

National Labor Relations Act in 1947.[8] The closed shop can no longer be legally enforced in any workplace in the United States.

2. *The Union Shop*

Under the union shop, employees must become and remain full members of the union within a defined time period after hiring, usually 30 days. The union shop is only slightly less coercive than the closed shop from the employee's viewpoint, but it represents a significant shift from the employer's viewpoint, since the union no longer has complete control over the pool of potential employees.

The NLRA does not prohibit the negotiation of the union shop, but the employer's ability to enforce union shop agreements is limited by NLRA § 8(a)(3) and the U.S. Supreme Court's decision in *NLRB v. General Motors Corp*., where the Court held that the NLRA did not authorize any union-shop membership requirement beyond the payment of fees and dues.[9] Since it is a violation of the NLRA for an employer to enforce a union shop clause against an employee who has faithfully tendered dues and fees to the union, employees are protected from losing their jobs as a result of any union discipline not related to dues payment. The courts have also held that objecting employees are entitled to a rebate of the portion of union dues and fees used for political or public affairs purposes.[10]

Even though the union shop has not been fully enforceable under federal law since 1947, it was the most common form of union security in private-sector collective bargaining agreements as recently as 1995,[11] and it even exists in a few public-sector agreements.[12]

3. *The Agency Shop and Fair Share*

Even as they banned the closed shop, the drafters of the Taft-Hartley Amendments were sufficiently concerned about the "free rider" problem that they carefully crafted the Act to allow milder forms of union security, including the agency shop.[13] The agency shop is similar to the union shop, but it lacks one of its more objectionable features.

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[8] Pub. L. No. 80-101, § 8(a)(3), 61 Stat. 136, 140 (1947) (codified as amended at 29 U.S.C. § 158(a)(3) (2000)).
[9] 373 U.S. 734, 743-44 (1963).
[10] *See infra* Section II.D.
[11] A 1995 Bureau of National Affairs study (the most recent available) found that sixty-four percent of private-sector agreements provided for the union shop. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 97 (14th ed. 1995) [hereinafter BUREAU OF NATIONAL AFFAIRS].
[12] A 2001 survey reported that agreements in five states purported to place public employees under the union shop. KEARNEY, *supra* note 1, at 72.
[13] WILLIAM W. OSBORNE, JR., LABOR LAW AND REGULATION 426 (2003).

The employee is not required to become a member of the union or to express ideological support for unionism, but he is required to pay the union an amount equivalent to union dues and fees, to cover the cost of representative activities. The agency shop is found in a significant number of private-sector agreements[14] and is permitted for at least a portion of the public workforce in nineteen states and the District of Columbia.[15] Supreme Court decisions[16] have restricted the ability of unions to fully enforce agency shop provisions against employees who object to providing financial support for union activities. As a result, objecting employees are entitled to a rebate of those portions of dues expended on political activity.

The "fair share" arrangement is a variation on the agency shop that features a pre-determined fee structure, omitting the portion of dues that would be used for political activities. The arrangement relieves employees of the responsibility to demand fee rebates.[17] Eleven states recognize the "fair share" for public employees.[18]

The Taft-Hartley Amendments originally required a majority of employees in the bargaining unit to authorize the negotiation of the agency shop in a referendum.[19] The requirement proved to be unnecessary, however, since the agency shop was authorized in about 97 percent of elections held under the clause. Therefore, Congress repealed the requirement in 1951, replacing it with a provision for a deauthorization election.[20] The deauthorization election is not frequently used. In Fiscal Year 2005, the National Labor Relations Board (NLRB) conducted only fifty-nine union-security-deauthorization elections, and employees voted for deauthorization of union security provisions in only sixteen of the elections.[21]

4. *Fee for Service*

Occasionally unions have attempted to circumvent state and federal prohibitions on coerced dues payments by attempting to charge employees for particular services. Unions frequently seek to obtain nonmember reimbursement for expensive services, such as arbitration.

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[14] The 1995 BNA study found agency shop provisions in ten percent of the agreements reviewed. BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 97.
[15] KEARNEY, *supra* note 1, at 72-73.
[16] *See infra* Section II.D.
[17] *E.g.*, Howard C. Hay, *Union Security and Freedom of Association in* LABOR RELATIONS LAW IN THE PUBLIC SECTOR 146-55 (Andria S. Knapp ed., 1977).
[18] KEARNEY, *supra* note 1, at 73.
[19] Pub. L. No. 80-101, § 9(e)(1), 61 Stat. 136, 144 (1947).
[20] Pub. L. No. 82-189, § 1(b)(c), 65 Stat. 601 (1951) (codified at 29 U.S.C. § 159(e)(1) (2000)).
[21] 70 NATIONAL LABOR RELATIONS BOARD (NLRB) ANN. REP. 17 (2006). To put those numbers in perspective, the Board processed over 29,000 total cases that year. *Id.* at 1.

Fee-for-service arrangements are less coercive than those discussed above, because payment of the fee is not a condition of employment, but merely a condition of access to the union's services. Unfortunately for the unions, the NLRB and the Federal Labor Relations Authority have consistently held that requiring nonmembers to pay fees or expenses for access to the contractual grievance and arbitration process was a violation of the exclusive representative's duty of fair representation.[22]

5. *Maintenance of Membership*

Under a maintenance-of-membership clause, employees are not required to join the union, but they are required to maintain their membership once they have elected to join, usually for a fixed period or for the life of the existing contract. Maintenance of membership prevents employees from opportunistically joining and then resigning from the union based on the individual's short-term needs. Maintenance of membership is very common in the public sector,[23] but it is rare in the private sector (due to the prevalence of the union shop and the agency shop),[24] and it is prohibited in the federal government.[25]

6. *Dues Withholding ("Checkoff")*

Automatic dues check-off is a limited but important form of union security in which the employer agrees to automatically deduct dues from consenting employees' paychecks each pay period and forward the funds to the union. Many union contracts require the union to pay a small administrative fee to the employer for each dues deduction, but some unions have negotiated dues check-off provisions that cost them nothing. Under the NLRA, contracts may allow employees to rescind their authorizations only at specified intervals of no more than a year, or the life of the current contract.[26] When such provisions are used, the dues check-off becomes a substitute for a maintenance of membership agreement. Automatic dues check-off is a great boon to union officials, since it relieves them of the time-consuming duty of collecting dues while ensuring a steady stream of funds. Dues check-off appears in the overwhelming majority of private

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[22] *E.g.,* IAM Local 697 and Carroll, 223 N.L.R.B. 832, 834 (1976); *see also infra* section V.D. There is a limited exception under the NLRA for employees who have obtained an exemption to mandatory support of unions on religious grounds. Unions can charge fees for grievance and arbitration services rendered to such employees. 29 U.S.C. § 169 (2006).
[23] KEARNEY, *supra* note 1, at 73.
[24] BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 97-98.
[25] 5 U.S.C. § 7102 (2006).
[26] 29 U.S.C. § 186(c)(4) (2006).

and public labor contracts,[27] and federal-sector agencies are required by statute to provide it (free of administrative charges) to any exclusive bargaining representative.[28]

7. *Leave for Representational Activities*

Time off for representational activities is not usually discussed as a form of union security, but it serves many of the same purposes, since it provides an important form of support and stability for the exclusive bargaining representative. As this article will show, low rates of union membership have made official time the most important form of union security in the federal sector.

About half of all private-sector contracts provide limited paid time for union officials to represent employees in grievances.[29] The vast majority of private-sector contracts allow long-term unpaid leave for employees who become full-time union officials, and most of these provisions allow employees to accrue seniority and eligibility for other benefits while on union leave.[30] About half of all private-sector agreements allow for short-term, unpaid union leave for attendance at union conferences and training activities,[31] and a small percentage guarantee paid time for union negotiators.[32] There have been no comparable studies of contracts in the public (non-federal) sector, but it is believed that official time provisions are common in state and local government collective bargaining agreements,[33] especially for grievance processing.[34]

A key difference between leave for representational activities and other union security arrangements is that the support comes from the employer, not from the represented employee. The most likely motive for employers to provide leave is to promote the smooth operation of the collective bargaining process. For instance, leave gives union leaders an incentive to conduct bargaining or grievance activities during normal work hours, which is usually more convenient for management officials. Because there is no "coercion" involved, company/official time has not aroused nearly the level of controversy that accompanies other union security provisions.

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[27] BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 99; KEARNEY, *supra* note 1, at 73.
[28] 5 U.S.C. § 7115 (2006).
[29] BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 36.
[30] *Id*. at 73.
[31] *Id*.
[32] *Id*. at 56.
[33] *See* KEARNEY, *supra* note 1, at 294.
[34] *Id*. at 305.

C. The Controversy Over Union Security

Even after the closed shop and the strictest forms of the union shop were prohibited nationwide in 1947, bitter controversy over mandatory support for unions continued. A key factor in the continuing controversy was the fact that labor and management leaders frequently disregarded the law and negotiated contract provisions that had the practical effect of perpetuating closed shop or union shop arrangements.[35] Since few employees had the sophistication or the resources to challenge the contracts, the prohibited practices continued. The unions' willingness to violate Taft-Hartley proved to be shortsighted, as the continued abuses inspired the rise of the "Right to Work" (RTW) movement during the 1940s. The first RTW laws had been passed in 1944, and by 1947, eleven states had adopted them.[36] The Taft-Hartley Act, enacted in 1947, explicitly allowed states to prohibit mandatory financial support to unions.[37]

During the 1950s the RTW movement gained momentum and evolved into a national organization, the National Right to Work Committee (NRWTC), which drew its support from workers and small business owners.[38] By the late 1960s, laws that prohibited compulsory support of unions had been enacted or adopted by judicial interpretation in twenty-two states.[39] The NRWTC continues to campaign for federal and state laws restraining all forms of compulsory unionism.[40]

There is no question that RTW laws prevent the negotiation of strong union-security clauses in the states where they are effective, and such laws can even be effective beyond state borders, influencing contracts negotiated in multi-state bargaining units that include RTW and non-RTW states.[41] Researchers have spent considerable effort attempting to determine the ultimate effect of RTW laws on union membership rates. Since the laws exist only in states with weak traditions of union membership, it is difficult to distinguish between the effects of the RTW laws and the effects of the underlying cultural factors that gave rise to them. A 1998 study of the available literature

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[35] GEORGE C. LEEF, FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT 36 (2005).
[36] *Id.* at 29.
[37] 29 U.S.C. § 164 (b) (2006).
[38] LEEF, *supra* note 35, at 43-46.
[39] KEARNEY, *supra* note 1, at 73-74 (listing twenty-one of the states but omitting Florida, which judicially adopted a prohibition on compulsory union support in 1977 (citing Fla. Educ. Ass'n v. Pub. Empl. Relations Comm'n, 346 So. 2d 551 (Fla. Dist. Ct. App. 1977)).
[40] A summary of the NRTWC's legislative activities can be found at their website, http://www.right-to-work.org/legislation (last visited June 15, 2006).
[41] BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 98-99.

concluded that RTW laws are strongly correlated with low success of union organizing efforts and increased "free riding."[42]

As Section III of this article will show, overuse of the politically-charged term "right to work" has distorted the public debate over union security in the federal sector. While the RTW supporters are certainly justified in pursuing effective measures to enforce Taft-Hartley's prohibitions on the closed shop and the union shop, the RTW movement has also pursued the prohibition of the fair share and even the milder forms of union security. Reckless use of the "right to work" slogan has misled many ordinary Americans and political leaders into believing that any form of union security is the functional equivalent of the union shop.

D. Constitutional Aspects of Union Security in the Public Sector

Before 1977 there was considerable uncertainty over the constitutional validity of union shop and agency shop provisions in the public sector. In a previous constitutional challenge to union shop arrangements negotiated under the Railway Labor Act (RLA), the Supreme Court had avoided the constitutional issue by holding that the RLA itself prohibited the use of coerced dues for political activities over the objections of dissenting employees.[43]

In *Abood v. Detroit Board of Education*,[44] the Court squarely faced the constitutional issue in the context of an agency-shop clause for a bargaining unit of public school teachers. The Court decided this public employee case in substantially the same manner it had decided the railway workers case, holding that the requirement for public employees to pay agency fees did not unconstitutionally infringe on the employees' rights, if the fees were used only to support the purposes of collective bargaining.[45] However, the Court held that enforcement of the agency-fee provision would infringe on dissenting employees' freedom of speech and association rights if the fees were used to support political or ideological causes "not germane to its duties as collective-bargaining representative."[46] Significantly, the Court found no constitutional difference between public and private workers for purposes of union security agreements.[47]

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[42] William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463 (1998).
[43] IAM v. Street, 367 U.S. 740 (1961); *see also* Ry. Employees Dep't, IAM, v. Hanson, 351 U.S. 225 (1956).
[44] 431 U.S. 209 (1977).
[45] *Id*. at 235-36.
[46] *Id.* at 235.
[47] *Id*. at 232 ("The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.").

In subsequent decisions, the Supreme Court has drawn specific distinctions between expenditures for prohibited political purposes and expenditures for authorized representational activities. In a 1984 case decided under the RLA, the Court held that national conventions, social activities, and publications were all sufficiently related to collective bargaining to justify charging their expenses to objecting employees, while organizing expenses were not.[48] Two years later, in a public employee case, the court held that the Constitution required unions to establish safeguards to prevent dissenting employees' contributions from being temporarily used for prohibited purposes, to provide dissenters with adequate information about the basis for the calculation of their proportionate share, and to establish a prompt procedure for ruling on objections.[49] In 1991 the Court held that the use of mandatory fees collected from public employees for national program expenses, convention expenses, and even strike preparation funds was permissible, even though a strike would have been illegal under state law.[50]

III. FEDERAL SECTOR COLLECTIVE BARGAINING, OFFICIAL TIME, AND UNION SECURITY BEFORE 1978

A. Employee Organization and Collective Bargaining before 1962

Many discussions of federal-sector collective bargaining begin with the publication of President Kennedy's seminal executive order in 1962, but organized labor activity in the federal sector occurred as early as the 1830s. During that decade, organizations of employees at various Navy yards used a combination of strikes and legislative petitions to obtain guarantees of a ten-hour workday without reduction in pay.[51] When the federal government purchased the Government Printing Office from a private concern in 1861, its unionized employees became federal employees. [52] Collective bargaining (including bargaining over wages) continued, and Congress eventually recognized the relationship in the Kiess Act of 1924.[53]

Large-scale legislative activities by federal employee organizations continued to meet with great success, but the Executive Branch proved to have a limited tolerance for the federal unions' legislative activities. Between 1865 and 1880, concerted pressure by organized employee groups led to Congressional recognition of

[48] Ellis v. Bhd. of Ry., Airline and Steamship Clerks, 466 U.S. 435, 450-51 (1984).
[49] Chicago Teachers Union v. Hudson, 475 U.S. 292, 304-09 (1986).
[50] Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 527-32 (1991).
[51] STERLING D. SPERO, GOVERNMENT AS EMPLOYER 79-84 (1972).
[52] *Id.* at 379-82.
[53] *Id.* at 383; Pub. L. No. 68-276, 43 Stat. 658 (1924).

"prevailing rate" wages for blue-collar workers[54] and the eight-hour work day.[55] By the time President Theodore Roosevelt took office, postal workers had attained such a degree of influence over postal wage legislation that he issued an executive "gag order" in 1902, prohibiting all federal employees from contacting Congress to influence any legislation.[56] The postal workers' organizations had previously avoided formal affiliation with the more militant national organizations, but the Roosevelt gag order, combined with harsh anti-union tactics employed by postmasters, led to a change of strategy.

Local postal workers' organizations cooperated with the American Federation of Labor (AFL) to secure passage of the first major piece of legislation on the subject of federal-sector employee organization, the Lloyd-La Follette Act of 1912.[57] The Act reversed the gag order and went even further, guaranteeing federal employees the right to participate in employee organizations without reprisal. Although the Act was a significant victory for organized labor, it did not require federal agencies even to consult with employee organizations, and for decades there was no significant follow-up action. Congress declined to make the 1935 National Labor Relations Act (NLRA) [58] and its amendments applicable to the federal sector. In the 1947 Taft-Hartley amendments to the NLRA, Congress emphasized its coolness to federal-sector unionism by explicitly barring federal-sector employees from participating in strikes.[59]

Despite the restrictive legal environment, employee organization continued in many federal agencies. Buoyed by the success of the collaborative effort to win passage of Lloyd-LaFollette, the AFL was able to obtain affiliations with most of the major postal workers' organizations within a few years.[60] Meanwhile, an unsuccessful attempt to lengthen working hours for white-collar employees in Washington spurred the AFL's successful organization of federal white-collar, professional, and craft workers into the National Federation of Federal Employees (NFFE) in 1917.[61] The NFFE left the

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[54] SPERO, *supra* note 51, at 84.
[55] *Id.* at 88-91.
[56] *Id.* at 122.
[57] Pub. L. No. 62-336, 37 Stat. 555 (1912). By its terms, Lloyd-La Follette originally applied only to postal employees, but in practice it came to be applied to all federal workers.
[58] National Labor Relations (Wagner) Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-166 (2000)).
[59] Taft-Hartley Act, Pub. L. No. 80-101, § 305, 61 Stat. 136, 160 (1947). As originally enacted, the strike prohibition provided only for the termination of an offending employee, but a 1955 amendment made each federal employee strike a felony offense. Pub. L. No. 84-330, 69 Stat. 624 (codified as amended at 5 U.S.C. § 7311 (2000)).
[60] SPERO, *supra* note 51, at 147.
[61] *Id*. at 178.

AFL in 1931, and the AFL created the American Federation of Government Employees (AFGE) to replace it in 1933.[62] In 1938 an organization of Treasury employees began operations. This organization eventually became the National Treasury Employees Union (NTEU), which is currently one of the largest federal non-postal unions, along with AFGE and NFFE.[63]

Even in the absence of an affirmative federal policy, a few federal agencies developed various forms of consultation or collective bargaining on their own initiative. The Tennessee Valley Authority (TVA), established under a special statutory authority that granted it considerable flexibility in employee management, became the first large federal agency to engage in modern collective bargaining, concluding its first written agreement in 1940.[64] Eventually the TVA negotiated agreements with bargaining units representing virtually its entire blue-collar workforce and many white-collar employees as well, and in the process it became the first large agency to embrace the principle of exclusive representation.[65] The scope of bargaining was surprisingly broad, including wages, job classification, and training, and there was no provision for the TVA leadership to override negotiated agreements or arbitrator decisions.[66]

Following the TVA's example, several divisions of the Department of the Interior embarked on formal collective bargaining during the 1940s. The Secretary of the Interior approved the Bonneville Power Administration's first formal agreement in 1945.[67] Collective bargaining became so commonplace that the Interior Department issued a *Manual on Labor Relations* that included specific guidance on certification of bargaining representatives and the negotiation of agreements.[68] While the Interior Department's practices emulated those in the private sector to a great extent, there were still considerable differences, in addition to the absence of a strike weapon for employees. The Secretary of the Interior kept veto power by reserving the right to override any negotiated contract provisions and to reject any grievance awards.[69]

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[62] *Id*. at 190-91.
[63] National Treasury Employees' Union Home Page, http://www.nteu.org.
[64] MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 297 (1976).
[65] WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 100-01 (1961).
[66] *Id.* at 103-04.
[67] PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT I (STAFF PAPERS ON EMPLOYEE-MANAGEMENT RELATIONS) 43 (1962) [hereinafter STAFF REPORT I], *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.
[68] HART, *supra* note 65, at 87-89.
[69] *Id.* at 90-91.

The efforts of the TVA and the Interior Department took place in the absence of any detailed government-wide guidance. The Civil Service Commission did issue a guide in 1951 urging agencies to meet with employee representatives to discuss matters of interest to employees and to carefully consider any proposals submitted.[70] During the Eisenhower Administration, proposed executive orders were drafted that would have required all agencies to recognize and "consult" employee organizations,[71] but President Eisenhower declined to act, even on these relatively weak proposals.

By 1961, it was estimated that approximately one-third of the federal workforce belonged to employee organizations, but the membership was disproportionately located in the Post Office Department. Union membership among non-postal employees was estimated at only sixteen percent.[72] The two unions with the largest federal-sector membership were both postal employee organizations.[73] AFGE and NFFE represented employees across a broad spectrum of federal agencies, but they could not boast anything close to the membership of the two largest postal unions.[74]

B. Pre-1962 Developments in Union Security and Official Time

The federal government's first reported encounter with a union security arrangement occurred when it acquired the Government Printing Office (GPO) in 1861. The GPO's predecessor (a private printing company) had operated as a closed shop, and the GPO continued to do so, without reported incident, for decades. In 1903 the GPO terminated a bookbinder because he had been expelled from the union, and the employee appealed to the Civil Service Commission. The Commission reversed the termination and was upheld by President Theodore Roosevelt, who wrote that "no rules or resolutions of [a] union can be permitted to override the laws of the United States . . . ."[75]

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[70] FEDERAL PERSONNEL COUNCIL, U.S. CIVIL SERVICE COMMISSION, SUGGESTED GUIDE FOR EFFECTIVE RELATIONSHIPS WITH ORGANIZED EMPLOYEE GROUPS IN THE FEDERAL SERVICE (1952), *in* PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT II, APPENDIX B [hereinafter SUGGESTED GUIDE], *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.

[71] PERSONNEL COUNCIL, U.S. CIVIL SERVICE COMMISSION, PROPOSED EXECUTIVE ORDERS ON EMPLOYEE-MANAGEMENT RELATIONS (1954 & 1957), *in* EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE BACKGROUND PAPERS**,** *available at* National Archives College Park (MD) Center, Record Group 174, Box 42.

[72] PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT II (EMPLOYEE-MANAGEMENT RELATIONS PRACTICES IN THE FEDERAL SERVICE) 9 (1961) [hereinafter STAFF REPORT II], *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.

[73] *Id.*

[74] *Id.*

[75] SPERO, *supra* note 51, at 380-81.

The GPO's union shop thus came to an abrupt end, but the GPO continued to engage in collective bargaining.[76]

Despite its pioneering attitude toward bargaining, the TVA rejected all proposals to negotiate union shop or agency shop arrangements, since it believed such negotiations would be unlawful, even under the TVA's broad grant of statutory authority.[77] However, the TVA adopted an official policy of encouraging union membership as part of its union contracts, which required supervisors to consider membership as a positive factor in employee evaluations,[78] transfers, promotion, and retention.[79] Both the Authority and its unions considered the union preference provisions to be a form of union security.[80] The TVA was one of the first federal agencies to set up a system of voluntary dues check-offs.[81] Like the TVA, the Interior Department rejected the union shop and the agency shop as "contrary to the principles of the Federal Government,"[82] but it allowed the Bonneville Power Administration to introduce voluntary dues check-offs in 1953.[83]

Official time was documented as an issue in the federal sector as early as 1919, when Franklin Roosevelt (then Assistant Secretary of the Navy) directed that the Boston Navy Yard not discriminate against members of shop committees whose grievance representation activities had reduced their productivity.[84] This order suggests that the use of official time for grievance representation was an accepted practice in at least one large department as early as the World War I era, despite the absence of any written guidance authorizing it.

The Civil Service Commission's 1952 Guide recommended allowing employees to consult with management representatives while on official time, but it discouraged the use of official time for organizing, soliciting dues, or distributing literature.[85] The version of the Federal Personnel Manual in effect in 1961 stated that employees "should be assured" of reasonable official time for preparing grievances, but it made no other mention of official time, even for employees representing a grievant.[86]

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[76] *Id*.
[77] HART, *supra* note 65, at 102-03.
[78] *Id*. at 99.
[79] Bowman v. Tenn. Valley Auth., 744 F.2d 1207, 1210 (6th Cir. 1984).
[80] *Id.*
[81] HART, *supra* note 65, at 106.
[82] STAFF REPORT I, *supra* note 67, at 44.
[83] *Id.* at 57.
[84] SPERO, *supra* note 51, at 100.
[85] SUGGESTED GUIDE, *supra* note 70, ¶ 5b.
[86] FEDERAL PERSONNEL MANUAL, CHAPTER E2, *in* EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE BACKGROUND PAPERS**,** *available at* National Archives College Park (MD) Center, Record Group 174, Box 42.

Surveys conducted in 1961 by the President's Task Force revealed that the limited use of official time had become common in many agencies. Some unions used official time to a much greater degree than others, so it appears that the practice varied considerably, even within agencies. Most of the postal employee unions used little or no official time,[87] but the NFFE, which represented employees in every large agency, reported that it used official time for investigation of grievances and for membership meetings.[88] A few unions even reported using official time for dues collection and solicitation of new members.[89] Twenty-eight agencies reported that they allowed representation of employees in grievances and appeals on official time, and no agency with significant union membership reported denying official time for grievance processing.[90] Only a few agencies reported allowing official time for collection of union dues, organizing, or internal union meetings.[91]

C. President Kennedy's Task Force and Executive Order 10,988

After World War II, employee organizations, led by the postal unions, began to press Congress to pass government-wide legislation mandating union recognition. The first union recognition bill was introduced in 1949, and successor bills were introduced in each Congress through the 1950s. A Civil Service Commission analyst later noted that the bills became "steadily more complex and more emphatic in pressing the union viewpoint."[92] Despite the substantial lobbying power of the postal unions, the opposition of the Truman and Eisenhower administrations ensured that none of the bills reached a floor vote in either house of Congress.[93] Eventually, the postal unions gained a valuable ally in Senator John F. Kennedy. Although the Democratic Party platform in 1960 did not mention the recognition of federal-sector unions,[94] Kennedy predicted, in an October 1960 letter to a postal union official, that a Democratic presidential administration, in

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[87] PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT VI (LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE AS REPORTED BY ORGANIZATIONS OF FEDERAL EMPLOYEES) 26 (1961), *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.
[88] *Id*. at 25.
[89] *Id*.
[90] STAFF REPORT II, *supra* note 72, at 19.
[91] *Id*.
[92] CIVIL SERVICE COMMISSION OPERATIONS LETTER 700-7, MAY 26, 1961, *in* EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE BACKGROUND PAPERS**,** *available at* National Archives College Park (MD) Center, Record Group 174, Box 42.
[93] *Id*.; WILLEM B. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES CIVIL SERVICE 45 (1966).
[94] STAFF REPORT I, *supra* note 67, at 27.

concert with a Democratic Congress, could "deal effectively" with legislation on union recognition.[95]

After the Democrats' success in the 1960 election, organized labor pounced on what it perceived as a golden opportunity. The AFL-CIO drafted an ambitious new bill that would have obliged federal agencies to bargain with representatives of national unions over a wide array of policies, including "promotions, demotions, rates of pay and reductions in force."[96] Interestingly, the bill would *not* have established the principle of exclusive representation, instead requiring agencies to negotiate with organizations, even those representing only a handful of employees.[97] In the early days of the 87th Congress, 25 other bills were introduced on the same subject.[98]

However, President Kennedy's assurance that he would "deal effectively" with the issue of union recognition did not turn out as the unions had hoped. Rather than supporting any of the proposed legislation, in June 1961 the President announced the formation of the Task Force on Employee-Management Relations in the Federal Service.[99] To lead the Task Force, he named Labor Secretary Arthur Goldberg, a well-known academic expert on labor-management relations and a former AFL-CIO attorney and negotiator. In the appointing memorandum, Kennedy referred to the requirement for "prompt attention by the Executive Branch" to the issue of federal sector labor-management relations, signaling his intention to issue an executive order.[100] The appointment of the Task Force immediately dampened Congressional enthusiasm for legislation on the subject,[101] and even organized labor soon resigned itself to the prospect of an executive order. The AFL-CIO submitted its own draft of an executive order in August.[102]

The Task Force recommended bringing the federal sector several steps closer to private-sector practice in labor relations, but it never seriously considered opening the door to the union shop or the

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[95] VOSLOO, *supra* note 93, at 58-59.
[96] H.R. 12, 87th Cong. (1961).
[97] *Id.* at 51.
[98] *Id.* at 59; STAFF REPORT I, *supra* note 67, at 25.
[99] PRESIDENT'S MEMORANDUM APPOINTING TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE (June 22, 1964), *reprinted in* COMM. ON POST OFFICE AND CIVIL SERVICE, HOUSE OF REPRESENTATIVES, 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE 1184 (1978) (hereinafter LEGISLATIVE HISTORY).
[100] *Id.*
[101] VOSLOO, *supra* note 93, at 59.
[102] AFL-CIO DRAFT EXECUTIVE ORDER, AUGUST 1961, *in* PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, STAFF REPORT III (SUMMARY OF TESTIMONY: TASK FORCE HEARINGS) APPENDIX (1961) [hereinafter STAFF REPORT III], *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.

agency shop. Indeed, the idea must have been considered a clear political taboo, since it was not included in any of the 26 proposed bills, and none of the union representatives who testified at the Task Force's hearings proposed it.[103] Instead, the unions focused their energy on requests for voluntary dues check-offs.[104] In its Report, the Task Force expressed its "emphatic opinion" that the closed shop and the union shop were inappropriate to the federal service,[105] but it did not mention the agency shop or attempt to evaluate whether it might be appropriate in the federal sector.

The Task Force's failure to discuss the agency shop as an option was particularly odd in light of the Task Force's reliance on the following quote from a 1955 American Bar Association report: "A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis . . . ."[106]

Of course, federal law had required private employers to negotiate union shop or agency shop proposals since 1935. The Report's conclusion on union security might have been more persuasive if the Task Force had at least considered the agency shop or if it had explained why union security was less appropriate for federal employees than for private-sector employees.

In contrast to its quick dismissal of the union shop, the Task Force carefully considered the desirability of voluntary dues check-offs. Relying on a legal analysis prepared by the Department of the Interior in 1951, supported by three subsequent decisions of the Comptroller General, the Task Force concluded that any diversion of federal employees' pay required Congressional authority.[107] Therefore, the Task Force recommended that Congressional authority be sought to implement dues check-offs throughout the government.[108]

Before making recommendations on the use of official time, the Task Force first asked the Department of Labor's attorneys for an opinion on the legal authority for the practice. The Department of Labor Solicitor's memo noted that union activities were arguably not official business, and therefore might not be a proper use of federal

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[103] STAFF REPORT I, *supra* note 67, at 25-26.
[104] STAFF REPORT III, *supra* note 102, at 7, 38, 54; AFL-CIO DRAFT EXECUTIVE ORDER, *supra* note 102, § 9.
[105] PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SECTOR (1961) [hereinafter TASK FORCE REPORT], *reprinted in* LEGISLATIVE HISTORY, *supra* note 99, at 1177, 1208 (1978).
[106] *Id*. at 1189.
[107] Some exceptions existed, such as the TVA, the Bonneville Power Administration, and the Inland Waterways Corporation, which operated under permissive personnel-management statutes. STAFF REPORT I, *supra* note 67, at 49-61.
[108] TASK FORCE REPORT, *supra* note 105, at 1204.

resources. However, the memo advised that agency heads had broad authority to grant "official leave" for activities deemed to be in the government interest, pursuant to department heads' statutory power to define the manner of employment within their agencies.[109] The Solicitor reasoned that the collection of union dues, solicitation of union membership, attending union meetings, and organizing could be considered "in the government interest," since such activities might promote good employee-management relations.[110] However, the memo also advised that the statutory authority did not authorize "substantial periods" of government time for union activities.[111]

Ultimately, the Task Force recommended that the use of official time be authorized, but on a limited basis. Noting that the agencies "varied" in their policies on allowing dues solicitation and organizing, the Task Force, without further explanation, recommended that official time not be permitted for internal union business.[112] On the question of official time for negotiations and grievance proceedings, the Task Force noted

> [T]here is virtual unanimous agreement that consultation between employee organizations and management should be conducted on official time. The Task Force is of the opinion that this practice should continue, inasmuch as management officials will always be in a position to control the amount of time involved. . . . If [the amount of official time] becomes burdensome, it would be appropriate for management to require that employee representatives negotiate on their own time.[113]

The Task Force's recommendations appear to have been based on the cautious wording of the Department of Labor Solicitor's opinion, combined with the Task Force's assessment that wide-ranging use of official time was not prevalent in most federal agencies.

Before President Kennedy took action on the Report, the National President of AFGE responded to the Report's recommendations in a letter to Secretary Goldberg.[114] The letter stated, possibly for the first time, AFGE's belief that there should be an explicit

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[109] STAFF REPORT I, *supra* note 67, at 65-67. The relevant statute at the time was 5 U.S.C. § 22, now codified at 5 U.S.C. § 301 (2006), which authorizes each department head to issue regulations "for the government of his department, the conduct of its employees, [and] the distribution and performance of its business."
[110] STAFF REPORT I, *supra* note 67, at 65-67.
[111] *Id*.
[112] TASK FORCE REPORT, *supra* note 105, at 1204.
[113] *Id*. at 1203.
[114] Letter from James A. Campbell to Arthur J. Goldberg (Dec. 28, 1961), *available at* National Archives College Park (MD) Center, Record Group 174, Box 41.

linkage between the lack of private-sector-style union security arrangements and the generous authorization of official time. If federal-sector unions were not to be granted precisely the same rights as their private-sector counterparts, the argument went, then the agencies must "lean over backwards" to promote effective labor relations, and this included permission to conduct internal union business on "company time."[115] Secretary Goldberg's response to AFGE on this particular point is unknown,[116] but AFGE's view found no support in the Task Force Report or in the ensuing Executive Order.

President Kennedy quickly implemented the Task Force recommendations in January 1962. Executive Order 10,988[117] required agencies to recognize all lawful federal employee organizations, and it set up three tiers of recognition: informal, formal, and exclusive. Organizations able to recruit and maintain at least ten percent of the bargaining unit population as members (and chosen as exclusive representative by a majority of the bargaining unit) could qualify for exclusive recognition.[118] Exclusive representatives were entitled to negotiate formal collective bargaining agreements and to represent bargaining unit members in all traditional labor-management relationships, such as grievance proceedings.[119] If no organization could obtain majority support as exclusive representative, but one or more could show membership by at least ten percent of the bargaining-unit members, then such organizations could receive formal recognition, which included the right to meet and confer over "personnel policies and practices" and "matters affecting working conditions."[120] Any other lawful employee organizations were entitled to informal recognition, even if another organization attained exclusive recognition. However, informal recognition did not require agencies to consult, but only to allow presentation of views "on matters of concern to its members."[121]

A brief paragraph on official time prohibited the solicitation of memberships, dues, and internal organization business except on non-duty time.[122] It allowed official time for "officially requested and approved consultations and meetings," but only when "practicable."[123] Agencies were permitted unilaterally to deny official time, even for contract negotiations and grievance proceedings involving exclusively recognized organizations.[124]

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[115] *Id*.
[116] *Id*. A notation on the letter states that he responded at a lunch meeting.
[117] 27 Fed. Reg. 551 (Jan. 17, 1962).
[118] *Id.* § 6a.
[119] *Id*. § 6b.
[120] *Id*. § 5.
[121] *Id*. § 4.
[122] *Id*. § 9.
[123] *Id.*
[124] *Id*.

D. Developments in Official Time and Union Security: 1962 to 1978

Union leaders were not fully satisfied with Executive Order 10,988, but they immediately began taking advantage of it. As unions made progress in attaining exclusive recognition and in negotiating written agreements during the 1960s, they soon began to test the limits of § 9 of the Executive Order. Their efforts brought them into conflict with the U.S. Comptroller General. Because official time involved the use of government resources, the Comptroller General assumed a crucial role as legal arbiter of questionable provisions. In 1966 the Comptroller General approved a contract provision allowing the use of official time "to attend union conducted training sessions designed to inform employees on … provisions of Executive Order 10,988 which are of mutual concern to the agency and the employee organization."[125] However, the decision added two major restrictions. First, no official time could be granted to train employees on recruiting, internal business, or, oddly enough, "the art of collective bargaining negotiations." The Comptroller General reasoned that the listed training subjects would not be "in the interest of the Government." Second, and with no rationale, the decision restricted grants of official time to periods of eight hours.

Meanwhile, unions achieved a victory on the subject of dues check-offs. In 1963, the Comptroller General determined that an act of Congress just a few weeks prior to the issuance of the 1961 Task Force Report[126] provided a legal basis for voluntary dues withholding.[127] Therefore, in October 1963, the Civil Service Commission issued regulations authorizing agencies to negotiate check-off provisions with exclusively recognized organizations while requiring the collection of an administrative fee of two cents per deduction.[128] Employees could withdraw their authorizations for dues deduction at six-month intervals.[129] By 1968, over 23 million dollars was being deducted annually.[130]

Between 1962 and 1969, union representation in the federal sector blossomed from 29 exclusive units representing about 19,000 employees (all in Interior and the TVA) to over 2,300 exclusive units in 35 agencies representing over 1.4 million employees (over half of the

[125] *Comptroller General Clarifies Use of Administrative Leave to Attend Union Training Sessions*, GOV'T EMPL. REL. REP. (BNA), July 12, 1966, at A3.
[126] 5 U.S.C. § 3075 (codified at 5 U.S.C. § 5525 (2001)).
[127] B-40342, B-132133, 42 Comp. Gen. 342 (1963).
[128] NESBITT, *supra* note 64, at 211.
[129] *Id*.
[130] *Id*. at 213.

federal workforce subject to E.O. 10,988).[131] By the late 1960s, over three-quarters of the collective bargaining agreements covering federal employees provided for official time for grievance processing, arbitration, or both.[132] The bulk of those agreements provided official time for union representatives only, not for grievants or witnesses.[133] Many of the agreements also included prohibitions against "excessive use" of official time.[134] The tone and content of the most typical contract terms suggests that the use of official time was limited and carefully controlled by management during the 1960s.

1. *President Johnson's Review Committee and the Right-to-Work Movement*

In 1967 President Johnson appointed a Review Committee to assess developments under E.O. 10,988 and to make recommendations for reforms. The comments of some of the union leaders and agency representatives before the Review Committee shed light on the limited application of official time under E.O. 10,988. The TVA reported that official time requests were "carefully scrutinized" because "[s]ubsidization by management of union activities undermines genuine independence," and also stated that it did not allow official time for union representatives in bargaining negotiations.[135] AFGE complained that agencies were overly restrictive in granting requests to place full-time union officials on leave without pay (LWOP) and argued that agencies should be required to grant LWOP to any full-time union officers and employees.[136] The National Association of Government Employees (NAGE) went even further, suggesting that officials of large bargaining units be granted full, paid official time for union duties.[137]

During the Review Committee's oral testimony, the debate over union security, suppressed by the 1961 Task Force, burst into the open.

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[131] STUDY COMMITTEE REPORT AND RECOMMENDATIONS (1969), *in* U.S. FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 63 (1975).
[132] BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, NEGOTIATION IMPASSE, GRIEVANCE, AND ARBITRATION IN FEDERAL AGREEMENTS 29 (1970).
[133] *Id*. at 30.
[134] *Id*.
[135] PRESIDENT'S REVIEW COMMITTEE ON FEDERAL EMPLOYEE-MANAGEMENT RELATIONS, SUMMARY OF TESTIMONY AND WRITTEN SUBMISSIONS 29 (1967) [hereinafter SUMMARY OF TESTIMONY] (on file at U.S. Dept. of Labor, Wirtz Labor Library, Washington D.C).
[136] Federal employees on approved leave without pay (LWOP) maintain their eligibility for certain benefits and can accrue credit for retirement. For a summary of current LWOP provisions, see the Office of Personnel Management website, http://www.opm.gov/oca/leave/html/lwop_eff.htm (last visited Dec 12, 2006). The use of LWOP for collective bargaining activities was not specifically addressed in any of the executive orders or in the current statute.
[137] SUMMARY OF TESTIMONY, *supra* note 135, at 74-75.

Representatives of the AFL-CIO and the American Federation of State, County, and Municipal Employees (AFSCME) urged authorization of the union shop or the agency shop.[138] A group of university professors and other labor-relations experts agreed, offering the following argument:

> It is hard to understand why [the 1961 Task Force] included the union shop in the same category [as the closed shop]. . . . All the union shop implies is an additional work requirement over and above the national security question, citizenship, adequate attendance on the job, appropriate promptness, etc. The union shop is a logical extension of the concept of exclusive recognition . . . . If all employees receive the benefits obtained by the union then it is logical for all employees to be required to join the organization.[139]

Of the agency representatives who testified before the Review Committee, only the Department of Commerce opposed the agency shop, on the vague grounds that "the Federal establishment is [not] ready for anything like that."[140] The NRWTC offered a more extensive argument, accusing the AFL-CIO of exploiting the exclusive recognition provision of Executive Order 10,988 to obtain union security provisions through legislation or a new executive order.[141] In the NRWTC's view, "a decision by this body to allow so-called 'union security' clauses would amount to the Federal Government coercing its more than 3,000,000 employees to either 'pay up or get out.'"[142]

The Review Committee completed a draft report that recommended abolishing informal recognition and tightening the standards for formal recognition.[143] The draft report endorsed dues check-offs as an effective union security measure, and it made no recommendations on the union shop or the agency shop.[144] However, it

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[138] *Id.* at 2, 84.
[139] Charles J. Slanicka et al., *Proposals for Amending Executive Order 10988* 11, *in* U.S. PRESIDENT'S REVIEW COMMITTEE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, 1967-68, STATEMENTS AND OTHER MATERIAL PRESENTED TO THE COMMITTEE VOL. 7 (on file at U.S. Dept. of Labor, Wirtz Labor Library, Washington D.C.).
[140] SUMMARY OF TESTIMONY, *supra* note 135, at 65.
[141] *Id.* (Statement of S.D. Cadwallader, President of the National Right to Work Committee).
[142] *Id.*
[143] DRAFT REPORT OF THE PRESIDENT'S REVIEW COMMITTEE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 22-24 (1968), *reprinted in* 56TH ANNUAL REPORT OF THE SECRETARY OF LABOR 33, at 48-53 (1968).
[144] *Id*. at 61-62.

did recommend enhancing the effectiveness of dues check-offs by making them revocable at twelve-month intervals rather than the then-prevailing six-month intervals.[145] It did not recommend changes to the official time rules. The Review Committee's work ceased at this point, and it never issued a final report, reportedly because of an objection to the draft report from the Department of Defense.[146]

As the Review Committee completed its draft recommendations, a comment by the Civil Service Committee Chairman at a press briefing in April 1968 set off a Congressional furor on union security. The Chairman reportedly stated that the Review Committee was considering a recommendation on "union security as it relates to something more than dues check-off."[147] Several members of Congress immediately expressed concerns. Labor Secretary Willard Wirtz emphatically denied that the Review Committee would recommend introduction of the union shop or the agency shop,[148] but some members of Congress believed that preventive action was necessary to relieve the White House from the "relentless pressure" exerted by union leaders.[149] Legislation was introduced in both houses prohibiting any sort of compulsory union dues, and in hearings held by the Senate Civil Service Committee in June 1968, several Congressmen and Senators offered various arguments against union security measures. One Congressman asserted that "[c]ompulsory membership would put employees in service to the union leaders, rather than the other way around" and made the interesting argument that compulsory payment of dues or fees to unions would amount to a taxpayer subsidy of unions.[150] Members also expressed concerns about federal employees being forced into union disciplinary systems[151] and the use of dues money for political activities.[152] None of the members present at the hearing spoke in favor of union security.

The proposed legislation against "compulsory union membership" did not come to fruition, but the hearings demonstrated the strong political opposition to any form of the union shop in the

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[145] *Id*.

[146] The Defense Department objected to the Review Committee's draft recommendation to set up a Federal Labor Relations Panel to handle negotiation impasses. NESBITT, *supra* note 64, at 130-31.

[147] *Exec. Order Review Committee Attempting to Submit Recommendations to President by April 30*, GOV'T EMPL. REL. REP. (BNA) No. 241, Apr. 22, 1968, at A8.

[148] Letter from Willard Wirtz to Senator Wallace Bennett (July 1, 1968), *quoted in Employee-Management Relations in the Federal Service: Hearings on S. 341 before the Senate Comm. on Post Office and Civil Service,* 90th Cong. (1968).

[149] *Id*. at 26 (statement of Rep. Benjamin Blackburn).

[150] *Id.* at 27.

[151] *Id.* at 29.

[152] *Id.* at 27 (statement of Rep. Benjamin Blackburn) and 32 (statement of Sen. Jack Miller).

federal sector, as well as Congress's poor understanding of the workings of union security provisions in the private sector.

In 1970, during the debates over the Postal Reorganization Act, Congress provided another demonstration of its hostility to union security in the federal sector. The Nixon Administration's original bill proposed to remove employees of the new U.S. Postal Service from the federal labor relations system and place them under the NLRA.[153] However, the bill ran into staunch opposition in the House when some members realized that § 8(a)(3) of the NLRA (authorizing negotiation of the agency shop) would govern postal employees. To obtain House support for the bill, a strong "right-to-work" provision was added exempting the Postal Service from § 8(a)(3).[154] Union leaders, recognizing that the Post Office Department had high rates of union membership even without the agency shop, accepted defeat on the union security issue in order to get expanded bargaining rights for Postal Service employees under the NLRA.[155]

2. *Executive Order 11,491 and Developments in the 1970s*

President Johnson left office without amending E.O. 10,988, leaving the task to the Nixon Administration. In 1969 President Nixon appointed a Study Committee, which relied heavily on the data and recommendations gathered by President Johnson's Review Committee.[156]

Two of the Study Committee's most significant recommendations were to abolish informal and formal recognition, leaving exclusive recognition as the sole possibility at the unit level.[157] Regarding informal recognition, the Study Committee noted agency complaints that it "encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management."[158] Most union leaders had urged the retention of informal recognition, but the Study Committee supported the recommendations of most agencies, which cited the same concerns that had been voiced on informal recognition.[159]

Although the records of the Review Committee contained no testimony criticizing the existing official time regime, the Study

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[153] NESBITT, *supra* note 64, at 144.
[154] "Each employee of the Postal Service shall have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right." Pub. L. No. 91-375, § 1209, 84 Stat. 719, 737 (1970) (codified at 39 U.S.C. § 1209 (2000)).
[155] NESBITT, *supra* note 64, at 144-45.
[156] STUDY COMMITTEE REPORT AND RECOMMENDATIONS, *supra* note 131, at 63.
[157] *Id*. at 65-66.
[158] *Id*. at 65.
[159] *Id.* at 65-66.

Committee recommended a significant reduction in the use of official time:

> This permissiveness [in E.O. 10,988] has led to a wide divergence of practice among the agencies in granting official time for employees serving as union negotiators. Some agencies grant official time; others prohibit it or limit the amount of time that is to be used. This has resulted in inconsistent treatment of employees similarly situated. In addition, the grant of official time has led in some instances to the protraction of negotiations over a period of many months. We believe that an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged. We recommend that the new order provide that employees serving as labor organization representatives not be carried in a duty status when engaged in the negotiation of an agreement with agency management.[160]

The Study Committee also noted that voluntary dues check-offs had "worked well as a union security measure," and that the system be continued "in order to foster stability in labor-management relations."[161] The Study Committee's Report made no mention of the Review Committee's recommendation that the revocation period for dues check-offs be lengthened to twelve months.

The resulting Executive Order introduced several major changes to the federal program, including the creation of a Federal Labor Relations Council (FLRC) to administer the program[162] and a Federal Service Impasses Panel with the authority to direct arbitration of negotiation impasses,[163] the abolition of informal recognition,[164] the phase-out of formal recognition,[165] and the elimination of the requirement for ten-percent membership as a prerequisite for exclusive recognition.[166] The Order also implemented the Study Committee's recommendation to prohibit official time for union negotiators.[167]

Not surprisingly, the prohibition on official time for negotiations, without any countervailing union security provisions, had

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[160] *Id.* at 72.
[161] *Id*. at 75.
[162] Exec. Order No. 11,491, § 4, 3 C.F.R. 861 (1969).
[163] *Id*. § 17.
[164] *Id*. § 7f.
[165] *Id*. § 8.
[166] *Id*. § 10.
[167] *Id.* § 20.

mixed consequences. In 1971 the FLRC reported that the prohibition had resulted in "difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation."[168] On the positive side, the Council noted that the prohibition had promoted "better advance planning" and "more efficient use of meeting time."[169] After balancing the costs and benefits, the Council recommended that the President authorize sufficient amounts of official time to avoid "undue hardship or delay in negotiations" and to promote "economical and business-like bargaining practices."[170]

In August 1971 the President implemented the recommendations.[171] As amended, E.O. 11,491 permitted the parties to bargain for official time for union negotiators, but each negotiator was limited to either 40 hours or one-half the total time spent in negotiations, and the number of union negotiators receiving official time would be limited to the number of management representatives.[172] Official time for contract administration functions, such as grievance processing, was left for agencies to negotiate, and the prohibition of official time for internal union business remained unchanged from the 1962 Order. The official time provisions of E.O. 11,491 remained in this form until the Order was superseded by the Civil Service Reform Act in 1978.

As the federal government's peculiar form of collective bargaining established itself, the "free rider" problem began to emerge. In 1974 the president of a large AFGE local complained to a Senate committee that he was required to represent over 13,000 Air Force bargaining unit employees, even though he had only 3,100 dues-paying members.[173] He estimated that his officials and stewards spent over seventy percent of their representational time on matters involving non-members, and they received no paid official time under their agreement.[174] In 1976 an AFGE official claimed that the union, which represented 650,000 federal workers, had fewer than 300,000 dues-paying members.[175]

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[168] FEDERAL LABOR RELATIONS COUNCIL, REPORT AND RECOMMENDATIONS ON THE AMENDMENT OF EXECUTIVE ORDER 11,491 (1971), *in* U.S. FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 58 (1975).
[169] *Id*.
[170] *Id*.
[171] Exec. Order No. 11,616, ¶ 11, 3 C.F.R. 605 (1971-1975).
[172] *Id*.
[173] *Labor-Management Relations in the Federal Service: Hearing on S. 351 Before the Senate Comm. on Post Office and Civil Service*, 93rd Cong. 203 (1973) (written submission of J.M. Hopperstad).
[174] *Id*. at 204.
[175] *Official Time Dispute Never Would Have Arisen with Union Security, Mulholland Tells SFLRP*, GOV'T EMPL. REL. REP., Dec. 27, 1976, at A10.

