THE AIR FORCE LAW REVIEW

ARTICLES

VOLUME 62 2008

THE AIR FORCE LAW REVIEW

AFPAM 51-106

The Air Force Law Review is a publication of The Judge Advocate General, United States Air Force. It is published semiannually by The Judge Advocate General's School as a professional legal forum for articles of interest to military and civilian lawyers. The *Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The Air Force Law Review does not promulgate Department of the Air Force policy. The opinions and conclusions expressed in this publication are solely those of the author and do not necessarily reflect the opinion of The Judge Advocate General, The Judge Advocate General's Corps, or any other department or agency of the United States Government.

The *Law Review* solicits contributions from its readers. Information for contributors is provided on the inside back cover of this issue.

Readers who desire reprint permission or further information should contact the Editor, *The Air Force Law Review*, The Judge Advocate General's School, 150 Chennault Circle, Maxwell Air Force Base, Alabama 36112-6418. Official governmental requests for free copies, not under the depository program, also should be sent to the above address.

Cite this Law Review as 62 A.F. L. REV. (page number) (2008).

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

Internet bookstore.gpo.gov. Phone toll free (866) 512-1800. DC area (202) 512-1800. Email: contactcenter@gpo.gov. Fax: (202)-512-2104.

THE AIR FORCE LAW REVIEW

VOL. 62 **2008**

ARTICLES

THE AIR FORCE LAW REVIEW

Authority to publish automatically expires unless otherwise authorized by the approving authority. Distribution: members of The Judge Advocate General's Corps, USAF; judge advocates of the Army, Navy, Marine Corps, and Coast Guard; law schools; and professional bar association libraries.

ASYMMETRICAL WARFARE AND INTERNATIONAL HUMANITARIAN LAW

MICHAEL N. SCHMITT

Professor Michael N. Schmitt (B.A., Texas State University (1978); M.A., Texas State University (1983); M.A., Naval War College (1996); J.D., University of Texas (1984); LL.M., Yale Law School (1991)) is Dean of the College of International and Security Studies, George C. Marshall European Center for Security Studies, Garmisch-Partenkirchen, Germany. *A version of this article originally appeared in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES 11-48 (Wolff Heintschel von Heinegg & Volker Epping eds., Berlin, Springer, 2007).*

I. INTRODUCTION

In much the same way the notion of "revolutions in military affairs" dominated the attention of military thinkers in the last decade, "asymmetry" has now become the catch-phrase *du jour*. Yet, asymmetry hardly represents a radically new operational model, for it is in the very nature of warfare to seek strategies, tactics, and weapons that either leverage one's own strengths (positive asymmetry) or exploit the enemy's weaknesses (negative asymmetry), or both. Sun Tzu understood this two and a half millennia ago when he proclaimed "an army may be likened to water, for just as flowing water avoids the heights and hastens to the lowlands, so an army avoids strengths and strikes weaknesses."[1] Centuries later, General Curtis E. LeMay, who, while the USAF Chief of Staff in 1964, famously set out his asymmetrical recipe for ending the Vietnam war: "They've got to draw in their horns and stop their aggression, or we're going to bomb them back into the Stone Age."[2] Modern foes also grasp the dynamics of asymmetry in warfare, a fact well illustrated by none other than Osama bin Laden:

> The difference between us and our adversaries in terms of military strength, manpower, and equipment is very huge. But, for the grace of God, the difference is also very huge in terms of psychological resources, faith, certainty, and reliance on the Almighty God. This difference between us and them is very, very huge and great.[3]

This article explores asymmetry's influence on the law governing methods and means of warfare. International humanitarian law (IHL) and war exist in a symbiotic relationship. Most typically, IHL reacts to shifts in the nature of warfare; indeed, most major humanitarian law treaties arrived on the heels of a major conflict in response to *post factum* concerns over particular aspects thereof.[4] As

---

[1] SUN TZU, THE ART OF WAR 101 (Samuel B. Griffith trans., 1971).
[2] CURTIS E. LEMAY, MISSION WITH LEMAY 565 (1965).
[3] Foreign Broadcast Information System, *Al-Jazirah Airs 'Selected Portions' of Latest Al-Qa'ida Tape on 11 Sep Attacks, Doha Al-Jazirah Satellite Channel Television in Arabic 1835 GMT 18 Apr 02*, Compilation of Usama Bin Laden Statements 1994-January 2004 (Jan. 2004), at 191, 194.
[4] The American Civil War motivated adoption of Professor Francis Lieber's "set of regulations" (Lieber Code) as General Order No. 100, U.S. Dep't of Army, Instructions for the Government of Armies of the United States in the Field; the Battle of Solferino during the Italian War of Liberation, and the resulting monograph *Souvenir de Solferino* by Henri Dunant (1862), led to creation of the International Committee of the Red Cross; the Russo-Japanese War of 1904-05 was followed by the Geneva Convention of

importantly, the nature of the hostilities in which belligerents find themselves shapes their attitude towards IHL. When they view law as serving their needs, for instance by protecting their civilians, fidelity to legal strictures is usually high. On the other hand, when belligerents see themselves as disadvantaged by normative boundaries, those boundaries may well be ignored. [5] This being so, in what ways does asymmetry in 21st century warfare affect application of IHL?[6]

II. FORMS OF ASYMMETRY

To grasp the normative consequences of asymmetry, it is necessary to conceive of the notion very broadly. Steven Metz and Douglas Johnston of the U.S. Army War College have fashioned a particularly useful definition in this regard. According to Metz and Johnson,

> [i]n the realm of military affairs and national security, asymmetry is acting, organizing, and thinking differently than opponents in order to maximize one's own advantages, exploit an opponent's weaknesses, attain the initiative, or gain greater freedom of action. It can be political-strategic, military strategic, or a combination of these. It can entail different methods, technologies,

---

1906 and the Hague Conventions of 1907; World War I was followed by the 1925 Gas Protocol and the 1929 Geneva Convention; World War II was followed by the Geneva Conventions of 1949 and the 1954 Cultural Property Convention; and Korea, Vietnam, and the "wars of national liberation" were followed by the Additional Protocols to the 1949 Geneva Conventions, the Environmental Modification Convention, and the Conventional Weapons Convention. Each of the aforementioned instruments is available on the ICRC IHL Documents Website, www.icrc.org/ihl.

There have been a few proactive attempts to limit methods or means of warfare, most notably the bans on blinding lasers and biological weapons. Additional Protocol to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects; Protocol on Blinding Laser Weapons (1995); Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare (1925); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972).

[5] The U.S. memos on torture illustrate this dynamic graphically. The memos are reproduced in MARK DANNER, TORTURE AND THE TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004); THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 144, 145, 153-69 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). For a graphic description of mistreatment, see Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1.

[6] For a discussion of this subject, see Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, INT'L REV. OF THE RED CROSS, March 2005, at 149.

> values, organizations, time perspectives, or some combination of these. It can be short-term or long-term. It can be deliberate or by default. It can be discrete or pursued in combination with symmetric approaches. It can have both psychological and physical dimensions.[7]

As is apparent, asymmetry has many dimensions. It operates across the entire spectrum of conflict, from the tactical through the operational to the strategic levels of war.[8] For example, at the tactical

---

[7] Steven Metz & Douglas V. Johnson II, ASYMMETRY AND U.S. MILITARY STRATEGY: DEFINITION, BACKGROUND, AND STRATEGIC CONCEPTS (2001). For an interesting argument that the concept of asymmetry has been "twisted beyond utility," see Stephen J. Blank, RETHINKING ASYMMETRIC THREATS (2003). Other useful material on asymmetry includes Ivan Arrequin-Toft*, How the Weak Win Wars: A Theory of Asymmetric Conflict*, INT'L SECURITY, Summer 2001, at 19; R.V. Gusentine, *Asymmetric Warfare – On Our Terms,* PROCEEDINGS OF THE UNITED STATES NAVAL INSTITUTE, August 2002, at 58. Steven J. Lambakis, *Reconsidering Asymmetric Warfare*, JOINT FORCE QUARTERLY, December 2004, at 102; Montgomery C. Meigs, *Unorthodox Thoughts about Asymmetric Warfare,* PARAMETERS, Summer 2003, at 4;

[8] The Department of Defense *Dictionary of Military and Associated Terms* sets forth the following definitions for the levels of war:

> *Strategic Level of War*: The level of war at which a nation, often as a member of a group of nations, determines, national or multinational (alliance or coalition) security objectives and guidance, and develops and uses national resources to accomplish these objectives. Activities at this level establish national and multinational military objectives; sequence initiatives; define limits and assess risks for the use of military and other instruments of national power; develop global plans or theater war plans to achieve these objectives; and provide military forces and other capabilities in accordance with strategic plans.
>
> *Operational Level of War*: The level of war at which campaigns and major operations are planned, conducted, and sustained to accomplish strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to accomplish the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. These activities imply a broader dimension of time or space than do tactics; they ensure the logistic and administrative support of tactical forces, and provide the means by which tactical successes are exploited to achieve strategic objectives.
>
> *Tactical Level of War*: The level of war at which battles and engagements are planned and executed to accomplish military objectives assigned to tactical units or task forces. Activities at this level focus on the ordered arrangement and maneuver of combat elements in relation to each other and to the enemy to achieve combat objectives.

level, troops with lightweight body armour have a distinct advantage over those without advanced protection. At the operational level, a networked force with real-time access to state-of-the-art C4ISR assets has a much better understanding of the battle. This allows it to act more quickly and decisively than does its enemy.[9] The strategic level of conflict has both military and political dimensions. At the military strategic level, asymmetry may itself become a strategy. Terrorism is the most compelling contemporary exemplar. Political strategies with military impact include the formation of alliances, crafting humanitarian law or arms control regimes, and other efforts to leverage diplomacy, law, information, and economics to enhance one's military wherewithal.[10]

Asymmetry not only acts at different levels, it also takes multiple forms. Most noticeable is technological asymmetry, which occurs when one side of a conflict possesses superior weapon systems and other military equipment (means of warfare).[11] Currently, the U.S. military far outdistances all other armed forces in this regard. Other Western countries, primarily those in NATO, occupy a second tier of technological advantage. The militaries that remain have little hope of reaching such levels. This reality is unlikely to change anytime in the near future, for U.S. investment in research and development dwarfs that of all other nations.[12] Of course, some technology will "trickle down," but those who benefit in this way are the least likely to find

---

DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, Joint Publication 1-02, as amended through Oct. 17, 2007, www.dtic.mil/doctrine/jel/doddict/. [hereinafter DOD DICTIONARY].