Lacking adequate dues remittances, the unions turned to the resource that was available to them: official time. During the early 1970s, the amount of effort expended in negotiating official-time provisions in contracts increased dramatically. A 1973 Civil Service Commission study showed that official time was among the most time-consuming issues in contract negotiations.[176] Between 1970 and 1973, the Federal Service Impasses Panel reported that the frequency of official time as an issue in impasse cases grew from 1 in 27 cases in 1970 to 10 in 68 cases in 1973.[177]

By 1975 the typical federal sector contract provided "reasonable" official time for union stewards and officers, [178] but contract provisions for block grants of official time for union officers (usually expressed as a certain number of hours per week) appeared in a few contracts, and allowances of 100 percent official time for union officers had even begun to appear.[179] Block grants for stewards were also becoming more common, but the amounts of time granted were generally modest.[180] Government officials began to acknowledge publicly that official time was being used as an alternative to the private sector's union security arrangements.[181] Although the use of official time expanded, in most cases it was kept within carefully defined limits. A 1974 Civil Service Commission survey of collective bargaining agreements showed that nearly a third of all federal employees were covered by contracts granting official time allowances for union stewards.[182] While the vast majority of bargaining units had obtained official time for contract negotiations, in the large majority of cases, less than 200 hours of aggregate official time was used.[183]

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[176] CSC/OMB SURVEY OF THE COLLECTIVE-BARGAINING PROCESS UNDER EXEC. ORDER 11491, at 93, 109 (1974).

[177] *Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service,* 93rd Cong. 84-85 (1974) (written statement of Howard W. Solomon, Federal Service Impasses Panel).

[178] UNITED STATES CIVIL SERVICE COMMISSION, UNION REPRESENTATION PROVISIONS IN FEDERAL LABOR AGREEMENTS 23 (1976).

[179] *Id*. at 29, 39.

[180] *Id*. at 38-39 (showing that the most common block-grant provisions for stewards provided only two hours per pay period).

[181] *Federal Labor Relations Program: Briefing before the House Subcomm. on Civil Service of the Comm. on Post Office and Civil Service,* 95th Cong. 12 (1977) (statement of Anthony F. Ingrassia, Director, U.S. Civil Service Commission).

[182] CIVIL SERVICE COMMISSION, SPECIAL LABOR AGREEMENT INFORMATION RETRIEVAL SYSTEM SURVEY (1974) *in Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service,* 93rd Cong. 122 (1974).

[183] CIVIL SERVICE COMMISSION, AN ASSESSMENT OF THE LABOR-MANAGEMENT RELATIONS CLIMATE AT FEDERAL FIELD ACTIVITIES, *in Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related*

In a countervailing trend, union officials in some of the larger bargaining units were gradually transforming into full-time (or nearly full-time) union officials while on federal pay, and the Office of the Comptroller General attempted unsuccessfully to intervene. In 1976 it decided that permitting an employee to be away from his official position for an "extended period" was an impermissible use of government resources, because it interfered excessively with governmental functions.[184] Concluding that the authority granted by 5 U.S.C. § 301 and the Civil Service Commission's regulations was not "sufficiently broad" to permit an employee to be diverted from her primary duties for an extended period, the Comptroller General arbitrarily set an upper limit of 160 hours per employee per year.[185] Objections from the FLRC and the national unions persuaded the Comptroller General to postpone implementation of the decision,[186] and eventually it dropped the specific limitation and deferred to the Civil Service Commission's new regulations, which imposed no new numerical limitations on the use of official time.[187]

In a 1975 review of the federal sector labor-management program, the FLRC noted that the represented proportion of the non-postal federal workforce had expanded to fifty-six percent by mid-1974.[188] Although there had been many disputes between union leaders and agency representatives over official time under E.O. 11,491, and several agencies and union representatives had recommended modifications to the official time rules, the Council decided that none of the suggested changes were backed by substantial evidence and that E.O. 11,491 promoted "businesslike conduct of labor relations while minimizing financial hardships on individual employees . . . ."[189] Therefore, the Council recommended no change to the policies on official time.[190]

Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service, 93rd Cong. 103 (1974).

[184] Comp. Gen. B-156287 (Feb. 23, 1976), *reprinted in* GOV'T EMPLOYEE REL. REP. (BNA) No. 646, Mar. 1, 1976, at G1. The decision concerned a union proposal that a teacher in an overseas Department of Defense school be allowed to spend fifty percent of his duty time in contract negotiations on paid status, and the other fifty percent in unpaid leave status.

[185] *Id*.

[186] Comp. Gen. B-156287 (unpublished) (Mar. 22, 1976).

[187] Comp. Gen. B-156287 (Sep. 15, 1976), *reprinted in* GOV'T EMPLOYEE REL. REP. (BNA) No. 675, Sep. 20, 1976, at A7.

[188] REPORT AND RECOMMENDATIONS OF THE FEDERAL LABOR RELATIONS COUNCIL ON THE AMENDMENT OF EXEC. ORDER 11,491 AS AMENDED (Jan. 1975), *in* U.S. FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 25, 28 (1975).

[189] *Id.* at 52.

[190] *Id*.

Repeated efforts to impose reforms through legislation during the early 1970s also proved unsuccessful. A group of bills did receive hearings in the House in 1974, but the bills received criticism from both agency and union representatives. One of the bills would have authorized the agency shop *and* mandated full official time for any labor-management proceedings, without limit.[191] The Civil Service Commission criticized the proposal, stating that "[c]ollective bargaining would be subsidized to the advantage of labor organizations by making official time an automatic right."[192] The Department of Transportation also objected to expanded use of taxpayer-funded official time, arguing that "employees who desire union representation should be prepared to support these efforts."[193] Another bill, which would have eliminated the duty of exclusive representation, was criticized by the National Treasury Employees Union, on the grounds that it would lead to "great instability" as employees joined and resigned from unions whenever convenient.[194] None of the bills succeeded, partly because of lack of support from the Ford Administration, and partly because of a lack of consensus among the large federal employee unions on the specifics of the legislation.[195]

By the mid-1970s, the shortcomings of the federal government's experiment with union security had become evident. The Civil Service Commission concluded that the official-time system had reached a good balance and needed no further reforms, but unions chafed at their lack of financial resources. Foreclosed from charging employees for services rendered to them, some unions had already begun to test the boundaries of the Executive Order by seeking to have designated union officials placed on increasingly larger block grants of official time. The system was ripe for further reform, and there was no shortage of thoughtful proposals.

IV. ENACTMENT OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

At the outset of his administration in 1977, President Jimmy Carter was eager to capitalize on public discontent with a federal civil service system that was perceived as inefficient at best and corrupt at

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[191] *Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service,* 93rd Cong. 553 (1974).
[192] *Id.* (comments of the U.S. Civil Service Commission).
[193] *Id.* at 574 (written comments of the General Counsel, Department of Transportation).
[194] *Id*. at 327 (statement of Vincent L. Connery, National President, NTEU).
[195] *Federal Employee Bargaining*, GOV'T EMPLOYEE REL. REP. (BNA), Jan. 17, 1977, at 5.

worst.[196] Therefore, he sought to enact the most thorough overhaul of the federal personnel system since the Pendleton Act of 1883. Soon after he took office, he appointed the Federal Personnel Management Project (FPMP), a task force of federal managers, to conduct a complete review of federal personnel policies.[197] Several of the FPMP's study teams examined the union security issue and recommended consideration of the agency shop in the federal sector.

The most thoughtful and detailed examination of the subject appeared in an Option Paper prepared by unnamed FPMP personnel.[198] The paper noted that the governments of eight states and the District of Columbia had authorized negotiation of the agency shop for at least a portion of their employees. It also cited the U.S. Supreme Court's recent holding in *Abood* that the agency shop, as practiced under the NLRA, did not violate the First Amendment rights of public employees.[199] After noting the large numbers of federal-sector agreements that provided for official time and the provision of agency office for unions, the authors summarized strong arguments in favor of reform:

> All benefits, and others, which accrue to the financial security of the union, are paid for by the agency (and ultimately, the taxpayers). Authorization of agency shop or related arrangements which would make the union more self-sufficient could provide an argument for shifting some or most of these financial burdens from the taxpayers to the employees whose interests the union is representing in these activities.[200]

The authors also summarized one argument in favor of the *status quo* on official time, although the argument was not particularly persuasive: "Conversely, it has been argued that the current provision of such economic benefits to unions and their employee representatives offsets any demonstrated need for agency shop or related forms of union security."[201]

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[196] Christine Godsil Cooper & Sharon Bauer, *Federal Sector Labor Relations Reform,* 56 CHI.-KENT L. REV. 509, 521 (1980).
[197] OFFICE OF PERSONNEL MANAGEMENT, KEY EVENTS, *at* http://www.opm.gov/BiographyofAnIdeal/PUevents1977p01.htm.
[198] FEDERAL PERSONNEL MANAGEMENT PROJECT, OPTION PAPER NO 4: FEDERAL GOVERNMENT LABOR-MANAGEMENT RELATIONS (1977), *in* STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1351 (1979) [hereinafter LEGISLATIVE HISTORY II].
[199] *Id.* at 1389; *see supra* Section II.D.
[200] LEGISLATIVE HISTORY II, *supra* note 198, at 1390-91.
[201] *Id*. at 1391.

The Option Paper discussed the District of Columbia's unusual variation on the agency shop, in which employees could escape the obligation to pay agency fees by waiving their right to union representation in grievances and appeals.[202] The Option Paper considered several other interesting versions of the agency shop, including a requirement to condition the agency shop on a separate vote of bargaining unit members and a requirement that the agency shop be granted only if unions agreed to consolidate bargaining-unit recognitions at the national or regional level.[203] The authors seemed inclined to recommend a modified agency-shop arrangement, perhaps along the lines of the District of Columbia's model, but in the end they merely presented it as one option for consideration.[204] Two other study groups made clear recommendations that some sort of agency fee should be made negotiable.[205]

As the FPMP conducted its studies, Congress worked on several proposals for a labor-management relations statute. In early 1977, three pro-union bills were introduced in the House, each backed by a different labor organization, and each containing an agency shop provision.[206] The bills backed by AFGE and the NTEU contained mandatory agency-shop provisions for exclusive bargaining representatives. The NFFE's less ambitious bill would have allowed elections to authorize "fair representation fees" while allowing unions to charge non-members for arbitrations and other special representational services.[207] Congressional committee staffers and union planners theorized that a mandatory union shop provision was a good opening position for negotiations since it might enable them to obtain a milder form of union security.[208] Staffers specifically mentioned Hawaii's agency shop law and the TVA's system of providing incentives in the personnel system for union membership.

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[202] *Id*. at 1388. The current version of this code provision is at D.C. CODE § 1-617.11(a) (2006). The same code section also allows negotiation of the agency shop, and the opt-out provision would only apply in bargaining units where the agency shop has not been negotiated.

[203] *Id.* at 1390.

[204] *Id*. at 1391.

[205] TASK FORCE 6 REPORT, LABOR-MANAGEMENT RELATIONS, *in* LEGISLATIVE HISTORY II, *supra* note 198, at 1441; FINAL STAFF REPORT, PRESIDENT'S REORGANIZATION PROJECT (1977), *in* LEGISLATIVE HISTORY, *supra* note 99, at 1462.

[206] H.R. 13, 95th Cong. § 7114(c) (1977), *reprinted in* LEGISLATIVE HISTORY II, *supra* note 198, at 149-50; H.R. 1589, 95th Cong. § 5(c) (1977), *reprinted in* LEGISLATIVE HISTORY II at 198; H.R. 9094, 95th Cong. § 7116(c) (1977), *reprinted in* LEGISLATIVE HISTORY, *supra* note 99, at 276.

[207] *NFFE Bargaining Bill Proposal Presented to House Subcommittee*, GOV'T EMPL. REL. REP. (BNA), May 16, 1977, at 6.

[208] *Administration Not Yet Ready with Bargaining Bill Stand*, GOV'T EMPL. REL. REP. (BNA), July 4, 1977, at 8.

Continued lack of consensus within the labor movement prevented any of the bills from moving forward in 1977.[209] Eventually the three groups compromised on one bill, H.R. 9094,[210] which made unlimited official time mandatory in all collective bargaining negotiations and grievance proceedings and explicitly allowed unions and management to negotiate unlimited amounts of official time for any purpose relating to labor-management relations.[211] Although its prospects appeared bleak when introduced,[212] H.R. 9094 eventually became the basis of the Federal Sector Labor-Management Relations Statute (hereinafter FSLMRS or Statute).

Despite the recommendations of its own Personnel Project, the Carter Administration had little interest in statutory reform of federal sector labor-management relations.[213] In March 1978 the Administration introduced a civil service reform bill that lacked any provisions on labor-management relations.[214] The bill did include proposals to streamline the disciplinary and appeals processes for federal employees, and those elements of the bill aroused the ire of many federal-sector unions. While several of the federal employee unions declared their outright opposition to President Carter's reform bill, the AFGE leadership stated publicly that it would support the bill, *if* a labor-management relations statute were added.[215] AFGE's gambit paid off in late April, when the President agreed to add a labor-management relations title to the bill.[216]

The agency shop was a contentious issue throughout the legislative process. The Democratic members of the House Post Office and Civil Service Committee played the key role in crafting the final legislation, and they used H.R. 9094, rather than the Administration's

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[209] *Analysis: Military Union Furor, Stalled Legislation Marked 1977,* GOV'T EMPL. REL. REP. (BNA), Jan. 9, 1978, at 7.
[210] *Id*.
[211] LEGISLATIVE HISTORY II, *supra* note 198, at 295.
[212] *Analysis: Military Union Furor, Stalled Legislation Marked 1977,* GOV'T EMPL. REL. REP. (BNA), Jan. 9, 1978, at 7.
[213] President Carter's Civil Service Commission chairman explained that the President's lack of interest stemmed from a desire to keep control of the program through the Executive Order, rather than surrendering it to Congress. *No Labor Relations Package in Proposed Legislation Yet*, GOV'T EMPL. REL. REP. (BNA), Feb. 13, 1978, at 8. In a public question-and-answer session on the civil service reform legislation in August 1978, President Carter made one of his few public comments on the labor-management relations portion of the bill: "My preference is to limit the collective-bargaining process in this legislation to what is included in the Executive Order today." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1368 (1979).
[214] LEGISLATIVE HISTORY II, *supra* note 198, at xii.
[215] Mike Causey, *Unions May Get New Clout*, WASH. POST, Apr. 13, 1978, at C2.
[216] Kathy Sawyer, *New Rules Drafted for U.S. Workers*, WASH. POST, Apr. 26, 1978, at A1.

less ambitious bill, as the basis for their committee markup.[217] At the outset, the Administration expressed its firm opposition to any form of the union shop,[218] and even the most pro-union Democrats in the House recognized the political difficulty of passing an agency shop provision.[219] Still, Committee Democrats proposed a compromise agency shop provision that would have required an election in each bargaining unit (separate from the election to certify a union as exclusive bargaining agent) to authorize the agency shop.[220]

The House bill's agency shop provision was deleted during the House Committee markup, probably because of the Administration's opposition.[221] Later, in the House-Senate Conference Committee, the House conferees persuaded the Senate to delete a provision from the Senate bill that "no employee shall be required by an agreement to become or to remain a member of a labor organization, or to pay money to an organization."[222] Union leaders had long decried similar provisions in the Executive Orders as thinly veiled expressions of hostility toward unions. Although the explicit prohibition on the agency shop was deleted, § 7102 of the Statute protected the right of employees to refrain from joining or assisting any labor organization.[223] And if any further doubt remained, the Conference Committee's Report made the intent of Congress clear: "The conferees wish to emphasize, however, that nothing in the conference report authorizes, or is intended to authorize, the negotiations of an agency shop or union shop provision."[224]

In its markup of the bill, the House Committee rejected an Administration proposal to delete the expanded official time provisions.[225] Instead, it adopted a compromise bill that conceded only a minor amendment to the official time provisions of H.R. 9094 by making official time for grievance processing negotiable, rather than

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[217] LEGISLATIVE HISTORY II, *supra* note 198, at xv-xvii. The Administration's initial proposal for a Labor-Management Relations Statute was the verbatim text of Executive Order 11,491. *Id*. at 484.
[218] Mike Causey, *White House Getting Its Way*, WASH. POST, May 8, 1978, at C2.
[219] One representative went so far as to criticize the FPMP's support for the agency shop as a "smoke screen" for the Administration's hostility toward unions, since "everyone knows that it is a virtual certainty that Congress would refuse to approve [agency shop legislation]." LEGISLATIVE HISTORY II, *supra* note 198, at 834 (comments of Rep. William F. Walsh).
[220] Kathy Sawyer, *Hill Panel Democrats Work to Alter Civil Service Bill*, WASH. POST, June 10, 1978, at C4.
[221] LEGISLATIVE HISTORY II, *supra* note 198, at xv-xvii.
[222] S. REP. NO. 95-1272, at 159 (1978) [hereinafter CONFERENCE REPORT].
[223] 5 U.S.C. § 7102 (2006).
[224] CONFERENCE REPORT, *supra* note 222, at 159.
[225] 124 CONG. REC. 25,601 (1978) (statement of Rep. Clay).

mandatory.[226] A Republican member of the Committee decried the bill's official time provisions as "outright taxpayer support for labor unions representing federal employees,"[227] but his objection was the only explicit criticism of the expanded official-time provisions to appear in the legislative history.

The bill reported out of the House Committee contained § 7132 on official time, which was enacted verbatim as § 7131 of the Statute:

> Official time
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
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> (d) Except as provided in the preceding subsections of this section--
>
> (1) any employee representing an exclusive representative, or

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[226] CONFERENCE REPORT, *supra* note 222, at xv-xvii. For practical purposes, union supporters gave up very little in this compromise, since the overwhelming majority of collective bargaining agreements already provided for official time for grievance processing.

[227] LEGISLATIVE HISTORY II, *supra* note 198, at 735.

> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.[228]

Since the official time provisions were only a small portion of one title of a massive civil service reform bill, it is unlikely that many legislators understood the scope of the changes. The careless (or perhaps disingenuous) statement of one of the bill's supporters on the House floor did not help to promote understanding:

> What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. . . . So we are now going to put into the United States Code instead of the Federal Register this basic plan of President Kennedy's that has worked so well in the last 15 years. The Federal employee unions do not get much out of this amendment process that is not already in the Executive order.[229]

The final floor debate on the House bill provided a vivid illustration of how poorly most members of Congress understood the official time changes. One of the last issues debated before the bill's final floor vote was the relatively minor matter of requiring agencies to provide dues check-offs at no cost to unions, rather than making negotiable a two-cent administrative fees for each deduction.[230] Although the cost of check-offs to the taxpayers would be negligible compared to the costs of expanded official time, Congressmen vigorously criticized the latter while ignoring the former. For example, one representative complained, "for the first time we are going to allow the Treasury to pay for union activity. . . . We are giving more than equity—we are allowing federal employee unions to dip into the federal treasury to provide for the dues check off."[231]

No changes were made to the official time provisions of the House bill on the floor, and the bill passed in September 1978.[232] Meanwhile, the Senate passed a bill that closely tracked E.O. 11,491

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[228] H.R. 11,280, 95th Cong. § 7132 (1978).
[229] 124 CONG. REC. 29,182 (1978) (statement of Rep. Udall).
[230] The provision was enacted as § 7115 of the statute.
[231] 124 CONG. REC. 29,201 (1978) (statement of Rep. Rousselot).
[232] LEGISLATIVE HISTORY II, *supra* note 198, at xx-xxv.

and included its official time provisions nearly verbatim.[233] The Report of the Senate Committee on Governmental Affairs reflected its view that the *status quo* was sufficient to promote effective labor relations:

> Nothing in the [official time] provision prohibits an agency and labor organization from negotiating provisions which provide for official time for labor organization representatives to engage in contract administration and other representational activities (including negotiations which arise out of circumstances during the term of the basic agreement) which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship . . . .[234]

Nonetheless, for reasons that were not recorded, the House bill's official time rules prevailed in the Conference Committee[235] and were enacted as § 7131 of the Civil Service Reform Act in October 1978.[236]

The FSLMRS[237] significantly strengthened the position of federal sector unions. It replaced the Federal Labor Relations Council, which had been composed of federal agency heads, with an independent Federal Labor Relations Authority (FLRA),[238] and it empowered the FLRA to decide disputes over bargaining unit determinations and elections,[239] the duty to bargain in good faith,[240] and to conduct hearings on complaints of unfair labor practices.[241] The FSLMRS also required agencies to negotiate grievance procedures allowing unions to invoke arbitration directly, without any requirement to obtain approval from a federal official.[242] All members of the Federal Service Impasses Panel were placed on five-year terms of office to increase their independence.[243]

The FSLMRS enhanced union opportunities for the use of official time while increasing management's obligations to provide it.

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[233] *Id.* at 600.
[234] S. REP. NO. 95-969 (1978).
[235] The Conference Report contained no details on how the differences over official time were settled. LEGISLATIVE HISTORY II, *supra* note 198, at 793-828.
[236] Pub. L. No. 95-454, 92 Stat. 1111 (1978).
[237] 5 U.S.C. §§ 7101-7135 (2006).
[238] *Id.* § 7105.
[239] *Id.* § 7111.
[240] *Id.* § 7117(c).
[241] *Id.* § 7118. Under Executive Order 11,491, an Assistant Secretary of Labor had performed each of these functions. Exec. Order 11,491, § 6, 3 C.F.R. 861 (1966-1970), *amended by* Exec. Order 11,616, ¶ 4, 3 C.F.R. 605 (1971-1975).
[242] 5 U.S.C. § 7121(b) (2006).
[243] *Id.* § 7119(c)(3). Under Executive Order 11,491, § 5, all members of the Panel had served at the pleasure of the President.

The prohibition on official time for internal union business remained,[244] but the legislative history accompanying it would guarantee that the prohibition would be narrowly construed. The limits on official time for union negotiators were removed, and official time became mandatory for preliminary and post-impasse stages of bargaining and for bargaining of agreements other than full-fledged collective bargaining agreements.[245]

In perhaps the most significant change, the FSLMRS added a broad authorization that had not appeared in any of the executive orders. Section 7131(d) granted agencies and unions broad authority to negotiate unlimited amounts of official time for bargaining unit employees for any matters "reasonable, necessary, and in the public interest." Thus, the statute did not limit the ambit of negotiated official time to labor-management relations activities. While official time for contract administration had not been forbidden under the executive orders, the lack of specific authorization (other than the limited, general authorization of 5 U.S.C. § 301),[246] combined with the Comptroller General's oversight, had served as a restraint on the practice, and agencies had never been held to a duty to bargain such proposals. Section 7131(d) opened the door for a wide variety of new (or newly-expanded) uses of official time for union representatives. By creating an explicit, statutory basis for official time, the statute also ended the Comptroller General's role as interpreter of the official time rules.

And thus, with minimal public debate, federal employee unions and their congressional supporters had achieved one of the goals the AFGE President had expressed in 1961: the authority to obtain substantial amounts of paid official time to compensate for the prohibition of the agency shop. The steadfast opponents of "compulsory unionism" in the Carter Administration and Congress had held the line against the dreaded agency shop, but in the process they had unwittingly set the stage for enhanced, government-funded union security. It is interesting to speculate on how the debate would have unfolded if the Carter Administration had seriously considered the recommendations of its Personnel Project and decided to allow one of the many creative proposals for the agency shop to emerge from the House Committee. Instead, the unions were left to fight for official time as a primary means of support, with negative consequences for the evolution of labor-management relations.

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[244] 5 U.S.C. § 7131(b) (2006).
[245] *Id.* § 7131 (a); *see also* Interpretation and Guidance, 2 F.L.R.A. 265 (1979).
[246] *See supra* note 109 and accompanying text.

V. DEVELOPMENTS IN UNION SECURITY SINCE 1978

A. Expansion of Official Time

1. *Official Time vs. Management Rights*

The FSLMRS set up a tension between § 7131 and the management-rights provisions of § 7106.[247] The stakes grew during the 1980s as unions tried to take advantage of § 7131(d) to bargain for 100 percent official time for union officials in large bargaining units. By early 1984, the vast majority of agreements provided merely for "reasonable" official time.[248] Agreements for 100 percent official time were rare, and agreements for 50 percent official time were not much more common.[249] Still, union leaders worked hard to expand the number of officials on 100 percent official time.

In determining the negotiability of an AFGE proposal for 60 full-time union representatives[250] in a consolidated bargaining unit containing over 72,000 employees, the FLRA determined that the agency did not have a duty to bargain over the proposal, based on its factual finding:

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[247] 5 U.S.C. § 7106 (2006).

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
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> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
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> (2) in accordance with applicable laws—
>
> . . .
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> . . .
>
> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
>
> (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[248] U.S. OFFICE OF PERSONNEL MANAGEMENT, A SURVEY OF UNION REPRESENTATION PROVISIONS IN FEDERAL LABOR AGREEMENTS 2 (1984).

[249] *Id.* at 32 (only four of 2,439 agreements allowed 100% official time for union officers).

[250] Before the FLRA issued its decision, impasse proceedings had been resolved through arbitration, and the arbitrator had awarded AFGE twelve full-time positions. *Id*. at 216 n.1.

> The employees in the units of exclusive recognition involved herein are skilled technicians in areas of sheet metal work, electronics, electrical engineering, data processing, and procurement functions. It is often the case that the employees work in crews in which the various tasks and skills are interrelated and interdependent so that the progress of the work depends on each function in the work process being fulfilled.[251]

FLRA resolved the tension between § 7106 and § 7131 in favor of management. It adopted a test that asked whether a union bargaining proposal would have a "direct effect" on a management right enumerated in § 7106.[252] If the agency could demonstrate that a proposal for 100 percent official time would, under the circumstances, require the agency to shift personnel from other work projects or organizations to cover the union official's regular duties, [253] then the FLRA concluded that the proposal had a direct effect on management's right to determine the "numbers, types, and grades of employees" under § 7106(b), and therefore the proposal was negotiable only at the agency's election.[254]

On review, the U.S. Court of Appeals disagreed, reasoning that the FLRA's analysis would render § 7131(d) virtually irrelevant:

> [I]f [the FLRA's] test were consistently applied to the negotiability of new proposals for official time, its effect would be to make such proposals negotiable at the agency's election whenever an agency is efficiently run. Any provision for additional official time in an efficiently run organization will require the agency to reassign work to other employees and, if present employees are already busy throughout the day, to hire additional employees to perform these reassigned duties.[255]

The Court's conclusion is certainly debatable, since the FLRA's decision was based on specific factual findings that would be difficult for agencies to justify in most circumstances, especially if the union does not propose any officials on 100% official time. Lacking any

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[251] *Id*. at 220.
[252] *See generally* AFGE Council of Locals No. 214 and Dep't. of the Air Force, Air Force Logistics Command, 19 F.L.R.A. 215 (1985).
[253] *Id.* at 220-22.
[254] *Id.* at 222.
[255] AFGE Council of Locals No. 214 v. FLRA, 798 F.2d 1525, 1529 (D.C. Cir. 1986).

useful legislative history on the disputed issue, and perhaps realizing the weakness of its reasoning, the Court ventured to speculate on Congress' intent:

> In specifically providing for official time, Congress must have envisioned either some reallocation of positions or some additional hiring and hence some limitation in management's right to determine the number of employees assigned to a work project or organizational subdivision. Otherwise, the official time provision of section 7131(d) would be a dead letter.[256]

While the decision in *AFGE Council of Locals No. 214* did not force any agency to accept proposals for 100 percent official time, imposing a duty to bargain over such proposals was significant, especially since that duty had never existed under the executive orders. This decision paved the way for a significant expansion of the number of full-official-time employees, a trend that would later generate controversy.[257]

2. *"Labor-Management Activity" under § 7131(d)*

Section 7131(d), with its seemingly open-ended authorization to negotiate grants of official time, was one of the most significant innovations of the Statute. However, the House Committee Report did signal a significant limitation on management's duty to bargain its provisions:

> Section 7132(d) [enacted as § 7131(d)] makes all other matters concerning official time for unit employees *engaged in labor-management relations activity* subject to negotiation between the agency and the exclusively recognized labor organization involved.[258]

The FLRA has consistently held that § 7131(d) imposes on agencies the duty to bargain over any proposal for official time to be used for labor-management relations activities,[259] but it has also been consistent in upholding management's right to refuse to bargain proposals that fall outside those bounds. Therefore, it has held that

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[256] *Id.*
[257] *See infra* Section V.C.5.
[258] H.R. REP. NO. 95-1403, at 59 (1978) (emphasis added).
[259] *E.g.,* Dep't of Justice, INS and AFGE Nat'l Border Patrol Council, 37 F.L.R.A. 362, 370-71 (1990) (rejecting Agency argument that time for preparing unfair labor practice charges was outside the scope of § 7131(d)).

agencies have no duty to bargain proposals for official time to attend employee funerals,[260] to appear at any federal agency for interviews or testing,[261] to visit members of Congress for "any" job-related reason,[262] and for teachers to conduct curriculum development and participate in accreditation evaluations. [263]

In some early decisions, the FLRA also overturned arbitrators' awards that interpreted contract provisions as granting official time for purposes not related to labor-management relations.[264] Essentially the FLRA held such provisions were a prohibited subject of bargaining. In 1991, the FLRA overruled its earlier decisions and held that § 7131 did not prohibit parties from negotiating official time for purposes not directly related to labor-management relations:

> Consistent with an agency's broad discretion to grant paid time in a variety of circumstances, parties may agree in their collective bargaining agreements to provide official time for other matters. In such circumstances, an arbitrator's interpretation of a collective bargaining agreement provision dealing with official time will not be found deficient under the Statute unless the award is contrary to law, rule, or regulation or other grounds stated in section 7122 of the Statute.[265]

The Authority did not cite any source of positive authority for its holding in *Council of Field Labor Locals*, but it could have cited 5 U.S.C. § 301, which authorizes agency heads to prescribe rules for internal agency operations. [266]

Council of Field Labor Locals does not oblige agencies to bargain official time proposals that fall outside the ambit of the

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[260] AFGE Local 2761 and Dep't of the Army, Army Publications Distribution Center, 32 F.L.R.A. 1006, 1012 (1988). The provision had been negotiated at the local level but disapproved by the Department of the Army prior to implementation of the agreement under 5 U.S.C. § 7114(c).

[261] AFGE Local 2094 and Veterans Admin. Med. Ctr., 19 F.L.R.A. 1027, 1029 (1985).

[262] *Id.*

[263] Panama Canal Fed'n of Teachers, Local 29 and Dep't of Def. Dependents Sch., Panama Region, 19 F.L.R.A. 814 (1985).

[264] Dep't of Health and Human Services, Social Security Admin. and AFGE, 27 F.L.R.A. 391, 392-93 (1987) (union official had used duty time to represent former employee in unemployment compensation hearing); Nat'l Archives and Records Admin. and AFGE Local 2928, 24 F.L.R.A. 245 (1986) (union official had used duty time to assist an employee who had been arrested by the local police).

[265] AFGE Nat'l Council of Field Labor Locals and Dep't of Labor, Mine Safety and Health Admin., 39 F.L.R.A. 546, 553 (1991). 5 U.S.C. § 7122(b) permits exceptions from arbitration awards "on other grounds similar to those applied by federal courts in private sector labor-management relations."

[266] *See supra* note 109 and accompanying text.

FSLMRS. In fact, the Authority has continued to issue decisions holding that such proposals are permissive subjects of bargaining.[267] However, the *Council of Field Labor Locals* decision can result in a substantial increase in agencies' official-time liabilities, if agency negotiators are not careful in drafting agreements, or if supervisors carelessly allow past practices to broaden the scope of unions' official time entitlements.[268]

3. *Interpreting the "Internal Union Business" Prohibition*

The prohibition on conducting internal union business during duty time has been a constant feature of federal labor relations since President Kennedy's Executive Order. In fashioning the official time provisions of the FSLMRS, the House Committee grudgingly retained the prohibition, but the bill's proponents ensured that there was abundant legislative history to support a very narrow construction of the "internal business" prohibition. The House Committee Report stated "Section 7132(b) provides that matters *solely relating to* the internal business of a labor organization must be performed when the subject employee is in a nonduty status."[269]

During the debate on the House floor, two of the Committee members worked to eliminate any possible ambiguity about the "internal business" provision:

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. The section also lists three such activities *reflecting our intention that "internal business" be strictly construed to apply only to those activities regarding the structure and institution of the labor organization.* Activities that involve labor-management contacts are not included in this section. Nor is preparation for such activities, such as grievances, bargaining, unfair labor practice proceedings, included within this section. Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed

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[267] Nat'l Ass'n. of Gov't Employees Local R1-109 and Dep't of Veterans Affairs Med. Ctr., 49 F.L.R.A. 852 (1994) (holding non-negotiable a union proposal for official time for union representatives to attend unemployment compensation hearings).

[268] *E.g.*, Dep't of Veterans Affairs Med. Ctr. and AFGE Local 2250, 53 F.L.R.A. 1228 (1998) (agency committed an unfair labor practice when it refused to comply with its past practice of granting official time to the Union's representatives to attend Equal Employment Opportunity hearings).

[269] H.R. REP. NO. 95-1403, at 58-59 (1978) (emphasis added).

> official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities.[270]

In its first decisions interpreting § 7131(b), the FLRA used this legislative history faithfully, creating opportunities for unions to negotiate uses of official time that agencies would not have been obligated to allow under the executive orders. In a 1979 case,[271] the agency disputed its duty to bargain a union proposal for official time to complete required reports under § 7120 of the FSLMRS. After a careful examination of the legislative history quoted above, the FLRA concluded that the appropriate test for interpreting § 7131(b) was whether the proposed use of official time was "solely related to the institutional structure of a labor organization."[272] It concluded that the preparation of required reports for federal agencies did not constitute "internal union business" under that test.[273]

Using similar reasoning, the FLRA later held that recordkeeping required by the Internal Revenue Service was not excluded by § 7131(b), and therefore the agency had a duty to bargain over a proposal to use official time for such purposes.[274] The FLRA used the same reasoning in rejecting an agency's argument that preparation for contract negotiations constituted "internal union business" under § 7131(b).[275] The FLRA has also held that attendance at internal union meetings is not necessarily excluded under § 7131(b), if the union can show that it used the meeting time for purposes such as discussing grievances and conducting training, and not for internal union governance.[276]

4. *Lobbying Activities*

Whenever the agency shop is discussed as an option for the federal service, the specter of mandatory union fees being used for lobbying or other political activities is usually raised as an argument against the idea.[277] Therefore, it is interesting that the FLRA has

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[270] 124 CONG. REC. H9638 (daily ed. Sept. 13, 1978) (statement of Rep. Clay) (emphasis added). Rep. Ford made a similar statement during the same debate. 124 CONG. REC. H9650 (daily ed. Sept. 13, 1978).
[271] AFGE Local 2823 and Veterans Admin. Reg'l Office, 2 F.L.R.A. 4 (1979).
[272] *Id*. at 8.
[273] *Id*. at 9.
[274] NTEU and U.S. Dep't of the Treasury, Internal Revenue Serv., 38 F.L.R.A. 1366 (1991).
[275] AFGE Local No. 1692 and Headquarters 323d Flying Training Wing, 3 F.L.R.A. 305 (1980).
[276] Dep't of Health and Human Servs., Social Security Admin., and AFGE, 27 F.L.R.A. 391, 395-96 (1987).
[277] *E.g., supra* note 152 and accompanying text.

interpreted the FSLMRS to *require* agencies to negotiate official time for union representatives to conduct certain lobbying activities. The Authority first confronted the issue in 1993, when it decided a negotiability dispute over the following proposal:

> Union officials shall be permitted a reasonable amount of Official time to represent Federal Employees by visiting, phoning and writing to elected representatives in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by NFFE.[278]

The Authority based its decision largely on § 7102 of the FSLMRS, which lists federal employees' collective bargaining rights, including the right of their representatives "to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities."[279] Since lobbying Congress was clearly a representational activity contemplated under the Statute, the FLRA held that the agency had a duty to negotiate a union proposal for its representatives to use official time to communicate with Congress on matters that "pertain to unit employees' conditions of employment."[280]

Several years later, another FLRA decision demonstrated the hazards of imprecise drafting when negotiating agreements. Interpreting a contract provision that provided union officials "reasonable time during working hours without loss of leave or pay to represent employees in accordance with this agreement," an arbitrator ruled that the agency was obligated to provide union officials time for lobbying activities.[281] In denying the agency's exceptions to the arbitration award, the FLRA held that his award was based on a "plausible" interpretation of the broadly-worded contract language.[282] In an effort to persuade the Authority to overrule the *NFFE Local 122* decision, the agency also argued that the award violated the Hatch Act,[283] which prohibited partisan political activities on government time, and 18 U.S.C. § 1913, a criminal statute that generally prohibits the use of appropriated-fund resources for lobbying Congress, unless expressly authorized. The Authority rejected both arguments. It found

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[278] NFFE Local 122 and Dep't of Veterans Affairs Reg'l Office, 47 F.L.R.A. 1118, 1121-22 (1993).
[279] 5 U.S.C. § 7102(1) (2006); *NFFE Local 122,* 47 F.L.R.A. at 1124.
[280] *NFFE Local 122*, 47 F.L.R.A. at 1126.
[281] Dep't of the Army, Corps of Engineers and NFFE Local 259, 52 F.L.R.A. 920, 925 (1997).
[282] *Id*. at 925.
[283] 5 U.S.C. §§ 7321-26 (1994).

that the lobbying activity in question was non-partisan and therefore did not violate the Hatch Act,[284] and it held that the FSLMRS constituted an express authorization for the type of lobbying conducted by the union officials, thus exempting it from the prohibition of 18 U.S.C. § 1913.[285]

In 1996, Congress complicated matters when it began adding the following section (or language very similar to it) to the annual appropriations acts of the Department of Defense: "None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."[286] Since a large proportion of federal employees covered by the FSLMRS are paid through Department of Defense appropriations acts, this new fiscal restraint was a significant development.

Relying on the new appropriations act section, a state National Guard bureau challenged its duty to negotiate a contract proposal similar to the one held negotiable in *NFFE Local 122*. The proposal in question would have granted union officials reasonable official time to contact Congress "in support of or opposition to pending desired legislation which would impact the working conditions of employees . . . ."[287] The FLRA held that the proposal was not negotiable, because § 8015 of the Appropriations Act (and the similar sections included in subsequent Defense Appropriations Acts) was specific, unambiguous, and contained no exceptions.[288] It clearly prohibited the use of Defense appropriated funds to attempt to influence Congress on "pending" legislation.[289] In a subsequent case, the Authority upheld the negotiability of a more carefully worded union proposal, which called for official time only to contact Congress on "desired" legislation.[290]

The lessons for negotiators are to be precise in contract language, to authorize exactly what is desired, and to avoid violating applicable laws. The *NFFE Local 122* decision demonstrates that vague drafting of contract provisions can result in giving unions much more official time than is intended. On the other hand, the *Granite State Chapter* decision shows how precise drafting of proposals by union negotiators can make the difference between negotiability and non-negotiability.

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[284] *NFFE Local 259*, 52 F.L.R.A. at 927.
[285] *Id*. at 933.
[286] Department of Defense Appropriation Act, Pub. L. No. 104-61, § 8015, 109 Stat. 636, 654 (1996).
[287] Office of the Adjutant General, N.H. Nat'l Guard and Granite State Chapter, Ass'n of Civilian Technicians, 54 F.L.R.A. 301, 302 (1998).
[288] *Id.* at 310-11.
[289] *Id.*
[290] Ass'n of Civilian Technicians, Razorback Chapter 117 and Nat'l Guard Bureau, Ark. Nat'l Guard, 56 F.L.R.A. 427 (2000).

B. Trends in Impasse Resolution for Official Time Proposals

Since the strike and the lockout are not available as impasse-resolution tools in the federal sector, Congress set up an impasse-resolution system involving the Federal Mediation and Conciliation Service (FMCS) and the Federal Service Impasses Panel (FSIP).[291] If mediation and negotiation fail to resolve bargaining disputes, FSIP has the authority to directly resolve them or to appoint arbitrators to conduct binding arbitration.[292] Although FSIP resolutions are not necessarily representative of the terms of all bargaining agreements, an examination of published FSIP decisions is instructive, since any clear trends presumably would influence union and management negotiators.

Unions, of course, generally strive to increase the amount of official time available to them and to get more officials on 100 percent official time. Sometimes they succeed. For example, the arbitrator's award that preceded the FLRA decision in *AFGE Council of Locals No. 214* provided the union with twelve 100-percent positions throughout Air Logistics Command over the agency's opposition.[293] Only three years after the Air Force's defeat in *AFGE Council of Locals No. 214*, the Air Force agreed to increase the number of union officials on 100 percent official time to 27.[294]

But management is not necessarily doomed to a spiral of constantly-increasing official time, if agency officials are resolute in requiring unions to justify their demands for increases. In a 1990 impasse case arising from the Department of Veterans Affairs, a union representing 300 employees sought to replace a "reasonable time" clause with a defined-time clause specifying 100 percent official time for the union president and 20 percent each for the vice president and secretary.[295] The union claimed that the increases for the union officers were necessary because stewards were "difficult to recruit and retain."[296] The agency argued that there was no evidence of a workload increase to justify the union proposal and pointed out that the union was not making good use of its steward system or the full-time agents available through its national union.[297] In adopting the agency's proposal, the FSIP urged the union to make greater efforts to cultivate stewards and to make use of its ability to distribute work.[298] However,

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[291] 5 U.S.C. § 7119 (2006).
[292] 5 C.F.R. § 2471.11 (2006).
[293] *AFGE Council of Locals No. 214*, *supra* note 252, at 216 n.1.
[294] *AFGE, AF Logistics Command Agree on New Contract Six Months Early,* 27 GOV'T EMPL. REL. REP. (BNA) 500 (1989).
[295] Dep't of Veterans Affairs Med. Ctr. Newington, Conn., and Local R1-109, Nat'l Assn. of Gov't Employees, 1990 F.S.I.P. LEXIS 28 (1990).
[296] *Id.*
[297] *Id.*
[298] *Id.*

it did not consider management's argument that 100 percent official time would be a hardship, merely because the current union president was in a critical duty position.[299] In a similar decision, FSIP rejected a union's proposal to shift from a "reasonable time" provision to 100 percent official time for the president of a 1,300-member bargaining unit.[300] The union's proposal had been motivated to a large extent by its envy for the block-time arrangements negotiated by two other bargaining units on the installation, but the Panel found the union's justification insufficient.[301]

Even if the agency allows the union to grow accustomed to an excessive amount of official time, it is not impossible to make corrections. In a 1985 decision, the FSIP adopted a management proposal to reverse a past practice in which the agency had allowed two union officials to be on 100 percent official time under a "reasonable time" agreement.[302] In support of its proposal, the agency argued that representational duties for the 700-member bargaining unit involved few grievances and third-party hearings, but official time resulted in direct costs of over $92,000 during a three-year period, in addition to indirect costs of overtime and reduced efficiency resulting from the absence of the two union officials.[303] In its decision, the FSIP deferred to the agency's record-keeping, characterizing the union's use of official time as "excessive."[304] In a similar decision in a 1992 case, FSIP adopted management's proposal to reduce a union president's official time cap from 100 percent to 80 percent, after concluding that the union had not presented sufficient justification to keep the president on full official time.[305] In a more recent decision, the Panel adopted a compromise that reduced a union president from 100 percent official time to 60 percent in a geographically dispersed bargaining unit of 600 employees.[306]

Recently the Panel has shown a willingness to take agencies' operational needs into account in evaluating proposals for 100 percent official time. In a 2003 decision, the Panel denied the union's request for full official time for its union president, instead choosing a compromise solution:

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[299] *Id*. The union president was the only dental technician responsible for making prosthetic devices at the facility.

[300] Dep't of the Army, U.S. Army Communications-Electronics Command and Local 476, NFFE, 1999 F.S.I.P. LEXIS 27 (1999).

[301] *Id.*

[302] Army Corps of Engineers, Kansas City Dist. and Local 29, NFFE, 1985 F.S.I.P. LEXIS 1 (1985).

[303] *Id*.

[304] *Id*.

[305] Dep't of the Army, Presidio of Monterey, Calif., and Local 1457, AFGE, 1991 F.S.I.P. LEXIS 71 (1991).

[306] Dep't of the Army, Army Corps of Engineers, Pittsburgh Engineer District, and Local 2187, AFGE, 2001 F.S.I.P. LEXIS 12 (2001).

> In our view, the Employer has a legitimate interest in ensuring that its professional employees, many of whom hold understaffed positions, are available to perform patient care duties for at least a portion of their work time. Thus, limiting the local Union president to 60-percent official time, and others to no more than 40 percent, *would ensure that Union representatives continue to serve as health care providers, the positions for which they were hired, at least on a part-time basis*.[307]

Another recent FSIP case pitted the Centers for Medicare and Medicaid Services against AFGE in an impasse over their national Master Labor Agreement.[308] AFGE, which represented 3,800 employees,[309] sought to increase the overall "bank" of official time hours from 12,000 per year to 18,000 and to keep seven union officials on 100 percent official time.[310] The agency, wishing to place tighter controls on the use of official time and to ensure that all of its employees spent a significant amount of time performing agency work, proposed reducing the bank of hours to 9,000 and limiting official time for individual union officials to no more than 50 percent of their duty time.[311] The FSIP decided to adopt the agency's proposal nearly verbatim, mainly because the union's time records showed that it had used only 8,000 hours of official time (aside from contract negotiations) in 2002.[312] One labor-relations expert offered a pithy analysis of the outcome: "Life is tough for the stupid and careless. Go in [to FSIP] with a good case, or don't go in at all."[313]

A few weeks later, the FSIP adopted an agency's proposal in preference to a union proposal that would have increased the union vice president from 50 to 100 percent official time.[314] The union, which had recently become the exclusive bargaining agent, argued that organizational tasks required two full-time officials.[315] The agency countered that the union could adequately discharge its representational

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[307] Dep't of Veterans Affairs, VA Med. Ctr. Indianapolis, Ind., and Local 609, AFGE, 2003 F.S.I.P. lexis 23 (2003) (emphasis added).
[308] Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, and Local 1923, AFGE, 2004 F.S.I.P. LEXIS 46 (2004).
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *FSIP Decision Could Have Major Implications for Future Negotiations*, FED. HUMAN RES. WEEK, May 25, 2004, at 97.
[314] Dep't of Veterans Affairs and United Am. Nurses, 2004 F.S.I.P. LEXIS 31 (2004).
[315] *Id.*

duties with a vice president on 50 percent official time, if its leaders were willing to delegate some responsibility to other union officials.[316] Noting the relatively small size of the bargaining unit (6,000 nurses)[317] and the fact that the union's proposal appeared to be based mainly on its internal organizational needs, FSIP adopted the agency's proposal. FSIP also noted its deference to the agency's operational needs:

> Authorizing another full-time Union representational position for a registered nurse at a time when the VA is experiencing difficulties in retaining nurses and striving to provide the best possible medical care for our nation's military veterans is unwarranted. In contrast, the Employer's proposal to authorize 50-percent official time for the Union's national vice-president is a more balanced approach because it permits the incumbent of that position to divide time between attending to Union representational matters and providing nursing services to veterans.[318]

FSIP decisions in recent years have not always been pro-management, however. In a 2001 decision, the Panel adopted a union proposal that more than doubled the union's official time ceiling, after the union demonstrated that the previous ceiling was inadequate and that it was undertaking significant new responsibilities, including representation of employees in EEO proceedings.[319]

FSIP favors the side that is well prepared and able to justify its proposals with specific facts. Recently this trend has often favored management, possibly because management officials have superior resources, or possibly because management tends to exercise better judgment in formulating its bargaining proposals. Whatever the reason, it is clear that FSIP is not eager to enhance unions' official time authorizations without sound, documented reasons. Another favorable development for management is the Panel's recent willingness to consider the agency's mission requirements, and not just the resource needs of the union, in deciding proposals for 100 percent official time. The Panel's decisions demonstrate that, even under the relatively permissive atmosphere created by § 7131 and the *AFGE Council of Locals No. 214* decision, well-prepared and resolute agency negotiators can achieve meaningful limitations on contractual grants of official time.

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[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] U.S. Army Corps of Eng'rs and United Power Trades Org., 2001 F.S.I.P. LEXIS 2 (2001).

C. Problems in Administering Official Time

1. *Evaluating Union Officials*

Evaluations and other career actions for employees who are on full or nearly full official time pose interesting problems for supervisors. The Office of Personnel Management's (OPM) regulations on evaluating federal employees require that employee performance actually be observed for some minimum period before an evaluation can be issued, although it does not specify what the minimum period should be.[320] The regulations prohibit basing performance evaluations on assumptions or anything other than actual observations of employee performance.[321] Before promulgating the regulations, OPM specifically rejected a proposal to mandate presumptive performance ratings for full-time union officials:

> When an employee is serving as the representative of a labor organization, he or she is performing duties for that labor organization. To intermingle performance of the representational duties into the appraisal program would be inappropriate because appraisal of the employee's performance must be based solely upon the employee's performance of agency duties. For employees who spend 100 percent of their time as labor representatives, and for employees who spend a significant amount of time as determined by the agency, this means that they cannot, and should not, be given performance appraisal ratings of record.[322]

Since it would obviously infringe on employee rights for supervisors to evaluate employees on their performance as union officials, many full-time union officials may go years without performance evaluations, risking the loss of federal career opportunities as a result. One union president attempted to circumvent this problem by proposing a contract provision that would have required the agency to temporarily amend his performance plan to reflect his status as unit president.[323] The proposal also would have allowed the union president's evaluation to be completed by "a neutral source selected from either the Federal Labor Relations Authority, a FMCS Mediator, or

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[320] 5 C.F.R. § 430.207(a) (2006).
[321] 5 C.F.R. § 430.208(a)(2) (2006).
[322] Performance Management, Final Rule, 60 Fed. Reg. 43,936, at 43,937 (Aug. 23, 1995).
[323] NAGE, Fed. Union of Scientists and Eng'rs Local R1-144 and Dep't of the Navy, Naval Underwater Sys. Ctr., 42 F.L.R.A. 1285, 1286 (1991).

an Arbitrator."[324] The FLRA held the proposal was non-negotiable because it conflicted with a statutory requirement that employee appraisals be based on "job performance,"[325] which the Authority construed to include only "an employee's performance of agency-assigned duties and responsibilities."[326]

Another union made a more successful proposal. Employees working full-time or nearly full-time on union duties would receive evaluations based on a minimum of only 120 hours of agency work annually.[327] The FLRA held that bargaining of the proposal was mandatory for the agency, since there was no statute or government-wide regulation prescribing a minimum appraisal period,[328] and the agency could not demonstrate a compelling need for a period longer than 120 hours.[329]

The Authority's case law provides considerable guidance for agencies and unions on this difficult subject, but it cannot resolve the basic problem created by the Statute's limited system of union security. Due to their limited financial resources, federal-sector unions are forced to rely on the sacrifices of volunteers who choose union service over their federal career path, sometimes for years at a time. The heavy reliance on volunteer efforts undoubtedly restricts union effectiveness and conflicts directly with agency operations, with negative consequences for the overall success of the labor-management program.