[9] C4ISR: Command, control, communications, intelligence, surveillance, reconnaissance. Intelligence is "the *product* resulting from the collection, processing, integration, analysis, evaluation, and interpretation of available information concerning foreign countries or areas." Surveillance is the "*systematic observation* of aerospace, surface, or subsurface areas, places, persons, or things, by visual, aural, electronic, photographic, or other means." Reconnaissance is "a *mission* undertaken to obtain, by visual observation or other detection methods, information about the activities and resources of an enemy or potential enemy, or to secure data concerning the meteorological, hydrographic, or geographic characteristics of a particular area." DOD DICTIONARY, *supra* note 8.

[10] Asymmetry can also relate to the level of violence in a conflict. In high-intensity conflict, technological advantage is usually more determinative than in low-intensity conflict. The impact of asymmetry can also be temporally determined. For instance, technological asymmetry, as demonstrated in Iraq, impacts the conflict more during the core hostilities, than during periods of occupation.

[11] Technological asymmetry has become much more significant in modern warfare than numerical ones.

[12] In 2006 global military expenditures reached $1.204 trillion. The United States accounted for 46% of the total, followed by France, Japan, China, and the U.K. at roughly 4-5% each. Stockholm International Peace Research Institute, Recent Trends in Military Expenditure, www.sipri.org/contents/milap/milex/mex_trends.html.

themselves at odds with the United States. The existing qualitative divide can only be expected to grow.

A second form of military asymmetry involves methods of warfare, specifically doctrines.[13] For advanced Western militaries, effects-based operations (EBO) have replaced attrition warfare as the pre-eminent asymmetrical operational concept.[14] Effects-based operations are designed to generate defined effects on an opponent. Terrorism also constitutes an asymmetrical doctrinal concept.[15] Increasingly adopted by low-tech forces to counter the military pre-eminence of their opponents, it is analogous to, albeit more nefarious than, the guerrilla warfare that was so effective against U.S. technological dominance in Vietnam.

Less obvious forms of asymmetry also influence the application of IHL. A conflict can be normatively asymmetrical when different legal or policy norms govern the belligerents. Normative asymmetry may even exist between allies. Conflicts can also be asymmetrical with regard to the participants therein. Although IHL is based on the premise of hostilities between armed forces (or militia and other groups that are similarly situated and meet set criteria), actors in modern warfare increasingly deviate from this paradigm. Finally, belligerents may be asymmetrically positioned by virtue of their *jus ad bellum* status or moral standing, real *or perceived*. Of course, when notions of legal or moral valence infuse the resort to arms, attitudes towards the application

---

[13] Doctrine consists of "[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives." DOD DICTIONARY, *supra* note 8.

[14] The United States Air Force has expressly adopted asymmetry as a doctrine.

> US military forces now employ sophisticated military capabilities to achieve national objectives and avoid costly force-on-force engagements that characterized the traditional strategies of attrition and annihilation that evolved from nineteenth century warfare. Airpower is particularly relevant to this new way of war or, as it is commonly referred to, "asymmetric force strategy." Asymmetric force strategy dictates applying US strengths against adversary vulnerabilities and enabling the US to directly attack an enemy's centers of gravity (COGs) without placing Americans or allies at risk unnecessarily.

U.S. DEP'T OF AIR FORCE, AIR WARFARE, DOCTRINE DOCUMENT 2-1 at 3 (Jan. 22, 2000). For a concise description of EBO, see Department of Defense, Effects-based Operations Briefing, March 19, 2003, www.defenselink.mil/news/Mar2003/g030318-D-9085.html. On EBO and law, see Michael N. Schmitt, *Effects-Based Operations and the Law of Aerial Warfare*, 5 WASH. U. GLOBAL STUD. L. REV. 265 (2006).

[15] Terrorism represents a form of EBO since the true targets are seldom an attack's immediate victims, but rather the attitudes of the population, political leaders, members of the armed forces, international community, and so forth.

of IHL are inevitably shaped accordingly. It is to the impact of such asymmetries on international humanitarian law that we now turn.

III. ASYMMETRY AND IHL

Each of the cited forms of asymmetry—technological, doctrinal, normative, participatory, and legal or moral standing—exerts measurable influence on the application of international humanitarian law. A disturbing example is mistreatment of detainees by members of the U.S. armed forces.[16] However, this paper limits itself to those aspects of IHL governing means (weapons) and methods (tactics) of warfare. Because technological asymmetry has the greatest relevance to the application and interpretation of IHL, most discussion will focus on that form.

A. Technological Asymmetry

The technological edge enjoyed by the United States and other advanced militaries is sometimes misunderstood. In wars of the last century, range, precision, and mobility were the dominant media of technological asymmetry, a reflection of the linear construct of the battlefield. With forces facing each other across a FEBA (forward edge of the battle area), the immediate objective of warfare was to weaken the enemy sufficiently to allow one's own forces to seize territory. You wore the enemy down through attrition warfare, the serial destruction of its military. Being able to shoot farther with greater accuracy than the other side was obviously useful in conducting attrition warfare. So was greater mobility, because it allowed your forces to avoid the enemy's assaults and strike at its weaker flanks.

Today, battlefields are multi-dimensional, i.e., technology has evolved to the point where the concept of a line marking the heart of the battle (with combat fading the greater the distance from that line) no longer makes sense. There may be ground forces facing each other, but the conflict is everywhere. Consider Operation Iraqi Freedom (OIF). During the campaign, there was literally no point within Iraq untouchable by Coalition forces. Indeed, the first blow of the war was not the crossing of the Iraqi border by an invasion force, but rather an attack by Tomahawk cruise missiles and F-117s designed to kill Saddam Hussein.

---

[16] To some extent, mistreatment of Afghan and Iraqi (and other nationality) prisoners was made "more acceptable" by the unlikelihood that U.S. troops would be taken prisoner and mistreated in return. In other words, reciprocity did not operate as the incentive for compliance it usually acts as in IHL. No U.S. soldiers were taken prisoner in Afghanistan. Nine were seized in Iraq, eight of which were rescued. CNN, War in Iraq, www.cnn.com/SPECIALS/2003/iraq/forces/pow.mia/.

In this environment, an ability to rapidly gather, process, and react to information about an opponent, while hindering the enemy's efforts to do the same, is even more determinative than range, precision, and mobility. Using networked C4ISR unavailable to the other side, friendly forces seek to "get inside the enemy's observe-orient-decide-act (OODA) loop."[17] In other words, acting more quickly than the enemy forces him to become purely reactive, thereby allowing you to control the flow, pace, and direction of battle. Eventually he becomes so disoriented that paralysis ensues. In this style of warfare, the technological edge that matters most is C4ISR—and it is in C4ISR that the gap between the technological "haves" and "have-nots" is widest . . . and still growing.

Operating inside an opponent's OODA loop requires: the ability to locate and accurately identify enemy forces quickly and reliably; weapon systems that are immediately available; sufficient command and control assets to monitor and direct fast-paced, changing engagements; and the capacity to conduct reliable battle damage assessment to determine if restrike is needed. Slowing the enemy's reaction time and blocking or distorting enemy information further enhances the effects of your own operations.

Modern technology fills these requirements. Today, the battlefield has become phenomenally transparent to those fielding advanced ISR assets. No longer are the obstacles that traditionally masked enemy activity—such as night, poor weather, range, terrain, and intelligence processing and distribution times—insurmountable. Moreover, today's advanced militaries draw on information from an amazing array of sources: geospatial intelligence (GEOINT); human intelligence (HUMINT); signals intelligence (SIGINT); measurement and signature intelligence (MASINT); open-source intelligence (OSINT); technical intelligence (TECHINT); and counterintelligence (CI).[18] This multi-source data can be fused and disseminated with such extraordinary speed that U.S. air forces have developed a methodology (Time Sensitive Targeting, or TST) to specifically leverage the narrowing sensor-to-shooter window.[19]

---

[17] Colonel J. Boyd, USAF, coined the term. Operating within an opponent's OODA loop is a decision-making concept in which one party, maintaining constant situational awareness, assesses a situation and acts on it more rapidly than its opponent. When this happens, the opponent is forced into a reactive mode, thereby allowing the first party to maintain the initiative. As the process proceeds, the opponent eventually begins to react to actions that no longer bear on the immediate situation. The resulting confusion causes paralysis.

[18] JOINT CHIEFS OF STAFF, DOCTRINE FOR INTELLIGENCE SUPPORT TO JOINT OPERATIONS, JOINT PUBLICATION 2-0 Figure II-2 (June 22, 2007).

[19] On the topic, see U.S. JOINT FORCES COMMAND JOINT WARFIGHTING CENTER, COMMANDER'S HANDBOOK FOR JOINT TIME-SENSITIVE TARGETING (Mar. 22, 2002), *available at* www.jwf.jte.osd.mil/pdf/tsthndbk.pdf. TST strikes were carried out during

Of course, technology is fallible. For instance, U.S. forces conducted 50 TST decapitation strikes against Iraqi leaders using cell phones fixes and human intelligence reporting. None succeeded.[20] Earlier, during Operation Allied Force (OAF), critics claimed that NATO air strikes against tanks "identified" through high-tech means often struck decoys.[21] Despite these alleged failures, the fact remains that on 21st century battlefields, systems such as satellites, AWACS, JSTARS, UAVs, counter-battery radar, and night vision goggles—all of which are now commonplace in the battlespace—render an opponent's activities remarkably observable.[22]

Operations Enduring Freedom and Iraqi Freedom. Although the process has been criticized, U.S. forces continue to refine the methodology. Leonard LaVella, Operation Enduring Freedom Time Sensitive Targeting Process Study (prepared for USAF-ACC/DRY), August 25, 2003, on file with author.

[20] HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ, 21-40 (2003), www.hrw.org/reports/2003/usa1203/ [hereafter OFF TARGET]. On the legality of the strikes, see Michael N. Schmitt, *The Conduct of Hostilities during Operation Iraqi Freedom: An International Humanitarian Law Assessment*, 6 (2003) Y.B. OF INT'L HUMANITARIAN L. 73, 79-93 (2006) [hereinafter *The Conduct of Hostilities*].

[21] For an assessment of strikes against mobile targets during Operation Allied Force, see U.S. DEP'T OF DEFENSE, REPORT TO CONGRESS: KOSOVO/OPERATION ALLIED FORCE AFTER-ACTION REPORT at 84-86 (Jan. 31, 2000); REBECCA GRANT, THE KOSOVO CAMPAIGN: AEROSPACE POWER MADE IT WORK at 23 (Sep. 1999).

[22] The E-3 Sentry is an airborne warning and control system (AWACS) providing surveillance, command, weapons control, battle management, and communications services in the aerial environment. It is distinguishable by the large rotating radar dome (radome) mounted on its fuselage, which is capable of identifying and tracking low-altitude targets out to 400 kilometers, and medium and high altitude targets at significantly greater distances. Defensively, AWACS detects enemy aircraft or missiles and directs fighters to intercept them. Offensively, it can monitor the battlespace, providing real-time location and identification of enemy and friendly aircraft and naval vessels to users at the tactical, operational, and strategic levels of warfare.

The E-8C Joint Surveillance Target Attack Radar System (JSTARS) is an airborne battle management, command and control, intelligence, surveillance and reconnaissance aircraft that provides ground and air commanders with information that supports attacks on enemy ground forces. Its radar can cover a 50,000 square kilometer area and detect potential targets 250 kilometers away.

Unmanned Aerial vehicle (UAV) are aircraft without a human crew. The RQ-1 Predator provides surveillance, reconnaissance, and target acquisition services over long periods of time. Its detection capabilities include a TV camera, an infrared camera, and synthetic aperture radar for looking through smoke, clouds or haze. The MQ-1 variant is armed with two Hellfire missiles, thereby allowing it to directly engage targets. A third UAV in service is the Global Hawk. Unlike the Predator, which is a medium level system, the Global Hawk flies at high level (thereby enhancing survivability and extending its coverage). It has great range and loitering capability; for instance, it can fly to an interest area over 1600 kilometers away and remain on station for 24 hours. Using synthetic aperture radar, a ground moving target indicator, and high-resolution electro-optical and infrared sensors, it collects information that is transmitted to users near real-time.

Counter-battery fire is merely fire delivered to suppress an enemy's fire (e.g., from mortars or artillery) after detecting its source. Aircraft or ground observers may

The weapons systems on hand to exploit this information are equally impressive. Combat aircraft ranging from the F-16 to the B-52 now often launch without a set target, relying instead on the systems described above to feed data to powerful command and control assets that in turn vector them to the attack. They can fly and strike at night and during poor weather,[23] loiter for extended periods (especially when tankers are available), and in many cases fire their weapons from beyond the threat envelope of enemy defences.[24] Precision systems dramatically increase the probability of damage (Pd) resulting from such attacks.[25] Today, modern weaponry has a circular error probable (CEP) measured in feet, tens of feet at worst.[26] The fielding of the JDAM is making precision weaponry widely available.[27]

---

identify the source. Today, radar is often used to calculate the source of an incoming shell.

[23] For instance, F-15s and F-16s rely on the Low Altitude Navigation and Targeting Infrared for Night (LANTIRN) to fly at night and in poor weather. Using terrain-following radar and an infrared sensor, the LANTIRN pod allows the aircraft to follow the contour of the earth at low level. High-resolution forward-looking infrared radar (FLIR) feeds the pilot an infrared target image, while a laser designator-rangefinder and target tracking software facilitate target identification and attack. A second precision targeting system is the LITENING pod, which is used day or night in all weather conditions. It employs high-resolution FLIR, a television camera for target imagery, automatic target tracking, and laser designation for acquiring multiple targets simultaneously. In addition to the F-15 and F-16, it can be carried by the A-10 and B-52.

[24] For example, the AGM (air-to-ground missile) 154 JSOW (Joint Stand-off Weapon) has the following ranges: unpowered low-altitude launch—24 km; unpowered high-altitude launch—64 km; powered launch—200km. GlobalSecurity.org, globalsecurity.org/military/systems/index.html.

[25] Probability of damage (Pd) is used to express the statistical probability (percentage or decimal) that specified damage criteria can be met assuming the probability of arrival. U.S. DEP'T OF AIR FORCE, INTELLIGENCE TARGETING GUIDE, AF PAMPHLET 14-210 at 59-60 (Feb. 1, 1998). For non-nuclear weapons, damage criteria include F-Kill (Fire-power kill), M-Kill (Mobility kill), K-Kill (Catastrophic Kill), FC-Kill (Fire Control Kill), PTO-Kill (Prevent Takeoff Kill), I-Kill (Interdiction Kill), SW-Kill (Seaworthiness Kill), Cut, and Block. *Id.* at 58.

[26] The two most frequently dropped guided weapons in Operation Iraqi Freedom were the GBU 12 laser-guided bomb and the GBU 32 Joint Direct Attack Munition. Their CEP (radius of a circle within which 50% of the weapons will strike) is 9 and 13 meters respectively. GlobalSecurity.org, *supra* note 24.

[27] The JDAM is an unguided free fall bomb to which a guidance tail kit has been attached. It has an unclassified CEP of approximately 13 metres from as far away as 15 miles (an upgrade will improve accuracy to 3 meters) based on global positioning system (satellite) and inertial navigation system guidance. What makes the JDAM unique are its price tag (roughly $20,000) and the fact that nearly all U.S. combat aircraft can carry them. GlobalSecurity.org, *supra* note 24. Thirty percent of the 19,948 guided munitions employed in Operation Iraqi Freedom were JDAMs. U.S. CENTRAL COMMAND AIR FORCES, ASSESSMENT AND ANALYSIS DIVISION, OPERATION IRAQI FREEDOM—BY THE NUMBERS at 11 (Apr. 30, 2003) [hereinafter BY THE NUMBERS], *available at* www.globalsecurity.org/military/library/report/2003/uscentaf_oif_report_30apr2003.pdf.

Further, as attack aircraft penetrate heavily defended enemy territory, high-tech jamming, escort, and wild weasel aircraft effectively neutralize enemy defences.[28] The Operation Iraqi Freedom air campaign illustrates the value of defence suppression missions. Although flying 20,733 fighter/bomber sorties over territory with degraded, albeit still potent air defences, the Coalition lost only one aircraft to hostile fire, an A-10 Warthog.[29] Airframes such as cruise missiles, UAVs, and stealth aircraft limit the need for defense suppression, thereby freeing up aircraft that would otherwise perform such missions to conduct attacks themselves.

Most significant among the technological wizardry is a networked command and control system that links information, decision-makers, and shooters in real-time. Observing the unfolding battle, commanders are able to move the right assets to the right location at the right time, either to exploit an opportunity or defend vulnerabilities. In some cases, intelligence is fed directly to the cockpit, thereby bypassing commanders and other planners altogether, and collapsing decision-making timing dramatically. In the end, modern air forces typically enjoy not air superiority, but air supremacy.[30]

Technological asymmetry in ground-to-ground fighting is less exaggerated, but still impressive. Advanced ground forces directly linked to many of the sensors described above, particularly the JSTARS and UAVs, have a picture of the battlefield far more comprehensive, accurate, and timely than that of their opponents. Additionally, offensive systems can fire from ranges far in excess of the enemy's and with greater precision. For instance, computerized counter-battery radar systems are capable of identifying an incoming shell at the apex of its flight and immediately computing counter-fire data. Based on the computer-derived location, fire is returned quickly, presumably before the enemy has an opportunity to relocate.