2. *Promotion of Employees Who Use Official Time*

The FSLMRS makes it an unfair labor practice for management "to interfere with, restrain, or coerce" any employee in the exercise of employee rights defined in the Statute.[330] It has consistently upheld complaints against agencies that make adverse promotion or transfer decisions based on speculation about the effects of an employee's union activities.

Even if an employee currently spends over seventy percent of his duty time on union activities, it is an unfair labor practice to deny that employee a requested transfer to a more desirable position based solely on the past union activities.[331] In addition, an agency cannot ask questions about an applicant's union responsibilities during a job

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[324] *Id.*
[325] 5 U.S.C. § 4302 (2006).
[326] *NAGE, Fed. Union of Scientists and Eng'rs Local*, 42 F.L.R.A. at 1292.
[327] NTEU and Dep't of Treasury, IRS, 55 F.L.R.A. 1005 (1999).
[328] *Id*. at 1007-08.
[329] *Id.* at 1008-09.
[330] 5 U.S.C. § 7116(a)(1) (2006).
[331] U.S. Army, Corpus Christi Army Depot, and Jesse O. Hall, 4 F.L.R.A. 588 (1980); *accord* AFGE Local 3446 and Dep't of Health and Human Services, Social Security Admin., 43 F.L.R.A. 467 (1991).

interview, raising the inference that the applicant was required to moderate his demands for official time in advance as a condition of selection.[332] Under the same reasoning, the agency cannot consider an employee's past use of official time as a factor in a promotion decision, unless it can show that the employee's absence will interfere with the employee's performance of duties of the new position.[333] However, if the agency can establish that the employee's performance of union duties in the current job position is preventing the accomplishment of mission-critical business, then the agency may be justified in transferring that employee to a less critical duty position, with no loss of pay.[334]

As a practical matter, it is difficult to see how employees who consistently spend a large proportion of their duty time on representational activities can remain competitive for promotion, even in an environment free of anti-union discrimination. Since employees can be evaluated based only on the duty activities assigned by the agency, it seems nearly impossible, in any honest evaluation system, for busy union representatives to keep up with their peers. Thus, the reliance on block grants may have two negative tendencies: (1) punishing any career-minded employees who volunteer to represent their co-workers, and (2) attracting union representatives who tend to be less competitive or less ambitious in their primary agency duties. Neither tendency contributes to an effective system of labor-management relations.

3. *Control, Monitoring and Prevention of Abuse*

Although the Statute requires employers to respect employees' rights to official time, it also prohibits the use of official time for internal union business and requires that official time be "reasonable, necessary, and in the public interest."[335] The conflicting requirements of the Statute pose challenges for first-line supervisors, who rarely have any expertise in labor-management relations. The FLRA has allowed agencies to enforce reasonable restrictions on official time (through disciplinary action, if necessary), to ask general questions about the use of official time, and to hold employees to reasonable job performance

[332] Veterans Admin. Med. Ctr. and Reg'l Office and AFGE Local 1509, 23 F.L.R.A. 122 (1986).
[333] AFGE Local 3446 and Dep't of Health and Human Svs., SSA, 43 F.L.R.A. 467 (1991).
[334] Dep't of the Navy, Norfolk Naval Shipyard, and Tidewater Va. Fed. Employees Metal Trades Council, 15 F.L.R.A. 867 (1984) (the agency had failed to establish that the employee's union responsibilities interfered with his duties to a degree that justified his reassignment).
[335] 5 U.S.C. § 7131(d) (2006).

standards. However, the FLRA has not fully established the extent to which supervisors can investigate suspected abuse of official time.

An early decision by an FLRA Administrative Law Judge (ALJ) provided a good illustration of the difficulties involved.[336] A second-level supervisor directed that all first-level supervisors determine the general nature of the representational activities to be performed before releasing any union officers on official time.[337] The policy was driven by legitimate concerns about abuse of official time and the necessity to keep proper accounting data on official time.[338] When a steward's first-level supervisor failed to adequately implement the directive, the second-level supervisor had a personal discussion with the steward to discuss the importance of management's inquiries into her use of official time.[339] In deciding the resulting unfair labor practices complaint, the ALJ concluded that management's actions were a proper way to balance its obligations with employee rights:

> The contention that the rule was designed to restrict or prevent representational activity . . . flies in the face of contract provisions which clearly recognizes management's right to such information as is necessary to determine whether official time requested or used is reasonable, and even whether release itself is warranted after weighing the work needs of the moment against the representational need.[340]

The FLRA has held that the agency does not commit an unfair labor practice when it enforces contract provisions requiring supervisor approval before union officials leave the premises on official time.[341] In a 1986 case, the agency disciplined a union president after it learned that he left the installation without permission. Even though the union president was using the official time to cooperate with an FLRA investigation into an unfair labor practice complaint, the Authority upheld the ALJ's conclusion that the union's rights to pursue complaints did not take priority over "the mission of an agency and its responsibility to monitor the activities of its work force."[342] The ALJ

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[336] Defense Gen. Supply Ctr. and AFGE Local 2047, 15 F.L.R.A. 932 (1984) (ALJ Decision).
[337] Supervisors were directed to determine "whether the steward would be engaged in negotiations, representing a 'client' or involved as a witness in some proceeding." *Id*. at 936.
[338] *Id*.
[339] *Id*. at 940-41.
[340] *Id*. at 941.
[341] Marine Corps Logistics Base Barstow, Calif., and AFGE Local 1482, 23 F.L.R.A. 594 (1986).
[342] *Id.* at 603.

also noted that the agency had a right and a responsibility to know the whereabouts of its employees while on duty time.[343]

When a union steward fails to follow contractual procedures for release on official time, and that failure disrupts the workplace, management can take appropriate steps to bring the steward into compliance.[344] When a large volume of phone calls from employees directly to a union steward's office, in violation of the contract, disrupted the work of the secretaries in the steward's office, management instructed the secretaries to ask all callers the general nature of their business and, when appropriate, to remind them of the contractual procedures for contacting the steward through their own supervisors.[345] The FLRA upheld an administrative law judge's determination that the agency's actions were "a reasonable method of policing the contract . . . ."[346] The same decision also upheld the agency's action in limiting the steward's representational meetings on official time to one per day, after the employee had demonstrated a pattern of giving her union business priority over her agency duties.[347]

Agencies can hold employees to reasonable standards of job performance. When the record shows that the agency has attempted to reconcile an employee's use of official time with his essential duties, but the employee's duty performance is still unacceptable, it is not an unfair labor practice to reprimand the employee or to note performance problems in a formal evaluation, even if time spent on representational duties is a factor in the lagging job performance.[348]

The Authority has held that an agency does not have a duty to bargain a proposal that would substantially deprive management of discretion to deny requests for Leave Without Pay (LWOP) to perform representational activities.[349] The proposal would have required management to grant such requests unless work demands left "no reasonable alternatives" to denial.[350] The Authority called the proposal a "substantive restriction" on the agency's right to assign work.[351] Oddly, the Authority did not consider employees' § 7102 rights in the decision, as it would in an official time case. For that reason, the precedential value of the decision is questionable, but since it has not

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[343] *Id*. at 604.
[344] Dep't of the Air Force, Air Logistics Command, and AFGE Local 1138, 14 F.L.R.A. 311 (1984).
[345] *Id.* at 321-25.
[346] *Id.* at 329.
[347] *Id.* at 330.
[348] Dep't of the Air Force, Scott AFB, Ill., and Nat'l Ass'n of Gov't Employees Local R7-23, 14 F.L.R.A. 289, 299-300 (1984).
[349] NTEU and Dep't of Treasury, Customs Service, 46 F.L.R.A. 696 (1992).
[350] *Id*. at 722-23.
[351] *Id.* at 726.

been overruled, it is a valuable precedent for management in negotiating official time provisions.

An unresolved question is the degree to which supervisors can inquire into the specific uses of official time, if abuse is suspected. The FLRA has held that, in general, management officials unlawfully interfere with representational activities if they require union representatives to disclose specific statements that represented employees have made to them.[352] However, management officials can lawfully investigate instances of misconduct that occur in the course of representational activities, so long as investigative questions are carefully tailored to avoid the substance of any protected communications.[353]

What if union officials fail to cooperate, or if management suspects that they are giving dishonest answers? In one decision, the FLRA stated that a supervisor did not interfere with protected activities by merely entering a union office to check on the whereabouts of an employee who was representing a co-worker in a grievance, but he did commit a violation when he returned to the union office a second time and engaged in heated argument with the union representative, in front of the represented employee.[354]

The FLRA has given management substantial leeway to make necessary inquiries into specific uses of official time. Still, in practice, management will usually depend on the honesty of employees. Management officials often avoid inquiries into suspected abuse of official time, since such inquiries have a natural tendency to provoke unwanted labor-management conflict. The dynamics of the official time system, which pit management's responsibility to effectively use resources against employee rights to confidential representation, leave considerable room for abuse and unnecessary conflict. The potential for abuse grows even greater when employees are placed on 100 percent official time and spend much of their time in union offices, out of sight of their nominal supervisors.

4. *Erosion of Critical Skills*

A 1991 negotiability decision by the FLRA illustrates one of the problems that results from placing employees on extended periods of official time. The union proposed a 120-day retraining period, free of formal evaluations, for any union officials who returned to full agency duties after being on more than 60 percent official time for at least two

[352] 5 U.S.C. § 7116(a)(1) (2006); *E.g.*, Dep't. of Treasury, Customs Service and NTEU, 38 F.L.R.A. 1300 (1991).
[353] Fed. Bureau of Prisons and AFGE Local 709, 53 F.L.R.A. 1500, 1511 (1998).
[354] *E.g.,* Social Security Admin. and AFGE Local 1923, 7 F.L.R.A. 823, 830-31 (1982).

years.[355] The union argued that the transition period was necessary to enable former union officials to catch up on changes in technology and patent procedures.[356] The FLRA held that the agency was not required to bargain over the proposal because, by prohibiting it from formally evaluating employees, it excessively interfered with management's right to assign work under § 7106(a)(2)(B) of the Statute.[357] The fact that the union felt the need to make the proposal demonstrates that the assumption of full-time or nearly full-time union duties can significantly reduce the effectiveness of employees in their primary government duties.

5. *The Social Security Administration Controversy*

The Social Security Administration (SSA) has produced the best case study to date of the advantages and drawbacks of the federal government's system of union security. During the 1990s, investigations by the SSA, the General Accounting Office (GAO), and committees of the U.S. House of Representatives revealed poor managerial control over the use of official time and frustration among SSA managers at their inability to assign work to union officials. The SSA controversy also illustrated the difficulty of reconciling the unions' need to maintain a degree of confidentiality in their operations with management's need to prevent abuses of official time.

During the 1980s, the SSA and AFGE became entangled in a bitter dispute over the use of official time under a "reasonable time" provision in their contract. The parties submitted numerous disagreements over the use of official time to a single arbitrator, who eventually overstepped his authority by ordering SSA to grant all official time requests and to file grievances with him over requests it found inappropriate.[358] During a Congressional investigation in 1987, SSA's Labor Relations Director stated that SSA had lost control over the use of official time due to the arbitrator's decisions, and as a result the number of employees on 100 percent official time had increased from eight to fifty-six since 1982. He estimated that the costs of SSA support for union activities would increase from $4.4 million to $5.8 million between 1986 and 1987.[359]

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[355] Patent Ofc. Prof'l Ass'n and U.S. Dep't of Commerce Patent and Trademark Ofc., 41 F.L.R.A. 795, 808 (1991).
[356] *Id*. at 810.
[357] *Id*. at 811-16.
[358] *Grievance over Use of Photocopier not Settled by Official Time Awards,* 26 GOV'T. EMPL. REL. REP. (BNA) 1644 (1988).
[359] *Federal Sector Labor-Management Dispute Resolutions: Hearing before Subcomm. on Employment and Housing, House Comm. on Government Operations*, 101st Cong. 159-60 (1987) (statement of Peter D. Spencer).

The dispute was eventually resolved after the parties reached a new collective bargaining agreement in 1988. The agreement replaced the previous official time provision with a nationwide bank of official time for the life of the agreement.[360] Although the new contract resolved a long and costly dispute, later events proved that SSA was unable or unwilling to use its provisions to control the use of official time by AFGE officials.

During the mid-1990s, a combination of factors prompted the House of Representatives to take a critical interest in the use of official time. The pro-union stance of the Clinton Administration, combined with its promotion of labor-management partnership councils in federal agencies,[361] led to increases in the use of official time. The Hatch Act Amendments of 1993[362] loosened restrictions on the political activities of federal civilian employees, and for the first time in decades federal employees began to appear at partisan (often Democratic) political events, causing suspicion and resentment among Republicans.[363] Finally, the Republican takeover of the House of Representatives in 1994 put the leadership of House committees into the hands of representatives who did not support union causes.

In 1995, House leaders asked the General Accounting Office to investigate reports that the use of official time had dramatically increased in the SSA. The GAO concluded that the use of official time in the SSA had increased substantially between 1990 and 1995[364] and that the estimated cost of expenditures for union activities at SSA roughly doubled between 1993 and 1996 to over $12 million annually.[365] The personnel costs of official time constituted the vast majority of that expense.[366] SSA also reported that the number of employees spending 75 percent or more of their duty time on representational activities grew from 80 to 145 between 1993 and 1995.[367] In contrast, less than $5 million in union dues was collected from SSA employees in 1995, demonstrating the degree to which the SSA's unions depended on official time as a means of support.[368]

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[360] *AFGE Members Reject SSA Contract,* 27 GOV'T. EMPL. REL. REP (BNA) 41 (1989). Although the AFGE membership voted against the contract, FSIP later ordered the contract implemented anyway. *Panel Orders SSA Contract Implemented Despite Rejection by Union Membership,* 28 GOV'T. EMPL. REL. REP. 6 (1990).
[361] Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (Oct. 1, 1993).
[362] Pub. L. No. 103-94, 107 Stat. 1001 (1993).
[363] Mike Causey, *Union Grievances*, WASH. POST, Sep. 10, 1996, at B2.
[364] GENERAL ACCOUNTING OFFICE, UNION ACTIVITY AT THE SOCIAL SECURITY ADMINISTRATION, REPT. NO. B-266105, at 9-13 (Oct. 2, 1996).
[365] *Id*. at 17.
[366] *Id*. at 18.
[367] *Id*.
[368] *Id*. at 19.

The report noted some benefits that union leaders and SSA officials had claimed as results of the increased labor-management cooperation in the SSA, including decreases in grievance arbitrations and unfair labor practices cases.[369] However, the GAO interviewed many SSA managers, and most complained that uncontrolled employee absences on representational activities interfered with their ability to provide customer service and accomplish other agency tasks.[370]

For comparison, GAO also reported statistics provided by the Postal Service and the Internal Revenue Service, two other agencies that had been tracking the use of official time. SSA used much more official time, proportional to its number of bargaining unit employees, than either of the other two agencies.[371] The Postal Service, which had a much higher rate of union membership (83 percent, versus 46 percent in the SSA), provided only 2.32 hours of official time per employee in 1995, compared to 7.76 hours per employee in the SSA.[372] With a high rate of membership, the Postal Service unions were able to pay the salaries of 460 full-time representatives and to reimburse members for time spent on contract negotiations.[373] The IRS, which had a union membership rate similar to that of the SSA, was able to keep its official-time usage to 5.43 hours per bargaining unit member, a much lower level than the SSA.[374]

The House Subcommittee on Civil Service held hearings on the GAO's findings in September 1996. The Subcommittee Chairman criticized the sharp rise in official time at SSA and a similar increase in the Customs Service.[375] Perhaps revealing his primary motivation for calling the hearing, the Chairman suggested that the unions should spend their money on representational activities, rather than "spending millions of their members' hard-earned money on political campaigns."[376] Union leaders pointed to the reduction in complaints documented in the GAO report, claiming that the reduction resulted

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[369] *Id.* at 14-15.
[370] *Id*. at 19.
[371] *Id*. at 20.
[372] *Id*. The Postal Service does not provide an ideal comparison. Its higher rate of union membership stems, at least in part, from the postal unions' power to bargain wages and benefits under the Postal Reorganization Act of 1970. However, the Postal Service is similar to other federal agencies in that it is forbidden to negotiate union shop or agency shop agreements. *See supra* notes 152-57 and accompanying text.
[373] GENERAL ACCOUNTING OFFICE, UNION ACTIVITY AT THE SOCIAL SECURITY ADMINISTRATION, REPT. NO. B-266105, at 29 (Oct. 2, 1996).
[374] *Id*. at 20.
[375] Rep. Mica cited an increase in official time costs in the Customs Service from $470,000 to $1 million annually, but he did not cite the source of his information. *Taxpayer Subsidy of Federal Unions: Hearing before the Subcomm. on the Civil Service of the House Comm. on Gov't Reform and Oversight,* 104th Cong. 1 (1996).
[376] *Id.* at 2.

from increased use of official time in partnership meetings.[377] The hearings resulted in no proposed legislation, but the House Subcommittee on Social Security, which had also received the GAO report, requested that the SSA Inspector General (IG) conduct a follow-up evaluation.

The resulting IG audit, completed in July 1998, concluded that SSA had inadequate controls in place to track official time and to prevent abuses.[378] Even the most conscientious supervisors had difficulty in properly controlling official time, because the SSA's roster of union officials was years out of date, supervisors were not aware of the amount of "bank" time available to union representatives, and the forms used to request official time often did not elicit sufficient information to support a determination of whether the time was permitted under the contract.[379] The majority of supervisors found the system for supervising the use of official time ineffective, and many complained that they did not have sufficient authority to monitor official time.[380] Moreover, many supervisors allowed union representatives to use official time without approval, in violation of the contract.[381] Higher-level SSA management failed to act on the majority of supervisors' reports of suspected abuse of official time. [382]

Union intransigence was another theme of the IG report. In many cases the unions did not fulfill their contractual responsibilities to cooperate with investigations of official time abuse.[383] AFGE also failed to cooperate completely with the IG audit itself. AFGE leaders initially instructed their representatives not to respond to the IG's information requests, and AFGE never fully cooperated with the IG investigation.[384] An AFGE official explained to Congress that some of the questions the IG asked union officials were "inappropriate,

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[377] *Id.* at 107 (statement of Robert M. Tobias, National President, National Treasury Employees Union).
[378] SSA OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT: USE OF OFFICIAL TIME FOR UNION ACTIVITIES AT THE SSA, in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the, House Comm. on Ways and Means,* 105th Cong. 95, at 100 (1998).
[379] *Id.* at 111-13.
[380] SSA OFFICE OF THE INSPECTOR GENERAL, EVALUATION REPORT: COUNCIL 220 UNION REPRESENTATIVE AND MANAGER OBSERVATIONS ON THE USE AND MANAGEMENT OF OFFICIAL TIME AT SSA [hereinafter SSA OFFICE OF THE INSPECTOR GENERAL], in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the House Comm. on Ways and Means,* 105th Cong. 34, at 53 (1998) [hereinafter *Labor-Management Relations at the SSA*].
[381] *Id*. at 114.
[382] *Id*. at 117.
[383] *Id*.
[384] *Id*. at 108.

confusing, and simply unnecessary."[385] One of the questions that AFGE found objectionable was a request for union representatives to provide a breakdown of their official-time activities among three broad categories: consulting with management, grievances, and union administrative matters.[386] In explaining AFGE's legal basis for objecting to the IG questions, the testifying AFGE official demonstrated a poor understanding of the applicable FLRA case law[387] and showed little interest in curbing the use of official time by his union officials.

A separate IG report concluded that it was impossible to quantify the value of the SSA's labor-management partnership program, because there was no adequate system to identify successful initiatives and cost savings.[388] The report also questioned the validity of the claims that partnership activities had caused reductions in arbitration hearings and unfair labor practices cases in SSA,[389] casting doubt on the previous claims that union involvement in partnership activities yielded benefits that exceeded the costs in official time.

At the ensuing House Subcommittee hearing, representatives learned that the SSA had allowed union leaders a surprising amount of latitude in selecting employees who would serve on 100 percent official time.[390] According to one supervisor:

> One of our union officials . . . worked for several years as a Claims Representative and eventually began spending approximately 50% of his time on official time. He was later named an Administrative Officer by the Regional Vice President and notified local management that he would be using 100% official time for an indefinite period. He was later elected to the Regional Vice President position and continued to use 100% official time. He recently lost the election for Regional Vice President, but was immediately appointed

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[385] *Labor-Management Relations at the SSA*, *supra* note 380, at 290 (statement of Witold Skwiercynzki).
[386] SSA OFFICE OF THE INSPECTOR GENERAL, *supra* note 380, at 45, 61.
[387] *Labor-Management Relations at the SSA*, *supra* note 380, at 294. Mr. Skwiercynzki cited two FLRA decisions that concerned agency attempts to elicit the details of protected discussions between employees and union stewards. The IG had not asked any such questions.
[388] SSA OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT: PARTNERSHIP ACTIVITIES AT THE SOCIAL SECURITY ADMINISTRATION (July 1998), in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the, House Comm. on Ways and Means,* 105th Cong. 95, at 155, 160 (1998).
[389] *Id.* at 172.
[390] The records of the hearing do not make it clear whether the latitude was explicitly granted in the SSA-AFGE contracts or had evolved as a practice.

> by the Local President a Chief Steward and given 100% official time.[391]

An SSA manager reported frequent misreporting of the purposes of official time by union officials to circumvent time caps, and two supervisors complained of morale problems caused by misuse of official time by full-time union officials.[392] An SSA human resources official confirmed that the SSA-AFGE contract gave union officials the primary authority to determine what official time was "reasonable."[393]

Just prior to the 1998 hearings, Representative Mica (who had convened the 1996 hearings) drafted an omnibus civil service reform bill that would have included a provision drastically reducing the use of official time, limiting it to grievance processing and attending management-initiated meetings.[394] The proposal was similar to a stand-alone bill that had been introduced the previous year and had stalled in Committee.[395] Leaders of federal employee unions blasted the proposal,[396] and a general lack of enthusiasm in Congress for controversial reform initiatives persuaded Representative Mica to abandon it.[397] No legislation resulted from the 1998 SSA hearings.

Unfortunately, there was no public follow-up on the findings made by the GAO and the SSA IG. The reports raised serious questions about the propriety of the use of official time in the SSA, but the defiant comments made by AFGE's representative and the lack of concern demonstrated by the SSA human resources official did not bode well for meaningful reform. The most recent OPM study shows that SSA's unions use official time at about the same rate that they did in the mid-1990s.[398]

D. The Unions' Dilemma: the Duty of Fair Representation

As noted above, the FSLMRS imposes a duty upon an exclusive bargaining representative to "[represent] the interests of all employees

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[391] SSA OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT: PARTNERSHIP ACTIVITIES AT THE SOCIAL SECURITY ADMINISTRATION (July 1998), in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the, House Comm. on Ways and Means,* 105th Cong. 95, at 244 (1998) (written, post-hearing submissions of Edwin Hardesty).
[392] *Id*. at 218-22 (statements of Jim Schampers and Edwin Hardesty).
[393] *Id*. at 270 (statement of Paul D. Barnes).
[394] Louis C. LaBrecque, *Union Leaders Call on House Panel to Drop Official Time Provisions from Bill*, 36 GOV'T EMPL. REL. REP. (BNA) 727, June 29, 1998.
[395] H.R. 986, 105th Cong. (1997).
[396] LaBrecque, *supra* note 394.
[397] Louis C. LaBrecque, *Committee OKs TSP, Child Care Changes as GOP Gives up on Massive Reform Bill*, 36 GOV'T EMPL. REL. REP. (BNA) 835, July 27, 1998; Ben White, *Civil Service Changes Stall in House*, WASH. POST, July 20, 1998, at A15.
[398] *See infra* note 431 and accompanying text.

in the unit it represents . . . without regard to labor organization membership."[399] In the absence of any authority to compel dues payments, and with a scope of bargaining much narrower than in the private sector (or in the Postal Service), the three largest non-postal federal unions do not enjoy high membership rates. The largest (AFGE) claims just over a third of its bargaining units as members, the next largest (NTEU) claims just over half, and the third-largest (NFFE) claims about a tenth.[400] Official time makes it easier for unions to supply volunteers for representational activities, but effective representation also requires funds to pay full-time professional staff and attorneys. In this respect, the federal-sector unions lag far behind their counterparts.

Throughout the history of the Statute, the desire for stable finances has driven unions to try to offer a higher level of representational services for members, but often they have been rebuffed. In a pivotal, early decision, the FLRA held that it was an unfair labor practice for a union to offer attorney representation only to union members in disciplinary actions.[401] The FLRA and the courts later softened the effects of the doctrine. In a pair of cases in the late 1980s, two federal appellate courts held that unions could discriminate against non-members in offering representation for statutory appeals processes (in these cases, appeals of disciplinary actions to the Merit Systems Protection Board).[402] Both courts reasoned that the duty of fair representation extended only to those responsibilities exclusively conferred on the unions by statute or contract. Later, the FLRA reached a similar conclusion in a case alleging discrimination in providing representation to employees responding to disciplinary proposals. The FLRA reasoned that the agency's regulation allowed employees to choose any representative for disciplinary actions, and since the right to representation was not connected to the collective bargaining agreement, the union did not have a duty to represent the employee.[403]

By contrast, representation in the contractual grievance and arbitration process falls squarely within the duty of fair representation. Arbitrations can cost several thousand dollars per hearing,[404] and

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[399] 5 U.S.C. § 7114(a)(1) (2006).

[400] Masters, *supra* note 2, at 66; AFGE membership claim updated by consulting the AFGE Home Page, www.afge.org.

[401] NTEU and Customs Serv., 10 F.L.R.A. 519 (1982), *aff'd sub nom.* NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983).

[402] AFGE Local 916 v. FLRA, 812 F.2d 1326 (10th Cir. 1987); NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986).

[403] AFGE Local 1857 and Holdahl, 46 F.L.R.A. 904 (1992).

[404] The Federal Mediation and Conciliation Service (FMCS), which provides arbitrator rosters for most federal-sector arbitration, calculated that the average arbitration cost in FY 2005 was over $3,700. FMCS, ARBITRATION STATISTICS, FISCAL YEAR 2005 (Oct. 3, 2005), at http://www.fmcs.gov (last visited June 20, 2006).

contracts frequently obligate unions to pay half of all arbitration expenses, regardless of the outcome. The FLRA has held that the union violates its duty of fair representation when it demands "user fees" from non-member employees[405] or requires non-members to contribute to an arbitration fund.[406] As a result, arbitrations for all employees are financed entirely by members. Due to the resulting financial limitations, union locals tend to be very selective about making demands for arbitration. Decision making on such matters can be quite subjective, so it is not surprising that the FLRA has had occasion to decide allegations of discrimination against non-members in grievance representation. Many of the reported cases result from blatant union misbehavior, such as explicitly suggesting that the availability or quality of grievance representation might depend on union membership.[407] In cases that are not as clear-cut, the FLRA applies a two-part test: first, the employee must establish that discrimination was a "motivating factor" for the union's decision; and second, the burden then shifts to the union to prove that there was a reasonable justification and that it would have made the same decision absent the discrimination.[408]

An interesting, unexplored question about the federal grievance and arbitration system is the extent of hidden discrimination against non-members in union decisions to demand arbitration. Unions certainly have powerful motives to avoid financing arbitration hearings for non-members, and a tight-lipped union leadership could leave the spurned non-members with no evidence to support a complaint of an unfair labor practice. Since non-members are less likely to be knowledgeable about FLRA complaint procedures than members, it is likely that very few non-members would even explore the possibility of a complaint against the union. Finally, the FLRA's remedies for proven acts of discrimination are not particularly daunting to violators. Typical remedies include cease-and-desist orders and orders to reimburse non-members for fees obtained under coercion by unions.[409] Under the Statute, unions have much to gain and little to lose if they adopt unspoken policies favoring members over non-members.

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[405] NTEU and Dep't of the Treasury, IRS, 38 F.L.R.A. 615, 624 (1990) ("A union's obligations under section 7114(a)(1) require that, with respect to matters falling within the scope of that section, a union's activities be undertaken without regard to membership status.").

[406] NTEU and Dep't of the Treasury, Customs Svs., 46 F.L.R.A. 696, 703-04 (1992).

[407] *E.g.*, SEIU Local 556 and Paige, 17 F.L.R.A. 862 (1985); AFGE Local 1778 and Dep't of the Air Force, 438th Air Base Group, 10 F.L.R.A. 346 (1982).

[408] AFGE Local 1345 and Vasquez, 53 F.L.R.A. 1789 (1998).

[409] *E.g.*, *SEIU Local 556*, 17 F.L.R.A. at 864-66; *AFGE Local 1778*, 10 F.L.R.A. at 351-52.

E. Union Security in the Federal Sector Today

Despite the SSA controversy of the 1990s, there has been little movement to reform federal law and policy on union security. In 2002 two bills were introduced to amend § 7131. A House bill would have imposed a statutory reporting requirement,[410] and a Senate bill would have narrowed the categories of authorized official time,[411] but both bills died in committee.

In addition, there have been no significant movement toward broader revisions to the FSLMRS, despite repeated criticisms from inside and outside the federal government. In 1988, soon after Congressional hearings examined the need for overall reform of the Statute, the newly elected AFGE National President publicly decried the union's poor financial condition and called on Congress to allow unions to "move in the direction of the agency shop."[412] Later the AFL-CIO unsuccessfully lobbied the Clinton Administration for an executive order allowing unions to charge fees to non-members.[413]

Perhaps the most credible call for reform of federal-sector union security practices came in a 1991 GAO report based on survey responses from federal administrators, union leaders, and third-party experts.[414] GAO found a consensus among all three groups that the FSLMRS had bred an overly adversarial and litigious climate.[415] Several management officials blamed the litigiousness partly on the federal union security system, claiming that the lack of an agency shop or fair share arrangement forced unions to cater to a minority of malcontents instead of representing all employees.[416] Management officials also criticized the official time system as a source of conflict between unions and management and claimed that it prevented unions from hiring professional representatives who would be more effective negotiators.[417] A clear majority of the agency headquarters officials joined the union leaders and third-party officials in supporting the

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[410] H.R. 4907, 107th Cong. (2002).
[411] S. 2383, 107th Cong. (2002).
[412] Frank Swoboda, *Managing a 'Microcosm of America'; New President Sturdivant Calls Finances 'No. 1 Enemy' of AFGE*, WASH. POST, Sept. 7, 1988, at A17.
[413] Laura Koss-Feder, *Dues Blues: Nonpaying Workers Irk Federal Unions*, N.Y. TIMES, Nov. 24, 1996, at 11.
[414] GENERAL ACCOUNTING OFFICE, FEDERAL LABOR RELATIONS: A PROGRAM IN NEED OF REFORM, REPORT NO. B-244904 (1991) [hereinafter FEDERAL LABOR RELATIONS].
[415] *Id.* at 18-22. The report cited examples of FLRA negotiability cases that arose over such trivial issues as the cancellation of a picnic (U.S. Army Adjutant General Pubs. Ctr. and AFGE Local 2761, 35 F.L.R.A. 631 (1990)) and an agency's failure to renew a water cooler contract. (U.S. Dept. of Labor, Employment Standards Administration, and AFGE, 37 F.L.R.A. 25 (1990)).
[416] FEDERAL LABOR RELATIONS, *supra* note 414, at 33.
[417] *Id.*

authorization of the agency shop in the federal sector.[418] The GAO urged Congress to convene a panel of experts to recommend a complete overhaul of the Statute,[419] but no action was taken.

Meanwhile the TVA was forced to retreat from its innovative and long-standing union security mechanism[420] after a Court of Appeals decision in 1984.[421] The Sixth Circuit held that granting preference to union members in involuntary reassignment actions violated the union's duty of fair representation.[422] In response to the decision, the TVA modified the union-preference provisions in its contracts by removing the provisions giving union members preference in promotion and transfer decisions. [423] However, TVA did not renounce the policy of considering union membership generally as a positive factor "within the limits permitted by applicable laws and Federal regulations."[424]

Recently OPM began imposing an annual requirement for all agencies covered by the FSLMRS to track and report the use of official time.[425] The most recent survey, covering fiscal year 2004, showed that unions use an average of 3.7 hours of official time per bargaining unit employee annually.[426] OPM did not attempt to estimate the cost of official time in the FY 2004 report, but in the previous year's report, the estimated cost was over $128 million, based on pay data provided by the agencies.[427] Assuming that agencies are reporting official time with reasonable accuracy, this does not represent an enormous cost, relative to the overall cost of civilian employee programs. By way of comparison, the Office of Management and Budget reported that the total cost of civilian pay and benefits for executive branch agencies

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[418] *Id*.
[419] *Id*. at 77.
[420] *See infra* notes 77-80 and accompanying text.
[421] Bowman v. Tenn. Valley Auth., 744 F.2d 1207 (6th Cir. 1984), *cert. denied sub nom.* Ofc. and Prof'l Employees Union v. Bowman, 470 U.S. 1084 (1985).
[422] *Id.* at 1214. The Court reached this conclusion even though the TVA is not covered by any of the labor-management relations statutes, and therefore its unions are not bound by the explicit statutory duties that flow from exclusive representation. The Court inferred the duty of fair representation from the TVA's enabling statute and the fact that exclusive representation had become the practice. *Id*. at 1212.
[423] GENERAL ACCOUNTING OFFICE, LABOR-MANAGEMENT RELATIONS: TENNESSEE VALLEY AUTHORITY SITUATION NEEDS TO IMPROVE, REPORT NO. B-237506 40 (September 26, 1991).
[424] *Id*.
[425] OPM Memorandum for Heads of Departments and Agencies, June 17, 2002, *available at* www.opm.gov/lmr (last viewed June 18, 2006). The requirement excludes the Postal Service and other agencies not covered by the Statute.
[426] U.S. OFFICE OF PERSONNEL MANAGEMENT, OFFICIAL TIME USAGE IN THE FEDERAL GOVERNMENT: SUMMARY REPORT, FY 2004 SURVEY RESPONSES 2, at 6 (2006) [hereinafter OFFICIAL TIME USAGE FY 2004] (on file with author).
[427] U.S. OFFICE OF PERSONNEL MANAGEMENT, OFFICIAL TIME USAGE IN THE FEDERAL GOVERNMENT FISCAL YEAR 2003, at www.opm.gov/lmr (last viewed June 18, 2006).

(excluding the Postal Service) in 2005 was nearly $170 billion.[428] Therefore, even if agencies are underreporting their official time figures by as much as one-third, and assuming that official time is as much as twice the figure cited in the OPM report due to the costs of benefits, the total direct cost of official time represents a mere two tenths of one percent of the total civilian personnel budget.

The rate of official time usage varies widely among agencies, but OPM's studies so far have not explored the reasons for the variations. The Department of Defense, which has the largest number of bargaining unit employees by far, reported only 1.6 hours of official time used per employee.[429] Veterans Affairs, with the next largest bargaining unit population, reported 3.0 hours per employee.[430] Several agencies with large numbers of bargaining unit employees reported much higher rates of official time usage per employee: 7.7 hours in Treasury, 7.5 hours in the SSA, and 11.2 hours in the Department of Transportation.[431] The statistics raise significant questions about the possibility of abuse or inefficiency in the use of official time in the latter agencies. Conversely, the agencies with higher rates of official time usage may have found productive uses of official time that should be shared with the rest of the government.

In the FY 2004 report, OPM for the first time described the uses of official time in three broad categories. The lion's share of official time was categorized as "General Labor-Management Relations," a category that would include contract administration and training.[432] The next largest category was "Dispute Resolution,"[433] a category that presumably includes grievance processing, arbitration, and representation of appellants in statutory appeals processes (where such representation is allowed by contract). Contract negotiation (for basic agreements and mid-term renegotiations) accounted for a mere thirteen percent of overall usage of official time.[434]

VI. CONCLUSIONS AND RECOMMENDATIONS

A. Lessons for Management and Unions

In an ideal labor relations system, management and unions would strive in unison to negotiate and implement official time

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[428] U.S. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007, at 356 (2006).
[429] OFFICIAL TIME USAGE FY 2004, *supra* note 426, at 5.
[430] *Id.* at 6.
[431] *Id.* at 5-6.
[432] *Id.* at 3-4.
[433] *Id.*
[434] *Id.*

provisions that provide unions the official time that they need (but no more) while including effective safeguards against abuse. Unfortunately, as the SSA investigations demonstrated, that ideal is not always achieved. That is unfortunate, because the FLRA and FSIP have provided unions and management nearly all of the tools necessary to arrange for needed official time while keeping its use within reasonable bounds. To create an effective official time program, management and unions should:

1. Come to the bargaining table prepared. FSIP's decisions[435] demonstrate that good, categorized records of previous official time use are critical. If a party expects new developments (such as bargaining unit expansion or assumption of new representational duties) to affect the need for official time, then it should integrate the new developments into its proposals, basing the specifics of the proposals on empirical evidence of official time use, whenever possible.

2. Be specific in contractual provisions. As the FLRA decisions demonstrate, arbitrators are likely to interpret vague contract provisions literally, giving them much broader scope than the agency may have intended, and the FLRA upholds arbitrators' reasonable interpretations of vague contract terms.

3. Agree that careful management of official time is in the interest of employees and management, and therefore detailed procedures for monitoring of official time should be included in contracts. During the three-year course of the Congressional inquiries concerning the SSA, AFGE adopted a defensive and confrontational approach toward inquiries into its official time practices, even though the IG investigations raised significant questions about the behavior of their local officials. Negative public or Congressional scrutiny of union members' use of official time does not serve the interests of employees or agencies. Contrary to AFGE's arguments during the 1998 hearings, only the content of communications between employees and union representatives is protected by the Statute. The FLRA has made it clear that supervisors may make general inquiries into the nature of official time used by any individual union representative, including those who are using large block grants of official time. Unions should accept this reality and work in partnership with management to eliminate abuses. If unions are unwilling to do so, agencies should still propose appropriate contract provisions and be prepared to argue them at impasse proceedings, if necessary.

4. Whenever practical, agencies should work to minimize the number of employees on 100 percent official time, to limit the duration of any individual's tenure in such positions, and to place the burden on unions to ensure that employees returning from periods of 100 percent

[435] *See supra* Section V.B.

official time are prepared to resume their primary responsibilities immediately on their return. Given their limited financial resources, unions representing large bargaining units may find no effective alternative to placing some employees on 100 percent official time. Still, negotiators must consider the adverse effects of the practice on individuals' primary job skills and on agency operations, as well as the increased potential for abuse when individuals approach 100 percent official time. Unions should consider that the use of "100 percenters" promotes the development of significant experience in those individuals, but it may also encourage over-centralization of union functions in the hands of a few members, which is an unhealthy development, especially when the bargaining unit is not particularly large. Unions need some individuals to have deep expertise, but they also need broad involvement in union affairs by the membership. Over-reliance on a few members who use large block grants of time discourages the development of the union steward system. Unless it is absolutely necessary, grants of block time should not exceed 50 percent, so that all employees can remain engaged in their primary duty responsibilities and unions will have an incentive to spread responsibilities. If union leaders do not agree, FSIP has demonstrated that it is willing to favor well-justified agency proposals along these lines.

B. Unanswered Questions

Why do some agencies use far more official time per employee than others? OPM's recent statistical reports raise obvious questions. The differences should be studied to determine whether official time is being overused in some agencies. On the other hand, it is possible that some agencies have devised productive uses of official time that account for the increased numbers. Either way, close study of the issue could yield valuable lessons that can be shared across the federal government.

Is there a relationship between the ease of obtaining official time under collective bargaining contracts and the number of frivolous complaints filed by unions? This issue would not be difficult for government investigators to study, since all of the necessary data resides in the files of government agencies. Agency headquarters and OPM retain copies of collective bargaining agreements, and the FLRA presumably retains information on the number of unfair labor practice charges filed by unions that do not result in settlements or complaints issued by FLRA field offices. OPM and FLRA should investigate the relationship between the liberal availability of official time and the number of unsuccessful unfair labor practices charges filed by unions.

Did the Statute's expansion of official time for contract negotiations in 1978 lead to increased union intransigence or excessive demands in bargaining? A study of this question could prove difficult,

since it would be necessary to separate the effects of § 7131 from the effects of other aspects of the Statute, but it would shed much-needed light on the effects of § 7131 on the efficiency of collective bargaining.

How do some federal-sector unions achieve much higher membership rates than others, and is there a significant difference in the overall effectiveness of unions in bargaining units that have higher union membership rates (i.e., unions that rely less on official time as a means of support)? The available data shows that the National Treasury Employees Union (NTEU) has unusually high rates of union membership among non-postal agencies, while units represented by the NFFE have exceptionally low membership rates. What is the NTEU doing to achieve its relative success, and does higher membership contribute to a better labor relations program?

Do unions practice silent discrimination against nonmembers in decisions to demand arbitration of grievances? Thanks to the dues check-off procedure, agencies have a wealth of information to analyze this problem. By comparing lists of dues-paying members to arbitration records, agencies can detect patterns that might demonstrate discrimination against non-union members. A federal study of the issue would shed valuable light on the effectiveness of the federal-sector grievance and arbitration system in the absence of traditional union security provisions.

C. The Need for Reform; Options to Evaluate

Many critics of the use of official time have focused on the use of taxpayer resources by unions. This criticism is not compelling, since OPM's figures show that the overall cost of official time is tiny in comparison to the total personnel budgets of federal agencies. Moreover, many activities that occur on official time (such as participation of ordinary employees in employee-management councils and grievance proceedings) would occur in any well-run organization, even in the absence of unions. Certainly there should be concern about the potential for abuse and waste of taxpayer resources, but a cursory glance at the news headlines will reveal abuse and waste of government resources in many contexts, often far in excess of the total annual cost of official time in the federal government.

But that is not the end of the discussion, because the available evidence suggests that the federal government's union security arrangements are a major factor in some of the federal labor system's most costly shortcomings, including:

– A lack of union funds to pay for professional employees, which forces unions to rely on volunteers and may lead to ineffective representation in many bargaining units;

– Limited union ability to pay for arbitration, which restricts the overall use of arbitrators to the detriment of employee rights while tempting unions to discriminate against non-members;

– The tendency of management's necessary oversight of official time to undermine union independence in the use of its resources;

– A lack of involvement by most bargaining unit employees in union affairs, accompanied in some bargaining units by an over-centralization of union functions in a few officials using block grants of official time;

– Unnecessary conflict between unions and management over the allocation and use of official time; and

– Negative effects on organizational effectiveness and worker morale due to the excessive use of 100% official time by unions in some agencies.

Given the great variation in size, mission, and culture of federal agencies, it is likely that there is no "one size fits all" approach for union security in the federal sector. Therefore, Congress should authorize OPM to implement different types of test programs in selected agencies.

1. *Authority to Negotiate a "Fair Share" Agreement*

Fair share arrangements have proven to be workable in many state and local governments and have withstood constitutional scrutiny. There is no persuasive argument that the federal-sector workplace is so dramatically different that the fair share agreement should not at least be tested there. To assuage critics of compulsory union support, the federal-sector "fair share" could include a mandatory authorization election prior to the negotiation of the fair share (as was required in the original version of the Taft-Hartley Act) *and* a procedure for a de-authorization election, similar to one in the current NLRA. Such safeguards in a test program should be sufficient to satisfy all but the most zealous opponents of organized labor. In fact, such a system might provide some gratification to anti-union activists. Given the low rates of union membership in many federal agencies, it is likely that many union locals would fail to gain majority support for the fair share in an authorization election, possibly resulting in the dissolution of some union locals.[436] Such a development might be healthy for the union movement, since it would enable unions to concentrate their resources on bargaining units where they enjoy substantial support.

History shows that Congressional approval of the fair share would not be easy to obtain, even on an experimental basis. However,

[436] In fact, one of the management officials interviewed as part of the 1991 GAO study raised this very possibility. FEDERAL LABOR RELATIONS, *supra* note 414, at 34.

the historical evidence also suggests that previous proponents of the agency shop have overreached by proposing a mandate for the union or agency shop, rather than merely an authorization to bargain over the subject, and they have damaged their cause as a result. A more modest reform proposal, such as an experiment with the fair share, might stand a chance of success, if its supporters take the time to explain the differences between the fair share and the union shop, as well as the relevant Supreme Court case law, which for decades has upheld the fair share for public employees against constitutional challenges.[437]

2. *Modification of the Duty of Fair Representation*

On grounds of basic logic and fairness, it is impossible to justify a duty of fair representation that requires union members to shoulder the significant out-of-pocket costs of grievance arbitration and similar services that unions are required to provide to nonmembers. If a fair-share arrangement is not adopted in federal agencies, unions should at the very least be able to require reimbursement of discrete costs resulting from personal services rendered to nonmembers, just as the NLRA allows unions to charge service fees to religious objectors. To prevent opportunism by employees, unions should be able to require a minimum period of paid union membership before providing personal services to members without charge.

Modifying the duty of fair representation would enable unions to provide better service to their paying members, thus making membership more attractive and enhancing the overall health of unions. But unlike the agency shop or the fair share, a modified duty of representation would not involve any coerced dues or fees. Non-members would be required to pay unions only when availing themselves of expensive union services, and then only on a cost-reimbursement basis. This alternative would not be a radical departure from the current federal system, and it would still allow non-members to "free ride" on many union efforts, such as the general benefits of collective bargaining contracts. But the payoff could be enormous. Relief from the responsibility to finance arbitrations for nonmembers, combined with the possibilities for providing new enticements for membership, could make a tremendous difference to the effectiveness of union locals.

An objection to this arrangement is that it would diminish the rights of nonmembers by discouraging them from exercising their arbitration rights. This objection is not persuasive. First, it is based on the questionable assumption that nonmembers have realistic access to grievance arbitration under the current system. Second, any tendency

[437] *See supra* notes 44-50 and accompanying text.

toward exclusion from the arbitration system would be entirely at the individual employee's option. Finally, since nonmembers need not be deprived of access to the negotiated grievance system short of arbitration, they will still have a basic level of procedural protection, courtesy of the union.

3. *An Examination of the TVA's Pre-1984 Preference Policy*

Between 1950 and 1984, the TVA entered into contractual provisions granting union members preferential treatment in a wide variety of personnel actions. For example, TVA's pre-1984 contract with the Tennessee Valley Trades and Labor Council included the following provision:

> Membership in unions party to this agreement is advantageous to employees and to management, and employees are accordingly encouraged to become and remain members of the appropriate unions. Such membership is a positive factor in appraising relative merit and efficiency. Accordingly, within the limits permitted by applicable laws and Federal regulations, qualified union members are selected and retained in preference to qualified nonunion applicants or employees.[438]

TVA openly touted the policy as a form of union security, reasoning that employee relations would be improved if employees were encouraged to participate in their unions.[439] As mentioned above, TVA was forced to restrict its implementation of the policy in 1984 after the Sixth Circuit concluded that the contract provisions violated the unions' duty of fair representation.[440] Unfortunately, no published studies have ever examined the effectiveness of the old TVA system as a union security mechanism. The preference system provided powerful incentives for union membership with no outright coercion or reliance on public resources. While many employees under union shop and agency shop contracts face near-certain termination from employment for failure to pay union dues, TVA employees faced only a higher risk of involuntary reassignment, non-selection for promotion, or layoff during times of retrenchment. Therefore, the system deserves closer scrutiny, but certain modifications might be in order.

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[438] McDavid v. TVA, 555 F. Supp. 72, 73 (E.D. Tenn. 1982).
[439] Bowman v. TVA, 744 F.2d 1207, 1210 (6th Cir. 1984).
[440] *See supra* notes 42-49 and accompanying text.

Constitutional challenges to the policy based on the First Amendment freedom of association claims are unlikely to succeed. In the single reported case addressing an employee's or applicant's direct constitutional challenge to the TVA policy, a federal district court upheld it.[441] The plaintiff, an unsuccessful applicant for employment, claimed that the TVA's preference policy violated his First and Fifth Amendment rights, but he raised no religious or political objections to the use of his dues. Absent a claim of "forced ideological or political conformity," the court upheld the policy based on a "rational basis" review, since classifications based on union membership are not constitutionally suspect.[442]

However, there is a serious constitutional issue inherent in the TVA approach: the lack of a provision for religious or political objections. TVA's policy granted a preference only for membership in a union, and not merely for providing equivalent financial support (i.e., payment of agency fees). The system created dilemmas for religious and political objectors similar to those created by the pure union shop agreement. The problem could easily be remedied by conforming the system more closely to the NLRA's agency shop model, in which dues are reduced by the proportional amount the unions spend on non-representational activities, and religious objectors have the option of contributing an equivalent amount to a charity. This modification would weaken the effectiveness of the system to an unpredictable degree, since financial support for the union does not bring the same advantages as proactive membership. Still, the modification would almost certainly be worthwhile to avoid burdening important individual rights.

An obvious practical drawback of TVA's policy is that it may result in the promotion of less-capable employees over more-capable coworkers, based on willingness to join the union and pay dues. In this respect, the TVA model requires, to a greater extent than the other union security measures, modification of the merit principles that have governed public employment since the late Nineteenth Century. Civil service merit systems generally require that personnel decisions be based entirely on merit and fitness for the job, precluding the consideration of private organization membership as a criterion.[443] While individual merit is certainly very important, it is not unreasonable to consider an employee's willingness to participate in an effective labor-management relations system as an aspect of merit. In a workplace based on the principle of exclusive representation, employees

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[441] *McDavid,* 555 F. Supp. at 75.
[442] *Id*. at 74 (citing City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283 (1986)).
[443] For a detailed discussion of merit systems and collective bargaining in public employment, see KEARNEY, *supra* note 1, at 178-92.

who do not support or participate in their labor organizations have a negative effect on the agency's mission, regardless of their other individual strengths.