And despite public controversy over protective armour for humvees in Iraq, Coalition vehicles are more survivable than their

---

[28] Wild weasel aircraft such as the F-16C use the AGM-88 HARM (high speed anti-radiation missile) to target enemy radar. The HARM contains a fixed antenna and seeker head that hones in on radar emissions. With a 30-mile range, it needs only a small 40-pound warhead to destroy its fragile target.

[29] BY THE NUMBERS, *supra* note 27, at 3, 7-8. Losses also included four Apache and two Cobra helicopters. *Id.* Iraqi air defences had been degraded by Operations Northern Watch and Southern Watch air strikes prior to commencement of Operation Iraqi Freedom. These operations monitored the no-fly zones in northern and southern Iraq.

[30] Air superiority is "that degree of dominance in the air battle of one force over another which permits the conduct of operations by the former…at a given time and place without prohibitive interference by the opposing force." Air supremacy is "that degree of air superiority wherein the opposing air force is incapable of effective interference." NATO STANDARDIZATION AGENCY, NATO GLOSSARY OF TERMS AND DEFINITIONS (AAP-6) (2004).

counterparts due to technological advances like the use of depleted uranium armour on tanks.[31] They are also faster and more manoeuvrable, and therefore capable of reacting more quickly to evolving situations.[32]

Soldiers are better equipped as well, sporting lightweight body armour, night vision goggles, global positioning systems, and individual weapons equipped with advanced sighting. They are able to communicate hands-free among each other even at the squad level. Secure, wireless laptops are deployed into the field with vertical and horizontal linkage and access to databases ranging from terrain charts to current enemy order-of-battle data. Helicopter or fixed wing air support is typically on-call and immediately available in the contact area.

Illustrative of the advantage is the Blue-Force Tracker, a satellite tracking and communication system that allows computerized integration and dissemination of data. With Blue-Force Tracker, all echelons of command and staff can follow a TIC (troops in contact) event and provide near simultaneous combat support. Using a combination of computer maps, real-time automated data updates (on friendly and enemy locations, as well as other battlefield information), and chat room coordination, troops engaging the enemy no longer have to rely on preplanned support or what happens to be "on-station" (in the vicinity). Instead, they can draw on the full range of theatre assets, nearly simultaneously.[33]

Of course, advanced forces remain vulnerable.[34] By March 2008, nearly 4000 U.S. soldiers, sailors, airmen, and marines had died in Iraq.[35] Nevertheless, in an otherwise equal fight, very few militaries can match units equipped with such technology. The Battle of Fallujah is an excellent example. Although the Iraqi insurgents enjoyed the positional advantage (defending an urban area), nearly 1200 were killed compared to approximately 50 U.S. Marines.[36]

---

[31] E.g., on the U.S. M1A1 Abrams main battle tank. Depleted uranium amour has a density two and a half times greater than steel. For a discussion of improvements on armoured fighting vehicles (AFV), see Christopher F. Foss, *Making the Tough Tougher*, JANE'S DEF. WKLY., June 6, 2001, Jane's On-line, www2.janes.com/K2/k2search.jsp.

[32] The M1A1 moves at speeds of over 70 km/hour.

[33] Interview with senior U.S. Army officer with recent combat experience.

[34] Technological advantage is no panacea. Indeed, history demonstrates that disadvantaged sides often find ways to counter their opponent's superiority. For a fascinating article warning against false confidence, see Charles J. Dunlap, Jr., *How We Lost the High-Tech War of 2007,* THE WKLY. STD., Jan. 29, 1996, at 22.

[35] Iraq Coalition casualty count. http://icasualties.org/oif/.

[36] Estimates of casualties vary somewhat. *See, e.g.*, Anthony Shadid, *Baghdad Suffers a Day of Attacks*, WASH. POST, November 21, 2004, at A30; *US Casualties Surge in Iraq, but Public Impact is Muffled*, AGENCE FRANCE PRESSE, November 30, 2004; Iraq Coalition Casualty Count, icasualties.org/oif/Stats.aspx (filter by place and month).

Growing technological asymmetry exerts a powerful influence on the application of ILH. On the one hand, there is little incentive for the asymmetrically advantaged side to deviate from IHL—at least until its opponent does.[37] During the combat phase of OIF, for instance, Coalition compliance with those components of IHL governing the conduct of hostilities was exceptional.[38] A number of concerns were expressed regarding the requirement to exercise precaution in attack, but such concerns generally evidenced a poor understanding of combat operations.[39] The sole colourable criticism was that certain of the decapitation targets and a few of the government and Ba'ath party facilities attacked did not meet the criteria for "combatant status" and "military objective" respectively. Such allegations are generally incorrect as a matter of law, but it is interesting to note that both decapitation and government facility strikes reflect the doctrinal asymmetry discussed *infra*.[40]

On the other hand, forces that are technologically disadvantaged have two basic problems—how to survive and how to effectively engage the enemy. Dealing first with the former, it is self-evident that the best way to survive is to frustrate the enemy's ability to locate and identify you. Many lawful techniques for doing so exist: encrypting transmissions, camouflage, ruses, manoeuvrability, jamming, meaconing, forcing the fight into a more advantageous environment such as an urban area, and so forth.[41]

The problem is that IHL is premised on a rough balance between humanitarian concerns and military necessity. States are generally only willing to accept those humanitarian limitations on their

---

[37] For an interesting article on how the advanced technology of war is tied to legal and moral issues, see Charles J. Dunlap, Jr., *Technology: Recomplicating Moral Life for the Nation's Defenders*, PARAMETERS, Autumn 1999, at 24.

[38] The combat phase was from 20 March 2003, when strikes were first launched, through 1 May 2003, the day on which President Bush announced, "major combat operations in Iraq have ended." George W. Bush, Remarks from the USS Abraham Lincoln, May 1, 2003, www.whitehouse.gov/news/releases/2003/05/iraq/2003501-15.html.

[39] For instance, Human Rights Watch criticized decapitation strikes conducted by the U.S. air forces on the ground that "the continued resort to decapitation strikes despite their complete lack of success and the significant civilian losses they caused can be seen as a failure to take 'all feasible precautions' in choice of means and methods of warfare in order to minimize civilian losses as required by international humanitarian law." OFF TARGET, *supra* note 20, at 40.

[40] *See* Schmitt, *The Conduct of Hostilities*, *supra* note 20.

[41] Meaconing is "a system of receiving radio beacon signals and rebroadcasting them on the same frequency to confuse navigation. The meaconing stations cause inaccurate bearings to be obtained by aircraft or ground stations." DOD DICTIONARY, *supra* note 8. On urban warfare, see James Blaker, *Urban Warfare: Advantage US,* CHRISTIAN SCIENCE MONITOR, March 27, 2003, at 11; Alan Crowell, *House to House,* NEW YORK TIMES, March 27, 2003, at B12; JOINT CHIEFS OF STAFF, DOCTRINE FOR JOINT URBAN OPERATIONS, JOINT PUBLICATION 3-06 (Sep. 16, 2002).

conduct of hostilities that neither enfeeble them militarily nor give their opponents a measurable advantage. When that balance is thrown off-kilter, as occurs when forces are asymmetrically equipped and capable, it is only natural that the weaker side seeks to compensate for the imbalance.

One way it often accomplishes this is by making it difficult to distinguish its forces from the civilian population.[42] Doing so turns the IHL principle of distinction on its head by incentivizing its violation. Set forth in Article 48 of the 1977 Protocol Additional I, and clearly customary in nature, the principle provides that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[43] The general principle is implemented through specific prohibitions on attacking civilians, civilian objects, and specially protected individuals and objects, such as those who are *hors de combat* and medical facilities.[44]

---

[42] On the moral dimensions of this practice, see Michael Skerker, *Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones,* 3(1) J. OF MIL. ETHICS 27 (2004). On the legal dimensions, see MICHAEL N. SCHMITT, THE IMPACT OF HIGH AND LOW-TECH WARFARE ON THE PRINCIPLE OF DISTINCTION, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, INT'L HUMANITARIAN LAW RESEARCH INITIATIVE BRIEFING PAPER (November 2003), reprinted in INT'L HUMANITARIAN LAW AND THE 21ST CENTURY'S CONFLICTS: CHANGES AND CHALLENGES (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005).

[43] Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977) [hereinafter PI]. The obligation is contained in the ICRC study, *Customary International Humanitarian Law*. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, I CUSTOMARY INT'L HUMANITARIAN LAW (2005), Rule 7 [hereinafter CIHL]. Customary international law emerges when "a general practice accepted as law" exists. Statute of the International Court of Justice, art. 38.1(b). It is "looked for primarily in the actual practice and *opinio juris* of States" *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, [1985] I.C.J. Reports, para. 27; *see also North Sea Continental Shelf cases,* Judgment, [1969], I.C.J. Reports 3, 44. For an excellent summary of the nature and sources of customary international humanitarian law, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87:857 INT'L REV. OF THE RED CROSS 175 (2005).