On close scrutiny, the disadvantages of the TVA model might be found to outweigh the advantages, but the fact that TVA management embraced the system for decades suggests that it may have some value. Therefore, the TVA's pre-1984 practices should be studied, and strong consideration should be given to testing a modified version of the TVA system in another agency.

4. *Restrictions on Official Time*

The political and policy trade-off for testing or permanently adopting any new system of union security should be the curtailment of unions' use of official time. The system imposes non-trivial costs on federal agencies, and unions should not be permitted to use it to the extent that prevails today, if they are also given access to more effective union security measures. Still, even in bargaining units with agency shop provisions, it may not be prudent or necessary to completely eliminate official time. As President Kennedy's Task Force noted, official time can be beneficial to agencies, especially when management is able to control the amount of time used.[444] Ensuring the availability of union stewards to conduct critical labor-management relations activities during duty hours justifies the minimal expense of providing limited official time.

The simplest and most time-tested approach would be to restore the authorization for official time to its status under E.O. 11,491, if new union security provisions are adopted in any agency. Specifically, official time for participation in grievance proceedings, meetings with management officials, and collective bargaining talks should be allowed, as these uses of official time are relatively limited, generally beneficial to management, and easy for management to monitor. The provision of 100 percent official time to employees on bargaining teams should also be reconsidered, based on the results of a thorough study into the matter. If unions have the benefit of a fair-share agreement, it can be presumed that they will be able to support contract negotiations under a grant of only fifty percent official time, as E.O. 11,491 authorized. Official time for lobbying, pre-bargaining preparation and similar activities should be strictly curtailed or eliminated, since it is difficult or impossible for management to monitor such activities, and an effective union security system enables unions to compensate their officials for such activities from their own funds.

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[444] *See supra* notes 421-24 and accompanying text.

A rollback of the official time authorization to pre-1978 levels will reduce or eliminate many of the problems that have resulted from implementation of § 7131, including the proliferation of employees on 100 percent official time, the difficulty of policing its use, frequent negotiability disputes and impasses, and the natural human tendency to be less careful when expending someone else's resources. The resulting benefits should be carefully weighed when evaluating any of the test programs described above. The likely result would be a healthier and more valuable system of labor-management relations in the federal workplace.

MORE EFFECTIVE FEDERAL PROCUREMENT RESPONSE TO DISASTERS: MAXIMIZING THE EXTRAORDINARY FLEXIBILITIES OF IDIQ CONTRACTING

MAJOR KEVIN J. WILKINSON

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I. INTRODUCTION

Federal public procurement practices are constantly under the public microscope. Congress, the Government Accountability Office (GAO), the media, and watchdog organizations scrutinize how agencies spend hundreds of billions of taxpayer dollars each year.[1] That scrutiny does not recede during national emergencies, whether they are military contingencies or natural disasters. In fact, that scrutiny has by all accounts increased exponentially, particularly with regard to federal procurement for Hurricane Katrina response and reconstruction. This includes both the hundreds of billions of dollars already spent and those funds yet to be spent. Serious concerns have been raised, and continue to be raised, as to federal agencies' procurement strategies and use of contracting alternatives during emergencies.

The federal procurement system has various contracting tools to prepare for, respond to, and recover from emergencies. Among these tools is the indefinite delivery-indefinite quantity (IDIQ) contract.[2] This article asserts that the multiple-award IDIQ contract is the most valuable procurement tool for disaster and crisis response operations by federal agencies and that IDIQ contracts are ideally suited to meet the majority of contracting needs before, during, and after disasters or emergencies.

Although IDIQ contracts have been in the procurement toolbox for decades, their use exploded with passage of the Federal Acquisition Streamlining Act (FASA)[3] in 1994.[4] Their value has been articulated primarily in terms of administrative efficiency and flexibility, especially because FASA's codification of IDIQ contracts was coupled with other streamlined procurement mechanisms with a goal to make federal

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[1] The U.S. federal government spends approximately $350 billion annually for goods and services. *See* OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET, http://www.whitehouse.gov/omb/procurement/index.html.

[2] *See* Federal Acquisition Regulation (FAR) Subpart 16.5. IDIQ contracts go by many names, including delivery order contracts, task order contracts, umbrella agreements, and, internationally, "framework" contracts. They are "used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award." FAR 16.501-2. For a description of IDIQ contracts, see *infra*, Section III.D.

[3] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[4] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HIGH RISK SERIES – AN UPDATE, REPORT NO. GAO 05-207, at 25 (Jan. 2005) (showing Multiple Award Schedules Sales from 1992-2004). The GSA Multiple Award Schedules alone account for 10-15% of U.S. federal procurement dollars spent, which equates to more than $32 Billion annually; s*ee also* Christopher R. Yukins, Discussion Draft, *Assessing Framework Agreements Under the WTO's Government Procurement Agreement: A Comparative Review of the U.S. Experience*, Materials Presented at Colloquium at George Washington University Law School 67 n.48 (2005) (presenting Federal Procurement Data Center's FEDERAL PROCUREMENT REPORTS for Fiscal Years 2000-2003), http://docs.law.gwu.edu/facweb/sschooner/GWUFrameworksProgramMaterials_Final.pdf.

procurement more commercial-like and with a significant reduction in government acquisition personnel.[5] Unfortunately, IDIQ contracting has been plagued by years of abuse and poor implementation.[6] Speed and efficiency came at the expense of competition, integrity, and transparency. Amidst the criticism, little has been said of the use of IDIQ contracts where speed and flexibility are necessitated by catastrophic events, not just administrative efficiency and flexibility.

In August 2005, Hurricane Katrina validated the multiple-award IDIQ contract as an essential contractual vehicle for use during and after natural disasters (and other emergencies), not so much by what was done than by what was not done. Hurricane Katrina exposed serious shortcomings in federal agencies' logistics and contract planning and execution.

The Department of Defense (DoD) has capitalized for some time now on the benefits of having a single-award IDIQ contract in place for logistics and services for military contingencies. The Department of the Army's Logistics Civil Augmentation Program (LOGCAP) has successfully provided DoD combat and combat service support for military contingencies since its inception in the late 1980s.[7] Since September 11, 2001, LOGCAP has grown from a multi-million dollar contract for services during minor contingencies to a multi-billion dollar contract in support of major military actions.[8] Over the last five years, the sole LOGCAP contractor, Kellogg, Brown and Root (KBR),

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[5] *See* Steven L. Schooner & Christopher Yukins, Feature Comment, *Empty Promise for the Acquisition Workforce*, 47 GOV'T CONT. ¶ 203 (2005) ("Facing pressure to downsize during the 1990s, Congress pressured agencies to slash procurement professionals, at best deeming 1102s (the Office of Personnel Management's 'contracting series') 'non-core,' or at worst, disparaging them as unnecessary or superfluous 'shoppers.' Without waiting to see if streamlining and increased purchaser discretion would make the existing workforce more *efficient*, reformers traded acquisition personnel for increased purchasing *flexibility*." (emphasis added)); s*ee also* Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383, 384 (2002) (indicating that proponents of IDIQ contracts "defend that red tape reduction and new contracting tools are the only way a reduced acquisition workforce can get the job done on a tight budget").

[6] *See* Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 5 NASH & CIBINIC REP. ¶ 30 (May 1998). For a listing of numerous Government Accountability Office (GAO) reports related to task order and delivery order contracting, see http://acquisition.gov/comp/aap/documents/Sources%20for%20Interagency%20Contracting%20Group.pdf; s*ee also* DEPARTMENT OF DEFENSE, MULTIPLE AWARD CONTRACTS FOR SERVICES, REPORT NO. D-2001-189 (30 Sept. 2001), http://www.dodig.osd.mil/ audit/reports/fy01/01189sum.htm.

[7] *See* LOGCAP, Who and Where We Are, http://www.amc.army.mil/LOGCAP/WhoWhere1.html; *see also* Donald L. Trautner, *A Personal Account and Perspective of the U.S. Army Logistics Civil Augmentation Program (LOGCAP)*, 2004 Conference of Army Historians (2004), http://www.amc.army.mil/amc/ho/pdf/History%20Paper_LOGCAP3.pdf (recounting history of LOGCAP and numerous military operations supported by LOGCAP contractor).

[8] Trautner, *supra* note 7, at 12.

has come under intense scrutiny for, among other things, alleged overpricing and poor performance.[9] The Army is terminating the current contract and re-competing it as a multiple award contract.[10]

Other federal agencies also have IDIQ contracts as part of their procurement strategies for dealing with emergencies. The United States Army Corps of Engineers (USACE) and the Federal Emergency Management Agency (FEMA) have had IDIQ contracts in place for disaster response; unfortunately, the contracts were woefully inadequate for the magnitude of the disaster wreaked across the Gulf Coast by Hurricane Katrina.[11] This forced FEMA to award four multi-million dollar IDIQ contracts with little or no competition.[12] After extensive criticism, FEMA promised to re-compete the contracts and introduced a "dual-track competitive bidding strategy" for disaster contracting, based on IDIQ contracts for future national emergency response and for post-Katrina Gulf Coast rebuilding.[13]

Many commentators take a traditional approach to IDIQ contracts that oversimplifies or unnecessarily restricts them. The traditional notion is that agencies should put advance "umbrella" agreements in place before a disaster so that when disaster strikes, they

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[9] *See, e.g.,* Dawn Kopecki, *When Outsourcing Turns Outrageous; Contractors may be saving the Army Money. But Fraud Changes the Equation*, BUS. WEEK, July 31, 2006).

[10] *See infra* notes 155-61 and accompanying text.

[11] *See, e.g.,* Renae Merle & Griff Witte, *Lack of Contracts Hampered FEMA: Dealing with Disaster on the Fly Proved Costly*, WASH. POST, Oct. 10, 2005, at A1 ("'There were contracts in place. But obviously they were not adequate,' said Richard L. Skinner, the Homeland Security Department Inspector General. 'I don't think the contracts in place ever contemplated anything this devastating. . . . They weren't prepared upfront to obtain the products and services they would need.'").

[12] The contracts were awarded to The Shaw Group Inc., Bechtel Corp., CH2M Hill Inc. and Fluor Corp. Each was worth $100 million. *See* Hope Yen, *Biggest Katrina Contracts Go to Firms in Political Loop*, SEATTLE TIMES, Oct. 20, 2005.

[13] *FEMA Announces New Contracting Strategy*, 39 GOV'T CONT. ¶ 440 (2005); *see, e.g.,* Jonathan Weisman & Griff Witte, *Katrina Contracts will be Reopened: No-Bid Deals Questioned on Hill*, WASH. POST, Oct. 7, 2005, at A1; Yen, *supra* note 12, at 1 ("FEMA . . . has pledged to rebid four contracts worth $100 million each to politically connected firm—Shaw Group Inc., Bechtel Corp., CH2M Hill Inc. and Fluor Corp.—that were awarded with little or no competition. Priority will be given to small and minority-owned businesses."). Despite the pledge, FEMA officials decided not to re-compete the contracts. However, in March 2006, FEMA awarded thirty-six new contracts, with a preference given to local, small, and small-disadvantaged businesses, and announced that work performed by the "big four" contractors would transition to the newly awarded contractors. *See* Press Release HQ-06-049, Federal Emergency Management Agency, Small Business Administration Work Together to Award Hurricane Katrina Recovery Contracts to Small and Minority-Owned Businesses (Mar. 31, 2006) [hereinafter Press Release HQ-06-049]. On August 9, 2006, FEMA awarded six Individual Assistance-Technical Assistance contracts "to provide assistance to applicants of Presidentially-declared disasters and emergencies." *See* FEMA Presolicitation Notice, Solicitation No. HSFEHQ-06-R-0030 (Mar. 7, 2006), http://www.fbo.gov/servlet/Documents/R/487240.

have "immediate access to the contractor's products and services for response and recovery work."[14] While this is the primary feature of IDIQ contracts, there are greater flexibilities inherent in these contract vehicles that should not be overlooked. They may not be one-size-fits-all vehicles, but properly administered, IDIQ contracts will outperform costlier, less efficient alternatives. This article presents a broader view of the IDIQ contract in disaster response. It is a vehicle that can flex as necessary to meet the needs and expectations of the public while maintaining its streamlined nature and efficiency.

Section II of this article sets the stage by addressing procurement shortcomings in Hurricane Katrina and explains why, practically, multiple-award IDIQ contracts are needed in disaster response. Section III describes the federal contingency contracting construct and presents an elegant model of contractual objectives and methods employed across the spectrum of a contingency. Section III also reviews the emergency procurement vehicles and tools available to contracting agencies, primarily those proffered by the newly implemented Federal Acquisition Regulation (FAR) Part 18. Although FAR Part 18 does not proffer anything new, it lays out "specific techniques or procedures that may be used to streamline the standard acquisition process."[15] Section III also looks at the Army's LOGCAP contract and its abrupt change of direction from a single-award contract toward a multiple-award contract. Finally, Section III turns to IDIQ contracts themselves, highlighting the simple requirements and procedures under which they operate.

Section IV then extracts IDIQ contracting from its limited traditional role and applies IDIQ contracting to the entire contingency contracting continuum, demonstrating its effectiveness across the complete span of an emergency, from the preparation and stand-by phase, through the disaster, to the long-term reconstruction phase. Section IV then discusses the keys to effectively administering IDIQ contracts to maximize their "extraordinary flexibilities" and the benefits of IDIQ contracts. Section IV also discusses how IDIQ contracts satisfy the public expectations imposed on federal agencies.

Section V concludes that IDIQ contracts are ideal for emergency response, especially when the contracting agencies engage in meaningful acquisition planning, procure commodities and "commoditized" services, and use simple, open IDIQ contracts.

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[14] J. Catherine Kunz, *Pre-Disaster Contracting: The Use of Indefinite-Delivery/Indefinite Quantity Contracts*, 22 ANDREWS GOV'T CONT. LITIG. REP. 13, 13 (2006).

[15] FAR 18.000(a).

II. HURRICANE KATRINA

A. The Storm

Hurricane Katrina was the costliest, most destructive, and one of the deadliest natural disasters in the history of the United States.[16] Estimates of its devastation have ranged from $96 billion to over $200 billion. Hurricane Katrina began as a tropical depression in the Atlantic Ocean over the Bahamas on August 23, 2005.[17] As the storm approached southern Florida, it developed into a cyclone, which was given the name Katrina on August 24.[18] On August 25, Katrina reached Category 1 hurricane status just before it reached land.[19] For some six hours, it crossed Florida, mostly over the Everglades, gradually losing its intensity and becoming a tropical storm.[20] On August 26, Katrina regained its hurricane status as it crossed the warm waters of the Gulf of Mexico. Between August 26-28, Katrina "embarked upon two periods of rapid intensification."[21] Early on August 27, Katrina became a Category 3 hurricane. Not only had Katrina intensified in force, but it also doubled in size. Within 12 hours, Katrina grew from a Category 3 hurricane to a Category 5.[22] On August 28, Katrina attained its peak intensity, within 200 miles of the mouth of the Mississippi River. As Katrina approached land, it weakened to a Category 3 hurricane.[23] On August 29, Katrina made landfall in Louisiana.[24] It continued northward, making its final landfall near the mouth of the Pearl River at the Louisiana-Mississippi border. Katrina weakened rapidly as it moved inland over Mississippi, becoming a Category 1 hurricane by the

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[16] *See, e.g.*, Live Science: Forces of Nature, http://www.livescience.com/forcesofnature/ap_050914_worst_disasters.html ("Hurricane Katrina already has the tragic notoriety of being among the 10 deadliest natural disasters to strike the United States . . . ."); *see also* Ashbritt, Inc., Comp. Gen. B-297889 (2006) ("Hurricane Katrina . . . is widely described as the most destructive natural disaster in U.S. history . . . ."); WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 5 (2006), http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf ("Hurricane Katrina was the most destructive natural disaster in U.S. history. The overall destruction wrought by Hurricane Katrina, which was both a large and powerful hurricane as well as a catastrophic flood, vastly exceeded that of any other major disaster . . . ." (footnote omitted)).

[17] *See* RICHARD D. KNABB ET AL., NATIONAL HURRICANE CENTER, TROPICAL CYCLONE REPORT: HURRICANE KATRINA 1 (2005), http://www.nhc.noaa.gov/ms-word/TCR-AL122005_Katrina.doc.

[18] *Id.* at 2.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2-3 (defined as a 30 knot or greater intensity increase in a 24-hour period).

[22] *Id.* at 3.

[23] *Id.*

[24] *Id.*

afternoon of August 29, and shortly thereafter becoming a tropical storm.[25]

Hurricane Katrina devastated a significant portion of the Gulf Coast of the United States. Most notably, the storm surge caused waters to rise on the Mississippi River and Lake Pontchartrain, which in turn overwhelmed levees protecting New Orleans.[26] Significant levee failures occurred on the 17th Street Canal, Industrial Canal, and London Avenue Canal, and the storm's waters flooded nearly 80 percent of New Orleans.[27] Television and print media carried vivid and graphic real-time images of the catastrophic disaster to the world. The plight of victims trapped in their homes, on rooftops, in vehicles, and at the Superdome, in need of food, clothing, shelter, medical attention, and evacuation was broadcast to millions (if not billions) of people. Cries went out from victims as well as sympathizers demanding immediate relief. The Mayor of New Orleans predicted that tens of thousands of people would be killed.[28] The world watched as days passed until relief finally came. Attention then turned to the multi-billion dollar, multi-year recovery and reconstruction effort ahead.

B. Federal Response Under the Microscope

Since Katrina, Congressional investigators, agency inspectors general, agency auditors, the media, and public watchdog groups have reviewed federal (and state and local) Hurricane Katrina preparation, response, and relief and recovery efforts, including those efforts made before the hurricane made landfall.[29] Because the government does

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[25] *Id.* at 4.
[26] WHITE HOUSE, *supra* note 16, at 6.
[27] *Id.*
[28] *Katrina Day-by-Day Recap*, PALMBEACHPOST.COM, http://www.palmbeachpost.com/storm/content/storm/2005/atlantic/katrina/day_by_day_archive.html. Thankfully, Mayor Nagin's prediction proved to be inflated by a factor of ten.
[29] *See* SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, U.S. HOUSE OF REPRESENTATIVES, A FAILURE OF INITIATIVE 332 (2006) [hereinafter SELECT BIPARTISAN COMMITTEE]. The committee stated:

> The [Department of Homeland Security Inspector General (DHS-IG)] assigned 60 auditors, investigators, and inspectors and hired additional oversight personnel. DHS-IG staff reviewed the award and administration of all major contracts, including those awarded in the initial efforts, and the implementation of the expanded use of government purchase cards. . . . In addition, 13 different agency OIGs have committed hundreds of professionals to the combined oversight effort, with a significant part of the oversight provided by DOD, the various service audit agencies, and criminal investigative organizations. To ensure that any payments made to contractors are proper and reasonable, FEMA has engaged the Defense Contract

much of its work by contracting out services and acquiring goods, federal procurement practices are a major part of the intense scrutiny. [30] This oversight was, and continues to be, increasingly intense in the wake of actual and perceived contracting abuses arising out of U.S. operations in Iraq and Afghanistan and the emergence of the same or similar abuses in the federal response to Hurricane Katrina.[31] This

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Audit Agency (DCAA) to help it monitor and oversee payments made and has pledged not to pay on any vouchers until each one is first audited and cleared. In addition, DHS's CPO met with each of the large Katrina contractors to impress upon them the need to ensure all charges are contractually allowable, fair, and reasonable. Finally, the GAO has sent a team to the Gulf coast area to provide an overall accounting of funds across the government and evaluate what worked well and what went wrong at the federal, state and local levels.

[30] Government investigations have included work in Congress and elsewhere. *See, e.g.*, SELECT BIPARTISAN COMMITTEE, *supra* note 29, at app. 9; WHITE HOUSE, *supra* note 16; SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, U.S. SENATE, HURRICANE KATRINA: A NATION STILL UNPREPARED (2006), http://hsgac.senate.gov/index.cfm?Fuseaction=Links.Katrina. The GAO has issued numerous reports related to Hurricane Katrina preparation, response and recovery, and reconstruction: U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS AND RESPONSE TO HURRICANES KATRINA AND RITA, REPORT No. GAO-06-365R (2006); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, AGENCY MANAGEMENT OF CONTRACTORS RESPONDING TO HURRICANES KATRINA AND RITA, REPORT NO. GAO-06-461R (2006); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY CONTRACTS, REPORT NO. GAO-06-622T (2006) (statement of William T. Woods, Director, Acquisition and Sourcing Management); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANES KATRINA AND RITA: CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS, REPORT NO. GAO-06-235 (Nov. 2, 2005) (statement of David E. Cooper, Director, Acquisition and Sourcing Management); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: IMPROVING FEDERAL CONTRACTING PRACTICES IN DISASTER RECOVERY OPERATIONS, REPORT NO. GAO-06-714T (2006) (Statement of William E. Woods); *see also* DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, A PERFORMANCE REVIEW OF FEMA'S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA, REPORT NO. OIG-06-32 (2006), http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06-32_Mar06.pdf. A number of government watchdog organizations also maintain websites monitoring government contracting with sections dedicated to Hurricane Katrina-related contracting, including Corpwatch.org (CorpWatch: Holding Corporations Accountable), Halliburtonwatch.org (Halliburton Watch), pogo.org (Project on Government Oversight), publicintegrity.org (The Center for Public Integrity) and www.taxpayer.net/budget/katrinaspending/contracts/index.htm (Taxpayers for Common Sense).

The House Select Committee's report suggests that "[t]he intense public scrutiny could limit the willingness of private sector companies to offer assistance during future disasters. Several firms expressed the view that the challenges associated with emergency contracting may not be worth the trouble. Finally, unfounded negative publicity harms company reputations." SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 337.

[31] *See* Oliver Morgan, *Congress Probes Hurricane Clean Up Contracts*, THE OBSERVER (Sept. 11, 2005) (quoting Congressional Representative Henry Waxman in tying Katrina

scrutiny and criticism is unprecedented and cuts to the core of the contracting effort. According to a Congressional investigation, federal agencies operated under "fundamentally flawed contracting strategies."[32] Watchdog organizations accused contracting parties of "disaster profiteering,"[33] akin to what critics allege was "war profiteering" in Iraq and Afghanistan.[34]

One would expect the federal government to have advance contracts in place before a disaster occurs; to be capable of providing a quick response through its contracting agencies; to procure quality goods or services at reasonable prices; to award contracts without cronyism or favoritism; to implement socioeconomic preferences for small businesses, small-disadvantaged businesses, and local businesses; and to conduct its contracting in a manner transparent to the general public. Although in many respects the government response to Katrina was laudable, government agencies failed to meet these expectations. These expectations are not novel nor are they outrageous. In fact, the FAR mandates most of them. Watchdog groups demand adherence to these FAR provisions and discourage use of available exceptions (e.g., limited competition, sole-source "no-bid" awards). So, what contracting vehicle best address these expectations? The answer is the multiple-award IDIQ contract.

1. *Advance Planning and Preparation*

Advance planning is generally essential to a well-executed mission, including disaster response. Acquisition planning is a key element of the broader, all-encompassing advance planning.[35] After all, the government does not normally have all the goods and resources it

contracting to Iraq contracting: "The administration has an abysmal contracting record in Iraq. We can't afford to make the same mistakes again. We must make sure taxpayer funds are not wasted, because every dollar thrown away today is a dollar that is not available to hurricane victims and their families."). *See, e.g.*, *Katrina contracts worth billions raise worries about waste*, SEATTLE TIMES, Sept. 20, 2005; Pratap Chatterjee, *Big, Easy Iraqi-Style Contracts Flood New Orleans*, CORPWATCH, Sept. 20, 2005, http://www.corpwatch. org/article.php?id=12647.

[32] COMMITTEE ON GOVERNMENT REFORM – MINORITY STAFF SPECIAL INVESTIGATIONS DIVISION, UNITED STATES HOUSE OF REPRESENTATIVES, THE BUSH ADMINISTRATION RECORD: THE RECONSTRUCTION OF IRAQ 8 (2005).

[33] *See, e.g.*, Charlie Cray, *Disaster Profiteering: The Flood of Crony Contracting Following Hurricane Katrina*, 26 MULTINAT'L MONITOR (2005), http://multinational monitor.org/mm2005/092005/cray.html) (referring to comments of the Project on Government Oversight (POGO) Director).

[34] *See, e.g.*, CENTER FOR MEDIA AND DEMOCRACY'S SOURCE WATCH, WAR PROFITEERING, http://www.sourcewatch.org/index.php?title=War_profiteering #Profiteering.

[35] FAR Part 7 "prescribes policies and procedures for—(a) Developing acquisition plans; [and] (b) Determining whether to use commercial or Government resources for acquisition of supplies or services." FAR 7.000.

needs for effective disaster response, and it is not normally able to perform all the necessary services itself. FAR Part 7 mandates that agencies "perform acquisition planning and conduct market research . . . for *all* acquisitions."[36]

The government should prepare for contingencies through careful planning, anticipating what goods and services will be needed. As part of its preparation for various contingencies, the government should also have advance contracts in place to facilitate quick acquisition and delivery at "better" prices.[37] With regard to Hurricane Katrina, the GAO found there was "inadequate planning and preparation to anticipate requirements for needed goods and services."[38] Although contracts were "in place" prior to Katrina, they were insufficient in breadth and amount of goods and services, and contracting personnel were unprepared to use them.[39]

The lack of corpse recovery services in Louisiana and the purchase of temporary classrooms for schools in Mississippi illustrate this government lack of planning and knowledge. In the hurricane's aftermath, hundreds of corpses lay decomposing in homes and streets across Louisiana and Mississippi.[40] Louisiana state and local officials bickered with FEMA officials over which agency was responsibility for recovering bodies. FEMA had made no arrangements because historically cities and localities recovered bodies in mass casualty situations.[41] One week after the storm struck, FEMA entered a verbal agreement with Kenyon International Emergency Services Inc. to recover the bodies, but difficulties finalizing the arrangement hindered recovery efforts.[42] Kenyon officials complained of a "bureaucratic quagmire" and withdrew from the agreement.[43] FEMA requested the DoD take over recovery efforts until a new contractor could be found.[44] More than two weeks after the hurricane made landfall, the Louisiana Department of Health and Hospitals signed its own written contract with Kenyon.[45] Clearly, federal and state agencies had not planned for

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[36] FAR 7.102(a) (emphasis added).
[37] *See* SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 329-32; Merle & Witte, *supra* note 11, at A1; Eric Lipton & Ron Nixon, *Many Contracts for Storm Work Raise Questions*, N.Y. TIMES, Sept. 26, 2005, http://www.nytimes.com/2005/09/26/national/nationalspecial/26spend.html?ex=1285387200&en=16d1c769d54e8c3c&ei=5088&partner=rssnyt&emc=rss.
[38] GAO-06-461R, *supra* note 30, at 4.
[39] Merle & Witte, *supra* note 11.
[40] *Id.* The majority lay in the ravaged New Orleans area. *Id*.
[41] *Id.*
[42] WHITE HOUSE, *supra* note 16, at 48.
[43] *Id.*; Merle & Witte, *supra* note 11.
[44] WHITE HOUSE, *supra* note 16, at 48.
[45] *Id.* (acting at the direction of Louisiana Governor Kathleen Blanco, "even though the Governor believed that 'recovery of bodies is a FEMA responsibility'").

corpse removal and were not prepared to quickly address it when the need arose.

Two weeks after the hurricane, the Mississippi Emergency Management Agency asked FEMA to provide temporary classrooms for Mississippi schools destroyed by the hurricane.[46] FEMA delegated this requirement to the USACE within a very short time frame.[47] In an investigation initiated by a call to its Fraud Hotline, the GAO found that:

> [USACE] contracting officials did not expect to be buying classrooms and, in fact, were not assigned the task until after Hurricane Katrina had struck. With no prior experience, no advance notice, and the need to buy the classrooms as quickly as possible, [USACE] contracting officials lacked knowledge of the industry and information about classroom suppliers, inventories, and prices that would have been useful in negotiating a good deal. Faced with the urgent need for classrooms, they chose to purchase them by placing an order, noncompetitively, on an existing agreement with Akima.
>
> Based on our analysis of a price quote obtained by Akima from a local Mississippi classroom supplier, the price that Akima actually paid for the classrooms, and prices for similar units from GSA Schedule contracts, we believe [USACE] could have, but failed to, negotiate lower prices.[48]

Federal agencies' inadequate planning contributed to hasty procurement decisions that resulted in significantly higher prices.[49] This lack of planning also resulted in the procurement of unnecessary goods or services, such as 4,000 base camp beds that were never used,[50] and the procurement of "wrong" goods,

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[46] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: ARMY CORPS OF ENGINEERS CONTRACT FOR MISSISSIPPI CLASSROOMS, REPORT NO. GAO-06-454, at 2 (2006) [hereinafter GAO-06-454].
[47] *Id.*
[48] *Id.* at 4-5.
[49] The classrooms contract with Akima was nearly double the price of other quotes. Although there was concern as to whether the other contractors could have provided the number of classrooms requested within the time frame, USACE could have negotiated a lower price. *See id*.
[50] GAO-06-461R, *supra* note 30, at 4.

such as 10,000 manufactured homes now stored and maintained at the Hope, Arkansas municipal airport.[51]

2. *Quick Response*

Whether the government is directly providing goods or services or procuring them, the public demands quick delivery of emergency supplies and services during a crisis or disaster. In a CBS News Poll conducted within two weeks of Katrina, seventy-seven percent of respondents believed the federal government's response to Katrina was inadequate, and eighty percent believed that the government did not respond as fast as it could have.[52] In the absence of advance planning, hurried agency actions led to the wasting of millions of dollars.[53]

3. *Quality Products/Services at Reasonable Prices*

The federal government is expected to meet its needs immediately through responsible contracting at "fair and reasonable" prices. This is true of all contracts regardless of how much competition was involved. FEMA's Mississippi classrooms purchase not only disclosed deficiencies in planning and knowledge of needed goods and services, it also raised concerns of "inflated" prices. The *New York Times* reported: "[T]he classrooms cost FEMA nearly $90,000 each, including transportation . . . . That is double the wholesale price and nearly 60 percent higher than the price offered by two small Mississippi businesses dropped from the deal."[54] Akima, the company awarded the contract, denied "price gouging," claiming "[t]he speed demanded in installing the classrooms required charging a premium. . . . What we provided to the government was a fair and reasonable cost given the

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[51] *Senate Holds Field Hearing in Arkansas on $431 Million in Unused FEMA Housing,*. 48 GOV'T CONTRACTOR ¶ 151 (2006). The homes have "no apparent destination, . . . a symbol of FEMA's failures in responding to the Gulf Coast crisis." *Id.* According to the Department of Homeland Security Inspector General, "not only did FEMA over-purchase manufactured homes, but the agency also purchased the wrong type of homes." *Id.* As a result, FEMA is paying $47 million for their storage and maintenance. *Id.*

[52] *Poll: Katrina Response Inadequate: Public Says Response to Katrina too Slow; Confidence in Bush Drops*, CBS NEWS POLLS, Sept. 8, 2005, http://www.cbsnews.com/stories/2005/09/08/opinion/polls/main824591.shtml; *see also FEMA Promises Strong Texas Response*, UNITED PRESS INT'L, Sept. 21, 2005 ("The Federal Emergency Management Agency, blistered by critics for its slow response to Hurricane Katrina, pledged quick help as Hurricane Rita neared Texas.").

[53] *See Audits: Millions of Dollars in Katrina Aid Wasted*, MSNBC Staff and News Service Report, http://www.msnbc.msn.com/id/11326973 (citing GAO and DHS Inspector General audits).

[54] Eric Lipton, *No-Bid Contract to Replace Schools After Katrina Is Faulted*, N.Y. TIMES, Nov. 11, 2005.

emergency conditions and the risks."[55] Notwithstanding the assertions, as previously discussed, GAO believes USACE could have negotiated lower prices.[56]

FEMA's $236 million contract with Carnival Cruise Lines to house 7,000 people in three cruise liners also underwent extensive and intense public scrutiny.[57] A Senate Federal Financial Management Subcommittee's investigation into the contract concluded that "taxpayers [would] end up paying four times the amount, per person, that vacation cruise passengers would pay, although Carnival's overhead costs [were] far lower that during normal cruises."[58]

Reasonable prices are generally assured through adequate competition; without that competition, the government may have to look to other factors to determine price reasonableness, including a contractor's cost or pricing data.[59] When the government engages in sole or limited source procurement, the public legitimately questions whether such prices are too high. The public also wants to see less "no-bid" (sole source) contracting. Even though all contracts require the contracting officer to make a price reasonableness determination, it is unlikely to affect the award, or, absent fraud, the contract price.

4. *Absence of Cronyism*

Procurement regulations demand integrity of the federal procurement system's participants.[60] Sole source and limited competition contracts are blemished with the perception of "cronyism," although competitively awarded contracts are not immune to such charges.[61] Any hint of favoritism to politically connected individuals or

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[55] *Id.*; *cf.* James Glanz, *Army to Pay Halliburton Unit Most Costs Disputed by Audit*, N.Y. TIMES, Feb. 27, 2006 (Army "largely accepted Kellogg Brown & Root's assertions that costs had been driven up by factors beyond its control—the exigencies of war and the hard-line negotiating stance of the state-owned Kuwait Petroleum Corporation.").

[56] GAO-06-454, *supra* note 46, at 4-5.

[57] *See, e.g.*, Cray, *supra* note 33, at 4.

[58] *Id; but see* SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 336-37 (Carnival Cruise Lines executives responded that "[t]o make the ships available, Carnival canceled approximately 100,000 existing reservations for which travel agent fees still had to be paid. Carnival makes its profit from ticket sales and 'add-ons' (drinks, shore excursions, etc.) and not in the 'time charter' business, which is a comprehensive package of food, beverages, and activities. In addition, it incorporated taxes into its offer, which will be refunded if it is determined it does not owe taxes under U.S. law.").

[59] *See* FAR Subpart 15.4.

[60] *See, e.g.*, Procurement Integrity Act, 41 USC § 423 (2006).

[61] *See, e.g.*, Cray, *supra* note 33 ("[A] series of exemptions to competitive bidding and other procurement requirements adopted by the Federal Emergency Management Agency (FEMA) and the Army Corps of Engineers has effectively turned the Gulf region reconstruction and cleanup contracts into a *feeding frenzy for 'disaster profiteers'—a network of crony contractors for whom the $200 billion cleanup and reconstruction promises to be a significant windfall*." (emphasis added)).

companies, particularly when coupled with perceived overpayment or "excessive profit,"[62] may erode public trust and confidence, even if the allegations are misleading or baseless.[63] Allegations of cronyism have enveloped the entire post-Katrina recovery effort. In October 2005, the *Washington Post* reported that billions of dollars in government contracts were going to large, out-of-state, "politically-connected" businesses, while "Gulf firms" were losing cleanup contracts.[64] In a story about the Mississippi classrooms purchase, the *New York Times* noted that Akima's majority owner was "represented in Washington by a lobbying firm with close times to the Bush administration and particularly Tom Ridge, the former head of the Department of Homeland Security."[65] The media and watchdog groups are not the only ones alleging "cronyism." Members of Congress are also making these charges. For example, Congressional Representative Barbara Lee, D-California, stated that "[t]he aftermath of Hurricane Katrina demonstrated the tragic consequences of having an administration where *cronyism trumps competence*."[66]

5. *The "Right" Contractor*

Federal procurement law provides preferences for certain "concerns," such as small businesses,[67] minority-owned businesses,[68] and in times of disaster or emergency, local businesses.[69] With regard to Katrina-related contracts, these three concerns have garnered significant attention from the media, the business community, and Congress. In the immediate aftermath of Hurricane Katrina, many of the contracts went to out-of-state companies, much to the chagrin and

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[62] *See Cashing in on the Katrina Cleanup: Why the Army is About to Hand an Indian Tribe an Enormous No-Bid Contract*, BUSINESSWEEK ONLINE (2006), http://www.businessweek.com/magazine/content/06_15/b3979071.htm (noting that estimates for AshBritt's profit margin could be as much as 25%).

[63] An example of misleading allegations is where the press notes that contracts are going to companies with "preexisting relationships," inferring cronyism. *See, e.g.*, *Auditors Keep Watch Over Katrina Contracts*, FOX NEWS, http://www.foxnews.com/story/0,2933,170182,00.html.

[64] Griff Witte et al., *Gulf Firms Losing Cleanup Contracts; Most Money Going Outside Storm's Path*, WASH. POST, Oct. 4, 2005, at D1 ("Companies outside the three states most affected by Hurricane Katrina have received more than 90 percent of the money from prime federal contracts for recovery and reconstruction of the Gulf Coast, according to an analysis of available government data.").

[65] Lipton, *supra* note 54, at 1. Akima's president denied that Akima or its parent company "used any ties to elected officials to pursue contracts." *Id*.

[66] Cray, *supra* note 33 (emphasis added).

[67] 15 U.S.C. § 631 (2006).

[68] Pub. L. No. 95-507, 92 Stat. 1757 (1978).

[69] Stafford Act, Pub. L. No. 93-288, 88 Stat. 143 (1974).

detriment of "local" businesses.[70] Even though these out-of-state companies employed local businesses as subcontractors, critics claimed the prime contractors earned substantial profits while the subcontractors were working for little more than cost.[71]

The Robert T. Stafford Disaster Relief and Emergency Assistance Act[72] grants a preference to local businesses for assistance contracts after major disasters or emergencies:[73]

> In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.[74]

Although statutory, the Stafford Act preference had no regulatory implementation and had been used infrequently since it was passed.[75] Federal agencies were unsure how to implement the Act. In a post-Katrina investigation, the GAO reported that:

> Preparation was . . . lacking in implementation of the Stafford Act preference for contractors residing or doing business in the affected area. USACE staff expressed uncertainty regarding how to apply preferences or determine if a company was in an affected area. Several General Services Administration (GSA) and FEMA officials indicated they were aware of the Stafford Act but stated it is difficult to immediately factor in local businesses in such a catastrophic event.[76]

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[70] Witte et al., *supra* note 64, at D1; *see also* SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 331 (stating that some local companies went out of business). It is unclear whether the Committee attributes this to the failure to hire local businesses or a statement of fact as to why they were not used.

[71] *See Cashing in on the Katrina Cleanup*, *supra* note 62, at 1; *see also* Larry Margasak, *Storm Contractors Found to Cleanup in Scams*, HOUS. CHRON., May 5, 2006.

[72] 42 U.S.C. § 5150 (2006).

[73] Application of the Act is contingent upon Presidential declaration of a disaster or emergency. *See* FAR 18.203.

[74] 42 U.S.C. § 5150 (2006).

[75] *See* GAO-06-461R, *supra* note 30, at 2.

[76] *Id.*

The House of Representatives Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina report echoed the GAO's findings.[77]

The most prominent Stafford Act case involved a USACE contract for debris removal in Mississippi. USACE "activated a previously awarded contract" to AshBritt, a non-Mississippi firm, to immediately begin helping in the Mississippi cleanup.[78] The contract was not sufficient to meet the large disaster needs, so USACE held a competition for a new contractor; AshBritt won the nearly $1 billion contract.[79] Numerous complaints were made regarding the award of this contract to a non-Mississippi firm, including one from "a member of the Mississippi Congressional delegation urg[ing] the Secretary of the Department of Homeland Security to follow the requirement of the Stafford Act and 'redirect' the cleanup contracts in Mississippi and Louisiana to local firms."[80]

Two months later, USACE issued a new solicitation for cleanup services. The solicitation limited the competition to Mississippi firms. AshBritt protested on the ground that the Stafford Act did not include the authority to use a set-aside.[81] The GAO denied the protest.[82] In 2006, Congress added the following sentence to Section 5150 of the Stafford Act: "In carrying out this section, a contract or agreement may be set aside for award based on a specific geographic area."[83] Representative Chip Pickering, sponsor of the amendment, emphasized the importance of local contractor involvement: "Congress wrote the Stafford Act to maximize the impact of federal dollars by giving preference to local contractors, strengthening the damaged economy and providing jobs to communities and victims of the disaster."[84]

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[77] *See* SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 333 ("Ambiguous statutory guidance regarding local contractor participation led to ongoing disputes over procuring debris removal and other services." The Committee concluded, "Ambiguities regarding the implementation of local contractor preference under the Stafford Act should be resolved. In addition, clear, unambiguous remedies and penalties for failure to meet such statutorily mandated preferences may need to be considered.").

[78] AshBritt, Comp. Gen. B-297889, Mar. 20, 2006, at 9 (The contract had a ceiling of $500 million with an option for an additional $500 million.).

[79] *Id*. at 9-13.

[80] *Id.* at 10.

[81] *Id.* (arguing that without express authority set-aside violates the CICA).

[82] *See generally, id.*

[83] Pub. L. No. 109-218, § 2, 120 Stat. 333 (2005).

[84] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 335 ("Mississippians have the ability, capacity and personal incentive to do this work. We want to rebuild and restore our home state, and these federal contracts will help our economy more through local contractors than sending the money to out-of-state corporations.").

In October 2005, FEMA claimed that seventy-two percent of its contracting dollars were spent on small businesses.[85] Nevertheless, there continues to be a perception that small businesses are being "frozen" out of the process.[86] Over time, the number of contracts awarded to small businesses and minority-owned businesses has increased, with promises of more to come.[87] However, the percentages were still well below what critics demand and what is "normally required."[88]

FEMA further responded to the pressures for local and small business participation through its October 2005 "dual-track strategy."[89] As part its strategy, FEMA increased participation of local businesses in the Gulf Coast reconstruction.[90] FEMA recently awarded thirty-six Gulf recovery contracts worth hundreds of millions of dollars primarily to local, small, and small-disadvantaged businesses.[91] The House Select Committee observed:

> Through this strategy, FEMA hopes to provide a diverse group of companies the opportunity to contract with FEMA for the Gulf coast hurricane recovery by adding prime contracting opportunities for small disadvantaged businesses with a geographic preference for those located in the Gulf states. The national competition approach is intended to preserve subcontracting goals and opportunities for small and disadvantaged businesses as part of all prime contracts for future disasters. Both strategies will emphasize the importance of using local businesses, a *critical piece of*

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[85] *See, e.g.*, Ethan Butterfield, *Velásquez: Small Business Frozen Out of Katrina Rebuilding*, WASH. TECH., Oct. 20, 2005, http://www.washingtontechnology.com/news/1_1/Small_Business/27235-1.html.

[86] *Id.*

[87] *See Katrina: FEMA breaks promise on Katrina Contracts*, CORP. WATCH, Mar. 25, 2006, http://www.corpwatch.org/article.php?id=13414 ("Since October, the percentage of FEMA contracts given to minority-owned businesses has increased slightly, from 1.5 percent to 2.4 percent of the $5.1 billion awarded.").

[88] *See, e.g.*, *Minority Firms Getting Few Katrina Contracts: Most Awards Going to Businesses with an Existing Government Relationship*, MSNBC, Oct. 4, 2005, http://www.msnbc.msn.com/id/9590752 (noting that "about 1.5 percent of the $1.6 billion awarded by [FEMA] has gone to minority businesses, less than a third of the 5 percent normally required.").

[89] Press Release, FEMA, FEMA, Small Business Administration Work Together to Award Hurricane Katrina Recovery Contracts to Small and Minority-Owned Businesses (Mar. 31, 2006), http://www.fema.gov/news/newsrelease.fema?id=24682.

[90] *Id.*

[91] Press Release HQ-06-049, *supra* note 13.

> *a successful economic recovery in a disaster-ravaged area*.[92]

FEMA also awarded six nationwide Individual Assistance-Technical Assistance contracts with local company, small business, and minority-owned business subcontractor requirements.[93]

6. *Transparency*

The public wants and deserves to know what its government is buying, from whom, and for how much. Public notice requirements, however, are generally lowered during contingencies or when there is an urgent or compelling reason.[94] Additionally, notice of orders and awards under IDIQ contracts is not required.[95] Consequently, it was the media that played a pivotal role in bringing transparency to the government's Katrina-related expenditures.[96] Agencies such as FEMA and USACE responded to their demands by using the Internet to announce prime contracts and some of the orders issued under them.[97] We can safely assume that such demands will continue.

III. FEDERAL GOVERNMENT CONTRACTING DURING EMERGENCIES

Experience suggests a few more certainties in life than death and taxes. The country will face emergencies or other contingencies, man-made and natural, and the government will purchase goods and services in response to them. Federal procurement regulations anticipate situations where expedited, immediate procurement actions are necessary. In the last decade, the system has adopted more "efficient" and "streamlined" ways of procuring goods and services that are effective tools during emergency situations, although their use is not limited to emergencies.[98]

This section of the article will discuss the conceptual construct within which the federal contracting agencies operate during a contingency. First, it will review a contracting continuum model presented recently at the Annapolis meeting of the American Bar Association's Public Contract Law Section by Jeffery Alan Green, a

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[92] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 335 (emphasis added).
[93] *See supra* note 13.
[94] *See, e.g.*, FAR 5.202.
[95] FAR 16.505.
[96] Christopher R. Yukins, *Hurricane Katrina Brings Transparency to Task-Order Contracting*, *in* GOVERNMENT CONTRACTING IN A "NEW" ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION'S 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE Vol. I, Tab R (2006).
[97] *Id.*
[98] *See* FAR Part 18.

House staffer with extensive experience in contingency contracting.[99] This section will then turn to the various contractual tools and vehicles available in that construct when contingencies and other emergencies arise. The section below then discusses the Army's LOGCAP contract and its abrupt shift to a multiple award IDIQ after nearly two decades with only one contractor. This section concludes with review of the IDIQ contract itself.

A. The Concept: Defense Type Contracting Continuum

Contracting agencies, whose missions include disaster or emergency response, including natural disasters and military contingencies, must effectively decide which contracting methods, vehicles, and tools to employ in a given situation. Jeffery Alan Green uses a "Defense Type Contracting Continuum" to analyze the different types of competition (full and open, limited, and sole-source) and attendant transparency requirements in relation to the speed with which the goods and services are needed.[100] Although the model specifically addresses military contingency operations, the lessons are equally applicable when the "battlefield" is a domestic natural disaster.

There is no one-way-fits-all approach to military contingency contracting, and different approaches must be taken based on the circumstances encountered on the battlefield. The Competition in Contracting Act (CICA) and the FAR establish a procurement system based on competition and transparency.[101] However, the "balance" between speed in acquiring the necessary goods or services and competition and transparency can, and will, vary across the continuum of operations from peacetime operations to initiation of hostilities to stabilization and return to peaceful operations.[102] The government may set aside competition and transparency requirements as hostilities become imminent and are initiated. As the situation stabilizes, the government may then return to full and open competition and full transparency. "No one approach to contracting is appropriate all the time. . . . [T]he appropriate balance between speed and transparency may vary greatly depending on the urgency of the requirement or the opportunity for traditional oversight."[103] The Continuum is illustrated as follows:

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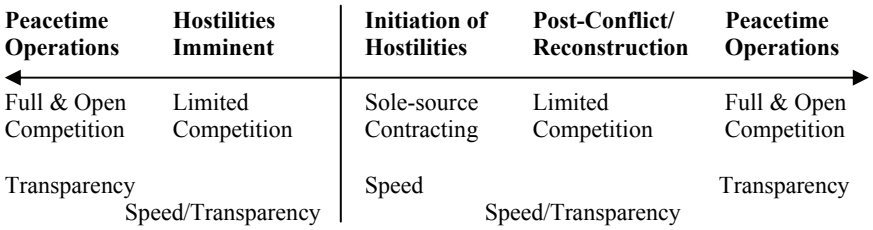
[99] Jeffery Alan Green, *The Defense Contracting Type Continuum: From Full and Open Competition to Sole Source and Back Again*, *in* GOVERNMENT CONTRACTING IN A "NEW" ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION, 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE Vol. I, Tab Q (2006).
[100] *Id.*
[101] *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103 (2002).
[102] Green, *supra* note 99.
[103] Schooner, *supra* note 101, at 103.

Defense Contracting Type Continuum[104]



The peacetime requirements deal with the "status quo," where "the desired outcome is maximum transparency using full and open competition to the maximum extent possible. . . . There is little need to waive any of the [CICA] requirements, as time and resources are plentiful."[105] This contracting mechanism is the most transparent and the slowest.[106] It assumes time is not of the essence and values the perception that all participants operate on a level playing field over the speed with which the procurement is made.

As the situation moves toward hostilities, limited competition "may be appropriate for pending wartime operations based on the need to react quickly to emerging requirements."[107] Limited competition is:

> often more appropriate for pre-conflict or reconstruction operations, when there is not abundant time for planning. Limited competition allows a degree of competition and is faster than full and open competition. Short notice or rapidly emerging requirements that do not rise to the level of urgent needs are often good candidates for the use of limited competition. Placed in the middle of the continuum, limited competition acts as a compromise between the speed of sole-source contracting and the transparency of full and open competition.[108]

Green places task order and delivery order contracting within this phase. "Under these conditions, it is imperative that task orders be limited to services required immediately, and these orders should be replaced as soon as possible by competitively awarded contracts. Limited

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[104] Green, *supra* note 99, at 8.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 9.

competition balances the competing interests of speed and transparency, and is a useful tool in meeting emerging requirements."[109]

Upon initiation of hostilities, "the normal parameters of the defense acquisition community shift to maximize the speed of contracting. Here, sacrifice of maximum transparency is appropriate when it is critical to field goods and services to U.S. forces rapidly."[110] The resulting lack of competition, however, "makes them ripe for abuse and therefore subject to intense scrutiny."[111] They are "highly controversial and only appropriate in situations authorized in law and, as in a post-conflict environment, immediately necessary to prevent additional casualties or fatalities."[112]

Contracting operations return to full and open competition as the situation returns to normal peacetime operations. To Green, "the decisive factor in returning to a system of maximum transparency is the ability of DOD contracting operations to deliver goods and services on a schedule acceptable to the requiring authority."[113] Green proposes that DOD "take important steps to institutionalize processes to transition from sole-source through limited competition to a return to full and open competition in as expeditious a manner as possible."[114] Green's model provides a meaningful construct beyond military contingency contracting, as its lessons are equally applicable to domestic emergency situations.

B. Emergency Procurement Tools and Vehicles

1. *FAR Part 18*

After Hurricane Katrina, the Office of Federal Public Procurement found that many government "officials were unfamiliar with acquisition flexibility regulations regarding emergency situations."[115] On July 12, 2006, FAR Part 18 was released with the goal of making "access to [the flexible] rules and policies easier and less

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[109] *Id.* at 6.
[110] Green, *supra* note 99, at 6.
[111] *Id*. at 7.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] Matthew Weigelt, *Emergency Provisions Added to FAR*, FED. COMPUTER WKLY, http://www.fcw.com/article95242-07-12-06-Web&newsletter%3Dyes. This is unfortunate, as OFPP had issued a guide in May 2003 to all executive agencies containing a succinct description of procurement tools available for use during contingencies and emergencies. *See* OFFICE OF FEDERAL PUBLIC PROCUREMENT, OFFICE OF MANAGEMENT AND BUDGET, GUIDELINES FOR USING EMERGENCY PROCUREMENT FLEXIBILITIES (2003), http://whitehouse.gov/omb/procurement/emergency_procurement_flexibilities.pdf.

time-consuming."[116] FAR Part 18 identifies "specific techniques or procedures that may be used to streamline the standard acquisition process."[117] They include "available acquisition flexibilities" that are generally available and "emergency acquisition flexibilities that are available only under prescribed circumstances."[118] Available flexibilities include the federal supply schedules, multi-agency blanket purchasing agreements (BPAs), and multi-agency IDIQ contracts.[119] Other vehicles include single source purchases under the simplified acquisition threshold, letter contracts, SBA 8(a) program contracts, HUBZone sole source awards, and service-disabled veteran-owned small business sole source awards.[120] Tools and techniques include waivers of Central Contractor Registration requirements, synopsis notice, qualification requirements, bid guarantees, and electronic funds transfer.[121] The FAR also provides for sole source or limited competition involving urgent requirements, oral requests for proposals, and advance payments.[122] In times of contingency, micro-purchase and simplified acquisition thresholds increase to $15,000 ($25,000 if outside the U.S.) and $250,000, respectively.[123]

2. *Katrina-Specific Tools*

On September 8, 2005, President Bush signed the Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina.[124] Among other things, it raised the micro-purchases threshold from $2,500 to $250,000.[125] Immediate attention and criticism ensued.[126] Although the

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[116] Weigelt, *supra* note 115, at 1.
[117] FAR 18.000.
[118] *Id.*
[119] FAR 18.105.
[120] *See generally* FAR 18.
[121] *Id.*
[122] *Id.*
[123] FAR 13.201(g) ("Purchases using this authority must have a clear and direct relationship to the support of a contingency operation or the defense against or recovery from nuclear, biological, chemical, or radiological attack."); FAR 2.101 (definition of "simplified acquisition threshold").
[124] Pub. L. No. 109-62, 119 Stat. 1990 (2005).
[125] Pub. L. No. 109-62, § 101, 119 Stat. 1990 (2005). This allowed such purchases to be made "without competitive quotations" if the contracting officer "determines the price for the purchase is reasonable." 41 U.S.C § 428 (2006); *see also* FAR 13.202(a). Micro-purchases are "exempt from virtually all procurement laws." KAREN L. MANOS, 1 GOVERNMENT CONTRACT COSTS & PRICING § 2:E:2 (2004); *see also Hurricane Katrina Relief Legislation: Impact on Procurement*, *Hearing before the U.S. Senate Democratic Policy Comm.* (Sept. 16, 2005) (statement of Professor Christopher R. Yukins) *reprinted in* GOVERNMENT CONTRACTING IN A "NEW" ERA: FLEXIBILITIES, CONSTRAINTS AND REALITIES, ABA PUBLIC CONTRACT LAW SECTION'S 12TH ANNUAL FEDERAL PROCUREMENT INSTITUTE, VOL. I, TAB R (Mar. 2-3, 2006) [hereinafter

increased threshold remained on the books, its use did not last long. On October 3, 2005, the Office of Management and Budget "issued guidance to federal agencies that effectively return[ed] the purchase limit for government credit card purchases to pre-hurricane levels."[127]

President Bush also suspended application of the Davis-Bacon Act to federal contracts entered into across the Gulf Coast[128] and waived affirmative action plans for Katrina-related contracts.[129] Although these are not contracting vehicles or thresholds, they expedite contractual actions and lower barriers to entry for contractors who otherwise would not have been able to receive federal contracts.[130]

Except for the increase in the micro-purchase threshold, these standing and ad hoc "flexibilities" are valuable tools in the contracting agencies' toolbox. Many of the tools and techniques may be used within the IDIQ framework, especially those that reduce the barriers to entry allowing IDIQ contracts to be formed quickly.

C. Army's LOGCAP: Single to Multiple Awardees

Perhaps more significant than FEMA's dual-track strategy, the Army has taken a new approach with its colossal contingency contracting vehicle for logistical services, the LOGCAP contract. Because military contingency contracting is akin to domestic disaster and emergency contracting, this paradigmatic shift is especially noteworthy. The Army's abrupt shift reflects a more flexible understanding of multiple-award IDIQ contracts. As with FEMA's strategy, it reflects an institutional awareness that competition during contingencies and disasters is not necessarily antithetical to or

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Yukins III]. The only restriction is that micro-purchases must "be distributed equitably among qualified suppliers." 41 U.S.C. § 428 (2006); FAR 13.202(a).

[126] *See, e.g.*, Yukins III, *supra* note 125.

[127] Press Release 2005-26, Office of Management and Budget (Oct. 3, 2005), http://www.whitehouse.gov/omb/pubpress/2005/2005-26.pdf ("Initially raised to help expedite the delivery of needed relief supplies to hurricane victims, the higher purchase limits are no longer needed and will be used only in 'exceptional circumstances' to guard against fraud and abuse.").

[128] Proclamation by the President: To Suspend Subchapter IV of Chapter 31 of Title 40, United States Code, Within a Limited Geographic Area in Response to the National Emergency Caused by Hurricane Katrina, http://www.whitehouse.gov/news/releases/2005/09/20050908-5.html.

[129] *New Katrina Federal Contractors Exempt from Affirmative Action for Three Months*, 25 EMP. DISCRIM. REP. (BNA) No. 11, Sept. 21, 2005, at 303, http://aptac-us.org/new/upload/File/New%20Katrina%20Federal%20Contractors% 20Exempted(1).doc.

[130] "The President's proclamation means, in effect, that the wage guarantees of the Davis-Bacon Act will not apply to any federal contracts—whether related to reconstruction or not—across a broad swath of the South. Excepting federal procurement from wage rules such as the Davis-Bacon Act (or, for example, the Service Contract Act) reduces barriers to entry in the federal marketplace, but can have profound impacts on a labor market." Yukins III, *supra* note 125, at 3 n.2.

inconsistent with the agencies' missions. This section discusses the history, recent criticism and new direction of the LOGCAP contract.

1. *History*

Force reductions after the Vietnam War led the U.S. Army to "establish deliberately planned dependence on outsourcing Combat Support/Combat Service Support . . . for wartime and other contingency [] use."[131] In the early 1980s, Congress directed DoD to "establish a contingency contract capability that would support CONUS mobilization and overseas force support deployment needs."[132] The Army was designated the executive agent, and in 1985 Army Regulation 700-137 established the LOGCAP.[133] The program drew criticism as a significant threat to force structure; others distrusted contractors.[134] The Army proceeded with the program, granting commands below the Department level ("numbered Armies") the ability to develop, award and administer their own LOGCAP contracts.[135] Army Central Command (ARCENT) let the first LOGCAP contract in 1989 to Perini, Inc.[136] The contract was called the Southwest Asia Petroleum Distribution and Operations Pipeline (SAPDOP) and it expired in July 1990.[137] Shortly thereafter, Iraq invaded Kuwait and the Army put SAPDOP back into place, at a much higher cost, to support Operations Desert Shield/Storm.[138] The Army recognized the decentralized approach would not work and decided upon a centralized LOGCAP with one umbrella contract supported by one prime contractor.[139] Operations Desert Shield/Storm provided a significant planning opportunity. After Operations Desert Shield/Storm, the Army planned to solicit the LOGCAP contract as it exists today.[140] The USACE was designated to provide contract administration and execution support.[141] In 1992, the first LOGCAP Umbrella Support Contract was

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[131] Trautner, *supra* note 7, at 5.
[132] *Id*. at 6.
[133] *Id*.
[134] *Id*. at 6-7 ("Contractors were thought to be too slow; too expensive; and, not controllable or useful as military personnel.").
[135] *Id*. at 7.
[136] *Id*.
[137] *Id*.
[138] Trautner, *supra* note 7, at 7.
[139] *Id*. ("Orientations of MSC LOGCAP contracts were too narrow and limited to functional area support such as oil supplies, transportation and individual meals with no provision for an overall dining facility for example.").
[140] Trautner, *supra* note 7, at 8.
[141] *Id*. USACE was chosen because of its location in the Washington, D.C. area and its "extensive experience with contracting international construction and engineering services." *Id*.

competitively awarded to Brown & Root Services Corporation.[142] Its first contingency support occurred in Somalia.[143] From 1992-1996, LOGCAP supported operations in Rwanda, Haiti, Saudi Arabia, Kuwait and the Balkans.[144]

In 1996, the Army Materiel Command (AMC) took over LOGCAP contract administration, management and execution.[145] In 1997, AMC re-competed the contract and awarded it to DynCorp Services, Inc.[146] At that time, the support was "relegated to the conduct of extensive readiness exercises, assistance visits, deliberate plans development and support of minor Events. Benign Event support was conducted in East Timor, Panama, Columbia, and Haiti."[147] The "minor support" and Balkans support was approximately $42 million.[148] After September 11, 2001, AMC recompeted the contract and Kellogg Brown & Root Services (KBR), a corporate successor to Brown & Root, won the contract.[149] AMC made significant changes to the contract. The major changes included expanding the definition of "contingency" and lengthening the award period from five to ten years (one base year and nine option years).[150] LOGCAP became the "contract of choice when fighting 'American's Global War on Terrorism.'"[151]

2. *Recent Criticism*

Although noted for its "globally rapid, vast and flexible [contingency] support,"[152] the LOGCAP contract has come under intense scrutiny primarily for its use during the Iraq War and reconstruction. Critics allege that the exclusive deal "has allowed Halliburton [the corporate parent to KBR] to charge unreasonably high costs for some work."[153] KBR has also been criticized for poor quality of its work.[154] Others cite the contract as an example of political

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[142] *Id*. at 9.
[143] *Id*. at 9-10. "[S]everal LOGCAP contractors [were] killed and wounded with the 'Black Hawk Down' incident.").
[144] *Id*. at 10.
[145] *Id*.
[146] *Id*. at 11.
[147] Trautner, *supra* note 7, at 11.
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id*.
[152] *Id*. at 12.
[153] James Glanz, *Army Plans to End Contentious Halliburton Logistics Pact and Split Work Among Companies*, N.Y. TIMES, July 13, 2006, at A6 (quoting Representative Henry A. Waxman, D-California).
[154] Holly Yeager, *Halliburton Loses Army Contract in Iraq*, FIN. TIMES, July 12, 2006, http://www.msnbc.com/id/13831996/print/1/displaymode/1098.

cronyism.[155] Representative Henry Waxman stated, "The termination of Halliburton's contract is long overdue. Taxpayers can breathe easier knowing that the days of $45 cases of soda and $100 bags of laundry are coming to a close."[156]

3. *A New Direction*

The U.S. Army recently announced that it was not exercising the option to renew the LOGCAP contract with KBR, a subsidiary of Halliburton.[157] At the time of award, the contract "was relatively modest in size, but stubborn insurgencies in both Iraq and Afghanistan . . . stretched U.S. troops and kept Halliburton busy trying to meet their needs."[158] In 2005, the Army paid KBR more than $7 billion. It is estimated the Army will pay KBR between $4 billion and $5 billion in 2006.[159] KBR has grossed more than $15 billion since 2001.[160]

The Army's plan is to let the contract as a multiple-award contract. The Army will award one contract for planning and oversight, and three contractors "will compete for the actual job orders."[161] An Army spokesperson said the Army "hoped this approach would foster competition and lower the risks of having one large contractor in charge of critical military programs."[162] Additionally, "the change would improve planning and accountability, and provide better contingency options if one contractor performed poorly."[163] The Army noted that the "widespread criticism" of Halliburton had not sparked the changes; rather, they were necessary to meet "the surging logistics needs of the American military."[164]

LOGCAP, like FEMA's initial post-Katrina contracts, gave rise to significant criticism of overpricing and poor performance, cronyism, and the like. Although LOGCAP was generally successful in providing the necessary goods and services, it failed to meet the same expectations other agencies failed to meet in their Hurricane Katrina response contracting. By abandoning the sole source arrangement, the Army is now in a position to maximize the flexibility of multiple award IDIQ contracts and meet the expectations the system has imposed upon its contingency contracting.

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[155] Glanz, *supra* note 153.
[156] Will Dunham, *Army to rebid huge Halliburton Contract*, REUTERS, July 12, 2006.
[157] Griff Witte, *Army to End Expansive, Exclusive Halliburton Deal*, WASH. POST, July 12, 2006, at A1.
[158] *Id.*
[159] *Id.*
[160] Glanz, *supra* note 153.
[161] *Id*.
[162] *Id*.
[163] Yeager, *supra* note 154.
[164] Glanz, *supra* note 153.

D. IDIQ Contracting Under FASA and the FAR

Observers readily acknowledge that the lack of (and insufficiency of) advance contracts, most notably IDIQ contracts, were significant deficiencies in federal procurement response to Hurricane Katrina.[165] Since Katrina, proponents of IDIQ contracts suggest a traditional, and rather myopic, use of IDIQ contracts.[166] These proponents recognize the "advance" aspect, the "speed" they afford, and even their two-tier "competition," but overlook, disregard or ignore the greater flexibility IDIQ contracts offer.[167] They seem to relegate IDIQ contracts only to those situations where the needs are anticipated in advance and the goods or services may be ordered when time precludes broader competition.[168]

However, the flexibility of IDIQ contracting allows for broader use during contingencies in lieu of sole source contracts and can effectively meet the expectations of the FAR and voiced by Congress and the public. In order to understand the role and value of multiple award IDIQ contracts, how they can meet the expectations discussed in Section II, and flex with the circumstances, one must understand what an IDIQ contract, in its basic form, is and what it does.

1. *A Brief History*

Task order and delivery order contracting have long been a part of the U.S. federal procurement system. Up until the early 1990s,

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[165] *See, e.g.*, *supra* note 30. Agencies establish umbrella agreements so they are in place in the event of a disaster. When a disaster occurs, agencies may order needed goods or services in an expeditious manner off the umbrella agreements. Hurricane Katrina breathed new life into a contracting vehicle that suffered from intense criticism, albeit more for the lack thereof and questionable implementation than anything else. *See* discussion *supra* Section II.B.

[166] *See, e.g.,* Kunz, *supra* note 14, at 13; Kathleen E. Karelis & David B. Robbins, *Government Contracting After A National Disaster*, 05-11 BRIEFING PAPERS 1, 3 (Oct. 2005).

[167] *See* Kunz, *supra* note 14, at 13:

> One of the clear lessons both FEMA and the government-contracting community as a whole learned is the need for agencies to have contract vehicles in place prior to a disaster so the government will have immediate access to contractor products and services for response and recovery work.
>
> When contract vehicles are not in place prior to a disaster, the government has to spend precious time and effort administering emergency procurement actions that often compromise fundamental government contracting principles, such as full and open competition and that suspend contracting safeguards, such as thresholds for disclosure of contractor cost or pricing data.

[168] *See, e.g.*, Green, *supra* note 99, at 5.

federal agencies made regular use of IDIQ contracts. Notwithstanding their use, questions of their legality were raised.[169] More concern was raised, however, due to the lack of guidance and oversight. In the early 1990s, Congress and the Executive Branch launched investigations, which "disclosed a loosely managed, rapid expansion of task and delivery order contracting."[170] However, they recognized the value of this procurement method. The Department of Defense Advisory Panel on Streamlining and Codifying Acquisition Laws (also known as the Section 800 Panel) "concluded that many government requirements would be unnecessarily delayed if agencies were not given the clear authority to enter into delivery order contracts for products and task order contracts for services."[171] The Panel recommended statutory authorization of task order and delivery order contracts.[172]

The Federal Acquisition Streamlining Act of 1994 statutorily recognized IDIQ contracts, provided a preference for multiple award contracts, and established parameters under which IDIQ contracts could be formed and administered.[173] Importantly, the streamlined acquisition process was intended for day-to-day contracting, as a tool for reform so as to increase commercial-like procurement practices efficiency and decrease the acquisition workforce, not necessarily as an emergency contracting tool. It did not require a contingency, disaster or emergency to trigger its use.[174] Exceptions to IDIQ competition requirements could be taken if the "agency need for the supplies and services is so urgent that providing a fair opportunity would result in unacceptable delays."[175]

Task order and delivery order contracting has been abused and poorly implemented which has led to significant criticism. It has been the subject of GAO investigations, Inspectors General reports, and immense scrutiny from scholars and practitioners.[176] Task order and

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[169] *See* Peter Ritenberg, *Task-Order Contracts: Popular but are They Legal?*, 22 NAT'L CONT. MGMT. J. 33 (Summer 1988).

[170] Louis D. Victorino & John W. Chierichella, *Multiple Award Task & Delivery Order Contracts*, 96-10 BRIEFING PAPERS 1 (Sept. 1996) (noting that "congressional hearings and executive branch investigations disclosed problems, in particular, in the use of task order contracts for technical and environmental engineering services. Contracts for these services had been awarded with vague, loosely drafted specifications or statements of work that were expanded dramatically after award in the scope and quantity of work.").

[171] John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 PUB. CONT. L.J. 395, 400 n.20 (1998).

[172] *Id.*

[173] Pub. L. No. 103-355, 108 Stat. 3243.

[174] *See generally id.*

[175] FAR 16.505(b)(2).

[176] *See, e.g.,* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CIVILIAN AGENCY COMPLIANCE WITH TASK AND DELIVERY ORDER CONTRACTS, REPORT NO. GAO-03-983 (2003); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FEW COMPETING PROPOSALS FOR

delivery order contracting did not remain in its FASA-established condition for long, as it has been amended various times since then.[177] The next section presents the current requirements for IDIQ contracting.

2. *The Regulatory Basics*

Federal Acquisition Regulation Subpart 16.5 implements statutory provisions governing indefinite delivery contracts, including requirements and indefinite quantity contracts. Generally, IDIQ contracts "may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award."[178] An IDIQ contract "provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements" off the contract.[179] "The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity" and "the contractor must furnish any additional quantities [ordered by the Government], not to exceed the stated maximum."[180]

The solicitation and contract must specify the period of the contract (including options); total minimum and maximum quantity of supplies or services to be purchased; a "statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services . . . in a manner that will enable a prospective offeror to decide whether to submit an offer"; and the procedures the Government will use to issue orders.[181] If multiple awards may be made, the solicitation must "state

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LARGE DOD INFORMATION TECHNOLOGY ORDERS, REPORT NO. GAO/NSIAD-00-56 (2000). For Inspector General reports, see U.S. DEPARTMENT OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, DOD USE OF MULTIPLE AWARD TASK ORDER CONTRACTS, REPORT NO. 99-16 (1999); DOD OFFICE OF THE INSPECTOR GENERAL, MULTIPLE AWARD CONTRACTS FOR SERVICES, REPORT NO. D-2001-189 (2001); DOD, OFFICE OF THE INSPECTOR GENERAL, CONTRACT ACTIONS AWARDED TO SMALL BUSINESSES, REPORT NO. D-2003-29 (2001). For scholarly reviews, see Nash & Cibinic, *supra* note 6; Thomas F. Burke & Stanley C. Dees, Feature Comment, *The Impact of Multiple-Award Contracts On The Underlying Values of the Federal Procurement System*, 44 GOV'T CONT. ¶ 431 (2002).

[177] *See* Cheryl Lee Sandner & Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 PUB. CONT. L.J. 461 (2001); Michael Fames Lohnes, *Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 PUB. CONT. L.J. 599 (2004).

[178] FAR 16.501-2(a).

[179] FAR 16.504(a).

[180] *Id.* To ensure the contract is binding, the quantity must be more than a nominal amount.

[181] FAR 16.504(a)(4).

the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order."[182]

IDIQ contracts are typically competed and awarded in the same fashion as any other negotiated federal procurement contract. They may be solicited using sealed bidding, competitive negotiation, (or even simplified acquisition methods when the anticipated maximum orders are within the appropriate thresholds), and may be awarded based on lowest price or "best value."[183] They are presumptively awarded through full and open competition unless other than full and open competition is justified and documented.[184] They are also subject to set-asides for preferred "concerns" such as small businesses and minority—owned businesses.

FASA and the FAR express a preference for multiple awards of IDIQ contracts.[185] "The contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources."[186] The decision whether multiple awards are appropriate must be made during acquisition planning. The FAR specifies factors the contracting officer should consider when determining the number of contracts to be awarded[187] and directs when the multiple award approach must *not* be used.[188] The GAO and Court of Federal Claims have sustained bid protests against single-award IDIQ contracts on the ground that an agency's justification was "not sufficient to reasonably overcome the preference for multiple awards."[189]

Once an IDIQ contract is in place, agencies may place individual orders under the contract. Orders must "clearly describe all services to be performed or supplies to be delivered."[190] They must "be within the scope, issued within the period of performance, and be within the maximum value of the contract." Contracting officers need not synopsize the orders nor give notice of order awards.[191] Orders may be placed under IDIQ contracts awarded by another agency provided that

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[182] FAR 16.504(c).
[183] *See* FAR 15.101.
[184] FAR 6.101.
[185] FAR 16.504(c).
[186] *Id.* Note that there is no limit to the number of participants. Although award of the contract requires compliance with CICA, award of orders does not.
[187] *Id.* Factors include the scope and complexity of contract requirements, the expected duration and frequency of orders, the mix of resources a contractor must have to perform expected requirements, and the ability to maintain competition throughout the contract period. FAR 16.504(c)(1)(ii)(A).
[188] *Id.*
[189] *See* One Source Mechanical, B-293692, Jun. 1, 2004, 2004 C.P.D. ¶ 112, at 3; WinSTAR Comm., Inc. v. United States, 41 Fed. Cl. 748, 762 (1998).
[190] FAR 16.505(a)(2).
[191] *See* FAR 16.505(a)(1); FAR 5.301(b)(4).

agency complies with the Economy Act and other regulations and policies.[192] FASA expressly exempts "the issuance or proposed issuance of an order under a task-order contract or delivery-order contract" from protest "except for a protest on the ground that the order increases the scope, period, or maximum value of the contract."[193]

Under multiple-award IDIQ contracts, the FASA and FAR require that the contracting officer "provide each awardee a fair *opportunity* to be considered for each order exceeding $2,500" unless certain exceptions apply.[194] FASA and the FAR grant the contracting officer:

> broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer *need not contact each of the multiple awardees* under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order.[195]

The FAR also identifies specific exceptions to the fair opportunity requirement. They are: (1) the agency need is so urgent the providing a fair opportunity would result in unacceptable delays; (2) only one awardee is capable of providing the supplies or services at the level of quality required; (3) it is a logical follow-on to an order already issued for the original order; or (4) it is necessary to satisfy a minimum guarantee.[196] On its face, the "fair opportunity" requirement appears to require a minimum level of competition. A significant weakness is that this requirement has not deterred noncompetitive practices[197] and

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[192] Economy Act, 31 U.S.C. § 1535 (2006); FAR 17.502.

[193] 10 U.S.C. § 2304c(d) (2006); 41 U.S.C. § 253j(d) (2006); FAR 16.505(a)(9). Note that since FASA does not apply to Multiple Award Schedule contracts such as the GSA Schedules, this jurisdictional limitation does not apply. *See* Severn Cos., Inc., B-275717, Apr. 28, 1997, 97-1 CPD ¶ 181 at 2 n.1 (GAO exercised jurisdiction over Federal Supply Service (FSS) orders since FASA restriction does not apply).

[194] FAR 16.505(b). This is standard is markedly different from the competition requirements for contract awards (including the IDIQ contracts themselves) under FAR Part 6 and FAR Subpart 15.3, from which orders under ID/IQ contracts are expressly exempted. *See* FAR 16.505(b)(1)(ii).

[195] FAR 16.505(b) (emphasis added).

[196] *See* FAR 16.505(b)(2).

[197] They have led to, *inter alia*, improper sole source awards, improperly supported waivers of competition requirements, and even awarding multiple awards with no intention of utilizing more than one contractor. *See, e.g.*, Yukins, *supra* note 4, at 65-72. These abuses are only compounded by the fact that the FASA and the FAR expressly

contractors are not able to protest award of an order based on failure to provide a "fair opportunity" to all IDIQ contractors.[198] Notwithstanding this weakness, proper formation and administration of multiple award IDIQ contracts may obviate such actions by providing broad benefits that may significantly outweigh the narrow perceived benefits of noncompetitive practices.[199]

The Department of Defense (DoD) played a significant role in Hurricane Katrina relief efforts, more so than for any previous natural disaster.[200] Given DoD's significant role, and that several government reports support DoD's greater participation,[201] it is important to understand the additional requirements DoD must follow regarding IDIQ contracts. USACE is a major participant in disaster relief and, because it is part of the DoD, is subject to these requirements. Section 803 of the 2002 National Defense Authorization Act[202] prescribes more rigorous competition requirements under multiple-award contracts and the GSA Multiple Award Schedules (MAS) contracts for DoD orders for services for more than $100,000.[203] For contract orders under master contracts with multiple awardees, DoD contracting activities must solicit quotations from all eligible contractors offering the required services. For orders under the GSA MAS, DoD contracting activities must solicit all contractors offering the required services or as many as practicable to ensure the receipt of three offers. Under both approaches,

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dictate that orders are not to be treated as contracts for purposes of bid protests except for certain limited bases and prohibit a contractor from challenging most awards of ID/IQ orders to another contractor. *See* discussion *supra* note 190.

[198] *See supra* note 1934 and accompanying text.

[199] *See infra* Section IV.C.

[200] *See* WHITE HOUSE, *supra* note 16, at 43; SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 327.

[201] *See, e.g.*, WHITE HOUSE, *supra* note 16, at 43; GAO-06-365R, *supra* note 30, at 5; SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 327:

> Select Committee Members stated and Brown agreed FEMA should develop a formal planning and logistics process similar to that developed by the Department of Defense (DOD). Some officials have suggested the DOD simply assume a larger role in logistics, or even take control outright. Although recognizing the value of DOD assistance, [FEMA Director Michael] Brown indicated DOD involvement would not be appropriate for smaller events. "I think that the Army can help FEMA in that regard," Brown said. "I would rather see it remain within FEMA because logistics is something that you need in every disaster, the smallest one that FEMA might be involved in to the largest; and I don't want to see us utilize the military in all of those.

Id. (footnotes omitted).

[202] Pub. L. No. 107-107, 115 Stat. 1012 (Dec. 28, 2001).

[203] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GUIDANCE NEEDED TO PROMOTE COMPETITION FOR DEFENSE TASK ORDERS, REPORT NO. GAO 04-874, at 2 (2004).

contracting activities "must provide a fair notice of the intent to make the purchase, a description of the work the contractor shall perform, and the basis upon which the contracting officer will make the selection."[204] Additionally, under both types of contracts, DoD contracting agencies are "required to afford all responding contractors a fair opportunity to make an offer and have that offer fairly considered."[205] The FAR 16.505(b)(2) exceptions to the fair opportunity process still apply, and, therefore orders may be made with limited competition if one or more exceptions apply.[206]

3. *Central Purchasing Bodies: GSA Schedules and Multi-Agency IDIQ Contracts*

An important part of disaster contracting is those IDIQ contracts already in place with other agencies from which the contracting agency may order, such as the Government Services Administration (GSA) Multiple Award Schedules (MAS). [207] Additionally, under the Economy Act, agencies may order from other agencies' contracts.[208] These IDIQ contracts provide a mechanism for other agencies to expeditiously order goods and services with less administrative burden on their own personnel.

GSA became a centralized federal procurement and property management agency when it took over management of the "General Schedule of Supplies" from the Department of the Treasury. This evolved into the GSA Schedules Program.[209] The GSA Schedules are governed by FAR Subpart 8.4. GSA administers 42 schedules with 11.2 million different services and products through 17,862 contracts.[210]

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[204] *Id.* at 5.
[205] *Id.*
[206] *See* DFARS 216.505-70. In July 2004, the GAO conducted an investigation into DOD implementation of Section 803. *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GUIDANCE NEEDED TO PROMOTE COMPETITION FOR DEFENSE TASK ORDERS, REPORT NO. GAO 04-874 (2004). Notwithstanding the stricter competition requirements, the GAO found that "[c]ompetition requirements were waived for nearly half (34 of 74) of the multiple-award contract and federal supply schedule orders GAO reviewed." *Id.* at Introduction. Additionally, "safeguards to ensure that waivers were granted only under appropriate circumstances were lacking," and competition for most of the remaining orders was limited. *Id.* On March 21, 2006, guidance was added to DFARS 216.505-70 regarding use of the exceptions to the fair opportunity to compete requirement. *See* DFARS PGI 216.505-70.
[207] The GSA MAS Program derives its authority from Title III of the Federal Property and Administrative Services Act of 1949 and Title 40 United States Code, Public Building, Property and Works. 41 U.S.C. § 251
[208] *See* Economy Act, 31 U.S.C. § 1535 (2006); FAR 17.502.
[209] EXECUTIVE OFFICE OF THE PRESIDENT, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 3-14 (Dec. 2006) (Final Panel Working Draft).
[210] *Id.*

Contracts are typically awarded for 5-year base periods and three 5-year options.[211] GSA has a continuous open solicitation policy under which offers for commercial goods and services may be submitted at any time.[212] Additionally, contractors may request to add goods or services to their contracts at any time during the term of the contract.[213]

GSA's core objective is "to use commercial terms and conditions and the leverage of the Government's volume buying to achieve the best possible prices and terms for both customers and taxpayers."[214] The program provides agencies with a simplified, streamlined ordering process." A GSA study indicated "it takes users an average of 15 days to issue an order under a Schedule contract compared to an average of 268 days to put a standalone contract in place."[215]

IV. SCALABLE MULTIPLE AWARD IDIQ CONTRACTS

Because they are "scalable," multiple award IDIQ contracts can stretch across the spectrum from pre-disaster preparations to post-disaster recovery and reconstruction, and can run the gamut of the goods and services necessary at each phase along the spectrum. IDIQ contracts' greatest flexibility comes in the immediate crisis period itself. IDIQ contracts offer a practical solution to disaster contracting urgency and uncertainty as they provide for the evolution of objectives, scale back competition and transparency only when absolutely necessary, and always maintain the quick response and flexibility necessary for lower administrative burdens and fast crisis/disaster responses. IDIQ contracts also lower the pressure on agencies to use no-bid contracts and other risky and anti-competitive alternatives, such as letter contracts, oral solicitations, and limited source selections. This section addresses each of the advantages in turn, in relation to a natural disaster, using Hurricane Katrina as the model.

A. Phases

1. *Preparation/Standby*

Hurricane season occurs each year during the summer and fall. Government agencies, such as the National Weather Service, track hurricanes, record data, and predict the number and magnitude of future hurricanes. In May 2005, the National Oceanic and Atmospheric

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[211] *Id.* at 3-16.
[212] *Id.* at 3-16 to 3-17.
[213] *Id.* at 3-17.
[214] *Id.* (quoting Federal Supply Schedule Procurement Information Bulletin 04-02).
[215] *Id.*

Administration (NOAA) issued its 2005 Atlantic Hurricane Outlook.[216] NOAA predicted a 70% chance of an above-normal hurricane season of 12-15 tropical storms, with 7-9 becoming hurricanes and 3-5 of them becoming major hurricanes.[217] The majority of the storms would occur between August and October over the tropical Atlantic and the Caribbean Sea. NOAA was unable "to confidently predict at these extended ranges the number or intensity of landfalling hurricanes, and whether or not a given locality [would] be impacted by a hurricane [during the] season."[218]

Given the recurring nature of hurricanes, general planning and preparation are constantly underway. Federal disaster response agencies are able to take lessons learned, studies, experiences, pre-season and mid-season predictions, and the like, from past hurricanes and plan for the known as well as anticipate the unknown. On the contracting front, this early step is a time of acquisition planning and "advance contract" formation. Because the exact amounts of the goods or services and the times for delivery or performance are unknown, IDIQ contracts are the quintessential tool around which the planning and preparation should revolve. They provide agencies with a pool of pre-qualified contractors at the ready with anticipated goods and services. The goods and services, the projected range in quantities, and the number of contractors party to the multiple award contracts are within the discretion of the agency, derived and updated through its advance acquisition planning.

IDIQ contracts themselves are generally subject to maximum competition and transparency. As noted previously, the "umbrella" contracts are typically competed and awarded in the same fashion as any other negotiated federal procurement contract, through sealed bidding, competitive negotiation, or even simplified acquisition methods.[219] The pre-disaster ordering is also the time to maximize the FAR's "fair opportunity to compete" requirement for task orders or delivery orders under IDIQ contracts.[220] In other words, contracting activities can ensure that most, if not all, eligible contractors are considered for the orders and may conduct mini-competitions within the already-competed umbrella contracts.

The FAR requires public notice of the IDIQ contract solicitation and award(s).[221] Under the FAR, once an IDIQ contract (multiple or

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[216] Press Release, National Oceanic and Atmospheric Administration, NOAA: 2005 Atlantic Hurricane Outlook (May 16, 2005), *available at* http://www.cpc.noaa.gov/products/outlooks/hurricane2005/May/hurricane.html.
[217] *Id.*
[218] *Id.*
[219] *See* discussion *infra* Section III.D.2. Procurements are subject to full and open competition unless an exception applies.
[220] FAR 16.505(b) ("The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $3,000.").
[221] *See* FAR Subparts 5.2, 5.3.

single award) is awarded, this "full" transparency shrinks to minimal (if any) transparency for individual orders under the contracts. The only notice required is that given to those contractors contacted as part of the order issuing process (and even then, contact with contractors is not required).[222] Section 803 of the 2002 Defense Authorization Act requires that DoD agencies solicit offers from more (and in some cases all) contractors offering the required services, which provides slightly more transparency to the ordering process.[223]

The FAR allows for even less transparency as the situation becomes more urgent. Under FAR 5.202, contracting activities need not submit notices where there is an unusual and compelling urgency and the government would be seriously injured if the government were to comply with the time periods. Under FAR 5.302, notice of order award is not required at any time.

2. *Imminent Disaster*

The next phase begins at the point a looming crisis/disaster is specifically identified and ends when it occurs. This phase probably began for Hurricane Katrina when NOAA issued an updated outlook in August 2005.[224] This outlook called for "an extremely active season, with an expected seasonal total of 18-21 tropical storms (mean is 10), with 9-11 becoming hurricanes (mean is 6), and 5-7 of these becoming major hurricanes (mean is 2-3)."[225] NOAA warned that the rest of the season would be "very active" and "it is imperative that residents and government officials in hurricane-vulnerable communities have a hurricane preparedness plan in place."[226] This notice arguably marked the initial transition into the "imminent disaster" phase. At the least, it should have heightened the awareness of public (local, state and federal) officials.

On August 21, 2005, the National Hurricane Center identified a system developing that eventually became Katrina. Thirty-six hours (on August 23) later it became a tropical depression.[227] Hurricane watchers tracked and monitored Katrina's movement and size. "[W]ithin two and a half days of landfall of the center in Louisiana[, track forecasts] were exceptionally accurate and consistent."[228] Additionally, "within about three days of landfall in Louisiana, [every official forecast] correctly

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[222] *See* FAR 16.505(b).
[223] *See supra* notes 202-206 and accompanying text.
[224] Press Release, National Oceanic and Atmospheric Administration, NOAA: August 2005 Update to Atlantic Hurricane Season Outlook (August 2, 2005), *available at* http://www.cpc.noaa.gov/products/outlooks/hurricane2005/August/hurricane.html.
[225] *Id*.
[226] *Id*. The Gulf Coast is clearly a "vulnerable community."
[227] *See* KNABB ET AL., *supra* note 17, at 13.
[228] *Id*.

anticipated that Katrina would be a major hurricane (at least a Category 3) at landfall on the northern Gulf coast."[229] As hurricane watchers monitored Katrina's growth and direction, the timeline moved squarely into the "imminent disaster" phase. The length of this stage may be longer or shorter based on the nature of the crisis and the quality and accuracy of the forecast. With an approaching hurricane like Katrina, authorities usually have a few days' notice of location of landfall and magnitude of storm.[230]

As the crisis or disaster approaches, the IDIQ contract can flex with the heightened levels of urgency. Goals and objectives evolve as immediate needs and concerns arise, including those unknown or not planned-for. Agencies issue orders from umbrella contracts and stage supplies near the anticipated disaster area.[231] Under the FAR, competition (and transparency) can be limited so as not to delay the acquisition of urgently needed goods or services. However, such restrictions are not necessary under IDIQ contracts. Orders in this phase generally can and should remain competitive. Here it may be more appropriate to take advantage of the relatively loose competition required under the "fair opportunity" standard, or even to issue sole source orders, rather than operate outside the normal ordering procedures for IDIQ contracts.[232] IDIQ contracts may be augmented through adding additional goods and services that may be necessary, adding contractors to existing contracts, or by competitively awarding new IDIQ contracts and issuing orders under them.

3. *Disaster*

The "Disaster" phase begins when the disaster or crisis begins, and ends when the agency's efforts are no longer focused on relief to preserve the lives, health, safety and property of victims. This period of time may be brief or long, depending on the nature and circumstances of the disaster. Hurricane Katrina made landfall on August 29 and

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[229] *Id*. at 14.

[230] A tsunami may only provide a few hours notice and an earthquake may provide no notice at all, thereby bypassing this phase altogether.

[231] Even before landfall, Mississippi and Louisiana governors asked that the President declare a disaster area in the states to invoke federal aid under the Stafford Act. *See* SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 36.

[232] Although in extreme circumstances, the agency may invoke the "urgency" exception. Again, the obvious benefit to using an exception for a sole-source or limited competition order within the IDIQ contracts themselves rather than a sole source contract is that a price has been negotiated and may still be negotiated further. *See* FAR 16.505(b)(2)(i) (citing as a statutory exception to the fair opportunity process where "[t]he agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays"); FAR 8.405-6(b)(3) (justifying limited consideration of Federal Supply Schedules contractors for orders when "[a]n urgent and compelling need exists").

wreaked destruction across southern Louisiana and Mississippi, until the storm dissipated over southern Tennessee the next day. For nearly two weeks, federal, state and local authorities rescued stranded individuals, provided emergency medical care, removed corpses, removed debris, and performed other disaster relief tasks.

As in the prior phase, sole source and limited competition awards may be made. But, as with that phase, there is value to issuing orders under an IDIQ contract rather than entering into a new contract. A presumptive price has already been established, negotiated at the time the IDIQ contract was formed and when bargaining positions were more equal. Competition for IDIQ orders can be accomplished in short order, thus lowering the perceived need to sole-source a new contract.

Because some important advance services contracts were not in place, FEMA was compelled to resort to limited competition to award the "big-four" IDIQ contracts.[233] They were "quickly awarded as Katrina approached and hit the Gulf Coast."[234] However, those contracts exceeded any reasonable amount and duration and were awarded to large, out-of-state companies, thus evoking extensive criticism.[235] Some argue that given the immediacy and seriousness of the objectives (e.g., saving human lives), the ability of contractors to surge to respond quickly to a large-scale disaster is essential and requires large companies. This opinion is not universally held.[236]

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[233] *See supra* notes 11-13.

[234] Spencer S. Hsu, *$400 Million FEMA Contracts Now Total $3.4 Billion*, WASH. POST, Aug. 9, 2006, at A8.

[235] Recently, criticism has shifted to the fact that these IDIQ contracts were still being used despite FEMA's newly awarded "replacement" contracts and they "ballooned in value from $400 million to about $3.4 billion." *Id*. Additionally, they suffer from "poor safeguards and high costs." *Id*. (citing DHS-IG, congressional auditors, and a Senate investigation).

[236] Senator Olympia Snowe, Chair of the Senate Committee on Small Business and Entrepreneurship, challenges the notion that surge and quick response capability would preclude local or small business participation. She states, "While [FEMA's] approach may be administratively convenient, I am concerned that it ignores the very real potential for delays which commonly occur when large companies attempt to mobilize and relocate workers and assets to the affected area. . . . Small businesses have proven to be capable partners in federal contracting." *FEMA Announces New Contracting Strategy*, 39 GOV'T CONT. ¶ 440 (2005). From the other side, then-FEMA Director Michael Brown suggested the scale of the disaster and the complexity of the response require a large firm's expertise and recommended "caution . . . [in] going down a path that says we're going to have all locals do it." He said, "Debris is a huge issue. Debris is one of those issues that is fraught with local politics. It's fraught with fraud, waste and abuse [and] in cleaning up debris in a situation like Katrina, you really have to have experts overseeing that global perspective because you have hazardous waste. SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 334. Regardless, IDIQ contracts properly administered, can put small and small-disadvantaged businesses into the disaster-recovery arena.

Under planned, in-place IDIQ contracts, contracts holders know the requirements and are poised to respond in quick fashion. Where the needs are unknown until the disaster occurs, agencies may add contractors to the IDIQ contract, add supplies or services not part of the contract, or create new IDIQ contracts and order under those contracts.

4. *Recovery/Reconstruction*

As the crisis dissipates and the immediate needs for preservation of life, health and safety have passed, the IDIQ contract can re-flex to its pre-disaster state. Pre-disaster speculation of needs and costs give way to tangible certainties. Among other things, roads and infrastructure must be repaired, debris removed, hospitals and public buildings rebuilt, and temporary alternative buildings and shelters provided. The needs evolve from saving lives and property to rebuilding and reconstructing the affected area. This is the most "political" of periods, especially in the wake of significant destruction like that wreaked by Hurricane Katrina, for tens if not hundreds of billions of dollars of contracts in government contracts are at stake. Who receives these contracts or orders is more important than in any other phase. Acquisition planning in the preceding phases provides the starting point, especially if such planning has accounted for the "political" imperatives, such as those reflected in the Stafford Act and the small business and small disadvantaged-business preferences. With IDIQ vehicles in place, agencies can move immediately into letting orders under the umbrella contracts. The agencies are able to award the orders quickly, with reasonable prices, and meet socioeconomic and political objectives, by issuing orders to local businesses or small or small-disadvantaged concerns who are party to the IDIQ. This may entail adding such contractors to existing IDIQ contracts. The last and more time consuming method would be to award new IDIQ contracts and then to award orders from them.

B. Keys to Maximizing the Extraordinary Flexibilities and Meeting Expectations

When contracts are awarded at the height of a disaster (and immediately preceding and following the disaster), they are generally awarded with little or no competition.[237] Although procurement regulations generally allow for exceptions to full and open competition, the resulting contracts often have terms and conditions that are unclear, ambiguous, and/or indefinite. The circumstances are also ripe for "chaos and the potential for waste and fraud as acquisitions [are] made

[237] *See supra* Section III.A.

in haste."[238] This section identifies five keys to effective IDIQ contracting in order to maximize their extraordinary flexibilities: acquisition planning, the use of commercial commodities and commoditized services, "open" contracts, simplified contracts, and the use of central purchasing bodies as gap fillers.

1. *Acquisition Planning*

Acquisition planning is an essential part of "advance planning." It serves the primary statutory requirement of promoting and providing for the acquisition of commercial items, using full and open competition.[239] It also contemplates those situations when full and open competition is not required, but the requirement still exists to obtain competition to the maximum extent practicable; planning must include consideration of the nature of the supplies or services being sought and the goal of achieving the best value for the government.[240] Federal law also expressly requires "consideration of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, and the impact of any bundling that might affect their participation in the acquisition."[241]

The importance of meaningful acquisition planning has not gone overlooked, particularly by the GAO.[242] While the GAO has been mindful of the circumstances under which agencies' contracting officers must operate, and the needs they endeavor to fulfill, the GAO requires adherence to the statutes and regulations, including the requirement to conduct acquisition planning.[243] The GAO recently affirmed its insistence on acquisition planning, even in the face of agency's purported urgency in times of contingency operations.[244] An exception

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[238] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 329 (discussing the findings of the committee). Some Committee members were troubled that nearly three months after Hurricane Katrina, "the government and contractor representatives who testified were unable to answer many basic questions about the scope, price, and terms of contracts awarded in response to Hurricane Katrina." *Id.* at Additional Views of Representative Charlie Melancon and Representative William J. Jefferson.

[239] *See* FAR 7.102(a), (b).

[240] *Id.*

[241] *See* FAR 7.105(b) (internal citations omitted).

[242] *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANE KATRINA: PLANNING FOR AND MANAGEMENT OF FEDERAL DISASTER RECOVERY, REPORT NO. GAO-06-622T, at 7 (Apr. 10, 2006); U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANES KATRINA AND RITA: PRELIMINARY OBSERVATIONS ON CONTACTING FOR RESPONSE AND RECOVERY EFFORTS, REPORT NO. GAO-06-246T, at 4 (Nov. 8, 2005).

[243] *See, e.g.*, WorldWide Language Resources, B-296985, Nov. 14, 2005, 2005 U.S. Comp. Gen. LEXIS 209, 2005 CPD ¶ 206.

[244] *Id.* Although the GAO holds the government to the requirement to conduct acquisition planning, the standard is not high. "With regard to the requirement for

to full and open competition will not pass GAO scrutiny if it is the result of poor acquisition planning.[245] Waiting too late in the process to prepare and plan may lead to a sustainable protest, even during a contingency.

Acquisition planning is a key element with regard to IDIQ contracting because it is a continuing activity, permeating all stages of the acquisition process--the umbrella contract and each task order or delivery order under the umbrella contract. [246] It also involves the entire contracting strategy, which may encompass multiple IDIQ contracts.[247]

Acquisition planning is the primary tool by which the benefits of IDIQ contracting in a contingency or disaster are set in place so that when disasters occur, contracting agencies may operate within the bounds of the procurement system and avoid or overcome temptations to ignore the regulations. The additional keys discussed in this paper benefit greatly from comprehensive, effective and continuous acquisition planning.[248]

2. *Commercial items: Commodities and Commoditized Services*

With regard to disaster recovery and response, the goods needed are predominantly commercial commodities, such as ice, water, and food. The services are primarily commercial items as well: temporary housing for victims and emergency workers and debris removal, among other things. There are arguably few, if any, goods or services used for disaster response that would not qualify as commercial items. Contracting agencies must identify commercial specifications and commercially available items as part of their disaster planning. FEMA

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advance planning, our Office has recognized that such planning need not be entirely error-free or successful. As with all actions taken by an agency, however, the advance planning required under 10 U.S.C. § 2304, must be reasonable." WorldWide Language Resources, B-296985, Nov. 14, 2005, 2005 U.S. Comp. Gen. LEXIS 209, 2005 CPD ¶ 206, at 26 (citations omitted). Notwithstanding GAO's relatively low standard of review, it behooves the agency to prepare and implement a comprehensive and effective procurement strategy.

[245] *See* FAR 6.301(c).

[246] FAR Part 7 addresses acquisition planning in general. FAR Part 16 identifies important considerations contracting officers must take into account during acquisition planning. The failure to consider these items may result in GAO sustaining a protest based on the agency's failure to consider them. One Source Mechanical, B-293692, Jun. 1, 2004, 2004 C.P.D. ¶ 112, at 8 (sustaining a bid protest against a single-award IDIQ contract because an agency's justification was "not sufficient to reasonably overcome the preference for multiple awards").

[247] *See, e.g.*, *FEMA Announces New Contracting Strategy*, 39 GOV'T CONT. ¶ 440 (2005).

[248] FEMA recently awarded 36 IDIQ contracts for Katrina-related reconstruction (March 2006) and six IDIQ contracts worth $250 million apiece as part of its dual-track strategy (August 2006). *See* Griff Witte & Spencer S. Hsu, *Big Katrina Contractors Win More FEMA Work*, WASH. POST, Aug. 10, 2006, at D1.

failed to do so with its purchase of 10,000 mobile and manufactured homes. FEMA sought custom specifications, which delayed the arrival of the homes. Homes for commercial sale were available for immediate delivery.[249] Unfortunately, the homes as purchased were unsuitable for use in a flood plain area and could not be used for Katrina victim relief as intended. They are now stored at a municipal airport in Arkansas, costing the government $47 million to store and maintain them.[250]

Commercial item purchasing simplifies the acquisition procedures and the requirements.[251] Prices are competed in the commercial marketplace, and it is easier and faster to compete contracts and orders when the items are primarily available in the commercial arena. Commercial item procurement also eases the administrative burden on acquisition personnel by simplifying and streamlining acquisition procedures, mandating a preference for performance-based specifications in acquisitions for services,[252] and placing quality assurance responsibilities primarily on the contractor.[253]

The linchpin with regard to IDIQ contracts for services is "commoditizing" the services. For instance, performance-based specifications for debris removal typically provide for payment based on the amount of debris removed, not the time expended in performance. Contractors perform the work without government dictating the details. The agency pays a fixed price, which gives contractors incentive to control costs. Finally, purchase of commercial services will likely be more effective in ensuring a quality product and reasonable price if they "tie payment to tangible results—e.g., a completed and delivered product."[254] The agency ensures completion by withholding payment until the commoditized service is completed.

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[249] *Senate Holds Field Hearing in Arkansas On $431 Million In Unused FEMA Housing*. 48 GOV'T CONT. ¶ 151 (2006).

[250] *Id.*

[251] *See* Steven Kelman, *Buying Commercial: An Introduction and Framework*, 27 PUB. CONT. L.J. 249 (1998); Jonathan D. Clark, *Overcoming the Critical Challenges of Contingency Contracting: Understanding the Flexibility Permitted by CICA, Simplified Acquisition Procedures, and Small Purchases*, 28 PUB. CONT. L.J. 503 (1999).

[252] FAR 37.000 ("This part requires the use of performance-based acquisitions for services to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods.").

[253] FAR 12.208 ("Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.").

[254] *See* OFFICE OF FEDERAL PUBLIC PROCUREMENT, OFFICE OF MANAGEMENT AND BUDGET, GUIDELINES FOR USING EMERGENCY PROCUREMENT FLEXIBILITIES 13 (2003), http://whitehouse.gov/omb/procurement/emergency_procurement _flexibilities.pdf.