[44] "The civilian population as such, as well as individual civilians, shall not be the object of attack." PI, *supra* note 43, art. 512. "Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives." PI, *supra*, art. 52.1. *CIHL* suggests that the following are specially protected: medical and religious personnel and objects; humanitarian relief personnel and objects; journalists; protected zones; cultural property; works and installations containing dangerous forces, the natural environment; and, those who are *hors de combat* (wounded, sick, shipwrecked, those who have surrendered, prisoners of war). CIHL, *supra* note 43, Parts II and V.

Application of the proportionality principle and the requirement to take precautions in attack further effectuate distinction. Proportionality, a customary IHL principle appearing three times in Protocol Additional I, prohibits "launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."[45] Requisite precautions in attack include, *inter alia*, doing "everything feasible" to verify that the target is not immune from attack; taking "all feasible precautions" when choosing weapons and tactics so as to minimize collateral damage and incidental injury; and selecting that target from among potential targets offering "similar military advantage," the attack on which causes the least collateral damage and incidental injury.[46]

The asymmetrically disadvantaged party either feigns protected status or uses proximity to protected individuals and objects to deter attacks. Facing a technologically dominant adversary, the Iraqi military (and others fighting alongside them) systematically resorted to these techniques. They had learned early in the conflict that meeting the Coalition forces in classic force-on-force action was nearly suicidal. Such tactics are an unfortunate, but logical, consequence of the Coalition's ability to kill them almost at will once they had been located and identified. To understand the dynamics of asymmetry, it is illustrative to explore a number of these methods of warfare and their legality.

During OIF, Iraqi regular and irregular forces repeatedly donned civilian clothes when Coalition forces might have otherwise identified them.[47] This practice flies in the face of the distinction principle's underlying goal of facilitating the recognition of civilians.[48] Undoubtedly, the practice weakens respect for the principle of distinction, thereby endangering civilians. Yet, despite Protocol Additional I's pronouncement in Article 44.3 that "combatants are

---

[45] CIHL, *supra* note 43, Rule 14; PI, *supra* note 43, arts. 51.5(b); 57.2(a)(iii); 57.2(b).
[46] CIHL, *supra* note 43, Rules 15-21; PI, *supra* note 43, art. 57.
[47] OFF TARGET, *supra* note 20, at 78-79. Since the denial of combatant status to Taliban fighters and publication of photos of U.S. Special Forces soldiers attired in indigenous clothing during Operation Enduring Freedom, the "requirement" to wear uniforms has evoked much discussion. *See, e.g.*, Michelle Kelly & Morten Rostrup, *Identify Yourselves: Coalition Soldiers in Afghanistan are Endangering Air Workers*, GUARDIAN, February 1, 2002, at 19. For a comprehensive legal analysis of the subject, see W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2003) [hereinafter *Special Forces'*].
[48] Jean Pictet, COMMENTARY: III GENEVA CONVENTION 52 (ICRC, 1960); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (ICRC, Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987), paras. 1577-78.

obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack," failure to do so is not a violation of IHL. Instead, military personnel who wear civilian clothes merely lose lawful combatant status and its associated benefits.[49] An explanation of this oft-confused point is in order.

Members of the armed forces enjoy combatant status under Article 4A (1) of the Third Geneva Convention.[50] Implicit as criteria for combatant status are the four cumulative conditions set forth in Article 4A (2), including "having a fixed distinctive sign recognizable at a distance."[51] The most common "distinctive sign" is a uniform. Protocol

---

[49] *See generally*, Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004), Chapter 2.

[50] The relevant provisions of Article 4 exclude the following from civilian status:

> (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 142, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; *see also* Regulations Respecting the Laws and Customs of War on Land, annex to Convention (No. IV) Respecting the Laws and Customs of War on Land, October 18, 1907, art. 1.2, 36 Stat. 2277, 1 Bevans 631 [hereinafter HIVR]; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, art. 13(2)(b), 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, art. 13(2)(b), 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII].

[51] Textually, these conditions appear in the provision applying only to members of a militia that do not form part of the armed forces (and members of other volunteer corps, including organized resistance movements). However, they are interpreted as being inherent in the term "armed forces." As noted by Michael Bothe (et al.), "[i]t is generally assumed that these conditions were deemed, by the 1874 Brussels Conference and the 1899 and 1907 Hague Peace Conferences, to be inherent in the regular armed forces of States. Accordingly, it was considered unnecessary and redundant to spell them out in the Conventions." Michael Bothe et al., NEW RULES FOR VICTIMS OF ARMED CONFLICT 234 (1982); *see also* discussion in CIHL, *supra* note 43, at 15. Case law is

Additional I relaxes the uniform criterion somewhat, but because certain States, especially the United States, strongly object to this relaxation, it cannot be said to be customary law.[52]

The loss of combatant status through non-compliance with the uniform condition has two consequences. Those captured forfeit prisoner of war (POW) status and its protections.[53] Further, because military personnel in civilian clothes do not qualify for combatant status, they enjoy no combatant immunity for using force against the enemy. Attacking the enemy is not a war crime, but it may amount to a criminal offence (e.g., attempted murder) under the national law of the capturing Party. Absent combatant immunity, any State with subject matter and personal jurisdiction may subject the non-uniformed soldier to domestic prosecution based on his or her combat actions, including attacking enemy combatants.[54]

---

supportive. *See, e.g.*, Mohammed Ali et al. v. Public Prosecutor (1968), [1969] AC 430, 449; *Ex parte Quirin* et al., 317 U.S. 1 (1942).

[52] PI, *supra* note 43, art. 44.3.

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
>
> (a) during each military engagement, and
>
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
>
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

It is not customary despite its appearance in CIHL, *supra* note 43, Rule 106. The U.S. position on Protocol I is authoritatively set out in Memorandum for Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, May 8, 1986 (on file with author) [hereinafter PI Memorandum]. *See also* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L LAW & POL'Y 419 (1987).

[53] This point is reflected in CIHL, *supra* note 43, Rule 106.

[54] The classic article on the subject is Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1952 BRITISH YEARBOOK OF INTERNATIONAL LAW 323, reprinted in MIL. L. REV. (Bicentennial Issue) 487 (1975).

Another technique commonly employed in Iraq to offset asymmetrical technological disadvantage is the use of civilians and civilian objects as shields.[55] In military jargon, such tactics are labelled "counter-targeting."[56]

Iraqi forces, especially the paramilitary Fedayeen, passively and actively exploited human shields to deter attacks. In the former case, they based themselves in locations where civilians were present; in the latter, they forcibly used civilians, including women and children, to physically shield their operations.[57]

Whether passive or active, human shielding expressly violates IHL. Article 51(7) of Protocol Additional I prohibits the use of "[t]he presence or movements of the civilian population or individual civilians … to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations."[58] The widespread condemnation that inevitably ensues whenever shields are used evidences the norm's customary character.[59]

Mere presence of human shields does not prevent an attack (as a matter of law) unless it would otherwise violate the proportionality principle by causing incidental injury or collateral damage excessive in relation to the concrete and direct military advantage accruing to the attacker. There have been suggestions that involuntary shields should

---

[55] OFF TARGET, *supra* note 20, at 67-73.

[56] Counter-targeting is "preventing or degrading detection, characterization, destruction, and post-strike assessment." Defense Intelligence Agency, Saddam's Use of Human Shields and Deceptive Sanctuaries: Special Briefing for the Pentagon Press Corps, Feb. 26, 2003, www.defenselink.mil/news/Feb2003/g030226-D-9085M.html.

[57] Todd S. Purdum, *Night Time Ambush in Iraqi City*, N.Y. TIMES, Apr. 5, 2003, at 1; Dexter Filkins, *In the Field Choosing Targets: Iraqi Fighters Or Civilians? Hard Decision for Copters*, N. Y. TIMES, Mar. 31, 2003, at 5.

[58] This prescription tracks that found in the 1949 Fourth Geneva Convention, art. 28: "The presence of a protected person may not be used to render certain points or areas immune from military operations." The prohibition only applies vis-à-vis those who "find themselves…in the hands of a Party, to the conflict or Occupying Party of which they are not nationals." It would not apply to Iraqi forces using Iraqis as shields. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[59] CIHL, *supra* note 43, Rule 97; *see also* U.S. DEP'T OF NAVY, U.S. MARINE CORPS, U.S. COAST GUARD, COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7, para. 8.3.2 (2007); Rome Statute of the International Criminal Court, Jul, 17, 1998, art. 8.2(b)(xxiii), U.N. Doc. A/CONF. 183/9*, 37 I.L.M. 1002 (1998), corrected through Jan. 16, 2002, at http://www.icc-cpi.int/. The U.N. General Assembly labelled Iraq's use of human shields during the first Gulf War as a "most grave and blatant violation of Iraq's obligations under international law" G.A. Res. 46/134 (Dec. 17, 1991). In May 1995, Bosnian Serbs seized UNPROFOR peacekeepers and used them as human shields against NATO air strikes. In response, the U.N. condemned the action, demanded release, and authorized the creation of a rapid reaction force to handle such situations. S.C. Res. 998 (Jun. 16, 1995).

not be included in the calculation of incidental injury, lest lawbreakers benefit from their misconduct.[60] However, Article 51.8 of Protocol Additional I rejects this contention: "Any violation of these prohibitions [includes the prohibition on shielding] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians. . . ." In other words, civilians never lose their IHL protection because of a belligerent's actions, but may chose to forfeit it by directly participating in hostilities.[61] Although IHL seeks to balance humanitarian concerns with military necessity, it was never intended to ensure a "fair fight" between belligerents.[62]

Human shielding is unlawful only when involuntary. *Voluntary* shields forfeit the protection they are entitled to as civilians by "directly participating" in hostilities.[63] As noted in Article 51.3 of Protocol Additional I, "[c]ivilians shall enjoy the protection afforded by this

---

[60] Those taking the opposite stance reasonably and accurately point out that it creates an incentive for the use of shields because an opponent can effectively render a military objective immune from attack simply by placing enough civilians at risk (by virtue of operation of the proportionality principle). A.P.V. Rogers has argued that:

> … a tribunal considering whether a grave breach has been committed [a disproportionate attack] would be able to take into account when considering the rule of proportionality the extent to which the defenders had flouted their obligation to separate military objectives from civilian objects and to take precautions to protect the civilian population . . . the proportionality approach taken by the tribunals should help to redress the balance which would otherwise be tilted in favour of the unscrupulous.