3. *"Open" IDIQ Contracts*

The ability to add goods or services, and even contractors, is essential to the scalability of IDIQ contracts. As the GSA Schedules successfully demonstrate, IDIQ contracts do not need to be closed to additional contractors. Although contracting officers consider a host of factors when deciding upon the number of awardees, there is nothing in law that requires the contracting officer to identify a specific number of awardees or to close the umbrella contract at a fixed point in time. This allows open entrance at future times, which should provide flexibility for even greater participation at times and places where needs and location are more definite—when the disaster is imminent and its location is pinpointed, and when the event occurs.[255] Further, it allows agencies to limit the use of noncompetitive means to procure goods or services "on the fly," in a hasty manner when the agencies' negotiating position is weakest. It also serves as a tool to implement procurement objectives, such as incorporating set asides for local businesses, small business concerns or small disadvantaged business concerns. Finally, multiple awards will relieve administrative burdens associated with management of individual contracts.[256]

4. *Simplified IDIQ Contracts*

Among the most flexible aspects of IDIQ contracts is that they can be remarkably simple in principle and form.[257] The simpler the contract, the more flexibility it has to add goods, services, or additional contractors. For relatively simple, labor-intensive, low technical work or commercial-off-the-shelf goods, contracting officers may establish IDIQ contracts using the simplest multiple award contract format based on contractor's price lists and catalogs establishing the umbrella agreement. Contracting officers may then order the services or goods in an expeditious manner. IDIQ contracts allow for competition that can be effected quickly and efficiently based on the price lists or catalogs. Simplifying IDIQ contracts serves to reduce further the barriers to entry for smaller business and those unfamiliar with the federal procurement system. Additionally, simple IDIQ contracts can be put into place quickly, if necessary, to provide for immediate needs not otherwise

[255] This assumes, of course, that there are no other obstacles to a "latecomer" award, such as expiration of the latecomer's offer.

[256] While there are greater administrative costs for multiple award contracts, there are less political costs.

[257] This is not always the case in practice, as is the case with the GSA Multiple Award Schedules. They are expensive and time consuming for contractors to join the Schedules. They require lengthy solicitation and contract documentation. However, practice under them is rather simple and quick. *See supra* Section III.D.3.

planned for. Orders can then be quickly issued from these IDIQ contracts.

5. *The Gap Filler: Central Purchasing Agencies*

Central purchasing bodies and interagency contract vehicles are an important part of federal procurement strategy. They are especially important because the federal government has experienced a serious downsizing of its acquisition personnel.[258] Use of interagency contract vehicles, including the GSA Schedules, has increased dramatically over the last decade.[259] The Acquisition Advisory Panel[260] acknowledges that these contracts "'have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for the new skill sets.'"[261] Additionally, "[i]nteragency contracts allow requiring agencies to meet mission needs while focusing human capital resources on core mission rather than procurement."[262] FAR 18.105 and 18.112 tout the GSA Multiple Award Schedules, multi-agency BPAs, multi-agency IDIQ contracts, and interagency acquisitions as available "flexibilities" for emergency contracting. They allow a market to emerge, where those agencies that are able to award and administer contracts do so.[263] The service-for-fee arrangement allows the purchasing agency to foot the bill for contracting that its manpower is unable to accomplish.

Those agencies, however, whose primary missions include emergency response and disaster relief cannot rely on other agencies,

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[258] *See* Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 190 (2006) ("Overall, the total number of federal civilian acquisition personnel decreased 22 percent from 1991 to 2001. Of the remaining civilian acquisition personnel, approximately 38 percent will be eligible to retire by the end of fiscal year 2007.").

[259] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HIGH RISK SERIES - AN UPDATE, REPORT NO. GAO 05-207, at 25 (2005) (showing Multiple Award Schedules Sales from 1992-2004). Sales grew from $4 billion to $6 billion between 1992-1996. Growth accelerated from then until 2004, when sales totaled over $32.5 billion. *Id.*

[260] It is also known as the SARA Panel. *See* National Defense Authorization Act for FY 2004, Pub. L. No. 108-136, §1423, 117 Stat. 2797 (2003) (directing establishment of "an advisory panel to review laws and regulations regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Governmentwide contracts"). The panel is named for the title: "Services Acquisition Reform Act" or "SARA."

[261] ACQUISITION ADVISORY PANEL, *supra* note 209, at 3-24 (quoting GOVERNMENT ACCOUNTABILITY OFFICE, GAO'S 2005 HIGH-RISK UPDATE (2005)).

[262] *Id.* They also benefit the contract holding agency through fees which support the operational costs of the interagency contract but excess revenues has funded other agency programs. *Id.* at 3-27.

[263] *See* Steven L. Schooner, Feature Comment, *Risky Business: Managing Interagency Acquisition*, 47 No. 14 GOV'T CONTRACTOR ¶ 156 (2005).

including the GSA, for all their acquisition needs. Various concerns arise that suggest that centralized agencies are not always the best option for emergency contracting and should only be used as "gap fillers." First, there are potential gaps between what an agency needs and what is available on interagency vehicles, which raises a risk of out-of-scope orders.[264] Second, centralized IDIQ contracts may have quantity restrictions that probably do not contemplate the full amounts necessary for a major disaster. Third, centralized contracting vehicles are not always good socioeconomic policy tools. The centralized purchasing agencies, such as GSA, may not be able to manage the socioeconomic objectives demanded of their customer agencies, such as local purchasing in the wake of a natural disaster. Fourth, the price mechanisms under a centralized contract may promote fraud or abuse or may otherwise not guard against steep price increases. Fifth, there is significant concern regarding communication and contract administration and oversight when centralized purchasing is used. The Army's contracting of interrogation services at Abu Ghraib prison through the Department of the Interior illustrates well how easily it is to misuse a centralized contract.[265] And lessons learned during Hurricane Katrina response indicate a serious breakdown in communication between and among GSA, USACE, and FEMA.[266]

Interagency contracting has been under scrutiny by the GAO and more recently, the Acquisition Advisory Panel.[267] GAO placed interagency contracting on its High Risk Areas list in 2004, where it remains today.[268] Federal agencies have responded to the criticisms of the interagency (and specifically the interagency IDIQ system), implementing policies to better safeguard against abuse.[269]

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[264] Out-of-scope means that the order represents a cardinal, or material, change beyond the scope of the contract and therefore should be the subject of a new procurement. *See* HG Properties A, LP, B-290416, July 25, 2002, 2002 C.P.D. ¶ 128.

[265] *See* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS, REPORT NO. GAO-05-201 (Apr. 2005).

[266] *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HURRICANES KATRINA AND RITA: CONTRACTING FOR RESPONSE AND RECOVERY EFFORTS, REPORT NO. GAO-06-235T, at 4 (Nov. 2005) (Statement of David E. Cooper, Director, Acquisition and Sourcing Management).

[267] *See supra* note 260.

[268] *See supra* note 4.

[269] *See, e.g.*, Defense Procurement and Acquisition Policy, Interagency Acquisition, http://www.acq.osd.mil/dpap/specificpolicy/index.htm (containing DoD policies).

C. Benefits of IDIQ Contracts in Disaster Response

1. *Pre-negotiated Contract Terms and Conditions Established in Writing*

The House Select Bipartisan Committee found that in the weeks after Katrina "[m]any of the contracts awarded were incomplete and included open-ended or vague terms. In addition, numerous news reports have questioned the terms of disaster relief agreements made in such haste."[270] The Committee further noted:

> FEMA executed few, if any, written contracts during what officials called "the real nightmare emergency" (Aug. 29 - Sept. 15). The circumstances surrounding their contract awards made it difficult for FEMA to understand fully the contract specifics. FEMA simply instructed companies to begin work and submit vouchers for payment. FEMA used this method for the acquisition of food, ice, buses, and other supplies. This could raise issues of enforceability, which will need to be resolved when written contracts are issued.[271]

One commentator noted: "To fill the gaps, [FEMA] was forced to acquire much of what it needed on the fly, signing deals worth hundreds or millions of dollars with little or no competition when its bargaining position could not have been worse."[272]

In contrast, IDIQ contracts' pre-negotiated contract terms and conditions lessen the uncertainty and confusion that may arise when contracts are incomplete, open-ended or vague. The FAR requires that IDIQ contracts set forth the "statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity and purpose of the supplies or services."[273] Agencies and contractors are able to negotiate the terms of the contracts at a time when the government's bargaining position is strong.

Under standing IDIQ agreements, agencies and their contractors also understand what goods or services are being procured and what is expected of the contractor when a more specific order is issued. Special terms and conditions relative to disasters generally or to specific kinds

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[270] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 329. Audits indicate that many were not definitized within the required time period and did not have favorable prices or other terms and conditions.
[271] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 330.
[272] Karelis & Robbins, *supra* note 166, at 1.
[273] FAR 16.504(a)(4)(iii).

of disasters or geographic areas may be included in the umbrella contract.[274]

Under standing contracts, parties also far better understand the amounts to be delivered. Although the quantities are unknown and delivery schedule uncertain, the government has a realistic, established minimum and maximum of goods and services to be ordered. In the event of a catastrophic event, that maximum may have to be increased through modification of the contract, however the minimum and maximum are pre-established and provide a range of estimated quantities. The exact goods and services (and the amounts) needed for disaster relief, response and reconstruction can only be ascertained after the crisis erupts. IDIQ contracts provide the mechanism for ensuring those goods and services are available to order. Open IDIQ contracts that allow for addition of contractors and items provide an additional safety net for the unforeseen needs that arise.

2. *Continuous Competition and Fair and Reasonable Prices*

The FAR requires that contracting officers expressly determine that prices are fair and reasonable.[275] This applies to IDIQ contracts as well as the orders under them. Umbrella contracts are set in place with a preliminary determination that the prices and rates established for the goods and services are fair and reasonable after a competitive award or multiple awards.[276] The contracting officer then may conduct "mini-competitions" within the IDIQ as he or she issues orders, such that the agency may obtain even better prices or "value" (e.g., terms and conditions) than what was set forth in the umbrella contract.

The IDIQ framework allows for increased competition at the critical period (just before, at or during, and immediately after a disaster or crisis), where unprepared contracting agencies might otherwise turn directly to the more risky sole source contracting. Even if the

[274] FEMA recently awarded six nationwide Individual Assistance-Technical Assistance (IA-TAC) service contracts. The Performance Work Statement (PWS) requires the contractor to maintain the [identified] readiness level and be prepared to provide technical assistance and support in an expedited, safe, and sanitary manner." *See* Solicitation No. HSFEHQ-06-R-0030, *available at* http://www.fbo.gov/servlet/Documents/R/487240/244184.

[275] *See, e.g.*, FAR 13.106-3(a), 15.402(a), 1.404-1.

[276] The Acquisition Advisory Panel issued a recommendation that "GSA be authorized to establish a new information technology Schedule for professional services under which prices for each order are established by competition and not based on posted rates." EXECUTIVE OFFICE OF THE PRESIDENT, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 1-71 (Dec. 2006) (Final Panel Working Draft). This is premised on the belief that pricing for services is requirement specific. This could pave the way for greater flexibility in services contracting and provide for better prices, terms and conditions for orders. *Id.*

competition is limited at the order level, it is within the IDIQ framework, where prices are presumptively fair and reasonable price given the prices were competed and established at the umbrella contract level.

3. *Fixed Price Contracts and Limiting Cost-Plus and Time and Material Contracts*

Federal law favors firm-fixed price contracts over the less desirable cost reimbursement contracts and time and materials (T&M) contracts.[277] However, in times of contingency or disaster, much of the contracting is done on a cost-reimbursement or T&M basis.[278] The primary concern with T&M contracts is the "current FAR rules . . . do not make efficient or successful performance a condition of payment. . . . The contractor is not obligated to continue performance if to do so would exceed the ceiling price, unless the contracting officer notifies the contractor that the ceiling price has been increased."[279] Therefore, substantial oversight of T&M contracts is necessary,[280] but generally not sufficiently available.

Advance planning and commodity (supplies and services) purchases may avoid cost reimbursement contracts and T&M contracts so as to maximize use of fixed price contracts. Because of the uncertainties involved in emergency contracting, there is a tendency to resort to T&M contracts for services. T&M contracts are the proverbial Achilles' Heel in IDIQ contracts for services. The contractor does not have to bear the risk of incomplete or defective performance. If a deliverable product is attached to the service, it can shift the risk back to the contractor.

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[277] T&M contracts are the least preferred of all contract types. This is because "[a] time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency." FAR 16.601(b)(1).

[278] Section 1432 of the Services Acquisition Reform Act (Pub. Law No. 108-136 (2003)) authorized limited use of T&M contracts. A T&M contract provides for the acquisition of "supplies or services on the basis of (1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) Materials at cost, including, if appropriate, material handling costs as part of material costs." FAR 16.601(a).

[279] EXECUTIVE OFFICE OF THE PRESIDENT, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 1-23 to 1-24 (Dec. 2006) (Final Panel Working Draft) (footnotes omitted). "In addition, the Government may be required to pay the contractor at the hourly rate, less profit, for correcting or replacing defective services. Generally, if the contractor is terminated for default or defective performance, the Government, nonetheless, is obligated to pay the contractor at the hourly rate, less profit, for all hours of defective performance." *Id.* at 1-24.

[280] FAR 16.601(b)(1) ("[A]ppropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods ad effective cost controls are being used.").

In cases where T&M contracts are necessary,[281] contracting agencies should ensure that "the contracting officer executes a determination and findings that no other contract type is suitable" and "the contract includes a ceiling price that the contractor exceeds at its own risk."[282] During acquisition planning, agencies can hold T&M and cost-plus contracts to a minimum or ensure that appropriate safeguards are included in the terms and conditions to ensure reasonable prices and successful performance.

4. *Contractor Pre-qualification of Contractors*

IDIQ contracts serve as a means of pre-qualifying contractors before the goods and services are needed. With all contract awards, contracting officers are required to make an affirmative determination of contractor responsibility.[283] Responsibility includes general standards, dealing with such items as "adequate financial resources," ability "to comply with the required or proposed delivery or performance schedule," "satisfactory performance record," and "satisfactory record of integrity and business ethics,"[284] and special standards appropriate for a particular procurement.[285] Therefore, the contract holders are pre-determined to be responsible and able to perform the services or provide the goods when the time arises.

Because needs unexpectedly arise and contractors may need to be added to existing contracts or new IDIQ contracts may need to be established, qualification requirements and other barriers to entry (e.g., electronic funds payment and Central Contracting Registry requirements) may be waived or otherwise reduced. As mentioned previously, "open" IDIQ contracts will only be effective if there are not other obstacles, such as barriers to entry.[286] Reduction of these barriers will expedite necessary procurement actions.

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[281] FAR 16.601(b) ("A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.").
[282] FAR 16.601(c). Also, the contracting officer "shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price." *Id.*
[283] FAR 9.104.
[284] *See* FAR 9.104-1.
[285] *See* FAR 9.104-2. "Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance. The special standards shall be set forth in the solicitation (and so identified) and shall apply to all offerors." *Id.*
[286] *See supra* note 255.

5. *Socioeconomic Objectives*

The primary objective for disaster relief and response is to "meet pressing humanitarian needs . . . in an effort to provide immediate relief to survivors and to protect life and property."[287] These include "emergency housing and shelter for victims and emergency personnel, to start debris cleanup, and to secure property from further damage."[288] Congress and the public demand that the local businesses are preferred contractors in relief and reconstruction.[289] They also demand that small and small-disadvantaged businesses (local or not) goals and requirements are met or exceeded.[290]

First and foremost, contracting agencies must have the capability to respond to large, catastrophic disasters anywhere in the nation to meet the humanitarian needs. Given that disasters' time, location and magnitude are uncertain, some national-level response mechanism is in order.[291] FEMA recognized this in its October 2005 announcement of its dual-track strategy.[292] In FEMA's first-track of its strategy (that related to Hurricane Katrina), FEMA awarded thirty-six contracts, primarily to local, small and small-disadvantaged businesses.[293] In August 2006, FEMA awarded six national IDIQ technical assistance support contracts after full and open competition.[294] FEMA also recognized the ability the "national" contractors would have to meet subcontracting goals and imposed on the contractors the responsibility to "utilize local firms to the maximum extent practical for subcontracting opportunities."[295] The contract solicitation evaluation criteria included a factor titled "Subcontracting Approach and Socio Economic Business Strategy."[296] Under this factor, large businesses had to submit subcontracting plans with "goals . . . meet[ing] or exceed[ing] the following DHS goals: Small Business (of all types) 40%; Small Disadvantaged Business 5%; Woman Owned Small Business 5%;

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[287] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 329 (describing how acquisition personnel acted following Hurricane Katrina).
[288] *Id.* (describing the goods and services provided after Hurricane Katrina).
[289] *See supra* Section II.B.5.
[290] *See id*.
[291] *See FEMA Announces New Contracting Strategy*, 39 GOV'T CONT. ¶ 440 (2005).
[292] *Id*.
[293] *See supra* notes 13 and 91 and accompanying text.
[294] *See* http://www.fbo.gov/spg/DHS/FEMA/FFMD/Awards/HSFEHQ-06-D-0814.html (award notice for one of six contract awardees).
[295] *See* Presolicitation Notice, http://www.fbo.gov/servlet/Documents/R/487240. This fulfilled FEMA's promise it made in October 2005 that it would "require prime contractors to meet significant small business subcontracting goals and abide by Stafford Act preferences for local business use." *FEMA Announces New Contracting Strategy*, 39 GOV'T CONT. ¶ 440 (2005). This track attracted Congressional skepticism as to whether it would, in fact, assist local businesses.
[296] *See* Solicitation, *supra* note 274, at Section L.

HUBZone 3%; and Small Disabled Veteran Owned Small Business 3%."[297]

As FEMA's strategy demonstrates, socioeconomic objectives need not be totally abandoned when using IDIQ contracts. Instead, these objectives may be incorporated into the planning and strategy. These goals are secondary during the immediate crisis itself, but need not be dismissed altogether. In fact, an effectively planned multiple award IDIQ contract may allow for the socioeconomic goals to remain at the forefront even during the immediate crisis, secondary only to the most urgently necessities.

Socioeconomic preferences, such as that for local persons or companies, are where the delivery of goods and services crosses paths with the goal of "revitaliz[ing] the community by infusions of cash."[298] In other words, contracting with local businesses serves the goal of rebuilding the affected area as well as sustaining the businesses and individuals affected by the disaster.[299] There are various ways in which the preferences may be accomplished. First, contracting agencies may establish a price preference for certain "concerns," such as local companies, small businesses, or minority-owned businesses. Businesses that do not qualify for the preference have a percentage added to the price of their bid or proposal. This ensures contracting officers retain the ability to use larger, out of state, or otherwise non-qualifying companies where the economic disparity in the bids is beyond an acceptable amount. Second, agencies may set aside contracts or orders under multiple award umbrella contracts for local businesses, small businesses, minority-owned businesses, etc., such as under FEMA's dual-track strategy discussed above. These set-asides may be based on dollar amount, percentage of contracts or orders, functional grouping, or geographic grouping. IDIQ contracts with functional and geographic groupings would allow smaller and/or local businesses to compete for nationwide IDIQ contracts, even though they do not have the ability to provide all the goods or services under the IDIQ contract or the ability to reach across the United States in an economically advantageous way. Finally, as discussed in the next part, subcontracting plans may require socioeconomic considerations.

6. *Subcontracting Plans for Larger Businesses*

Larger businesses will be a part of the competitive procurement process for disaster-related contracts. In fact, they will likely have the lion's share of the contracts, because of their technical know-how,

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[297] *Id.*
[298] S. REP. NO. 91-1157, at 12 (1970).
[299] *See supra* note 84 and accompanying text.

familiarity with the government procurement process, and larger reach and surge capability. Experience demonstrates that these large corporations will subcontract significant portions of the work. It is through the pre-qualification process afforded by IDIQ contracting that the larger companies' subcontracting plans can be pre-set, evaluated and approved. These subcontracting plan requirements may be set out in the solicitation and umbrella contract themselves and require the prime contractor to utilize small businesses, local businesses, and/or other concerns.[300] The plan would be in place and although there may be unforeseen happenings, the expectations would be expressly written into the contract.[301]

Agencies' hiring of prime contractors that subcontract the work is an important part of the procurement process. The ability of a large contractor to manage subcontracts, and, theoretically, perform the oversight necessary, relieves the stress on contracting agencies. Clearly, the oversight of one large contractor, which in turn manages numerous subcontractors, is more manageable than the direct oversight of dozens or hundreds of smaller contracts. After Katrina, critics complained of instances of contractors having up to five levels of subcontractors and that the subcontractors were earning little more than cost on those contracts while the prime contractor made substantial profit. They also complained that FEMA directed potential contractors to the large contractors to compete for subcontracts, "the effect of [which] was to transfer responsibility for conducting competitions and evaluating proposals from FEMA to the prime contractors."[302] Therefore, agencies must exercise some restraint while taking advantage of the ability to dictate the required subcontracting plan elements.

7. *Orders Limited in Amount and Duration*

Katrina contracting demonstrates that where orders are issued or contracts are entered into during the height of an emergency, safeguards are needed.[303] One important safeguard is strictly limiting orders or

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[300] See *supra* Section IV.C.4 for a discussion of FEMA's dual-track strategy, which required socioeconomic goals as part of the evaluation factors.

[301] Critics have complained of the profit schemes of subcontracts as opposed to contracts. One article noted that where the prime contractor received a substantial profit (25%), the subcontractors were barely breaking even. However, with the need to have the resources and surge capability, this must be an integral part of the contracting strategy.

[302] Karelis & Robbins, *supra* note 166, at 3.

[303] This is a lesson-learned from Iraq-related contracting. *See, e.g.*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS, REPORT NO. GAO-05-201 (April 2005).

contracts in their amount and duration.[304] Few contracts or orders actually need to be issued with open, incomplete and/or vague terms. They should be almost exclusively for a limited purpose, related to the primary objectives of preservation of life, health and safety and preservation of property. The orders may terminate pursuant to their terms or be terminated. As recognized after Katrina: "If there is a continuing need for the requirement, the initial contract . . . [could] be left in place[, but] only long enough for a competition to be held. . . . [C]ompetitively awarded contracts [would] then replace the original arrangement." [305] There is no need to go so far as to competitively award new contracts. Contracting agencies may issue task orders or delivery orders, maximizing the "fair opportunity," from pre-established IDIQ contracts.

8. *Needs of the Contractors: Accounting for Having Goods and Services "at the Ready"*

The acquisition process includes pre-solicitation discussions on the government needs and what the commercial marketplace is able to provide. This discussion is essential to effective disaster response contracting. For instance, during the hearings conducted by the House Select Bipartisan Committee, the AshBritt Chief Executive Officer stated that it costs "hundreds of thousands of dollars to keep pre-existing contracts in place, and firms receive no funding for this upkeep, which represents a free insurance policy for USACE."[306] A Department of Homeland Security Spokesman echoed this concern, "caution[ing] that there is a limit to how much a contractor can reasonably be expected to have at the ready. Such preparation costs companies money that they eventually would ask the government to reimburse."[307] IDIQ contracts guarantee a minimum amount (quantity or dollar figure) that contractors will receive, which may serve as a mechanism to compensate contractors for maintaining its capability to have goods and services in place. IDIQ contracts provide a mechanism to set advance contracts and for parties to agree upon terms and conditions that will benefit the government, but also ensure that contractors are able to provide the goods and services with appropriate allocation of risk.

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[304] *See* OFFICE OF FEDERAL PROCUREMENT POLICY, *supra* note 115, at 11.
[305] SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 332 (discussing the contracts put into place immediately following Hurricane Katrina).
[306] *Id.* at 333-34.
[307] Merle & Witte, *supra* note 11, at A1.

9. *Transparency*

Hurricane Katrina contracting demonstrated that transparency in contingency contracting was possible and there was no indication that notice of orders and awards detracted from the speed of the acquisitions.[308] In response to the media's demands "to know how the government's money was being spent . . . agencies such as . . . [USACE and FEMA] used the Internet to announce prime contracts (primarily task- and delivery-order contracts) that had been awarded for relief, and, in some instances, the orders that had been issued under prime contracts."[309]

10. *Acquisition Workforce Relief*

A discussion of acquisition reform or improvement is incomplete without reference to the acquisition workforce itself. As alluded to earlier, the acquisition workforce has greatly diminished from its numbers a decade ago.[310] As the numbers have declined, the dollars spent by the federal government have increased substantially.[311] The lack of experienced personnel hindered Katrina response.[312]

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[308] *See* Yukins II, *supra* note 96, at 16 (stating that "the post-Katrina experience showed us that agencies can indeed publish information on task-order awards without disabling the procurement system").
[309] *Id.*
[310] *See* Econom, *supra* note 258, at 190; FEDERAL ACQUISITION INSTITUTE, ANNUAL REPORT ON THE FEDERAL ACQUISITION WORKFORCE: FISCAL YEAR 2005 (July 2006), *available at* http://www.fai.gov/pdfs/FAWF2005.pdf.
[311] *See* Sandra O. Seiber & Ronald L. Smith, *Is the Federal Government Contracting Workforce Headed for a Train Wreck?*, CONT. MGMT NEWS (Dec. 2005), *available at* http://www.ncmahq.org/publications/cmnews/dec05/Train%20Wreck.asp (showing that from 1997 to 2004, "DoD workload per person nearly doubled, from $6.4 million per 1102 staff to almost $13 million. . . . . While the number of contracting actions has remained relatively the same over this period, contract complexity has risen significantly, as have the dollars awarded.").
[312] The House Select Bipartisan Committee found the following:

> Before Katrina, FEMA suffered from a lack of sufficiently trained procurement professionals. DHS procurement continues to be decentralized and lacking a uniform approach, and its procurement office was understaffed given the volume and dollar value of work. FEMA's grossly understaffed acquisition unit was not ready for the Katrina disaster. FEMA had 55 acquisition slots, and procurement officials think it should have had a minimum of 172. Further, only 36 of the 55 slots were actually occupied. FEMA is one of the DHS agencies that are not under the control of the DHS chief procurement officer, thus the FEMA acquisition office reported to Michael Brown. As of the time of the interview, FEMA was relying upon staff from the central acquisition office, comprised of 60

Clearly, the acquisition workforce is strapped, burdened with contingencies at home and abroad. Unfortunately, no one seems willing to address this concern head on even in the face of intense criticism. Even with IDIQ contracts' streamlined approach and interagency contracting's "market," agencies *need* contracting officers and staff of their own.[313] Any remedy that does not include increasing the workforce would be as effective without it. Streamlining the contract formation process can only go so far, especially with the administrative responsibilities once the contracts are in place.

V. CONCLUSION

The IDIQ contracting vehicle is the most vital contracting mechanism available for crisis and disaster response. It has the ability to operate effectively at all stages of disaster-related contracting. It "flexes" as procurement needs arise and objectives evolve and has the ability to incorporate the expectations of the various public voices. The keys to successful IDIQ contracting during disasters are meaningful acquisition planning, commodity and commoditized service commercial items, and simple, open contracts with the ability to add contractors or goods and services at any time during the disaster.

Hurricane Katrina validated the need for effectively planned and implemented IDIQ contracts during disasters and emergencies. However, their extraordinary flexibility has not been realized. By availing themselves of this invaluable acquisition tool, contracting agencies can ensure quick response to disasters, quality products are procured at reasonable prices, the integrity of the process is maintained against charges of cronyism, and socioeconomic objectives are incorporated into the procurement process.

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acquisition personnel and led by a member of the Senior Executive Service. Regardless, the office was understaffed.

SELECT BIPARTISAN COMMITTEE, *supra* note 29, at 332.

[313] The Federal Acquisition Institute's July 2006 report shows that federal agencies' acquisition workforce is still very low and diminishing. *See* FEDERAL ACQUISITION INSTITUTE, *supra* note 310.

REEMPLOYMENT RIGHTS FOR THE GUARD AND RESERVE: WILL CIVILIAN EMPLOYERS PAY THE PRICE FOR NATIONAL DEFENSE?

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Today, National Guard and Reserve personnel are serving on the front lines of freedom in the war on terror, and they have provided vital relief to our citizens affected by Hurricanes Katrina and Rita. . . . Employers play a critical role in helping the men and women of the National Guard and Reserve carry out their mission. In offices, schools, hospitals, and other workplaces, employers provide time off, pay, health-care benefits, and job security to their Guard and Reserve employees. These patriotic efforts allow our men and women in uniform to focus on their military assignments and help strengthen our country. Americans are grateful to these employers for putting the needs of our citizens and our country's safety and security first.

—President George W. Bush, October 14, 2005[1]

I. INTRODUCTION

Since September 11, 2001 approximately 517,000 Reserve component members of the United States military have been mobilized in support of Operations Noble Eagle, Enduring Freedom and Iraqi Freedom.[2] In 2006, during any given month, over 90,000 guard and reserve troops mobilized in support of current military operations around the world and in the United States.[3] These non-career soldiers, sailors, airmen and marines left their families and civilian jobs for up to twenty-four months at a time.

While the Guard and Reserve supply critical manpower to the U.S. military, the absence of these individuals from their civilian employment can cause serious hardship to the employer and to the members' ability to maintain their civilian jobs. Despite the enactment of the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, guard and reserve members continue to report instances of discrimination and adverse action as a result of their military service.

The purpose of USERRA is threefold: to encourage noncareer service in the military by eliminating or reducing the negative effect on the members' civilian careers and employment; to minimize disruption

[1] Proclamation No. 7947, 70 Fed. Reg. 61,015 (Oct. 14, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/10/20051014-8.html.

[2] Information Briefing, Office of the Assistant Secretary of Defense for Reserve Affairs (Mar. 13, 2006), at http://www.defenselink.mil/ra/documents/RA101FY06.pdf.

[3] *See generally* Press Releases, Department of Defense News Releases, National Guard (In Federal Status) and Reserve Mobilized (Jan.–Dec. 2006), at http://www.defenselink.mil/releases.

in the lives of the service member, employers, co-workers and communities by providing for the prompt reemployment of a member upon completion of service; and to prohibit discrimination against persons because of their military service.[4]

Today's full time active military forces are supported by seven guard and reserve components: Army National Guard, Army Reserve, Navy Reserve, Air National Guard, Air Force Reserve, Marine Corps Reserve, and Coast Guard Reserve.[5] These personnel are protected by USERRA when called to federal active service.[6] Although small in number and not as publicly recognizable as the five branches of the military, commissioned members of the Public Health Service are also protected by USERRA.[7]

Despite the ten-year existence of the Act, even the federal government as an employer has a difficult time balancing the need for an efficient workforce and complying with the Act's provisions.[8] This begs the question of whether USERRA is too broad in its protections and too burdensome on employers. The military's recent changes in force structure resulted in a reduction of active duty career forces and an increased reliance on non-career guard and reserve forces. As a result, the civilian sector that employs those guard members and reservists must, in effect, shoulder some of the economic burden of national

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[4] 38 U.S.C. § 4301(a) (2006).

[5] Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859, 861 (2002).

[6] USERRA protections apply to members of the "uniformed services" meaning "the Armed Forces [Army, Navy, Air Force, Marine Corps], the Army National Guard, and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency." 38 U.S.C.S. § 4303(16) (2006). USERRA does not apply to National Guard and Air National Guard members activated by their state governor in furtherance of a state mission.

[7] 38 U.S.C. § 4303(16) (2006). USERRA protections also apply to those who serve in the commissioned corps of the Public Health Service and certain types of service in the National Disaster Medical System, a division of the Department of Homeland Security. For categories of service eligible for coverage besides traditional service in one of the five military branches, see 38 U.S.C. § 4303(16) (2006) and 20 C.F.R. §§1002.56-1002.62 (2006).

[8] *See generally*, *Protecting the Rights of Those Who Protect Us: Public Sector Compliance With the Uniformed Services Employment and Reemployment Rights Act And Improvement of the Servicemembers Civil Relief Act: Hearing Before the H. Comm. on Veterans' Affairs*, 108th Cong. 63 (2004) (statement of Charles Ciccolella, Deputy Assistant Secretary, Veterans' Employment and Training Service); *see also*, *Protecting the Rights of Those Who Protect Us: Public Sector Compliance With the Uniformed Services Employment and Reemployment Rights Act And Improvement of the Servicemembers Civil Relief Act: Hearing Before the H. Comm. on Veterans' Affairs*, 108th Cong. 15-23 (2004) (statements of Jason Burris and Judithe Hanover Kaplan).

defense, in addition to what they already pay in the form of taxes and fees to the federal government.

After its 1994 implementation, USERRA aided service members, but did not draw much attention beyond the military community and the affected civilian employers. The activation of hundreds of thousands of guard and reserve troops following September 11, 2001, and the subsequent prolonged military actions in Afghanistan and Iraq, brought employment issues involving non-career military members to the forefront of legal and public attention. Prior to 2001, there was scarcely a mention of USERRA except in military law journals such as the Army Lawyer and the Air Force Law Review. In the years 2001 through 2006, articles and comments focusing specifically on aspects of USERRA could be found in more than twenty legal journals.

For the first time since the Vietnam conflict, military action outside of the United States is impacting civilians at home. Aside from the obvious toll on family members of the deployed servicemembers, civilian employers are also facing business related hardships due to the absence of their reserve service member employees.

It is estimated that seventy percent of reservists called to active duty come from small or medium sized companies in the civilian labor force.[9] Additionally, eleven percent of them work in family businesses or are self-employed.[10] This distribution of labor presents difficult questions about who will bear the burden of funding our nation's military forces and for the ultimate sharing in responsibility for defending our nation and maintaining military readiness.

With the unprecedented number of citizen-soldiers being called to active duty for extended periods of time, and the burden falling on civilian employers who may not have the economic power to support it, economic incentives must be added to USERRA to ensure compliance. Without such initiatives, the protections of USERRA may be inadequate to address the needs of the military member, the burdens of the civilian employer, and the realities of the modern labor market.

While some commentators have called for an expansion of USERRA to address student reservists' need to maintain academic standing and scholarships, and rights and benefits for guard personnel activated by a state governor, these expansions fall outside of the purpose and jurisdiction of USERRA.[11] If any expansion of USERRA

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[9] 150 CONG. REC. H5067 (daily ed. June 24, 2004) (statement of Mr. McGovern).

[10] OFFICE OF THE SECRETARY OF DEFENSE RESERVE AFFAIRS, EMPLOYER SUPPORT OF THE GUARD AND RESERVE, CONGRESSIONAL RESPONSE 4 (Mar. 31, 2004) [hereinafter CONGRESSIONAL RESPONSE], at http://www.dod.mil/ra/documents/esgrreport1april04.pdf.

[11] *See generally* Fernandez, *supra* note 5, at 863; Marcel Quinn, *Uniformed Services Employment and Reemployment Rights Act (USERRA)—Broad in Protections, Inadequate in Scope*, 8 U. PA. J. LAB. & EMP. L. 237 (2005).

is warranted, it should be to address the economic and production burdens shouldered by civilian employers. The first step in the analysis is to understand how our nation's military evolved into a Guard and Reserve dependent organization.

II. THE CHANGING OF THE GUARD: EVOLUTION OF MILITARY FORCE

A. The Infancy of the Total Force Concept

Forty-six percent of the uniformed military forces are comprised of guard and reserve members.[12] The use of guard and reserve forces is not a new concept in national defense. The National Guard traces its roots to the militia of the Massachusetts Bay Colony circa 1636.[13] However, the substantial reliance on guard and reserve personnel for national defense has grown since World War II, culminating in our present day reliance on them for almost fifty percent of our fighting force.[14]

As the personnel makeup of our modern military force evolved to incorporate more guard and reserve personnel, legislation began to address the difficulties guard and reserve members would face as a result of being called to serve on active duty. The first legislation to address the reemployment needs of guard and reserves forces came in the form of the Selective Training and Service Act of 1940.[15]

That statute, enacted just prior to World War II, was created as Congress saw the need to recruit and train an ample number of civilians to bolster the small standing military forces at that time.[16] The legislation was a contingency based plan; if war broke out, these reserve additions to the force would serve and then return to their civilian jobs at the conclusion of their service.[17]

Following the war, American military posture moved into the Cold-War stance and adopted conscription policies to maintain adequate troop numbers. Congress reenacted the employment protection legislation as part of the Military Selective Service Act[18] to protect the

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[12] CONGRESSIONAL RESPONSE, *supra* note 10, at 1.
[13] Ryan Wedlund, *Citizen Soldiers Fighting Terrorism: Reservists' Reemployment Rights*, 30 WM. MITCHELL L. REV. 797, 802 (2004).
[14] CONGRESSIONAL RESPONSE, *supra* note 10, at 4.
[15] Pub. L. No. 76-783, 54 Stat. 885 (1940) (terminated 1947).
[16] Lieutenant Colonel Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999).
[17] *Id.* at 56.
[18] Pub. L. No. 759, § 9, 62 Stat. 614 (1948) (formerly codified at 50 U.S.C. app. § 459; *repealed by* Pub. L. No. 93-508, § 405, 88 Stat. 1600 (1974)); Manson, *supra* note 16, at 56 n.5.

typical draftee who served two to three years and then returned to civilian life.[19]

The Vietnam era brought the next revisions to reemployment rights. Following the Vietnam conflict, conscription was rescinded and the concept of the all-volunteer force was employed. Statutory employment protection was an inducement to lure one-term volunteers to replace draftees and to promote continued reserve service in those separating from active duty.[20] Enticing service members to remain available in a reserve capacity was critical at this time due to the military's shift from relying on a large standing force to a leaner active component complimented by a reserve component.

By 1973, the Department of Defense had officially adopted a "Total Force" policy which emphasized that all components of the military: Active, Guard and Reserve, should be prepared and readily available to provide our national defense.[21] Reducing the size of the active military to cut defense spending translated into relying more on a reserve force that would cost only a fraction of maintaining a large active force.[22]

Complimenting this shift in military policy, Congress assisted by passing laws that would aid reserve members with civilian employment issues. Enacted in 1974, the Vietnam Era Veterans' Readjustment Assistance Act contained several provisions guaranteeing the reinstatement rights of employees who were inducted into active duty as a result of Selective Service or activated as a result of a reserve order.[23] Those protections remained relatively unchanged until the influence of the next major military conflict, the Persian Gulf War, prompted a more extensive look at reemployment rights to include protection from discrimination.[24]

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[19] Manson, *supra* note 16, at 56.

[20] *Id.* at 57.

[21] William J. Perry, Secretary of Defense, Annual Report to the President and Congress (March 1996), *available at* http://www.defenselink.mil/execsec/adr96/index.html.

[22] James Jay Carafano, The Army Reserves and the Abrams Doctrine: Unfulfilled Promise, Uncertain Future, Heritage Lecture (Dec. 6, 2004), *available at* http://www.heritage.org/research/nationalsecurity/hl869.cfm.

[23] *See* Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1594 (1974) (formerly codified at 38 U.S.C. §§ 2021-2026 (1976), *redesignated* 38 U.S.C. §§ 4301-4306 (1992)).

[24] *See* Pub. L. No. 99-576, § 331, 100 Stat. 3279 (1976); Pub. L. No. 102-12, § 5(a), 105 Stat. 36 (1991); Pub. L. No. 102-25, §§ 339(a), 340(a) (1991) (§ 339(a) added a new section entitled "Qualification for Employment" which borrowed the definition of "qualified" from the American's with Disability Act of 1990 to mean qualified to perform the essential functions of the position with or without reasonable accommodation) (codified at 38 U.S.C. §2027, redesignated 38 U.S.C. §§ 4301-4307); The Veteran's Benefits Act of 1992, Pub. L. No. 102-568, § 506, 106 Stat. 4340; (superseded by the Uniformed Services Employment Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 2(a), 108 Stat. 3150 (1994)).

B. Modern Force Structure from the Persian Gulf War

The activation of more than 225,000 guard and reserve troops for the Gulf War in 1990-1991 "was the first major activation of the Reserve under the Total Force concept."[25] This activation brought to light deficiencies in the collective veterans' rights laws that were initially addressed in piecemeal fashion.

The Persian Gulf War Veterans' Benefits Act of 1991 addressed employment retraining and reasonable accommodations for disabled veterans seeking reinstatement to pre-service employment.[26] The Soldiers' and Sailors' Civil Rights Amendments of 1991 addressed the issue of gaps in employer sponsored health plan coverage due to military service.[27]

This prompted Congress to scrutinize the standing veterans' rights laws. Realizing that the "last 50 years of Veterans' Reinstatement Rights laws has become confusing and cumbersome patchwork of statutory amendments and judicial constructions that at times hinders the resolution of claims,"[28] both the Senate and House introduced bills that would comprehensively apply to employment and reemployment rights.[29]

While the previous statutes had only addressed the reemployment and seniority restoration rights of draftees and reservists, USERRA was a comprehensive tool for all service related employment difficulties. Finally enacted in 1994, USERRA modified the reemployment protections contained in the previous statutes. It expanded the protections to prohibit discrimination based on military service and to protect employee health and pension plans.[30] The statute borrows concepts from other federal employment discrimination statutes, such as Title VII of the Civil Rights Act and Americans with Disabilities Act (ADA), that aid an employer's understanding of the rights promulgated by USERRA.[31]

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[25] Wedlund, *supra* note 13, at 803.
[26] Pub. L. No. 102-25, 105 Stat. 75 (1991).
[27] Pub. L. No. 102-12, 105 Stat. 34 (1991).
[28] 138 CONG. REC. S16,022-30 (daily ed. Oct. 1, 1992) (statement of Sen. Cranston).
[29] *See* 138 CONG. REC. H11,703 (daily ed. Oct. 5, 1992); 138 CONG. REC. S16,022 (daily ed. Oct. 1, 1992).
[30] *See* Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. §§ 4301-4334 (2005)).
[31] Manson, *supra* note 16, at 59. USERRA provides for protection against discrimination based on a protected status, (military service) similar to Title VII's protection from discrimination based on race, sex, creed, color and national origin. USERRA also contains the duty to make reasonable accommodations for an employee seeking reinstatement who has become disabled due to his or her military service, similar to the accommodation provisions in the Americans With Disabilities Act.

III. USERRA RIGHTS AND PROCEDURES

USERRA is codified at 38 U.S.C. §§ 4301-4334. Federal regulations implementing USERRA as it applies to states, local governments, and private employers can be found at 20 C.F.R. Part 1002. These rules became final on December 19, 2005.[32] The Office of Personnel Management published separate regulations for federal executive agency employers and employees.[33] At 32 C.F.R. Part 104, the Department of Defense promulgated rules providing guidance to the military services' on how to educate reservists on their rights and how to assert claims.

Two federal agencies have been tasked to ensure compliance with and to promote the interests of USERRA. The Veterans' Employment Training Service (VETS), under the Department of Labor, provides assistance to those asserting rights for employment and reemployment.[34] A special committee, The National Committee for Employer Support of the Guard and Reserve, within the Office of the Assistant Secretary of Defense for Reserve Affairs is charged with gaining and maintaining support from public and private employers for members of the Guard and Reserve.[35]

In cases that reach the courts, plaintiffs have the benefit of a policy of liberal construction in their favor. "Because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries."[36] When deciding cases brought under USERRA, the federal courts continue to employ the same broad construction in favor of members of the uniformed services that was first used to construe actions brought under the Selective Service Act.[37]

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[32] Regulations Under the Uniformed Services Employment Reemployment Rights Act of 1994, 70 Fed. Reg. 75,246 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002).

[33] *See generally* 5 C.F.R. part 213, 5 C.F.R. part 353.

[34] 38 U.S.C. § 4321 (2006) (this provision also gives the Secretary of Labor the authority to request assistance from existing federal and state agencies engaging in similar activities and utilize the assistance of volunteers). The Veterans' Employment Training Service is a program of the Office of the Assistant Secretary for Veterans' Employment and Training (OASVET) established in December 1981 for the purpose of ensuring that Congressional mandates for effective job service programs and job training programs are carried out by the Department of Labor. *See* Dept. of Labor Home Page, at http://www.dol.gov/vets/aboutvets/history/ history.htm.

[35] ESGR was established in 1972 to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment. It is the lead Department of Defense organization for this mission under DEP'T OF DEFENSE, DIR. 1250.1, NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE (13 Apr. 2004).

[36] Hill v. Michelin North America, Inc., 252 F.3d 307, 312-13 (4th Cir. 2001).

[37] *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) (following the Court's approach to previous cases brought under the Soldiers' and

A. General Coverage Provisions

USERRA was intended to establish a "floor not a ceiling, for the employment and reemployment rights and benefits" of covered employees.[38] Therefore, federal or state laws, private contracts, or agreements that provide a greater right or benefit than USERRA will not be affected.[39] However, a state law, contract, or policy that reduces or limits the rights or benefits given by USERRA, or one that puts additional prerequisites on attaining benefits will be superseded by the USERRA statute.[40]

An employee eligible for USERRA protection is defined simply as "any person employed by an employer," which includes a citizen, national, or permanent resident alien of the United States who works in a foreign country for an employer that is incorporated or otherwise organized in the United States.[41] Federal regulations also define employee to include former employees of an employer, so that an employee who has been terminated from employment will have standing as an "employee" to be able to assert her rights under the statute.[42] USERRA protections also apply to current employees as well as those applying for initial employment.

The term "employer" is broadly defined under the statute. It applies to "any person, institution, organization or entity that pays salary or wages for work performed or that has control over employment opportunities."[43] This would include persons to whom the employer has delegated employment related responsibilities.[44] An employer is one that currently employs or one that has denied initial employment in violation of the discrimination provisions of USERRA.[45]

Sailors' Civil Relief Act, such as in *Boone v. Lightner*, 319 U.S. 561, 575 (1943) wherein the Court stated: "This legislation [the Selective Service Act] is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

[38] Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 20 C.F.R. § 1002.7 (2006).

[39] 38 U.S.C. § 4302(a) (2006).

[40] *Id*. §4302(b).

[41] *Id*. § 4303(3).

[42] 20 C.F.R. § 1002.5(c) (2006).

[43] 38 U.S.C. § 4303(4) (2006).

[44] *See* Brandsasse v. City of Suffolk, 72 F. Supp. 2d 608 (E.D. Va. 1999) (The City of Suffolk and its director of personnel, who had authority over hiring and firing for the city, were both subject to liability as "employers."); Jones v. Wolf Camera, 1997 U.S. Dist. LEXIS 23607 (N.D. Tex. 1997) (The court was unable to find, on the basis of the pleadings alone, that two supervisors were not persons to whom the employer had delegated the performance of employment related responsibilities, thereby rejecting defendants' argument in motion to dismiss that they, as individual supervisors, and not corporate officers with operational control, could not be held liable as "employers" under USERRA.).

[45] 38 U.S.C. § 4303(4)(A)(v) (2006).

Voluntary or involuntary performance of duty in a uniformed service triggers the protections of USERRA.[46] That means the statute protects equally those who are ordered to service against their wishes and those who readily volunteer for a deployment against their employer's wishes. Employers cannot penalize an employee who has volunteered for active service or training. This is an important concept because many of the reported cases allege statements questioning the necessity of the employee's absence or questioning whether reporting for military service is essential, despite being ordered to do so. This is especially true for duty that is not combat related, as if to challenge the legitimacy of the employee's military service.

Covered service in the military is not limited to active duty deployments in support of war or armed conflict. Applicable service can take the form of active duty for training purposes, initial training (boot camp) into the military services, full time guard duty, or periods necessary for medical or technical examinations to determine fitness for duty.[47] Service with the National Guard can be confusing to those not familiar with the military. Only guard members who are called to federal service by the President are protected by USERRA. Guard personnel who are ordered to service by their state governor for state missions, such as flood relief or riot control, do not have federal employment protections.[48] To remedy this lapse in coverage, every state has enacted some level of protection in regard to reemployment rights for their guard personnel, however most states primarily protect public sector employees rather than private sector employees.[49]

Like most benefits conferred as a result of military service, eligibility depends on the character of the service. According to 38 U.S.C. § 4304, USERRA protections are not available to those servicemembers who have been separated from military service with a Dishonorable or Bad Conduct Discharge,[50] a Dismissal,[51] an Under Other Than Honorable Conditions Discharge,[52] or those who have been

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[46] *Id.* § 4303(13).
[47] *Id*.
[48] See 20 C.F.R. § 1002.57 for explanation of which type of National Guard service is eligible for USERRA protection.
[49] John F. Beasley, Jr. & Marisa Anne Pagnattaro, *Reemployment Rights for Noncareer Members of the Uniformed Services: Federal and State Law Protections*, 20 LAB. LAW. 155, 169 (2004).
[50] This type of discharge is a punishment adjudged as sentence at court martial. It applies to enlisted members of the armed forces only.
[51] A dismissal is the only authorized discharge that can be adjudged against commissioned officers in a court martial.
[52] This characterization of discharge is the lowest that can result from an administrative involuntary separation from the service. Each Service Secretary promulgates regulations regarding procedures and characterization of service for involuntary separations.

dropped from the rolls of a particular service pursuant to 10 U.S.C. § 1161(b).[53]

An employer may deny reemployment or benefits that would otherwise be available to the returning employee/service member if the person does not meet the characterization criteria. Each person being discharged or separating from the armed services is issued a Department of Defense Form 214 (DD214) which indicates the person's discharge date and status. An employer may request this form as proof of service characterization.[54]

B. Discrimination and Acts of Reprisal

38 U.S.C. § 4311 prohibits discrimination against a person on the basis of their status as a member of, or applicant to, a uniformed service. An employer may not deny initial employment or reemployment, or take any adverse employment action on the basis of an employee's service or application for service in the military. Such adverse employment actions would include retention in employment, promotion or any benefit of employment.[55]

1. *Motivating Factor and the Burden of Proof*

According to § 4311(c)(1), to prove an employer has engaged in a prohibited activity, a claimant must demonstrate that the employee's service in the military was a motivating factor in the employer's adverse action.[56] It clarified Congress's intent from the predecessor statute, the Veterans' Reemployment Rights Act (VRRA), that a plaintiff need only prove that military service was a *motivating* factor for the employer's adverse action and not the *sole* reason. The addition of this provision addressed a past judicial construction that had hindered the resolution of claims and constricted employment protections.