A.P.V. Rogers, *Law on the Battlefield* 129 (2004); *see also* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 163 (1992).

[61] On direct participation, see Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005); Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FUR DIETER FLECK 505-529 (Horst Fischer et al. eds., 2004).

[62]The sole possible exception is the principle of belligerent reprisal. A belligerent reprisal is an unlawful, but proportionate, act taken to compel one's adversary to desist in its own unlawful course of conduct. But it is an extremely limited doctrine and one that is increasingly rejected as out of step with contemporary acceptable methods of warfare. Further, it is designed not to foster a fair (equal) fight, but rather to force the Party violating humanitarian law back into compliance. On reprisals, see Frits Kalshoven, BELLIGERENT REPRISALS (1971). Protocol Additional I went far beyond prior humanitarian law in prohibiting reprisals, a fact that led in part to U.S. opposition to the treaty. *See* PI, *supra* note 43, arts. 51.6 (civilians and civilian population), 52.1 (civilian objects), 53 (cultural objects and places of worship), 54.4 (objects indispensable to the survival of the civilian population), 55.2 (the natural environment), and 56.4 (dams, dykes, and nuclear electrical generating stations).

[63]International volunteer shields travelled to Iraq prior to Operation Iraqi Freedom. All departed once they realized the seriousness of their actions and the Iraqi government's desire to use them as shields for military objectives.

Section, *unless and for such time as they take a direct part in hostilities."*[64] Since they may therefore be attacked, they can shield nothing as a matter of law.[65]

Civilian objects may also be utilized to neutralize enemy technological advantages, through operation of law (proportionality principle), because policy concerns preclude attack, or simply as hiding places. For instance, Iraqi forces frequently placed military equipment and troops in or near civilian buildings (e.g., schools). They also used specially protected objects, such as medical and religious buildings and cultural property, as bases for military operations or supply depots.[66]

The IHL on using objects as shields is less explicit than that regarding human shields. Unlike Article 51, which deals only with protection of "the civilian population or individual civilians," Article 52, which addresses civilian objects, fails to mention shielding. Article 58 mitigates the omission somewhat by requiring defenders to "endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objects; avoid locating military objectives within or near densely populated areas; [and] take the other necessary precautions to protect the civilian

---

[64] The Rome Statute adopts this standard by making it a war crime to intentionally attack civilians unless they are "taking direct part in hostilities." *Supra* note 59, art. 8.2(b)(i). The U.S. correctly takes the position that as direct participants, they become targetable (although there will seldom be any reason to directly attack them) and, more important, are excluded in the estimation of incidental injury when assessing proportionality.

> And then, the other target category that is a challenge for us is where the human shields that we've talked of before might be used. And you really have two types of human shields. You have people who volunteer to go and stand on a bridge or a power plant or a water works facility, and you have people that are placed in those areas not of their own free will. In the case of some of the previous use of human shields in Iraq, Saddam placed hostages, if you will, on sensitive sites in order to show that these were human shields, but, in fact, they were not there of their own free will. Two separate problems to deal with that, and it requires that we work very carefully with the intelligence community to determine what that situation might be at a particular location.

Department of Defense, Background Briefing on Targeting, March 5, 2003, www.defenselink.mil/news/Mar2003/t03052003_t305targ.html. Human Rights Watch takes the opposite position. Human Rights Watch, International Humanitarian Law Issues in a Potential War in Iraq, Feb. 20, 2002, www.hrw.org/backgrounder/arms/iraq0202003.htm#1.

[65] Children legally lack the mental capacity to form the intent to voluntarily shield military objectives. Israeli forces do not to use live ammunition against children. Justus R. Weiner, *Co-existence Without Conflict: The Implementation of Legal Structures for Israeli-Palestinian Cooperation Pursuant to the Interim Peace Agreements*, 26 BROOK. J. INT'L L. 591, at n. 407 (2000).

[66] *1 MEF Roots Out Paramilitaries, Destroys Several Ba'ath Party Headquarters*, U.S. Central Command News Release 03-04-13, Apr. 1, 2003.

population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[67] While these obligations apply only "to the maximum extent feasible," [68] a contentious term in IHL interpretation, it is by definition always feasible to not intentionally deter attack by placing military objectives near civilian objects. This being so, intentional use of civilian objects to shield military objectives, as Iraqi forces did, amounts to a failure to comply with one's IHL obligations.

An additional way technologically inferior forces avoid attack is through misuse of specially protected objects. Human Rights Watch (HRW) documented many such incidents during hostilities in Iraq. For instance, *Off Target*, HRW's report on the conflict, cited Fedayeen use of al-Nasiriyya Surgical Hospital, the Baghdad Red Crescent Maternity Hospital, the Imam Ali mosque in al-Najaf, and the Abu Hanifa mosque. The Iman Ali mosque is the holiest site in Iraq for Shia Muslims, whereas the Abu Hanifa mosque is an important shrine for Sunnis.[69]

These actions were clearly unlawful. The First Geneva Convention provides that "[t]he responsible authorities shall ensure that … medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety."[70] Protocol Additional I, Article 12.4, expresses the prohibition even more bluntly: "Under no circumstances shall medical units be used in an attempt to shield military objectives from attack." Article 53(b) sets forth a similar prohibition for "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."[71] Both of the mosques cited by HRW meet the special significance criterion.

Unlawful tactics such as those described *supra* do not entirely neutralize a foe's technological superiority. The IHL provisions extending special protection to medical, religious, and cultural facilities include clauses removing protection upon misuse.[72] More generally, civilian objects may become military objectives because of their militarily significant *location*, through *use* for

---

[67] *See also* CIHL, *supra* note 43, Chapter 6.
[68] PI, *supra* note 43, art. 58. On the obligations of defenders, see discussion in Marco Sassoli, *Targeting: the Scope and Utility of the Concept of "Military Objectives" for the Protection of Civilians in Contemporary Armed Conflicts*, in NEW WARS, NEW LAWS? (David Wippman & Matthew Evangelista eds., 2005).
[69] OFF TARGET, *supra* note 20, at 72-73. On misuse of religious locations, see also *Regime Shows Disregard for Historical, Religious Sites in Holy City*, U.S. Central Command News Release No. 03-04-28, Apr. 2, 2003; *Regime Use of Baghdad Mosques And Hospitals*, U.S. Central Command News Release No. 03-04-65, (Apr. 6, 2003).
[70] GCI, *supra* note 50, art. 19.
[71] *See also* HIVR, *supra* note 50, art. 4.
[72] *See also* Rome Statute, *supra* note 59, art. 8.2(b)(ix).

military actions, or when the enemy's intended future *purpose* for an object is military in nature.[73]

Even if the technologically weaker party can manage to avoid being attacked, at some point it must take offensive action against its enemy if it hopes to prevail. Guerrilla warfare is a classic response to this requirement. Increasingly, especially as the capabilities gap widens, so too are violations of IHL.

With advanced technology, it is becoming ever more difficult to get close enough to the enemy to mount an attack, let alone survive one. Perfidy, i.e., "killing or wounding treacherously individuals belonging to the hostile nation or army,"[74] has become a common tactic for doing so. The precise parameters of perfidy are unclear. The 1907 Hague IV Regulations reference "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as distinctive badges of the Geneva Convention,"[75] a prohibition that is now unquestionably customary.[76] Article 37.1 of Protocol Additional I is perfidy's most recent codification: "It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy."

Protocol Additional I proffers feigning civilian, non-combatant status as an example of perfidy.[77] Thus, when combatants don civilian clothing for the express purpose of attacking the enemy, they arguably violate the IHL prohibition on perfidy. Although disagreement exists over the prohibition's alleged customary character,[78] the weight of

---

[73] PI, *supra* note 43, art. 52(2). For instance, an apartment building's use as a unit headquarters transforms it into an attackable military facility. Any collateral damage or incidental injury that might be caused during the attack would be governed by the principle of proportionality.

[74] Convention [No. II] with Respect to the Laws and Customs of War on Land, with annex of regulations, preamble, Jul. 29, 1899, art. 23(b), 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 HR]; HIVR, *supra* note 50, art. 23(b). Perfidy is distinguished from ruses, which are acts intended to mislead an adversary and cause him to act recklessly, but which do not involve false claims of protected status. Ruses are lawful. HIVR, *supra*, art. 24; PI, *supra* note 43, art. 37.2.