In interpreting the legislative history of the VRRA in 1981, the U.S. Supreme Court in *Monroe v. Standard Oil Company*, found that § 2021(b)(3) of the VRRA[57] was "enacted for the significant purpose of

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[53] Only the President has the authority to drop a commissioned officer from the rolls of an armed force if the officer has either been absent without authority for at least three months, has served more than six months of confinement as a result of a court martial sentence, or who is sentenced to confinement in a Federal or State prison after having been found guilty of an offense by a civilian court and whose sentence has become final. *See* 10 U.S.C. § 1161(b) (2006).

[54] 38 U.S.C. § 4312(f)(1) (2006).

[55] *Id.* § 4311(a).

[56] *Id.* § 4311(c)(1).

[57] 38 U.S.C. § 2021(b)(3) provided, "Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of

protecting the employee-reservist against discriminations like discharge and demotion, motivated *solely* by reserve status."[58] Following this opinion, lower courts "interpreted § 2021(b)(3) as permitting the exoneration of an employer who could point to a nonpretextual reason for an adverse employment decision that was irrelevant to the employee's military status, even if military status played some role in the decision."[59] Such an interpretation eliminated any opportunity for the employee-reservist to survive summary judgment if there was any reason for the adverse action offered by the employer other than military status.

Discussions in both House and Senate bills for USERRA reiterated the original intent of Congress that the employer bear the burden of proof for raising the affirmative defense.[60] To the extent that lower courts had relied on *Standard Oil* and required the plaintiff to prove military status was the sole motivating factor for the adverse action, the House Report stated those decisions misinterpreted the original legislative intent.[61] The House Report called the proposed revision of the burden of proof standard a mere reaffirmation of the original intent of Congress. The intent was that the courts use the "so-called 'but-for' test and that the burden of proof is on the employer, once a prima facie case of discrimination is established."[62] This clarification brought the standard in line with the proper burden shifting scheme approved by the Supreme Court in cases brought under the National Labor Relations Act as decided in *NLRB v. Transportation Management Corporation*.[63]

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any obligation as a member of a Reserve component of the Armed Forces." Pub. L. No. 93-508, 88 Stat. 1594, 1595 (1974).

[58] Monroe v. Standard Oil Company, 452 U.S. 549, 560 (1981).

[59] Gummo v. Village of Depew, 75 F.3d 98, 105 (2nd Cir. 1996) (citing Burkart v. Post-Browning, Inc., 859 F.2d 1245, 1247 (6th Cir. 1988); Sawyer v. Swift & Co., 836 F.2d 1257, 1262 (10th Cir. 1988); Clayton v. Blachowske Truck Lines, Inc., 640 F. Supp. 172, 174 (D.Minn. 1986), aff'd, 815 F.2d 1203 (8th Cir. 1987).

[60] *Gummo*, 75 F.3d at 106 (citing S. REP. NO. 103-158, at 45 (1994); H.R. REP. No. 103-65(I), at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457)).

[61] H.R. REP. No. 103-65(I), at 24, 1994 U.S.C.C.A.N. 2449, 2457.

[62] *Id.*

[63] Both the House and Senate cited *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983) as the approach that should be followed. In *NLRB v. Transportation Management Corp*., the Supreme Court affirmed the assignment of burdens by the National Labor Relations Board in an unfair labor practice case where an employee claimed he was discharged for engaging in protected activity under the National Labor Relations Act, while the employer claimed the employee was discharged for misconduct. For dual motive cases, the Board required the General Counsel to prove by a preponderance of the evidence that the employee's conduct protected by the NLRA was a substantial or a motivating factor in the adverse action. If this was established, the burden then shifted to the employer to prove by a preponderance of the evidence that there was a legitimate reason for the adverse action. The lower court had held that it was improper to place any burden of persuasion upon the employer. *NLRB*, 462 U.S. at

While this clarification may be a more liberal construction for employees, it doesn't fully guarantee the employee will get his or her case past the summary judgment stage. Although the burden shifting scheme sounds like the analysis applied under Title VII actions, USERRA § 4311 shifts the burden of persuasion as well as production. For cases under Title VII, other than pattern or practice and group disparate impact, the burden of persuasion always remains on the plaintiff. As the Federal Circuit Court explained in *Sheehan v. Department of the Navy*, "[t]he procedural framework and evidentiary burdens set out in § 4311, as explained in *Transportation Management* for NLRB rulings, are different from those in discrimination cases under Title VII of the Civil Rights Act of 1964, as described in *McDonnell Douglas Corp. v. Green*, and subsequent decisions."[64]

In USERRA actions, the plaintiff must persuade the court that military service was a motivating factor in the adverse action. If successful, the burden of persuasion shifts to the employer to prove as a matter of law that it would have taken the action against the employee regardless of the employee's military service. If the court is persuaded on this issue, the plaintiff does not have the opportunity to try and prove pretext, or to allow the fact finder to decide against the employer regardless of the proffered reason.

This same evidentiary analysis also applies to an action for retaliation under § 4311(b). This section prohibits employers from taking adverse action against a person for exercising any right under USERRA or testifying, assisting, or participating in any proceeding or investigation under USERRA. Similar to other anti-retaliation provisions in employment law, the provision protects not only the service member exercising his or her rights, but also the non-military affiliated person who is assisting or aiding the service member in asserting USERRA rights.[65]

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400. The Supreme Court later called it's analysis of the meaning of burden of proof in § 7(c) of the NLRA "cursory" and not able to withstand scrutiny, although the NLRB's ultimate holding was not overruled. *See* Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries, 512 U.S. 267, 276 (1994).

[64] 240 F.3d 1009, 1014 (Fed. Cir. 2001). The Court further explained, "*McDonnell Douglas*, while allocating the burden of production of evidence, does not shift the burden of persuasion to the employer. *See* Nat'l Labor Relations Bd. v. Weiss Memorial Hospital, 172 F.3d 432, 442 (7th Cir. 1999) (contrasting *Wright Line* with 'the shifting burdens of production under the ubiquitous *McDonnell Douglas* analysis, which is merely a method for ordering the proof'); Walker v. Mortham, 158 F.3d 1177, 1184-85 n.10 (11th Cir. 1998), *cert. denied* 528 U.S. 809, 145 L. Ed. 2d 36, 120 S. Ct. 39 (1999) (distinguishing the employer's burden to prove its affirmative defense under the NLRA from the McDonnell Douglas prima facie case, which shifts the burden of production but not the risk of nonpersuasion)."

[65] Manson, *supra* note 16, at 61 (comparing 38 U.S.C. § 4311(b) with 42 U.S.C. § 2000e-3(a) (antiretaliation provision of Title VII of the Civil Rights Act of 1964), and 42 U.S.C. § 12203(a) (prohibition against retaliation under Americans with Disabilities

2. *Benefit of Employment*

USERRA defines "benefit of employment" as "any advantage, profit, privilege, gain, status, account, or interest that accrues by reason of [employment] . . . ."[66] Consistent with the general principle of broad interpretation of USERRA and its predecessor statutes, the term "benefit of employment" has been liberally construed. A transfer to a less desirable position or a position with different work hours can constitute a denial of a benefit of employment.[67]

The manner in which an employee is charged or awarded leave time for absences for military service has been seen to be a "benefit of employment." In *Butterbaugh v. Department of Justice*, the Federal Circuit Court of Appeals found that a Department of Justice policy charging employees leave time for non-work days spent attending military training was improper according to its interpretation of "days" as work days, not calendar days under 5 U.S.C. § 6323(a)(1), and therefore was a denial of a benefit of employment.[68]

Adverse actions or disciplinary measures taken by the employer can also affect a "benefit of employment." In *Schmauch v. Honda of America Manufacturing, Inc.*, the court determined that a jury could reasonably find that extending an employee's Attendance Improvement Plan (AIP), a means to correct unexcused absences from work, for work he missed due to military service, was an adverse action affecting a benefit of employment.[69] Had it not been for his military service, the plaintiff's AIP would have been extinguished sooner, and his final unexcused absence would not have violated the AIP and resulted in his termination.[70]

Act), and 29 U.S.C. § 623(d) (1988) (anti-retaliation provision of Age Discrimination in Employment Act)).

[66] 38 U.S.C. § 4303(2) (2006).

[67] *See* Maxfield v. Cintas Corp No. 2, 427 F.3d 544 (8th Cir. 2005) (transfer from sales position to trainer position held to be a denial of a benefit of employment because sales position was a more stable job, and employee could earn bonuses based on his own performance, whereas trainer position only awarded bonuses on the basis of others' performance); Hill v. Michelin North America, Inc., 252 F.3d 307 (4th Cir. 2001) (transferring employee to job with a less regular work schedule and longer work days was considered a denial of a benefit of employment). *Cf.* Burlington Northern and Santa Fe Railway Company v. White, 126 S. Ct. 2405, 2416 (2006) (discussing reassignment of job duties as adverse employment action in the context of anti-retaliation provision of Title VII).

[68] 336 F.3d 1332 (Fed. Cir. 2003); *see also* Rogers v. City of San Antonio, 392 F.3d 758 (5th Cir. 2004), *cert denied*, 125 S. Ct. 2945 (2005) (holding that the determination of leave benefit calculations affected by employment absences caused by military service is governed by more specific provisions of 38 U.S.C. § 4316(b)(1), rather than general discrimination provisions of §4311).

[69] 295 F. Supp. 2d 823, 827 (DC Ohio 2003).

[70] *Schmauch,* 295 F. Supp. 2d at 827.

A "paper suspension" not officially served, but placed in the employee's file, was found to affect a benefit of employment because it was disciplinary in nature and affected the employee's status or interest.[71] A park ranger's law enforcement commission was determined to be a benefit of employment because its withdrawal affected the ranger's work assignments and adversely affected his entitlement to enhanced benefits under the retirement system and his opportunity for promotion.[72]

A benefit of employment does not include an affirmative right to perform military service, however. In *Thomsen v. Department of Treasury*, the plaintiff was an officer in the Uniformed Division of the Secret Service designated as a "key employee" by agency policy.[73] At the time, federal regulations prohibited persons holding these "key" positions from service in the military Ready Reserves because they held positions within the Secret Service that could not "be vacated during a national emergency or mobilization without severely impairing the capability of their agency to function effectively."[74] Therefore, the agency required the Army to transfer the plaintiff to inactive reserve status against the plaintiff's wishes.

Thomsen argued that the designation of "key employee" denied him a benefit of employment, presumably his ability to be allowed to serve in the Army Reserves as other government employees do. In finding that Thomsen's membership in the Army Reserves was not a benefit of employment with the Secret Service, the court pointed out that the type of protected benefit covered by the statute is a benefit that "flows as a result of the person's employment by the employer in question."[75]

Membership in the Army Reserves was not derived from Thomsen's employment with the Secret Service, therefore his removal from the Army Reserves was not itself a denial of a benefit of employment. Despite the court's recognition of the liberal approach in construing claims under USERRA, it held that "USERRA cannot properly be read to convey an affirmative right to serve in the armed forces."[76]

This begs an interesting question of whether the same analysis would apply if the employee were a private sector employee with a contract that provided he or she could not serve in the armed forces if he or she held a particular position within the company. One could argue that the contract would not be superseded by USERRA because the

[71] Johnson v. U.S. Postal Service, 85 M.S.P.R 1, 4 (M.S.P.B. 1999).
[72] Peterson v. Department of the Interior, 71 M.S.P.R. 227, 237 (M.S.P.B. 1996).
[73] Thomsen v. Department of Treasury, 169 F.3d 1378 (Fed. Cir. 1999).
[74] *Thomsen*, 169 F.3d at 1380.
[75] *Id.* at 1381.
[76] *Id.*

contract does not limit, reduce, or eliminate any right or benefit provided by USERRA, just as in *Thomsen*. However, such a contractual provision does restrict a person's ability to serve in the military reserves. It prevents the person from making the choice to volunteer for military service for fear of being ineligible to hold that particular position within the company.

In a case brought under the Veteran's Reemployment Rights Act, a police officer and former Marine Corps officer, sued the Baltimore City Police Department for its policy of restricting the number of police officers, other than new recruits, who could join an active military reserve unit to one hundred.[77] The plaintiff, Officer Kolkhorst, alleged that the restrictive policy violated § 2021(b)(3) of the VRRA, which prohibited employers from denying hiring, retention, promotion or other incidents of employment because of service in a Reserve component of the Armed Forces, the precursor to § 4311 of USERRA.[78]

Kolkhorst, who was not a member of any military reserve unit at the time of his hiring, had subsequently applied to the Department for permission to join an active reserve unit; but, the allotted one hundred positions were already filled so the plaintiff was placed on a waiting list.[79] Despite this, the plaintiff joined a Marine Corp reserve unit and was able to attend weekend training by arranging his work schedule with his immediate supervisors at the Department.[80] When Kolkhorst was ordered by the military to attend his annual training at Fort Lajune, North Carolina, he submitted a request for a leave of absence to perform military training to the police department, which was denied.[81] Now that the Department was aware of Kolkhorst's active reserve status, he was issued a memorandum directing him to remove himself from active military reserve status.[82]

The court found that the memorandum, which required Kolkhorst to either withdrawal from the military reserve or face dismissal, violated the protections of § 2021(b)(3) of the VRRA by impermissibly "encroaching upon the normal incidents and advantages of Kolkhorst's employment."[83] Further, the court held that the Department's official policy of limiting the number of officers who could participate in the active military reserves directly interfered with the language and purpose of the nondiscrimination provision of the VRRA.[84]

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[77] Kolkhorst v. Tilghman, 897 F.2d 1282 (4th Cir. 1990).
[78] *Id.* at 1284.
[79] *Id*. at 1283.
[80] *Id*. at 1284.
[81] *Id*.
[82] *Id.*
[83] *Id*. at 1285.
[84] *Id*. at 1295.

The same conclusion would result if the case were decided using the USERRA discrimination provision, which imitates the former 38 U.S.C. § 2021(b)(3). Similar to the VRRA, § 4311 of USERRA states that an employer may not deny initial employment, retention, promotion or any benefit of employment due to service in the armed forces. These protections from discrimination prevent a civilian employer from enforcing a contract provision restricting an employee's ability to serve in the armed forces. The proposed contract provision would also be restricted by § 4302, which provides that USERRA supersedes "any contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates any right or benefit provided by . . . [USERRA]."[85]

The difference in result between *Kolkhorst* or the hypothetical contract provision and *Thomsen* was the fact that the Secret Service was able to remove Thomsen directly from the active duty roster of the Army Reserves through the special federal statute regarding key employees. The Service's actions did not affect an incident of employment with the Secret Service, even though the result still restricted Thomsen's ability to serve in the Armed Forces Reserves.

In contrast, the City of Baltimore, or the private employer seeking to enforce a limiting contract, do not have that direct access to the military roster that the Secret Service did. The only way a state or private employer could restrict an employee's service in the military would be to take some action or impose a policy which denies an employment opportunity with that particular employer. Such an action, as in *Kolkhorst,* would directly violate USERRA.

3. *Hostile Work Environment*

Although not specifically mentioned in the statute, a discrimination claim based on a hostile working environment has been administratively and judicially interpreted based on Congress's intent for broad protection under USERRA. The Merit Systems Protection Board (MSPB) applied the hostile work environment rationale first in *Peterson v. Department of Interior*.[86] The MSPB recognized that the anti-discrimination language in § 4311 is different than the language found in Title VII of the Civil Rights Act, but it was not dissuaded from applying the same concept of hostile work environment to USERRA claims.[87]

[85] 38 U.S.C. § 4302 (2006).
[86] 71 M.S.P.R. 227 (M.S.P.B. 1996).
[87] *Peterson*, 71 M.S.P.R. at 238.

The MSPB noted that courts have consistently construed anti-discrimination statutes to proscribe harassment in the workplace.[88] Because Congress had intended to prohibit discrimination against persons due to their military service, it followed that such discrimination encompassed hostile environment claims the same as it would in Title VII, Title IX, of the Rehabilitation Act and the Americans with Disabilities Act.[89]

Beyond the jurisdiction of the MSPB, the issue is not settled. Some district courts have accepted the interpretation of USERRA that allows for hostile environment discrimination claims,[90] but others do not find the MSPB decision persuasive against a lack of precedent from the Supreme Court or federal circuit court decisions.[91] The MSPB's decision, however, is based on proven principles of application. Based on the broad construction mandates of applicability and interpretation, a court would be hard-pressed to find a compelling reason not to expand the discrimination protections of USERRA to include protection from a hostile work environment.

There is some precedent from the Supreme Court in an analogous case decided under Title IX, *Jackson v. Birmingham Board of Education*.[92] Despite the absence of language in 20 U.S.C. § 1681(a) that would make retaliation against a person who has complained of sex discrimination by recipients of federal education funding a cause of action under Title IX, the Supreme Court found that retaliation is a form of intentional discrimination on the basis of sex encompassed by Title IX's private case of action for intentional sex discrimination.[93]

Title IX provides that no person should be subjected to discrimination on the basis of sex under any education program or activity receiving federal funding. Because Congress used the term "discrimination," which covers a wide range of intentional unequal treatment, the intent was to give the statute broad reach.[94] Similar to the broad statement concerning "discrimination" in Title IX, USERRA directs that an employer shall not deny an employee "any benefit of employment" on the basis of the employee's application to or service in

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[88] *Id*. at 237 (citing Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971), *cert denied* 406 U.S. 957 (1972) (finding offensive environment for employees based on race) and Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986) (finding sexual harassment was sufficiently severe to alter conditions of employment and create an abusive working environment)).
[89] *Peterson*, 71 M.S.P.R. at 239.
[90] Vickers v. City of Memphis, 368 F. Supp. 2d 842 (W.D. Tenn. 2005); Maher v. City of Chicago, 406 F. Supp. 2d 1006 (N.D. Ill. 2006).
[91] Church v. City of Reno, 1999 U.S. App. LEXIS 2068 (9th Cir. Nev. Feb. 9, 1999), Figueroa Reyes v. Hosp. San Pablo del Este, 389 F. Supp 2d 205 (D.P.R. 2005).
[92] Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005).
[93] *Jackson*, 544 U.S. at 173.
[94] *Jackson*, 544 U.S. at 175.

the armed forces. One would expect the Court to apply similar reasoning to hold that one of the "benefits of employment" protected by USERRA is freedom from a harassing or hostile working environment. Given that 38 U.S.C. § 4311 prohibits discrimination in employment actions based on an employee's military affiliation, and the liberal construction already afforded to the series of laws protecting veterans, the Court would not be overstepping it bounds if it considered a hostile working environment based on military affiliation to be a form of discrimination prohibited by § 4311.

C. Reemployment of Employees Absent Due to Uniformed Service

In addition to protection from employment discrimination due to military service, an employee who leaves civilian employment to serve in the uniformed services is entitled to reinstatement with the civilian employer upon the completion of the military service.[95] The position the employee is entitled to upon his or her return from a period of military service is governed by 38 U.S.C. § 4313. Encompassed within the "position" is job title, assignments, status and similar seniority related concepts. Before applying the rules in § 4313, a person's eligibility for reemployment must first be established under § 4312.

1. *Proof Requirement for § 4312*

When asserting a claim under the reemployment rights provisions found at 38 U.S.C. § 4312, the burden shifting scheme employed under the discrimination section, § 4311, does not apply.[96] The view of the Department of Labor is that § 4312 gives an employee an absolute right to reemployment if the employee has complied with the obligations imposed by § 4312(a) regarding length and character of service, and proper notice.[97] This interpretation is consistent with congressional commentary which described § 4312(a) as providing an "unqualified right to reemployment to persons who leave other than temporary positions to serve in any type of military duty."[98]

Only one court has interpreted § 4312 differently. The Court of Appeals for the Sixth Circuit in *Curby v. Archon* interpreted § 4312 to

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[95] 38 U.S.C. § 4312 (2006).

[96] Anthony Green, *Reemployment Rights Under the Uniformed Services Employment and Reemployment Act (USERRA): Who's bearing the Cost?*, 37 IND. L. REV. 213, 225-26 (2003).

[97] 20 C.F.R. § 1002.33 (2006) ("Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment? No. The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service . . . .").

[98] H.R. REP. 103-65(I), *supra* note 61, at 24, 1994 U.S.C.C.A.N. at 2456.

be a subsection of § 4311, therefore "a person seeking relief under § 4312 must also meet the discrimination requirement contained in § 4311.[99] The court's view was that proper statutory construction mandated the result. In its view, because § 4311 covered discrimination in all phases of employment, and § 4312 was much narrower and only addressed reemployment situations, § 4312 was a subsection of § 4311 and therefore required proof of discrimination before asserting a reemployment right.[100]

Considering the goals and language of USERRA as a whole, the *Curby* court could not accept the plaintiff's argument that § 4312 should stand alone. Even though the court cites to one of the purposes of USERRA as "to minimize the disruption to the lives of persons performing service in the uniformed services . . . by providing for the prompt reemployment of such persons upon their completion of such service."[101] the court ignores the intent of that provision and the legislative history behind it.[102]

Cases in other circuits subsequent to *Curby,* as well as federal regulations enacted in 2005, view § 4312 as separate and distinct statutory protection.[103] In *Wrigglesworth v. Brumbaugh*, the district court used the wording of both statutory provisions and other federal statutes that refer to USERRA to demonstrate that § 4312 and § 4311 stand independent of one another.[104] The *Wrigglesworth* court also recognized that in the "long history of litigation under the predecessor statutes to USERRA, including many decisions by the [Supreme Court] have determined that the Act protected the unqualified right of a veteran

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[99] Curby v. Archon, 216 F.3d 549, 557 (6th Cir. 2000).
[100] *Id.* at 557.
[101] *Id.* at 556 (citing 38 U.S.C. § 4301).
[102] *See* H.R. REP. 103-65(I), *supra* note 61, at 24, 1994 U.S.C.C.A.N. at 2456 ("Section 4312(a) would provide an unqualified right to reemployment . . . .").; *see also* Hilton v. Sullivan, 334 U.S. 323, 329 (1948) (interpreting the reemployment provision of the Selective Service Training Act of 1940 which required that a returning employee "shall be restored" to his position, the Court there was no ambiguity in those words used and Congress intended its language to be mandatory).
[103] *See* 20 C.F.R. § 1002.33 (2006); Coffman v. Chugach Support Services, Inc., 411 F.3d 1231, 1235 (11th Cir. 2005) ("unlike section 4311, this provision [section 4312] does not require an employee to show any discriminatory animus"); Wriggleworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1135 (W.D. Mich. 2000) ("Section 4312 neither contains nor implies a proof of discrimination requirement"); Jordan v. Air Products and Chemicals, Inc., 225 F. Supp. 2d 1206, 1208 (C.D. Cal 2002) ("viewing § 4312's plain language, and mindful of the mandate to construe the USERRA liberally . . . , this court finds an unqualified right to reemployment . . . ."); Aldridge v. Daikin America, Inc., 2005 WL 2777306 (N.D. Ala. 2005) ("Sections 4311 and 4312 of the USERRA provide separate and distinct statutory protections for service members").
[104] *Wriggleworth*, 121 F. Supp. 2d at 1134 (citing to Section 1316 of Title 2 and Section 416 of Title 3 where the protections of USERRA are listed separately as Section 4311 protection against discrimination, Sections 4312 and 4313 right of reemployment, and Sections 4316 and 4318 rights to employee benefits).

to reemployment . . . . There is no reason to read the statute as imposing requirements not legislated by Congress."[105] The plain reading of USERRA, the legislative history, and case precedents all support the conclusion that § 4312 is a distinct provision of USERRA mandating reemployment following a period of military service and does not require proof of discrimination in order to enforce a right to reemployment.

2. *Rights and Procedures for Reemployment under §4312*

Employees that leave their civilian employment due to military service are entitled to certain rights to reemployment by the same employer. According to 38 U.S.C. § 4312(a), any person who is absent from their employment position due to service in the uniformed services is entitled to reemployment rights and benefits, and other employment benefits of USERRA, provided they comply with the following three provisions.

First, the person must give advanced written or verbal notice of their military service.[106] The statute requires no particular format for the notice. Recognizing the oftentimes informal relationship between employer and employee, verbal notice is sufficient, although written notice would obviously provide better proof that notice was given.[107] The purpose of the notice is simply to notify the employer of the pending service. The employer has no veto power over the employee's decision to volunteer for military service, or power to challenge an order to service from military authorities.[108]

Additionally, an employee is not required to declare his intent to return to his employer upon the completion of military service prior to leaving.[109] In the view of the employer, this results in an open door that may prevent the employer from hiring a new employee to fill the gap left by the service member. The employer is in essence at the mercy of the service member employee. If the service member employee returns after military service, the employer must displace any replacement workers hired. If the employer chooses to wait out the absence, it may have adverse effects on the efficiency and production of the business.

Despite criticism from the Equal Employment Advisory Council and the U.S. Chamber of Commerce, the Department of Labor has interpreted the notice provision to also act as an anti-waiver

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[105] *Id.* at 1137.
[106] 38 U.S.C. § 4312(a)(1) (2006). Under this section, the "person" able to give notice also includes an appropriate officer from the employee's military unit.
[107] 70 Fed. Reg. 75,246, 75,255.
[108] 70 Fed. Reg. 75,246, 75,256; *see also* 20 C.F.R. §1002.87 (2006) ("An employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services.").
[109] 20 C.F.R. § 1002.88 (2006).

provision of reemployment rights as well.[110] Meaning, if the service member employee tells the employer prior to leaving that he does not intend to seek reemployment upon his return, he still does not forfeit his USERRA rights or protections to seek reemployment. The reemployment right does not mature until after the service member employee returns from military service. Federal regulations also cite to § 4302(b)'s preemption provision as a basis to conclude that an employee cannot waive his or her reemployment rights prior to or during a period of service in the uniformed services.[111] This is consistent with congressional intent that "one of the basic purposes of the reemployment statute is to maintain the servicemember's civilian job as an unburned bridge" which does not require a service member to indicate his decision to return to his previous civilian employment until after his release from service.[112]

Notice of pending military service is required unless military necessity would preclude the giving of advanced notice, or if the giving of such notice is impossible or unreasonable under the circumstances.[113] Department of Defense regulations consider classified missions, or pending or ongoing operations which may be compromised if made public, as the types of service that do not require the member to give advanced notice to the civilian employer.[114]

Second, the cumulative length of the current and all previous absences from the employment position with that particular employer cannot exceed five years.[115] This five year limitation is subject to various exceptions found in § 4312(c)(1)-(4)(E). These exceptions include required weekend and annual training for guard and reserve members, service during domestic or national emergencies, and national security operations and war. It would be the rare occasion that a guard or reservist's service would not fall within one of the exceptions.[116] For example, the extended and frequent missions to support the conflicts in Iraq and Afghanistan are not subject to the five year limitation because they fall under the category of national security missions or wars.

Prior to USERRA's enactment, a battle raged in the courts over whether an employer could deny reemployment to a veteran if the length of the employee's absence due to military service was

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[110] 70 Fed. Reg. 75,246, 75,256-75,257.
[111] 70 Fed. Reg. 75,246, 75,257.
[112] H.R. REP. 103-65(I), *supra* note 61, at 26.
[113] 38 U.S.C. § 4312(b) (2006). According to this subsection the determination of what constitutes "military necessity" shall be made by the Secretary of Defense and will not be subject to judicial review. For example, classified matters will not be reviewed. The determination of what is "impossible or unreasonable under the circumstances" is subject to judicial review.
[114] 32 C.F.R. § 104.3 (2006).
[115] 38 U.S.C. § 4312(a)(2) (2006).
[116] Wedlund, *supra* note 13, at 817.

"unreasonable."[117] In *King v. Saint Vincent's Hospital*, the Supreme Court put the argument to rest, holding that the reemployment provision of the VRRA found in § 2024(d) did not limit the length of a tour of service after which an employee could enforce his reemployment rights.[118] Therefore, any claim by an employer that a returning employee could not be reemployed because the length of their service was unreasonable would fail.

Likewise, USERRA does not state or imply a condition of reasonableness on the length of an employee's absence in order to seek enforcement of reemployment rights. As to time limitations on service, the conditions are clearly stated in USERRA at 38 U.S.C. § 4312(a) and (c). As long as the employee's cumulative length of absence from the employer does not exceed five years, subject to the exceptions of § 4312(c), the employee is entitled to reemployment.

Third, the person must report to or submit an application for reemployment with the employer within the allotted time provided in the statute.[119] The time for submitting an application or reporting to work varies depending on the length of the military service. For example, if the period of service was less than thirty-one days, the person must report to her employer by the beginning of the first full regularly scheduled shift on the first full calendar day following the completion of the period of military service, plus an eight hour period to allow for safe transportation from the place of duty to the employee's home.[120] Therefore, if the employee completes her military service at 1600 (4:00pm) on Tuesday, and has a two-hour drive home, she would be expected to report to her civilian employer for her 0800 shift on Wednesday. This interpretation is consistent with the congressional comments in the statute which seem to grant the employee at least eight hours of rest prior to giving notice and reporting back to work with the civilian employer.[121]

However, one court has held that this should not be interpreted to give an employee an affirmative right to eight hours of rest. In *Gordon v. Wawa, Inc*., an Army reservist was returning home from his weekend reserve duties when he stopped at his civilian job, Wawa convenience store, to pick up his paycheck and obtain a copy of the work schedule.[122] Allegedly he was ordered to stay and work the late shift, without the opportunity to return home and rest.

Following the shift, on his drive home, the reservist fell asleep at the wheel and was killed. The court held that "eight hour period" in

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[117] *See* Manson, *supra* note 16, at 88 n.81.
[118] King v. St. Vincent's Hospital, 502 U.S. 215, 222 (1991).
[119] 38 U.S.C. § 4312(a)(3) (2006).
[120] *Id*. § 4312(e)(1)(A)(i).
[121] *See*, H.R. REP. 103-65(I), *supra* note 61, at 29.
[122] Gordon v. Wawa, Inc., 388 F.3d 78 (3rd Cir. 2004).

38 U.S.C. § 4312(e)(1) did not confer an affirmative right to rest to a returning service member, but merely stated the time limitation to give notice of one's return from service and report back to the employer.[123] Because the reservist did not insist on his rest period, nor did he inform the manager that he had just returned from reserve duty, no reemployment was denied on the basis of military service, and his estate did not have a claim for a violation of USERRA § 4312(e)(1).[124]

The *Gordon* case is noted for its unusual set of facts, which resulted in an answer that does not actually resolve the issue of whether there is a right to eight hours of rest if the service member were to insist on the rest period. *Gordon* appears to say that, while an employer cannot deny reemployment to a returning service member who has waited eight hours after her release from service to report to her civilian employer, a service member who reports back directly without taking advantage of an eight hour rest period has no basis to assert the protection of § 4312(e)(1).

This lack of clarity is troubling because the typical reserve or guard duty is a short term or weekend assignment, where the employer has advanced notice and has worked the contingency into the work schedule. So what would happen if the employer, who was shorthanded on the midnight shift, were to insist that the employee returning from weekend reserve duty that ended at 6;00 p.m. stop at the factory on his drive home to work the midnight shift? Would the employee be subject to discipline if he did not report? Or would the employee be able to assert a right to return home and rest for eight hours prior to reporting back to the employer?

The Department of Labor's view is that the holding in *Gordon* does not interfere with rest or notification periods in the statute, and an employee is not required to give up any portion of the eight-hour period, or any other rest or notification periods as a condition of reemployment.[125] The Department of Labor suggests that if an employer attempts to require an employee to report to or reapply for employment earlier than the times provided for in USERRA, then the employee should seek assistance from VETS or the courts to prevent the employer from enforcing such a policy.[126] But filing a complaint with VETS or the courts may take months or years to settle and may ultimately be more trouble than it is worth, resulting in most employees simply reporting when told.

The less than thirty-one day service period is the traditional situation for guard and reserve personnel who are completing their weekend duty or annual two-week tour, and the type most familiar to

[123] *Id.* at 81-82.
[124] *Id*. at 83-84.
[125] 70 Fed .Reg. 75,246, 75,259.
[126] *Id.*

the civilian sector. In recent times however, it has been typical to see guard and reserve units deployed in support of various roles in the war on terrorism for more than 180 days. For those persons serving more than 180 days, they are required to submit an application for reemployment to their employer not later than thirty days after the completion of their service.[127] For those serving between thirty-one and 180 days, there is a fourteen day period to apply for reemployment.[128]

There are special time provisions for those who are hospitalized for or convalescing from an illness or injury occurring or aggravated during military service.[129] The employee is not required to report back to his employer until recovered from the service connected injury. However, the period of recovery cannot exceed two years.[130] In practical terms, those reserve or guard members who are injured in the line of duty are typically kept on active duty while convalescing under military care.[131] Therefore, once the member was sufficiently recovered, the member would be discharged from active duty and the special convalescent provisions would not even apply unless the member underwent additional medical treatment outside of the military.

Even if a person fails to report or apply for employment or reemployment within the required time period, he does not automatically forfeit his right to reemployment and benefits under USERRA. Instead, the employee will be subject to any discipline for absence from work in accordance with the company's established policies, conduct rules and general practices, but he retains the right to reemployment.[132]

3. *Circumstances Where Reemployment is Not Required*

An employer has three statutory defenses for denying reemployment to a former employee returning from military service. First, an employer is not required to reemploy the returning service member if a change in the employer's circumstances would make reemployment impossible or unreasonable.[133] Second, an employer is not required to reemploy an employee who has incurred or aggravated a disability during military service, if reemploying such a person would impose an undue hardship on the employer.[134] Third, reemployment is not required if the employment was only of a brief or nonrecurring nature, and there is no reasonable expectation that the employment will

[127] 38 U.S.C. § 4312(e)(1)(D) (2006).
[128] *Id.* § 4312(e)(1)(C).
[129] *Id.* § 4312(e)(2)(A).
[130] *Id.*
[131] Manson, *supra* note 16, at 67.
[132] 38 U.S.C. § 4312(e)(3) (2006).
[133] *Id.* § 4312(d)(1)(A).
[134] *Id.* § 4312 (d)(1)(B)

continue indefinitely or for a significant period. The employer has the burden to prove impossibility, undue hardship, or the temporary nature of the employment.[135]

a. Impossible or Unreasonable

While an employer can assert an affirmative defense against USERRA claims, the defense of impossibility or unreasonableness "must be narrowly construed."[136] Courts have held that the creation of a useless position, or mandated employment where there has been a reduction in force that would have included the veteran, are the type of circumstances where reemployment may be found to be unreasonable.[137] However, the fact that the position has been filled in the veteran's absence or no opening exists does not make reemployment unreasonable.[138] As the Fifth Circuit Court of Appeals stated in *Cole v. Swint*, "[i]f mere replacement of the employee would exempt an employer from the Act, its protections would be meaningless."[139] In a situation where the service member employee has been replaced while absent due to military service, the burden is on the employer to displace the replacement worker[140] or ensure that the returning employee is placed in a position of like seniority, status and benefits.

One case making this burden on the employer abundantly clear was *Fitz v. Board of Education*, where the court rejected the Board of Education's argument that removing a tenured teacher from a position to accommodate the plaintiff's reemployment would violate the collective bargaining agreement between the teacher's union and the Board.[141] The court cited to the Supreme Court in *Accardi v. Pennsylvania*,[142] where it stated that "[n]o practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."[143] The court

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[135] *Id.* § 4312(d)(2).
[136] 70 Fed. Reg. 75,246, 75,261.
[137] Kay v. General Cable Corp., 144 F.2d 653, 655 (3rd Cir. 1944).
[138] *Kay,* 144 F.2d at 656; *see also* Davis v. Halifax County School System*,* 508 F. Supp. 966, 968 (E.D. NC 1981) ("It is not sufficient excuse that another person has been hired to fill the position . . . ."); Nichols v. Department of Veterans Affairs, 11 F.3d 160, 163 (Fed. Cir. 1993) (stating that a filled position does not make it unavailable—returning veteran is entitled to position even if it means displacing other worker. These hardships are envisioned by the Act.).
[139] Cole v. Swint, 961 F.2d. 58, 60 (5th Cir. 1992).
[140] *See* Anthony v. Basic American Foods, Inc., 600 F. Supp. 352, 357 (N.D.Ca. 1984) (finding that precedent indicates the bumping of another employee in favor of the returning veteran is acceptable).
[141] Fitz v. Board of Education, 662 F. Supp. 1011, 1014 (E.D. Mich. 1985).
[142] 383 U.S. 225 (1966).
[143] *Fitz*, 662 F. Supp. at 1014 (citing Accardi v. Pennsylvania Railroad, 383 U.S. 225, 229 (1966)).

also rejected the Board's argument that canceling a contract between a tenured teacher in favor of the plaintiff would violate state law, basing its reasoning on the fact that the reemployment rights provision superseded any state law to the contrary.[144]

There are, however, some legitimate changes in circumstance that may relieve an employer of its duty to rehire a returning veteran. One example is where the employer has sold the business to another.[145] Whether the new employer is obligated to rehire the service member is based on whether the new owner is a "successor in interest" of the business. The term "employer" under the Act includes a successor in interest to a person, institution, organization, or other entity that was considered an employer.[146]

In order to determine if one is a successor in interest, courts have looked to the timing of the transfer of the business and the nature of the transaction. An early case examining the issue in relation to § 9(b) of the Universal Military Training and Service Act[147] was *Cox v. Feeders Supply Company*.[148]

In *Cox*, the plaintiff had been employed for approximately ten months by Feed and Farm Supply Company prior to leaving for military service.[149] During the plaintiff's absence, Feed and Farm Supply Company sold ninety percent of its inventory to the defendant corporation, Feeders Supply Company, along with office furniture and equipment.[150] Feeders Supply Company did not purchase Feed and Farm's accounts receivable, trucks, or the good will of the business, nor did it assume any of Feed and Farm's obligations.[151] After the sale, Feed and Farm immediately went out of business, so when the plaintiff returned from his military service, he sought reemployment with Feeders Supply.

The Sixth Circuit Court affirmed the decision of the lower court which found there was no showing of business continuity between Feed and Farm and Feeders Supply and therefore, Feeders Supply was not a successor in interest.[152] The court further found that the plaintiff was never an employee of Feeders Supply prior to his entry into military service, therefore he could not obtain now "what he had never

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[144] *Id.*
[145] *Basic American Foods, Inc.,* 600 F. Supp. at 357.
[146] 38 U.S.C. § 4303(4)(A)(iv) (2006).
[147] Enacted as part of the Selective Service Act of 1948, Pub. L. 80-759, 62 Stat. 604 (1948) (The provision provided for reemployment of returning veteran employees unless a change in the employer's circumstances made in impossible to do so.).
[148] Cox v. Feeder's Supply Company, 344 F.2d. 924 (6th Cir. 1965) (per curium).
[149] *Id*. at 924.
[150] *Id*. at 925.
[151] *Id*.
[152] *Id*.

possessed." [153] Because Feeders Supply was never an employer of the plaintiff, they were not obligated by statute to reemploy him.

In a later case, the Tenth Circuit similarly found that where there was no common ownership or control between the buyer and seller, the new owner was not a successor in interest.[154] In that case, the plaintiff was employed by KBTR radio, owned by Mullins Broadcasting Company. The plaintiff left his employment after being drafted into military service and while he was absent the Combined Communications Corporation purchased all of Mullins' stock and arranged a sale of KBTR to Mission Broadcasting Company.[155] Mission Broadcasting Company moved the station to another location, changed the call letters to KERE, and operated under a different format.[156]

Shortly after the sale became final, the plaintiff was discharged from military service and applied to Mission Broadcasting for reemployment.[157] The court held that based on the facts and circumstances such as "a complete break in the continuity of the business as to its location, specific nature, or format, its public identity, and its employees thus allowing the assets to pass to entirely different owners," Mission Broadcasting was not a successors in interest to Mullins Broadcasting.[158]

Under a different set of circumstances, a district court found the successor to the original employer joint and severally liable for failing to reemploy a service member employee.[159] The plaintiff, Ken Chaltry, was a radio announcer employed by Ollie's Idea, Inc., when he received a draft notice in June 1972. Chaltry informed his employer of the impending military service and requested a few weeks off from his job.[160] When he returned from his time off, the plaintiff informed the owner of Ollie's Idea, George Freeman, that he was not required to report to military duty for another six months and wished to continue working at the radio station. At this time, the plaintiff was told that he was not entitled to the position because he had already been replaced.[161]

The plaintiff filed a complaint with the Department of Labor, which prompted Mr. Freeman to issue a letter promising that Chaltry would have a position when he returned from his military service.[162] When Chaltry was discharged in December 1994, he applied to Ollie's

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[153] *Id*.
[154] Wimberly v. Mission Broadcasting Company, 523 F.2d 1260, 1261 (10th Cir. 1975).
[155] *Id.*
[156] *Id*.
[157] *Id*.
[158] *Id.* at 1262.
[159] Chaltry v. Ollie's Idea, Inc. 546 F. Supp. 44 (W.D. Mich. 1982).
[160] *Id.* at 47.
[161] *Chaltry,* 546 F. Supp. at 47.
[162] *Id.* at 47.

Idea for reemployment and was told there were no openings.[163] Plaintiff was later offered a temporary position, which he refused. In 1977, Laidlaw Associates, Inc. purchased the radio station from Freeman and was informed of the outstanding claim against Freeman and Ollie's Idea for failing to reemploy the plaintiff.[164]

Aware of the earlier decisions on successorship, the district court believed that the circumstances of this case called for a broader interpretation of successor liability. This interpretation was warranted because Laidlaw was aware of the plaintiff's claim against Ollie's Idea when it purchased the company and it appeared that there was an agreement, based on the terms of the sale, that the plaintiff not be reemployed.[165]

The court also embraced the plaintiff's argument to consider successorship in the context of civil rights and labor cases. In those cases, nine factors were used to determine if a successor company would be liable for the unlawful employment practices of the predecessor.[166] Finding a majority of those factors existed, and the fact that the circumstances of Ollie's and Laidlaw had not changed enough to make it impossible or unreasonable to reinstate Chaltry, the court found Ollie's Idea and Laidlaw jointly and severally liable for failing to reemploy the plaintiff in violation of the reemployment provision of the Vietnam Era Veterans' Readjustment Assistance Act in existence at that time.[167]

The Eighth Circuit Court of Appeals also adopted the nine factors as the test to apply in deciding successorship under the Vietnam Era Veteran's Readjustment Act where the Act, as in the case with USERRA, did not define "successor."[168] In *Leib v. Georgia Pacific Corporation*, the court found that the nine factors used by the courts in *Chaltry* and *EEOC v. MacMillan* were adequate to "properly balance the rights of employer and returning veterans and best effectuates Congress' intent under the veterans' reemployment statute" and it was

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[163] *Id*. at 48.
[164] *Id.*
[165] *Id*. at 50.
[166] *Chaltry*, 546 F. Supp. at 51 (citing EEOC v. MacMillan Bloedel Container's Inc., 503 F.2d 1086, 1094 (6th Cir. 1974)) (using the following nine factors to determine successor liability in a Title VII case: (1) whether the successor company had notice of a claim; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same facilities; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under the substantially same working conditions; (8) whether he uses the same machinery, equipment, and methods of production; and (9) whether he produces the same product).
[167] *Chaltry*, 546 F. Supp. at 52.
[168] Leib v. Georgia Pacific Corp., 925 F.2d 240 (8th Cir. 1991).

error for the lower court to focus exclusively on continuity of ownership and control.[169]

Since successorship is not defined in USERRA, a broad interpretation in favor of the veteran would be consistent with congressional intent regarding all aspects of USERRA. Therefore, the nine factor test, requiring an examination of all the facts and circumstances of the predecessor and successor relationship, is a proper method to determine who is a successor employer under USERRA.

b. Undue Hardship

When an employee returns from military service with a disability that was incurred or aggravated during service, the employee may have a defense against the obligation of reemployment if such reemployment would impose an undue hardship on the employer.[170] The USERRA definition of "Undue hardship" mirrors the ADA: "actions requiring significant difficulty or expense."[171] Both statutes list the same factors to consider when determining if an action involves significant difficulty or expense: the nature and cost of the action needed; the overall financial resources of the employer; the overall size of the business; and the type of operation of the employer.[172]

At present, there are no cases which specifically examine the issue of undue hardship under USERRA. Section III.C.5 of this article, however, will discuss cases regarding placing returning employees, who are no longer qualified for their pre-service position due to disability, in positions of like status, seniority and pay for which they are qualified.

c. Temporary Position

The employer's third defense is proving that the position the service member left was only temporary in nature and no expectation of continued employment was created. The statute describes such temporary employment as "employment for a brief, non-recurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." Seasonal employment can be temporary or non-temporary depending on the circumstances of employment. A seasonal position has been held to be non-temporary and eligible for reemployment protection where the employee can establish a customary continuance in his employment from one season to the next and recognition of the employee's preferential claims to his

[169] *Leib*, 925 F.2d at 247.
[170] 38 U.S.C. § 4312(d)(1)(B) (2006).
[171] 38 U.S.C. § 4302(15) (2006); *see also* 42 U.S.C. § 12111(10) (2006); Green, *supra* note 96, at 228.
[172] 38 U.S.C. § 4303(15) (2006).

job when work is resumed.[173] If there is an accumulation of preferential hiring rights and seniority related benefits, the position will be viewed as non-temporary.[174]

Just because the employer claims that the position is temporary, or the terms of the collective bargaining agreement classify the position as temporary, does not necessarily make it so. In *Stevens v. Tennessee Valley Authority*, the plaintiff was an hourly construction worker on a project with the Tennessee Valley Authority (TVA) when he was ordered to a period of active duty with his guard unit.[175] Upon his return, he made a timely application for reemployment in his old position, which was denied; instead, he was offered a position as a "new" construction worker.[176] TVA's position was that the applicable collective bargaining agreement considered all persons filling trade and labor positions or construction work positions as temporary employees; therefore, TVA was not required to reemploy the plaintiff.[177]

Agreeing with the lower court, the court rejected TVA's argument based on precedent that a veteran's rights to reemployment may not be overcome by language in a collective bargaining agreement.[178] An employer may create temporary and non-temporary positions within its workplace, but just because it designates the position as temporary does not make it so if the characteristics of that position make it non-temporary in nature.[179]

The court then went on to describe the test to be used to determine if a position is non-temporary: "whether the veteran, prior to his entry into military service, had a reasonable expectation, in light of all the circumstances of his employment, that his employment would continue for a significant or indefinite period."[180] Some of the

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[173] *See* Stanley v. Wimbish, 154 F.2d 773, 775 (4th Cir. 1946) (holding that the proper test for a non-temporary position was whether the employee is customarily continued in his employment with recognition of his preferential claims to his job, recognizing that an employee can continue to hold a position in a seasonal industry at times when no work is going on) (citing NLRB v. Waterman S.S. Co., 309 U.S. 206, 219 (1940)). In *Waterman*, it was shown that the positions held by the ship's sailing crew were not temporary despite long periods of inactivity when the ship was in dry dock for repairs and the crew was no longer being paid by the ship's owners. It was customary that once the ship was repaired and ready for the next voyage, the previous crew would resume their positions of employment. *Waterman,* 309 U.S. at 213-19.

[174] Stevens v. Tennessee Valley Authority, 687 F.2d 158, 162 (6th Cir. 1982).

[175] *Id.* at 160.

[176] *Id*.

[177] *Id*.

[178] *Id.* at 160-161 (citing Beckley v. Lipe-Rollway Corp., 448 F. Supp. 563 (N.D.N.Y. 1978)).

[179] *Stevens*, 687 F.2d at 161.

[180] *Id*. The Court based it's holding on precedent in *Bryan v. Griffin*, 166 F.2d 748 (6th Cir. 1948) (finding employment terminable at will but for an indefinite period is non temporary) and Moe v. Eastern Air Lines, 246 F.2d 215, 219 (5th Cir. 1957) ("[W]e think that the controlling determination is whether, regardless of the contract of

circumstances to consider are: the accumulation of seniority-related benefits, such as pension credits and preferential hiring rights; and, the expected length of the employment.

In *Stevens*, the plaintiff was originally hired for the life of a long-term construction project, which continued through the plaintiff's absence due to military service and through the length of the court proceedings. These circumstances provided evidence that the position was not temporary.[181]

4. *Reemployment Positions for Returning Employees*

An employee who meets the qualifications of 38 U.S.C. § 4312 "shall be promptly reemployed" by their civilian employer following the completion of military service.[182] What exactly is meant by "prompt" is not defined in the statute, but can be interpreted to mean "as soon as practicable under the circumstances of each case."[183] Despite this vague initial statement, the applicable regulation goes on to instruct that, absent unusual circumstances, reemployment "must occur within two weeks of the employee's application for reemployment."[184] The regulation, however, recognizes that reinstatement following several years of military service may require more time to reassign or terminate replacement employees.[185] However, employers should not take that to mean they can delay or deny reemployment because the pre-service position has been filled, or because no comparable position is currently vacant.[186] As the discussion of § 4312 indicates, the employee has the absolute right to be reemployed by his or her pre-service employer.

The exact position to which the employee shall be returned depends on the length of military service, and whether the employee has become disabled due to military service. As to the length of service, the statute differentiates between those with less than ninety-one days service and those with more than ninety days. The disability provision differentiates between those who are not qualified to return to the entitled position of employment due to the service-related disability and those who are not qualified for some reason other than the disability.[187] Applicable to all situations is the "escalator principle."[188] That is, the

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employment, there was a reasonable expectation that the employment would be continuous and for an indefinite time.").

[181] *Stevens*, 687 F.2d at 163.

[182] 38 U.S.C. § 4313(a) (2006).

[183] 20 C.F.R. § 1002.181 (2006).

[184] *Id.*

[185] *Id*.

[186] 70 Fed. Reg. 75,246, 75,269.

[187] 38 U.S.C. § 4313(a)(3)-(4) (2006).