[75] HIVR, *supra* note 50, art. 23(f). The reference is to the Geneva Convention of 1864. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 18 Martens Nouveau Recueil (le ser.) 612.

[76] CIHL, *supra* note 43, Chapter 18; International Military Tribunal (Nuremberg), Judgment and Sentences (1946), 41 AM. J. INT.L. 172, 218 (1947).

[77] PI, *supra* note 43, art. 37.1(c).

[78] Yoram Dinstein has perceptively pointed out that elsewhere the Protocol Additional relaxes the requirement for uniform wear; this inconsistency renders characterization of feigned civilian status as perfidy "not … much more than lip-service." DINSTEIN, CONDUCT, *supra* note 49, at 203. That perfidy constitutes a grave breach under Protocol

authority suggests it is customary. The ICRC's *Customary International Humanitarian Law Study* includes it as a customary norm and the IHL manuals of many countries, including those of the United States,[79] characterize such actions as perfidious. The *San Remo Manual on International Law Applicable to Conflicts at Sea* does likewise.[80] Finally, according to the Official Record of the Diplomatic Conference that adopted Protocol Additional I, the Committee that drafted the article on perfidy "decided to limit itself to a brief list of particularly clear examples. Examples that were debatable or involved borderline cases were avoided."[81]

An unquestionably perfidious tactic is feigned surrender. Again, feigning surrender allows one to get close enough to attack the enemy, thereby compensating for the technological edge that would otherwise preclude attack. Feigning surrender to ambush Coalition forces was a recurring pattern of Iraqi behaviour during OIF.[82]

Article 37.1(a) of Additional Protocol I cites "the feigning of an intent to negotiate under a flag of truce or surrender" as an example of perfidy when carried out with the objective of capturing, injuring, or killing the enemy. A flag is not the sole means of communicating intent to surrender; any technique that so informs the enemy suffices. Surrendering forces are *hors de combat* and entitled to immunity from attack.[83] The *Customary International Law Study* includes the ban on perfidious surrender as a customary IHL norm.[84]

Another tactic for countering technological strength on the battlefield is misuse of protective emblems. During the recent conflict, Iraqi regular and irregular forces used marked ambulances to reach the battlefield, serve as scout vehicles, and attack Coalition forces. Additionally, the Ba'ath Party building in Basra was marked with the

---

Additional I, but feigning civilian status does not, further supports this position. PI, *supra* note 43, art. 85.3(f). *But see* Parks, *Special Forces', supra* note 47.

[79] CIHL, *supra* note 43, at 224; NWP 1-14M, *supra* note 59, para. 12.7; U,S, Army Judge Advocate General's School, Law of War Handbook 192 (2005); *see also* U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004), para. 5.9.2(c) [hereinafter U.K. MANUAL] (although because the U.K. is a party to Protocol, the manual's bearing on the existence of a customary norm is limited).

[80] SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995), Rule 111.

[81] Official Records, vol. XV, CDDH/236/Rev.1, para. 17.

[82] *See, e.g.*, Glenn Collins, *Allied Advances, Tougher Iraqi Resistance, and a Hunt in the Tigris*, N.Y. TIMES, Mar. 24, 2003, at 1; Brian Knowlton, *Bush Tells of 'Good Progress' But Says War has Just Begun*, INT'L HERALD TRIB., March 24, 2003, at 6.

[83] Lieber Code, *supra* note 4, art. 71; Project of an International Declaration concerning the Laws and Customs of War (1874 Brussels Declaration), art. 13; The Laws of War on Land (1880 Oxford Manual), at 9(b); 1899 HR, *supra* note 74, art. 23(c); HIVR, *supra* note 50, art. 23(c); PI, *supra* note 43, art. 41.2(b). Violation is a grave breach pursuant to PI, *supra*, art. 85.3(e). The Brussels Declaration and Oxford Manual are available at the ICRC Treaty Database, www.icrc.org/ihl.

[84] CIHL, *supra* note 43, Rule 65.

ICRC emblem. Party buildings were often employed as supply depots for military equipment and rallying points for militia.[85] As noted *supra*, Iraqi forces also conducted military operations from medical facilities.

Displaying the distinctive emblems of medical and religious personnel, transports, and units, or the personnel, property, and activities of the International Movement of the Red Cross and Red Crescent, for other than their intended purposes, is unlawful under IHL.[86] The misuse need not be intended to help capture, injure, or kill an opponent. This prohibition is one of the longest standing in IHL, appearing in the 1863 Lieber Code; 1899 and 1907 Hague Regulations; 1906, 1929, and 1949 Geneva Conventions; Protocol Additional I; and the military manuals of many nations.[87] It is self-evidently customary in nature today.[88] When the purpose of the misuse goes beyond merely "hiding" from the enemy to the use of the emblem to treacherously attack, the separate violation of perfidy occurs.[89]

Suicide bombing is an asymmetrical technique to which the disadvantaged side increasingly resorts. Such attacks are seldom isolated acts by religious or other fanatics. On the contrary, most suicide bombings are tied to an organized political or military campaign, usually one designed to "compel modern democracies to withdraw military forces from territory that the terrorists consider to be their homeland."[90]

Suicide bombing is not unlawful *per se*. The case of Japanese Kamikaze's during the World War II illustrates the point that lawful combatants can conduct suicide attacks against enemy combatants consistent with the principle of distinction.

However, the technique is unlawful as perfidious if conducted by combatants out of uniform (see discussion *supra*). More typically,

---

[85] OFF TARGET, *supra* note 20, at 70.

[86] Permitted purposes are set forth in GCI, *supra* note 50, arts. 24-27, 38-44; GCII, *supra* note 50, arts. 22, 24-25, 27, 36-39, 41-44; GCIV, *supra* note 58, arts. 18-22; PI, *supra* note 43, arts. 8, 18, 22-23.

[87] Lieber Code, *supra* note 4, art. 117; *see also* 1899 HR, *supra* note 74, art. 23(f); HIVR, *supra* note 50, art. 23(f); 1906 Geneva Convention, arts. 27-28, ICRC Treaty Database, www.icrc.org/ihl; 1929 Geneva Convention, arts. 24 & 28, ICRC Treaty Database, www.icrc.org/ihl; GCI, *supra* note 50, arts. 39, 44, 53, 54; GCII, *supra* note 50, arts. 41, 44, 45; PI, *supra* note 43, art. 38.1; NWP 1-14M, *supra* note 59, para. 12.2; U.K. MANUAL, *supra* note 79, para. 5.10(a).

[88] CIHL, *supra* note 43, Rule 59.

[89] *See, e.g.*, NWP 1-14M, *supra* note 59, para. 12.2.; FEDERAL MINISTRY OF DEFENSE (GERMANY), HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL (1992), sec. 640.

[90] Robert A. Pape, *Blowing Up an Assumption*, INT'L HERALD TRIB., May 19, 2005, at 8. Pape looked at 315 suicide bombings since 1980 in his research. See *also* ROBERT A. PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM (2005).

though, civilians (unlawful combatants) carry out suicide attacks.[91] If they *intentionally* use their civilian appearance to enable them to get close enough to their target to detonate themselves, they have acted perfidiously. On the other hand, if that is not their intent, then they will have "directly participated" in hostilities, but not have violated IHL. Rather, as with combatants that wear civilian clothes, the consequences of their actions are that they lose civilian immunity from attack (i.e., they may lawfully be targeted) and may be prosecuted under the domestic law of any State with subject matter and personal jurisdiction.[92]

In each of the methods of warfare described above, the asymmetrically disadvantaged party engages in behaviour that either violates IHL norms designed to foster the distinction between combatants and civilians (and military objectives and civilian objects), or takes steps that otherwise weaken them. More reprehensibly, parties to a conflict may dispense with the norms altogether by directly attacking civilians and civilian objects. Unable to prevail on the battlefield (even using the tactics just discussed), the technologically weaker party takes the next logical step—moving the fight beyond the battlefield in the hope of prevailing indirectly. Perhaps the objective is to rupture a coalition, as in the Iraqi scud attacks against Israeli population centres in 1991.[93] Alternatively, the direct attacks may be designed to counteract the involvement of the international community, governmental or non-governmental, in a conflict, as with the suicide bombings of the U.N. and I.C.R.C. facilities in Iraq.[94] Current insurgent attacks against the Iraqi citizenry seek to both turn the population against the Coalition forces out of a sense that they were more secure before the war, and, more generally, intimidate the population into uncooperativeness with the Coalition.

Most frequently, attacks directly against protected objects and individuals are designed to strike at the key center of gravity for democracies—its population. The attackers hope to alter the

---

[91] Regarding use of the method in Iraq, see Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003,* 34 ISRAEL YEARBOOK ON HUMAN RIGHTS 1, 4-5 (2004).

[92] *See* Schmitt, *Humanitarian Law and Direct Participation*, *supra* note 61, at 520-21.

[93] During the Gulf War of 1990-91, Iraq sought to draw Israel into the conflict by targeting Israeli cities with SCUD missiles. It was hoped that this would rupture the Coalition, which included forces from States with an anti-Israel policy stance, such as Syria.