[188] *See* Fishgold v. Sullivan Dry Dock & Repair Corporation, 328 U.S. 275, 284-85 (1946). "Escalator principle" is taken from language used by the Court to describe the

notion that the employee should return to the position he or she would have held if continuously employed without any interruption due to military service.[189]

This concept came from the Supreme Court's interpretation of § 8(c) of the Selective Service Training Act of 1940 in *Fishgold v. Sullivan Dry Dock & Repair Corporation.*[190] Section 8(c) provided that any person who was restored to employment following military service was to be treated as being on furlough or leave of absence during the period of military service and would not lose any seniority or status due to the military service or training.[191]

The Court found that the restoration and seniority provisions of § 8 protected the veteran against loss of position and loss of seniority because of absence due to uniformed service.[192] The term "escalator principle" evolved from language in the opinion stating that upon returning from military service, the veteran "does not step back on the escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war."[193] The Court viewed the statute as not only protecting the veteran from being penalized for service, but to also gaining advantage over those who did not serve.[194] This enduring principle is codified in § 4313 of USERRA.[195]

Looking at the time in service provisions of § 4313 of USERRA, those employees serving less than ninety-one days are to be returned to the position of employment they would have held absent the interruption in employment, as long as they are qualified to perform the duties of the post service position.[196] The statute defines "qualified" as "having the ability to perform the essential tasks of the position."[197] If the employee is not qualified to hold the post-service position, and reasonable efforts have been made to qualify the employee but have failed, then the employee shall be employed in the position of employment she held prior to the commencement of military service.[198]

The first clause follows the escalator principle by treating the employee as if he were never absent. The second clause takes the employee back to moment they left employment for military service

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position the employee returns to following service in the military. "Thus he does not step back on the seniority escalator at the point he stepped off." *Id.*

[189] Wedlund, *supra* note 13, at 817.

[190] 328 U.S. 275 (1946).

[191] Pub. L. 76-183, 54 Stat. 885 (1940).

[192] *Fishgold,* 328 U.S. at 285.

[193] *Id*. at 284-85.

[194] *Id*. at 284.

[195] 38 U.S.C. §4313 (2006); *see also* 32 C.F.R. § 104, Appendix A, Part J, Number 1-2.

[196] 38 U.S.C. § 4313(a)(1)(A) (2006).

[197] *Id*. § 4303(9).

[198] *Id*. § 4313(a)(1)(B).

because they are not qualified to perform the duties required of the escalated position. These concepts will guide the routine absences due to military service, such as weekend duty, the two-week annual training period, or training courses that typically last thirty days.

For short duty, such as weekend drill, employers are usually aware of the employee's military obligations and the employer expects the employee to return to the same position when the military service period is complete. It is not expected that the employer would hire a replacement worker for such a short period of time. Beyond ninety days however, the statute does not require the employer to put the returning service member back in the exact same position.[199] This addresses situations where an employer may have hired a replacement or eliminated that exact position altogether. In these cases, the statute gives the employer flexibility in regard to placement on the service member's return.

For employees who are absent for more than ninety days, the statute directs the return of the employee to the position she would have held if continuously employed by the employer, or a position of like seniority, status and pay, if qualified to perform those duties.[200] If the employee is not qualified or unable to become qualified to perform the duties of the escalated position, then he should be returned to the position he left or one of like seniority, status, or pay as the one he left.[201]

A position of "like status" is often the subject of dispute between the employer and the employee because "status" is not defined in the statute. A determination of "like status" would require an examination of the duties and responsibilities of the previous position as compared to the new position. "[A] subsequent position must carry with it like responsibility, duties and authority if it is to be of like status and thus meet the requirements of the statute."[202]

When an employee returns from military duties, the employer is responsible for making a reasonable effort to qualify the employee for the position to which he or she is entitled. Reasonable efforts are defined as "actions, including training provided by the employer, that do not place an undue hardship on the employer."[203] This may include providing upgrade training the employee missed due to the absence, or administering a makeup examination for promotion or skills certification.[204]

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[199] *Id.* § 4313(a)(2).

[200] *Id.* § 4313(a)(2)(A).
[201] *Id*. § 4313(a)(2)(B).
[202] Nichols v. Department of Veterans Affairs, 11 F.3d 160, 164 (Fed. Cir. 1993).
[203] 38 U.S.C. § 4303(10) (2006).
[204] *See* 70 Fed. Reg. 75,246, 75,272; *see also* Manson, *supra* note 16, at 72.

Under the escalator principle, what goes up may also be required to go down. If the employee would have been demoted, laid off, or terminated but for the military absence, then those adverse consequences are applicable to the returning employee.[205]

5. *Reemployment and Disability Accommodation*

In the case of an employee who returns from military service with a disability, the employer is required to make reasonable efforts to accommodate the disability while returning the employee to the position he would have occupied if his employment had not been interrupted by military service.[206] Thus, the escalator principle still applies in cases of disability.

The employer, therefore, has two obligations. First, the employer must make reasonable efforts to qualify the employee for the elevated position.[207] Second, the employer must make reasonable efforts to accommodate the disability.[208] The same definition of "qualified" applies here as in the reemployment of non-disabled individuals: being able to perform the essential tasks of the position.[209]

If reasonable efforts to accommodate the disability and qualify the employee for the elevated position fail, the employer remains obligated to place the employee in a different position.[210] The employer must make reasonable efforts to accommodate the disability and qualify the employee in one of two types of different positions. The first different position is any other position in which the employee is qualified or can become qualified to perform, which is equivalent in seniority, status, and pay.[211] If this position does not exist, then the employer must place the person in a position which is the nearest approximation in terms of seniority, status, and pay consistent with the circumstances of the case.[212]

Hembre v. Georgia Power Company[213] provides a good example of what is required when reemploying a veteran with a disability under the terms of the Veterans' Reemployment Rights Act. The plaintiff was employed in the General Repair Shop of Georgia Power prior to leaving for military service in 1972.[214] In 1974, the plaintiff applied for reinstatement with Georgia Power after he was

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[205] *See* 20 C.F.R § 1002.194 (2006); *see also* Manson, *supra* note 16, at 71-72.
[206] 38 U.S.C. § 4313(a)(3) (2006).
[207] *See* 38 U.S.C. § 4313(a)(2)(B) (2006).
[208] *See id.* § 4313(a)(3).
[209] 20 C.F.R. § 1002.198 (2006); *see also* 20 C.F.R. § 1002.226 (2006).
[210] 38 U.S.C. § 4313(a)(3) (2006).
[211] *Id.* § 4313(a)(3)(A).
[212] *Id*. § 4313(a)(3)(B).
[213] Hembre v. Georgia Power Company, 637 F.2d 423 (5th Cir. 1981).
[214] *Id.* at 425.

discharged from the military due to a service related injury that left him blind in one eye.[215] He applied for a particular position as an apprentice electrician for which he had the requisite seniority, but due to his disability he was not medically qualified to perform all of the tasks of the position.[216] Instead, the company placed the plaintiff in an unskilled and lower paying clerk position in the parts warehouse.[217]

About two years later, the company encouraged plaintiff to bid for the more desirable Meterman C position in the Central Meter Shop. The plaintiff had the most seniority of any other bidder and was awarded the position. However, because of the terms of the collective bargaining agreement, he would start anew in the seniority rankings for layoff purposes within the Central Meter Shop.[218] At that point, the plaintiff rejected the position and sought assistance from the Department of Labor, claiming that the company had failed to place him a position of like, seniority, status and pay or the nearest approximation thereof.[219]

After examining the characteristics of both positions, the Court of Appeals affirmed the lower court's decision that the clerk position plaintiff was originally assigned was not comparable to the apprentice position that the plaintiff would have held had he not been disqualified due to his disability.[220] The company argued that plaintiff should have accepted the Meterman C position when it was offered so that he would only have a claim for greater seniority rather than reemployment.[221] The court rejected this argument, stating that refusal to accept a position that does not comply with the law should not be held against the plaintiff.[222] The company had an obligation to place the plaintiff in a position that was of like seniority, status, and pay as the apprentice electrician even if that meant going outside of his previous shop or department.[223]

Regardless of whether the plaintiff had to be transferred out of his shop or department, he was still entitled to keep his seniority despite a collective bargaining provisions to the contrary.[224] The court reasoned that the application of principles from seniority systems cannot deprive a veteran of the benefits Congress has provided for by statute.[225] An

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[215] *Id*.
[216] *Id*.
[217] *Id*.
[218] *Id*. at 426.
[219] *Id*.
[220] *Id*. at 427. The court noted that the Meterman position was actually comparable to the apprentice electrician position in skill, pay, and benefits. As compared to the clerk position, the Meterman position was classified as a highly skilled, and the pay difference over a four year period was approximately $12,750. *Id*. at 427 n.5.
[221] *Hembre*, 637 F.2d at 427.
[222] *Id*. at 428.
[223] *Id.*
[224] *Id.* at 429.
[225] *Id.* (citing McKinney v. Missouri-Kansas-Texas Railroad, 357 U.S. 265, 268 (1958)).

employer will not be relieved of its duty to provide a comparable position unless it can prove that placing the returning employee in such a position will result in an undue hardship on the employer.[226]

Using the same definition as in the ADA, it is an affirmative defense for the employer if such accommodation, training or effort by the employer to return the employee to a position of like seniority, status, and pay as the one he would have but for the disability would impose an "undue hardship."[227] Undue hardship means actions requiring significant difficulty or expense.[228] "The gauge for determining undue hardship is to compare the financial costs associated with the reasonable efforts or accommodations in relation with the overall financial resources of, persons employed at, effect of expenses and resources, or the impact otherwise of the action on the facilities operation."[229]

Despite similar language in USERRA and the ADA, it is important to differentiate between the two, for while USERRA and the ADA intersect, they do not always overlap. For example, if a returning service member is denied reemployment because their service-related disability will require workplace accommodation, they may have a claim under the ADA, but not USERRA. If the same service member is refused reemployment because he no longer has the skills or knowledge to perform the job he was returning to because of his disability, then he may have a claim under USERRA, but not the ADA.[230]

The ADA addresses discrimination in employment due to disability as defined specifically within that statute, while § 4313 of USERRA addresses a refusal to qualify or accommodate an employee returning from uniformed service who is no longer qualified for his pre-service or escalator position because of a service-related disability.[231] The term "disability" is not even defined in USERRA. The crux of reemployment under § 4313 is whether the employee is qualified for the position to which he or she is returning. Unlike the ADA's concept of "qualified individual with a disability," USERRA's use of the term "qualified" has no relation to the disability.[232]

There is a final placement consideration under § 4313(a) that applies when an employee cannot be returned to employment because of an inability to be qualified to perform either the escalator position or the

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[226] 38 U.S.C. § 4312(d)(2)(B) (2006).
[227] *Id*.
[228] 38 U.S.C. § 43103(15) (2006).
[229] Green, *supra* note 96, at 228.
[230] Beasley, Jr & Pagnattaro, *supra* note 49, at 168.
[231] *Compare* 38 U.S.C. § 4313 (2006) (USERRA applies to all employers regardless of the number of person employed by them) *and* 42 U.S.C. 12111(5)(A) (2006) (The ADA is applicable to employers with fifteen or more employees); *see also* 70 Fed. Reg. 75,246, 75,277.
[232] *Compare* 38 U.S.C.S. §. 4303(9) (2006) *with* 42 U.S.C.S. § 12111(8) (2006).

position held at the commencement of military service for a reason other than disability. In that case, the employee should be placed in any other position in the nearest approximation to the escalator or the pre-service position that the employee is qualified to perform, with full seniority.[233]

In trying to determine how and when to apply the preceding tests, it is important to keep in mind the purpose of USERRA. The underlying intention of §§ 4312 and 4313 is to provide prompt reemployment to the employee returning from uniformed service. The statute essentially eliminates excuses by the employer that the position is no longer available, or the veteran no longer has the skills necessary to fill that position. The statute obligates the employer to provide the training necessary to reemploy the veteran. Only in extreme cases, would the employer be able to assert the affirmative defense that the training would result in an undue hardship.

6. *Reemployment by the Federal Government and Certain Federal Agencies*

Federal employment is managed by an intricate set of administrative procedures that are overseen by the Office of Personnel Management.[234] Employment in the federal system can be much different than being employed by a private employer. Therefore, separate provisions in USERRA address reemployment by the federal government. In general, those persons eligible for reemployment under § 4312 will be reemployed subject to the rules in 38 U.S.C. §4313, just as a private sector employee would.[235] However, in certain situations, the Director of the Office of Personnel Management will have to place returning employees in alternate positions if the federal agency of previous employment no longer exists, or if it is impossible or unreasonable to reemploy the person with the original agency.[236]

For those employees who are returning to employment with a select group of federal agencies identified in 5 U.S.C.

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[233] 38 U.S.C. § 4313(a)(4) (2006).
[234] *See generally* 5 U.S.C. § 2101 (2006).
[235] 38 U.S.C. § 4314(a) (2006).
[236] *Id.* § 4314(b). Other situations requiring placement by the Director of the Office of Personnel Management are when the returning employee was formerly employed in a position with the judicial or legislative branch and it is now impossible or unreasonable to return the individual to that position, and if the adjutant general of a State determines that it is impossible or unreasonable to return an employee to a National Guard technician position that is governed by 32 U.S.C. § 709. 38 U.S.C. § 4314 (c)-(d) (2006). A National Guard technician is a unique category of military member. A Guard technician maintains a dual status as both a federal civilian employee and a National Guard member while performing their employment duties. *See* 32 U.S.C. § 709 (2006); 10 U.S.C. § 10216(a) (2006)).

§ 2302(a)(2)(C)(ii),[237] which deal primarily with intelligence matters, a separate section governs reemployment matters. It dictates that the head of each agency referred to in § 2302(a)(2)(C)(ii) prescribe procedures for ensuring rights under USERRA are afforded to the employees of that particular agency.[238]

Because of the nature of the mission of those agencies, more leeway is given to the agency on reemployment matters. No absolute rules for reemployment are mandated by statute. The head of the agency is required to prescribe procedures to ensure, to the maximum extent practicable, that persons absent due to uniformed service are reemployed in a manner similar to the requirements in § 4313; however, that section does not have to be strictly followed.[239]

And if § 4313 is not followed, or if reemployment is not provided to the returning employee, there are fewer methods of recourse for the returning employee. A determination by the agency's designated official that reemployment is unreasonable is not subject to judicial review.[240] However, the affected employee may seek assistance from the Department of Labor and the Office of Personnel Management in finding an alternate position with another agency.[241]

D. Rights, Benefits and Obligations of Absent Employees

Along with reemployment protections, USERRA guarantees that seniority, and the rights and benefits determined by seniority, are also protected while the employee is absent due to military service.[242] Separate sections specifically address health plan coverage and employee pension plan coverage.[243] These provisions are additional expressions of the longstanding goal of veterans' reemployment laws since the Selective Service Training Act of 1940,[244]—to return the employee to the position he would have been in had his civilian employment not been interrupted by military service.

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[237] Currently those agencies are: the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities.
[238] 38 U.S.C. § 4315(a) (2006).
[239] *Id*. § 4315(b).
[240] 38 U.S.C. § 4315(c)(3) (2006).
[241] *Id*. § 4315(d).
[242] *Id*. § 4316.
[243] *Id*. §§ 4317-18.
[244] Manson, *supra* note 16, at 77.

1. *Seniority and Other Rights and Benefits*

Two different types of benefits are guaranteed by 38 U.S.C. § 4316, depending on the status of the person as either a returning employee or an absent employee. Regarding a returning employee, a person reemployed following a period of uniformed service "is entitled to the seniority and other rights and benefits" they had earned prior to leaving for service, "plus the additional seniority and rights and benefits [they] would have attained if . . . continuously employed."[245]

An employee absent due to military service is treated as if he remained employed by the civilian employer, but is on an unpaid leave of absence or furlough while performing military service.[246] During the period of employment interrupted by military service, an employer cannot require the employee to use vacation or annual (or similar) leave to cover the absence.[247] However, an employee shall be permitted to request that any available paid vacation or annual leave time be used during all or part of his or her absence due to military service.[248] While absent, the service member employee is entitled to any non-seniority based rights or benefits that are provided by the employer to persons on furloughs or leaves of absence.[249] This includes not only rights and benefits existing at the time of commencement of service, but also those that may be implemented during the service member's absence.[250]

The type of non-seniority benefits that an employee may be entitled to will depend on the policies, practices or agreements within the workplace. If no rights or benefits are normally given to employees on leaves of absence or furloughs, then no special rights and benefits are created just for employees absent due to military service.[251]

If there are existing rights and benefits, those benefits are guaranteed to the absent employee unless the employee has provided written notice of intent not to return to that position of employment upon release from military duty.[252] The employer has the burden of proving that the person provided clear written notice of his intent not to return and that the person was aware of the specific nature of the rights and benefits he was giving up.[253]

The Supreme Court has spoken on the issue of a returning employee's entitlement to benefits based on seniority in the context of the pre-USERRA reemployment rights statutes. In *Accardi v.*

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[245] 38 U.S.C. § 4316(a) (2006).
[246] *Id.* § 4316(b)(1)(A).
[247] *Id.* § 4316(d).
[248] *Id.*
[249] *Id.* § 4316(b)(1)(B).
[250] *Id.*
[251] *See* 20 C.F.R. § 1002.150 (2006).
[252] 38 U.S.C. § 4316(b)(2) (2006).
[253] *Id.* § 4316(b)(2)(B).

Pennsylvania Railroad Company,[254] the plaintiffs sought an increase in severance payments based on seniority under § 8 of the Selective Service Training Act of 1940, which like § 4316 of USERRA, guaranteed that a service member be returned to previous employment without loss of seniority or benefits derived from seniority.[255] The severance payments were based on the length of "compensated service" with the employer, so the employer excluded the years that the plaintiffs were absent from the railroad due to military service, arguing that the severance pay was not based on seniority but an employee's actual length of compensated service.[256]

The plaintiffs argued that their military service years should have counted toward the years of "compensated service" with the employer, otherwise they would be denied a benefit based on their seniority. Noting that the term "seniority" was not defined in the Act, the Court cautioned that regardless of the meaning given by private employers, they cannot deprive a veteran of substantial rights guaranteed by the statute.[257]

"Seniority" was to be given a meaning consistent with the intention of Congress—that a returning service member should be treated as if he had been continuously employed by the employer during the period of service in the armed forces.[258] The Court rejected the railroad's argument that the severance pay formula was based on actual hours worked. In the Court's view, the determination of the amount of severance pay was based on a system of seniority such that, the longer one worked for the railroad, the more severance pay the worker was entitled to.[259] Therefore, the Court held that the failure to include the plaintiffs' military service time in the calculation of "compensated service" with the railroad was a violation § 8 of the 1940 Act.[260]

In contrast, where a benefit is determined by actual hours on the job and given as a form of deferred compensation, the Court has held that a returning employee is not entitled to credit for time spent in the military service towards the accrual of that type of benefit. In *Foster v. Dravo Corporation*,[261] the Court determined that a returning employee was not entitled to missed paid vacation benefits which were intended as a form of short term compensation for work performed and not as an entitlement based merely on length of service.[262]

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[254] 383 U.S. 225 (1966).
[255] *Id.* at 226.
[256] *Id.* at 228-29.
[257] *Id.* at 229.
[258] *Id.*
[259] *Id.* at 230.
[260] *Id.* at 230-31.
[261] 420 U.S. 92 (1975).
[262] *Id.* at 100.

Consistent with *Accardi*, the Court determined that the returning employee would be eligible for an increase in the length of paid vacation time because the length of vacation time was based on seniority. However, entitlement to vacation days that were missed because the employee was absent due to military service would not be awarded.[263]

This analysis highlighted the difference between the terms governing the length of the vacation and the terms governing eligibility for receiving vacation time. Length was based on seniority and protected, while eligibility for earning vacation days was based on actual hours worked and not protected. The returning employee was placed in no worse position than anyone else who was on a leave of absence for a reason other than military service.

The decision is consistent with the escalator principle and with other Supreme Court decisions holding that benefits based on more than simple continued status as an employee are not protected by statute.[264] In cases disputing entitlement to increases in pay, vacation benefits, promotions and similar work-related benefits, the factual analysis will begin with whether the system is based on seniority alone, or on actual hours worked or performance on the job.[265] This analysis will determine whether the escalator principle should apply.

Another important protection contained in 38 U.S.C. § 4316 is a protection from discharge without cause for a specific period of time after returning from military service. If the person's service was for more than 180 days, the employee cannot be discharged from employment (except for cause) for one year after the date of reemployment.[266] If the employee's military service was for less than 180 days but more than thirty days, then the person is protected from discharge (except for cause) for 180 days after reemployment.[267]

While this provision provides an exception to an at-will employment relationship that usually exists between employer and employee during the designated period of time under USERRA, it does not protect the employee from discharge entirely. Employee misconduct or inability to satisfactorily perform one's duties is sufficient cause to discharge a returning employee.[268] Besides an

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[263] *Id.* at 101 n.9.

[264] *See Foster*, 420 U.S. at 97 (citing McKinney v. Missouri-Kansas-Texas Railroad Company, 357 U.S. 265, 78 S. Ct. 1222 (1958); Tilton v. Missouri Pacific Railroad Company, 376 U.S. 169, 181, 84 S. Ct. 595 (1964)).

[265] *See id.* at 100.

[266] 38 U.S.C. §4316(c)(1) (2006).

[267] 38 U.S.C. §4316(c)(2).

[268] *See* Ferguson v. Walker, 397 F. Supp. 2d 964 (C.D. Ill. 2005) (small village had to drastically reduce police force due to legitimate budget constraints and convert all positions to part-time only, veteran was offered part-time position but refused, thus discharge was for cause); Pignato v. American Trans Air, 14 F3d 342 (7th Cir. 1994)

employee's conduct, discharge for cause may also be found where the employee is discharged for another nondiscriminatory reason such as elimination of the employee's particular position or reduction in workforce.[269]

2. *Health Plans*

One of the biggest worries of activated reservist and guard personnel is maintaining health care coverage for their dependents while serving in the uniformed services. While most guard and reserve personnel serving extended periods of service are eligible for coverage under the military's TRICARE health system, the option of continuing coverage through their civilian employer may be more attractive to some.

Usually when one leaves employment, their existing employer sponsored health care is terminated. Section 4317 of USERRA allows an employee who is covered by a job-related health plan to elect to continue such coverage for themselves and their dependents while performing military duties.[270] A "health plan" under this section is any insurance policy or contract, medical or hospital service agreement, membership or subscription contract or other arrangement that provides for the individual's health services.[271] It includes plans that are subject to regulation under the Employee Retirement Income Security Act (ERISA), as well as those sponsored by state and local governments, which are not covered by ERISA.[272] It also includes multi-employer health plans maintained according to collective bargaining agreement between employers and labor union organizations.[273]

The cost of extending the coverage may fall entirely on the employee, provided the period of military service is more than thirty days. For periods of service more than thirty-one days, the employee is required to pay both his share and the employer's share of the coverage, plus two percent for administrative costs, or no more than 102% of the full premium under the plan.[274] For service lasting less than thirty-one

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(failing to show up for work and public intoxication at work function sufficient for discharge); Keserich v. Carnegie-Illinois Steel Corp., 163 F.2d 889 (7th Cir. 1947) (neglect of duties and refusal to perform assigned tasks sufficient for discharge); Gottschalk v. Railway Express Agency, Inc., 166 F.2d 1004 (3rd Cir. 1948) (violation of duty of loyalty and self dealing harming employer's interests were basis for discharge); *but see* Duarte v. Agilent Technologies, Inc. 366 F. Supp. 2d 1039 (D. Colo. 2005) (employee not given fair opportunity to resume duties prior to being evaluated and ranked against other employees).

[269] 20 C.F.R. § 1002.248 (2006).
[270] 38 U.S.C. § 4317(a)(1) (2006).
[271] *Id.* § 4303(7).
[272] 20 C.F.R. § 1002.163(b) (2006).
[273] *Id.* § 1002.163(c).
[274] 38 U.S.C. § 4317(a)(2) (2006).

days, the employee cannot be required to pay more than the normal employee share, if any, for the coverage.[275]

If the employee elects to continue health plan coverage, the maximum period of coverage is the lesser of either: a period of twenty-four months beginning on the date of absence from employment due to military service, or the actual period of military service (calculated from the day the absence begins to the day after the service member returns home and fails to apply for reemployment).[276]

If the health plan was terminated because the activated employee chose not to elect coverage, or because the coverage period was exceeded, then an exclusion or waiting period[277] may not be imposed when the employee is reemployed following military service.[278] A waiting period may be imposed as to certain illnesses or injuries determined by the Secretary of Veterans Affairs to have been aggravated by or incurred during military service.[279]

3. *Pension Plans*

Persons returning to their civilian employer following a period of military service also have the right to continue in the civilian employer's pension plan without loss of service time. For those reeemployed by their employer, time spent in military service will be treated as service with the employer for the purpose of determining eligibility in the pension plan, in vesting and in the accrual of benefits.[280]

Upon reemployment, the employer is liable to fund any employer contributions that would have been made to the plan during the period of military service based on the rate of pay the absent employee would have been paid.[281] In the case of employee contribution plans where the employee makes contributions or elective deferrals which are matched by the employer, the returning employee may make up the missed contributions or deferral following reemployment.[282] The employee is given up to three times the length of

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[275] *Id.* § 4317(a)(2).
[276] 38 U.S.C. § 4317(a)(1)(A)-(B) (2006); *see also* 70 Fed. Reg. 75,246, 75,266. The period of twenty-four months of coverage was expanded from eighteen months by a 2004 amendment to the statute. Veterans benefits Improvement Act of 2004, Pub. L. No. 108-454, Title II, Subtitle A, §201(b), 118 Stat. 3606.
[277] Normally, a waiting period is a period of time that may be imposed by the terms of a health benefit plan whereby the employee is required to wait a set period of time before health benefits are reinstated upon reemployment. *See generally* 20 C.F.R. § 1002.168 (2006).
[278] 38 U.S.C. § 4317(b)(1) (2006).
[279] *Id*. § 4317(b)(2).
[280] *Id.* § 4318(a)(2); 70 Fed. Reg. 75,246, 75,280.
[281] 38 U.S.C. § 4318(b)(1) (2006).
[282] *Id*. § 4318(b)(2).

the period of military service, not to exceed five years, starting from the date of reemployment, to make up these missed contributions.[283] The employee is not required to make up all or any of the contributions, but if he chooses to do so, the contributions can only be made while employed by the post-service employer.[284] If the employee decides to leave the employer for another job or additional military service, the opportunity to make up contributions is lost. If the employee elects not to make up the missed contributions, the employer is not required to make any matching contributions since those payments are contingent on the employee contributions.[285]

If the employee makes up the missed contributions, the amount paid cannot be in excess of the amount he or she would have been permitted to contribute or defer if continuously employed.[286] This portion of the statute is consistent with the overall purpose of USERRA—to enable the employee to return to civilian employment in the position he or she would have been in had it not been for military service. However, if the service member does not return to the same pre-service employer, or dies during military service, there is no opportunity to make up contributions to the pension plan that would have been made if continuously employed.[287]

Benefits for employees who participate in non-contributory defined benefit plans, or contributory defined benefit plans in which they make up all missed contributions, will likely not be affected by employment interruptions due to military service.[288] Upon retirement, they will receive the same amount of benefit regardless of military service interruptions. Those participating in a defined contribution plan, however, will most likely not receive the same benefit they would have received if continuously employed because the employee is not entitled to forfeitures or earnings that may have accrued during the period of service when making up contributions. Depending on the mood of the investment market at the time of military service, this may turn out to be beneficial or detrimental to the service member employee.

Multi-employer pension benefit plans[289] present challenges to the general rule regarding reemployment and make-up contributions. Unlike other pension situations, an employee does not have to be reemployed by the same pre-service employer in order to be entitled to

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[283] *Id*.
[284] 20 C.F.R. § 1002.262(b) (2006).
[285] 20 C.F.R. § 1002.262(c) (2006).
[286] 38 U.S.C. § 4318(b)(2) (2006).
[287] 70 Fed. Reg. 75,246, 75,280.
[288] 20 C.F.R. § 1002.265(a)-(b) (2006).
[289] "A mulitemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer." 20 C.F.R. § 1002.266 (2006).

employer contributions to the multiemployer pension plan.[290] As long as the employee is hired by an employer contributing to the same multiemployer plan where the pre-service and post-service employers share a common means or practice of hiring the employee, as in a union hiring hall, then the employee is entitled to the same employer contribution.[291] Liability for contributions is determined by the terms of the plan.[292] If the plan is silent, the last employer who employed the person prior to military service is responsible for post-service contributions.[293] By structuring the obligations of multiemployer plans this way, Congress intended to give the plan sponsors, employers, unions, and plan trustees the flexibility to design payment responsibilities in accordance with the particular circumstances of an individual plan.[294]

E. Enforcement Procedures

The Department of Labor is the lead agency responsible for assisting guard and reserve personnel with claims arising under USERRA. The Secretary of Labor accomplishes this primarily through VETS.[295] However, unlike an action under Title VII, an individual does not have to seek assistance or obtain a "right to sue" letter from the appropriate administrative agency before filing an enforcement action in court.[296]

A person claiming a violation of his rights under USERRA by a private, state or federal employer may file a complaint with the Secretary of Labor through VETS if they wish to obtain the government's assistance.[297] The Department of Labor is obligated to investigate the complaint, and if there is a violation, attempt to resolve the complaint and ensure compliance on the part of the employer.[298] If the Department of Labor cannot resolve the complaint, the claimant is notified of his or her option to proceed against the employer through an enforcement action.[299] Once this notification is received, the employee has options to pursue a judicial remedy for the employer's unlawful actions.

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[290] *See* 20 C.F.R. § 1002.266(c) (2006).
[291] *Id.*
[292] 38 U.S.C. § 4318(b)(1)(A)-(B) (2006).

[293] *Id.*
[294] 70 Fed. Reg. 75,246, 75,284.
[295] 38 U.S.C. § 4321 (2006).
[296] Manson, *supra* note 16, at 80 n.163; *see also* 38 U.S.C. § 4323(a)(2)(A) (2006).
[297] 38 U.S.C. § 4322(a) (2006).
[298] *Id*. § 4322(d).
[299] *Id*. § 4322(e).

Remedial action takes different paths for those who are employed by the federal government and those who are employed by a state or private entity. In the case of a private employer or state employer, the employee may request the assistance of the Attorney General's office in filing an action on his or her behalf, or the employee may commence their own action against the employer through private counsel.[300] The option for private counsel also exists if the Attorney General refuses to proceed with an enforcement action.[301]

With all of these options for filing, the statute attempts to give great flexibility to claimants to obtain enforcement of the statute. While there is no specific statute of limitations period, and the Department of Labor takes the position that none applies,[302] the federal regulations advise claimants to act promptly to preserve their rights, as suits long delayed may be subject to laches.[303]

Enforcement procedures also benefit claimants by absolving USERRA claimants from all court costs and fees, even if the claimant loses in court.[304] If a person who has obtained private counsel prevails in their enforcement action, the court may award reasonable attorney fees, expert witness fees and litigation expenses.[305]

A claimant is eligible for legal and equitable remedies.[306] These include compensation for lost wages or benefits, promotion or placement in a position required by statute, and, in the case of a willful violation of USERRA, the court may award liquidated damages in an amount equal to the value of lost pay or benefits.[307] U.S. district courts have jurisdiction over cases brought by the United States against a particular state as an employer and against private employers.[308] District courts also have jurisdiction over an individual filing an enforcement action against a private employer.[309] If the individual is bringing an action against a state without the assistance of the United

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[300] *Id*. § 4322(a).
[301] *Id*. § 4323(a)(2)(C).
[302] 70 Fed. Reg. 75,246, 75,287.
[303] 20 C.F.R. § 1002.311 (2006). Maher v. City of Chicago, 406 F. Supp. 2d 1006, 1031 (N.D. Ill 2006); *see also* Rogers v. City of San Antonio, 392 F.3d 758 (5th Cir. 2004), *cert denied*, 125 S. Ct. 2945 (2005) (the Court of Appeals held that plaintiffs' USERRA claims were limited by the general four-year statute of limitations applicable to federal causes of action not governed by a specific statute of limitations, because the plaintiffs had asserted to the lower court and the appellate court that general federal limitations period in 28 U.S.C. § 1658 applied as the statute of limitations period); *but see* 38 U.S.C. § 4323(i) (2006) ("No state statute of limitations shall apply to any proceeding under this chapter.").
[304] 38 U.S.C. § 4323(h)(1) (2006).
[305] *Id*. § 4323(h)(2).
[306] *Id*. § 4323(d) and (e).
[307] *Id*. § 4323(d)(1).
[308] *Id*. § 4323(b)(1).
[309] *Id*. § 4323(b)(3).

States, then the state court concerned has jurisdiction over the suit.[310] Despite this language in the statute regarding suits against a state, one question that remains is how USERRA purports to overcome the Eleventh Amendment's restriction on suing a state for damages.[311]

Unlike employees of private employers or state governments, employees of the federal government do not have the right to bring suit in a district court or state court. Complaints by federal employees are litigated before the MSPB.[312] The MSPB may order the offending agency to comply with the statute and compensate the employee for any lost wages or benefits caused by the non-compliance.[313] An employee may request representation before the MSPB by the Office of Special Counsel if the Special Counsel is satisfied that the claim is meritorious.[314] Decisions of the MSPB are appealable to the United States Court of Appeals for the Federal Circuit.[315]

Employees of the federal agencies referred to in 38 U.S.C. § 4315 (agencies with an intelligence mission) follow a separate set of enforcement provisions, which eliminate their ability to seek relief through the MSPB. An aggrieved employee of one of these agencies may submit a claim to the inspector general of the offending agency for investigation and resolution.[316] That is the extent of enforcement for that class of federal employees. Due to the lack of judicial review or public filing of complaints by these employees, it is difficult to determine if there are compliance problems within these agencies.

IV. WHAT'S MISSING FROM USERRA: INCENTIVES FOR EMPLOYERS

Since the days of World War II and throughout the evolution of the all volunteer force, Congress has recognized the importance of guard and reserve personnel to the overall military structure. The core purpose of USERRA is very much the same as the previous seventy years of veterans' employment rights laws: to protect non-career service members from discrimination and disadvantage in the civilian

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[310] 38 U.S.C. § 4323(b)(2) (2006).
[311] Velasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998), *vacated in part* 165 F.3d 593 (7th Cir. 1999) (dismissing a USERRA claim brought by private litigant against the State of Indiana in federal court because such an action violated the Eleventh Amendment's sovereign immunity guarantee); *see also* Alden v. Maine, 527 U.S. 706 (1999) (suit to enforce Fair Labor Standards Act (an act that also authorized suits against states) against State of Maine dismissed because Maine did not consent to private suit for damage in state court).
[312] 38 U.S.C. § 4324(b) (2006).
[313] *Id*. § 4324(c).
[314] *Id*. § 4324(a)(2).
[315] *Id*. § 4324(d).
[316] *Id*. § 4325(b).

workplace. While there has been consistency in military policy, the civilian workplace has changed considerably.

Once locally owned businesses are now global conglomerates. National companies have expanded interests internationally. Will the spirit of patriotism and cooperation with the American military guide foreign owned businesses to welcome this special class of employee into their corporate family? What about locally owned businesses that must compete in today's economy? Will small businesses be able to hold off industry giants when many of their employees are absent due to a revolving door of military service?

A. USERRA Protections Can Adversely Impact Employers

While becoming familiar with the protections and consequences of USERRA, businesses will likely notice the absence of any real incentive, other than patriotism, for employers to hire or reemploy reserve or guard members. Similar to other discrimination statutes, USERRA speaks in mandates. But USERRA has such an economic impact on employers that it should also address the economic burden to employers. In an age when the bottom line means everything, employers may not see a business reason to offer and maintain jobs for guard and reserve members. The inefficiency and inconvenience of complying with the letter of USERRA may drive businesses away from complying with the spirit of the Act. For some small businesses, there may come a time when it may not be economically possible to comply with the act.

Private employers are not the only entities affected by the increased reliance on guard and reserve personnel. Small local governments also face economic challenges when one or more of its employees are deployed. The National Association of Counties reported to Congress in 2004 that sixty nine percent of counties with populations below 10,000 that responded to their survey indicated a hardship due to military deployments since September 11, 2001.[317] For all counties responding to the survey, coping with the temporary absence of the service member employee provided the most challenges, especially in public safety positions such as law enforcement, firefighters and other emergency personnel.[318] Coupled with the increased demands of homeland security, most counties surveyed did not have the resources to

[317] *Protecting The Rights Of Those Who Protect Us: Public Sector Compliance With The Uniformed Services Employment And Reemployment Rights Act And Improvement Of The Servicemembers Civil Relief Act: Hearing Before the Committee on Veterans' Affairs*, 108th Cong. 191 (2004).
[318] *Id*. at 185 (written statement of Commissioner Harry Van Sickle).

hire temporary replacements, so services were either cut or personnel from other sectors were reallocated to fill some of the gaps.[319]

While it is important to protect those who protect us, we should be realistic about what the employment market, both private and public, can bear. The problem lies in the fact that the system has never really been tested in long-term conflicts. The current use of guard and reserve personnel is unprecedented in military history. Not only are guard and reserve troops being used more frequently and for longer periods of time, the active duty component of the military is getting smaller as services eliminate career positions.[320]

The Department of Labor has also recognized that the economic burdens of USERRA and the need to protect the increasing number of non-career military personnel will result in more friction between employers and their military affiliated employees. In its annual report for 2005, the Department cited the economy and increases in military active duty periods as the two external factors having the greatest impact on achieving the goals of USERRA.[321] The Department expects USERRA complaints to increase as guard and reserve call-ups increase in a steady economy.[322] But what happens if the economy takes a marked downturn? One can assume that complaints will increase even more.

As the military continues to look for ways to cut costs, it will undoubtedly look at personnel—one of the most expensive assets. Pay, health care, retirement, housing and other benefits continue to increase for the military as they do for civilian employers.[323] The military's response is to cut the active duty force and rely more on temporary workers in the form of guard and reserve personnel. Some argue that the cost savings by the government of not having to maintain a large professional force has been shifted disproportionately to the employer.[324] This is true when the military increasingly relies on temporary personnel who draw regular pay and benefits while on active duty, but get nothing when deactivated. Civilian employers, on the other hand, must keep jobs that were occupied by reservists and guard personnel open or hire temporary replacements, and then must reemploy the returning workers to the positions they would have held, along with the accompanying increased pay and benefits.

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[319] *Id*. at 190.
[320] *See* DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2006, at 76 (2006), *available at* http://www.defenselink.mil/qdr/report/Report20060203.pdf.
[321] DEPARTMENT OF LABOR ANNUAL REPORT, FISCAL YEAR 2005, PERFORMANCE AND ACCOUNTABILITY REPORT, PERFORMANCE GOAL 05-3.2B (VETS) FY-2005, *available at* http://www.dol.gov/_sec/media/reports/ annual2005/SG3.htm.
[322] *Id.*
[323] Michele A. Flourney, *Did the Pentagon Get the Quadrennial Defense Review Right?*, THE WASH. QUARTERLY, Mar. 20, 2006, at 67.
[324] Green, *supra* note 96, at 242.

There are instances where civilian employers have willingly accepted this new burden. Immediately after September 11, 2001 when many guard and reserve personnel were activated, several civilian employers voluntarily provided their absent employees with pay differential or benefits.[325] Notably, the federal government did not provide any guaranteed benefit for their guard and reserve employees, and proposed legislation to make the federal government the "model employer" for guaranteed pay for such employees has continually failed.[326] As deployments increase in length and frequency, even the most patriotic employer may determine, as the federal government appears to have determined, that the cost of continuing to provide benefits to absent employees is too high, and going above and beyond what the statute requires will be rare.

Unfortunately, other than anecdotal evidence in the form of surveys or estimates, there has not been a way to accurately track how guard and reserve call-ups have impacted employers. It wasn't until 2004 that the federal government and the Department of Defense instituted a database program, Civilian Employment Information Program, to track and maintain data on who is employing reserve and guard members.[327] The purpose of the database is to use the information to maintain a supportive relationship with employers who employ reserve and guard members, and direct them to programs and information about USERRA.[328] Using that database and being able to accurately ascertain the economic impact on businesses owned by guard

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[325] OFFICE OF THE SECRETARY OF DEFENSE RESERVE AFFAIRS, REPORT ON RESERVE/EMPLOYER RELATIONS, *supra* note 10, at 3.

[326] *See* 151 CONG REC S10702, 10703 (daily ed. Sep. 29, 2005) (statement of Sen. Durbin)("It turns out that hundreds of corporations across America have said that is the right thing to do . . . . [They] will make up the difference in pay so that their families back home have financial peace of mind that they can pay the mortgage, the utility bills, keep the family together while that soldier is risking his life overseas . . . . Unfortunately, there is one employer that refuses to do this. It turns out it is the largest single employer of all the Guard and Reserve who are being activated. One employer that refuses, despite this Web site, despite all these speeches, one employer that refuses to stand behind the soldiers who were activated in the Guard and Reserve and to make up the difference in pay if they are paid less when they are activated than they were paid in civilian life . . . . That employer is the Federal Government of the United States.") Ironically, in June 2006, the Department of Labor held a ceremony honoring the Federal Government as a model employer. Press Release, Department of Labor, VETS News Release 06-1058-NAT, Federal Government Cited as 'Model Employer' in Supporting National Guard and Reserve Employees (June 28, 2006), *available at* http://www.dol.gov/opa/media/press/vets/VETS20061058.htm.

[327] 151 CONG. REC. H9974 (daily ed. Nov. 8, 2005) (statement of Rep. Johnson) (debating House Resolution 302, Recognizing And Commending Continuing Dedication And Commitment Of Employers Of Members Of The National Guard And The Other Reserve Components).

[328] *See* 151 CONG. REC. H9974 (daily ed. Nov. 8, 2005).

and reserve members will aid in determining what legislation may be necessary to balance the burden of paying for our national defense.

B. Existing and Proposed Solutions Have Failed to Consider Employers

Some large employers may be able to absorb the cost of having one or two employees absent due to military service, but the impact on a small business or sole proprietorship can be devastating when a key employee is called away. The situation is further exacerbated when the employer or the military member has no control over the length and frequency of the absences for military service.

For small businesses, there is one program available to assist, but it is a small bandage for what can be a gaping wound. The Small Business Administration offers loans to eligible small businesses to meet its ordinary and necessary operating expenses that it could have met, but is unable to meet, because an essential employee was "called-up" to active duty in their role as a military reservist.[329] The purpose of the program, known as the Military Reservist Economic Injury Disaster Loan program, is only to provide enough working capital to the business to pay its necessary obligations until the essential employee returns.[330] Other than the Small Business Disaster Loan program, there are no meaningful programs for self-employed persons or professionals who maintain a client-based business, such as physicians, dentists, lawyers, or stockbrokers, to maintain their practices or businesses in the event of a long-term deployment. The only option for client-based professionals and sole proprietorships to maintain a business may be to quit the Guard or Reserve.

Since 2001, many versions of legislation have been introduced in Congress to provide economic relief to reserve and guard personnel with some of the proposals also offering tax credits for employers.[331] But most of these initiatives focus on the financial impact of a deployment on reserve or guard personnel and providing pay differential and benefits while called to active duty. The Hope at Home Act of 2005 called for federal employers to provide pay differential to absent guard and reserve personnel.[332] It also proposed a business tax credit for civilian employers who voluntarily give their guard and reserve

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[329] UNITED STATES SMALL BUSINESS ADMINISTRATION, DISASTER RECOVERY LOAN INFORMATION, *available at* http://www.sba.gov/disaster_recov/loaninfo/militaryreservist.html (last visited July 8, 2006).

[330] *Id.* A fact sheet for the Military Reservist Loan program is available at http://www.sba.gov/disaster/mreidlall.html.

[331] *See, e.g.,* 151 CONG. REC. E261 (daily ed. Feb. 16, 2005); H.R. 4655, 108th Cong. (2004); S. 417, 109th Cong. (2005); S. 981, 109th Cong. (2005), as part of the Department of Defense Authorization Act of 2006, 151 CONG. REC. S10702 (daily ed. Sep. 29, 2005) (originally introduced in 2001 by S. 1818, 107th Cong. (2001)).

[332] 151 CONG. REC. E261 (daily ed. Feb. 16, 2005).

personnel a pay differential while those employees are called to active service.[333]

While this would be beneficial to the military personnel, it does not address the original economic burden placed on the employer in keeping the service member's position open and then subsequently reemploying the veteran in an escalated pay and benefit status. The business tax credit only applies if the employer goes beyond what the statute requires and provides pay differential to its absent employees. This does not help employers who are adversely impacted by the basic reemployment rights and benefits due the absent employee.

Similar legislative attempts were previously made under other names: the Reservists Pay Security Act of 2005;[334] the Guardsman Reservist Financial Relief Act of 2003;[335] and the Reservist and Guardsman Pay Protection Act of 2002.[336] All focused on providing financial relief to the deployed military member.

The Patriotic Employers of Guard and Reservists Act of 2004 similarly proposed a tax credit for employers who continued to pay their military member employees while those employees had been called to active duty, but also proposed a tax credit to help defray the cost of hiring temporary workers to replace the absent service member employees.[337] No other financial provision for employers was proposed.

One recent proposal addressed the needs of small businesses and was a step in the direction of evaluating the impact on employers, as well as service member employees. Introduced in 2005, the Supporting Our Patriotic Small Businesses Act was an effort to both recognize and provide economic aid to small businesses that are impacted by guard and reserve deployments.[338] The proposal called for increased funding to the Office of Veterans Business Development to administer its loans and programs[339] and proposed additional time for deployed service members to meet continuing education requirements for professional occupational licensing.[340] Despite language to increase funding to the Office of Veterans Business Development, it was not intended as an off-

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[333] *Id.*

[334] S. 417, 109th Cong. (2005); S. 981, 109th Cong. (2005), as part of the Department of Defense Authorization Act of 2006, 151 CONG. REC. S10702 (daily ed. Sep. 29, 2005) (originally introduced in 2001 by S. 1818, 107th Cong. (2001)).

[335] H.R. 1779, 108th Cong. (2003) (reintroduced by H.R. 621 (109th Cong. (2005)). This proposal allows for penalty free withdrawals from a retirement plan by Guardsmen and Reservists called up for more than 179 days.

[336] S. 3008, 107th Cong. (2002).

[337] H.R. 4655, 108th Cong. (2004) (reintroduced as "Guard and Reserve Financial Stability Act of 2005" by H.R. 2296 109th Cong. (2005)).

[338] S. 1014, 109th Cong. (2005).

[339] *Id.* § 3.

[340] *Id.* § 707.

set to financial losses created by losing guard and reserve employees to deployments.

It does not appear that Congress is interested in removing financial burdens placed on civilian employers so much as they are interested in providing additional pay, benefits and loan programs to service members. Perhaps this is because Congress views businesses as being able and obligated to assist in our national defense. Since national defense provides the freedom and security businesses require to thrive, Congress may believe that business should bear some of the burden of paying for that defense beyond the obligation of taxes. But this mindset may have unintended negative consequences in today's global economy. Nothing prevents an employer from moving portions of its operations overseas to cut labor costs.

The only realistic benefit that Congress can give employers is to provide some sort of business tax credit for losses or expenses directly caused by the reemployment of a service member employee. The employer's biggest complaint is loss of efficiency and production due to frequent and extended military service. A tightly controlled regulation that requires employers to mitigate their losses, but allows for tax relief, may bring some economic incentive and generate good will among employers to willingly comply with USERRA.

Tax credits for employers hiring replacement employees as suggested in the Patriotic Employers of Guard and Reservists Act of 2004 would also benefit employers while providing an incentive to continue to support service member employees. The argument against such legislation is that it would defeat the purpose of this shift of strategy in military manning. The government is attempting to cut costs by reducing the size of the career military force and using more of the non-career force, so compensating or providing tax deductions to civilian employers for employing those non-career members will offset the intended cost savings.

Another option to lighten the burden on employers is to limit the escalator principle for employees who are absent for lengthy periods of time. For example, if an employee is absent from the civilian position for more than two years, upon return to civilian employment he is only eligible for escalated pay and benefits up to that two year period, regardless of the actual time spent away in military service. This would provide some benefit and protection to the absent employee while relieving some of the financial burden of the employer.

Without more data on the actual effects of absent employees and USERRA compliance, it is difficult to determine what remedies, if any, are needed for employers. As the Office of the Secretary of Defense for Reserve Affairs concluded, "[u]ntil such time as we have information derived from employers of reservists, proposing legislative

changes may be poorly focused and not yield the desired results."[341] To that end, newly instituted programs like The Civilian Employment Information Program will be an invaluable tool to not only identify employers, but also to analyze the economic impact that USERRA has on them.

Congress also added § 4334 to USERRA in 2004, which requires all employers to provide workplace notices concerning the rights and benefits of USERRA.[342] This will aid in not only informing service members of their rights and employers of their obligations, but may also prompt employers who are having difficulties with their businesses to reach out to the Department of Labor or their legislative representatives with any economic problems they are facing as a result of complying with USERRA. This will further aid in understanding the precise difficulties faced by both sides and in drafting legislation that will more address the greater question of how the private sector and state and local governments will share the burden of national defense.

V. CONCLUSION

USERRA and its predecessor statutes were designed to protect an invaluable component of our national defense—our reserve and guard service members. These statutes were created in a time when the Total Force concept was maturing but had not reached its full potential. Prior to the Persian Gulf War in 1991, the majority of guard and reserve service was predictable and of short duration. The nature of military conflict has changed from full scale war of short duration to drawn out security, peace keeping, interdiction and combat operations. With a shrinking active duty force and an expanding mission, more emphasis will be placed on using guard and reserve personnel to fulfill mission requirements.

In the past, Congress and the courts have paid much deference to the sacrifices of men and women who volunteer to serve in the armed forces on a part time basis, recognizing the economic hardships and potential employment discrimination service members face as a result of their absence. This deference will hopefully continue into the foreseeable future. However, in order to maintain the goals of USERRA, Congress must also consider the legitimate needs of employers. One-sided legislation will not keep the healthy balance needed between the military and the private sector to ensure the nation has sufficient trained, qualified and motivated personnel to supplement the active duty force.

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[341] CONGRESSIONAL RESPONSE, *supra* note 10, at 8.

[342] 38 U.S.C. § 4334 (2006); *see also*, Appendix to Part 1002 –Notice of Your Rights Under USERRA, 20 C.F.R. § 1002.

If the Department of Defense is intent on scaling back the active duty force and relying more on guard and reserve personnel to serve on extended missions, then there will be a breaking point with civilian employers that sentiments of patriotism will not soothe. It will mean not just lost profits, but lost businesses for some. Forcing an individual to chose between a civilian job and defending our nation does not help the nation economically or strategically. Likewise, forcing employers to avoid employing persons serving in the Guard and Reserve by finding ways around USERRA is detrimental to the nation. Future legislation should look for a balance between benefits to service members and easing the possible adverse financial impact on civilian employers.

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