[94] Recall the August 2003 attack on the U.N.'s Headquarters in Baghdad which killed 23, including Sergio Vieira de Mello, the Secretary-General's Special Representative in Iraq. Two months later, a suicide bomber drove an explosive-packed ambulance into the ICRC compound, killing 18 bystanders. Many aid organizations, including the U.N., withdrew or scaled back their staffs following the attacks. For a discussion of the subject, see Nicholas de Torrente, *Humanitarian Actions under Attack: Reflections on the Iraq War*, 17 HARV. HUM. RTS. J. 1 (2004).

democracy's cost-benefit calculations enough to achieve their aims without having to defeat their enemy's superior military. The attacks of September 11th, although conducted outside the context of an armed conflict to which IHL applied, are the paradigmatic examples of this dynamic. All such actions are a direct violation of the customary law norms codified in Articles 51.2 and 52.1 of Protocol Additional I.[95] Sadly, they are a logical reaction to asymmetry on the battlefield.

Beyond *methods* of warfare, an asymmetrically disadvantaged opponent may resort to various *means* of warfare to counteract an opponent's dominance. One possibility is the computer, which enables attack on the enemy's computer networks (computer network attack – CNA). The beauty of CNA directed at a militarily stronger opponent is that the very technology representing the enemy's technological edge constitutes a highly exploitable vulnerability. Further, mounting a computer network attack is affordable, requiring little more than connectivity and hacker know-how.[96] It is a powerful counter to technological asymmetry.

There is nothing inherently unlawful about using computers to disrupt the enemy's networked military systems. However, because a military network is usually more difficult to hack into than civilian infrastructure, the latter is an attractive target set for a belligerent without the sophisticated, dedicated information operations units fielded by the United States.[97] It must be noted that not all CNA targeting of civilian entities is prohibited; some operations will not qualify as an "attack" because the IHL term of art does not encompass mere inconvenience or hardship. That said, computer network attacks directed at civilians or civilian objects that cause death, injury, damage, or destruction would amount to an unlawful attack.

A more frightening prospect is an asymmetrically disadvantaged belligerent turning to weapons of mass destruction (WMD).[98] In the

---

[95] *See* text *supra* at notes 43-44; *see also* CIHL, *supra* note 43, Rules 1-10. The United States specifically finds both provisions to be reflective of customary IHL. PI Memorandum, *supra* note 52.

[96] On computer network attack, see COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW (Michael N. Schmitt & Brian O'Donnell eds., 2002); Michael N. Schmitt, *Wired Warfare: Computer Network Attack and International Law*, 84 (No. 846) INT'L REV. OF THE RED CROSS 365 (June 2002); Michael N. Schmitt, Heather A. Harrison-Dinniss & Thomas C. Winfield, *Computers and War: The Legal Battlespace*, Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative Briefing Paper (June 2004), www.ihlresearch.org/ihl/pdfs/schmittetal.pdf.

[97] Such as the Air Force's 67th Information Operations Wing. See homepage at aia.lackland.af.mil/homepages/67iow/units.cfm.

[98] This a strategic concern expressed by the United States in its National Defense Strategy:

> In the face of American dominance in *traditional* forms of warfare, some hostile forces are seeking to acquire *catastrophic* capabilities,

case of nuclear weapons, use for State survival is probably lawful per se (assuming compliance with the proportionality principle and precautions in attack requirements).[99] Yet, nuclear weapons might also be employed as a conflict's opening salvo against an asymmetrically advantaged opponent in the hope that the blow would be so devastating the adversary would surrender or otherwise accede to the objectives of the attacker. The controversy over North Korea's efforts to enhance its nuclear delivery capability is an apt illustration of how asymmetry can propel a weak State to think of nuclear weapons as compensatory in nature.[100] The legality of use for other than survival purposes is unsettled.[101]

One nefarious possibility is that weaker States will fall back on chemical or biological weapons to compensate for the enemy's military wherewithal. Both are easier to surreptitiously develop, hide, and employ than nuclear weapons, and the source of a chemical or biological attack would be more difficult to ascertain. Any use would be unlawful. In the first place, even if directed against military objects, the effects of their use would probably be difficult to control, thereby violating the prohibition on the use of indiscriminate weapons.[102] Second, the most likely scenario is use against the civilian population because it would produce the greatest effect on the enemy's willingness to continue. This would violate the prohibition on attacking civilians and civilian objects. Third, use of biological and chemical weapons would violate express prohibitions for States Party to the 1925 Gas Protocol, 1972 Biological Weapons Convention, and 1993 Chemical

---

> particularly weapons of mass destruction (WMD). Porous international borders, weak international controls, and easy access to information related technologies facilitate these efforts. Particularly troublesome is the nexus of transnational terrorists, proliferation, and problem states that possess or seek WMD, increasing the risk of WMD attack against the United States.

DEPARTMENT OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES, Mar. 2005, at 2.

[99] The International Court of Justice implicitly recognized this in *Use of Nuclear Weapons*, when it refused to rule out affirmatively the possibility that the use of nuclear weapons would be legal if the survival of a State were at stake. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263 (July 8).

[100] *See, e.g.,* James Brooke, *North Koreans Claim to Extract Weapons Grade Fuel for Bombs*, N.Y. TIMES, May 12, 2005, at 1.

[101] All of the nuclear powers argued that it was not in proceedings before the International Court of Justice in the *Use of Nuclear Weapons*. See discussion of the case in Michael N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, NAVAL WAR C. REV., Spring 1998, at 91-116.

[102] PI, art. 51.4(c) prohibits as indiscriminate attacks "which employ a method or means of combat the effects of which cannot be limited as required by this Protocol." *Supra* note 43. An example is a contagion that spreads randomly among a population.

Weapons Convention.[103] These proscriptions arguably extend even to non-party states, at least to the extent they represent customary law.[104]

Beyond a disadvantaged party directly violating IHL in an effort to avoid defeat, asymmetry may well influence IHL's *interpretation* or *application*. For instance, outmatched on the battlefield, the weaker party has an incentive to broadly interpret the notions of "effective contribution to military action" and "definite military advantage" when identifying military objectives. Similarly, the U.S. inclusion of "war-sustaining" objects (primarily economic in nature) within the scope of military objectives would appeal to a weaker side, for "war-sustaining" entities are of considerable value, but less well defended than typical military objectives.[105]

Application of the proportionality principle might also be affected. Ultimately, no objective means of valuing either incidental injury/collateral damage or military advantage exists.[106] Instead, it is the subjective perspective of the party carrying out the proportionality assessment that matters. A weaker party is likely to assess the military advantage accruing from its own attack as high. This is because when one chronically suffers defeats, any success looms large. Consider the opening days of the war in Iraq. Every downing of a Coalition helicopter or destruction of an armoured fighting vehicle was celebrated as a great victory. By contrast, Coalition forces almost effortlessly destroyed every Iraqi military vehicle (their air force never took off out of fear of immediate destruction) that dared challenge them. In such an environment, it is only natural that dissimilarly placed parties apply the proportionality principle dissimilarly.

The same dynamic applies to the other side of the calculation. To a belligerent facing military defeat, enemy civilian casualties are unlikely to have the weight they would to one assured of victory. The latter, for instance, will be far more concerned about public perceptions of its actions than the former. Coalition efforts to avoid causing collateral damage and incidental injury during OIF are illustrative. Of course, proportionality is always a contextual determination, but

---

[103] Gas Protocol, *supra* note 4; Biological Weapons Convention, *supra* note 4; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45, 32 I.L.M. 800 (1993).

[104] They are included in CIHL, s*upra* note 43, Rules 73 & 74.

[105] *See* note 126 *infra* and accompanying discussion.

[106] Nor for distinguishing military advantage that is "concrete and direct" from that which is not. The official ICRC *Commentary* to the Protocol Additional indicates the expression "show[s] that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." PI Commentary, *supra* note 48, para. 2209.

concerns about enemy civilian suffering inevitably erode the closer to defeat one comes.

As should be apparent, technological asymmetry exerts enormous influence on the willingness of belligerents to abide by IHL. It similarly affects how they interpret and apply it. However, technologically asymmetry is but one of numerous forms of asymmetry that affect the viability of IHL during conflict. A brief review of the others is instructive.

B. Doctrinal Asymmetry

In war, each side hopes to be technologically and tactically superior to its opponents. Both search for that doctrinal approach which best leverages their strengths and exploits the enemy's weaknesses. For advanced Western militaries, effects based-operations (EBO), which are made possible by technological asymmetry, represent the emerging prevailing approach. Because the lack of technological wherewithal precludes lesser-equipped forces from engaging in EBO, its application creates doctrinal asymmetry.[107]

In EBO, targeting "is concerned with the creation of *specific desired effects* through target engagement. Target analysis considers all possible means to create desired effects, drawing from all available capabilities. The art of targeting seeks to create desired effects with the least risk and expenditure of time and resources."[108]

Effects-based operations begin with identification of the effect(s) that the attacker hopes to create through attack. The enemy's systems are then deconstructed to identify those components that should be attacked to best realize the desired effect. As an example, EBO posits that it is unnecessary to destroy an enemy formation that can be rendered combat ineffective through computer network attack on its command and control system. In a real-world application of EBO, U.S. forces engaged in a decapitation campaign during OIF designed to kill senior Iraqi leaders. Leadership is an attractive effects-based target set because, at least in theory, decapitation paralyzes enemy command and control (the effect), thereby avoiding the need to destroy the enemy armed forces.[109] Ultimately, the process addresses the causality between actions and their effects; concentrates on desired effects, both physical

[107] On the role of technology in enabling EBO, *see* Schmitt, *Effects-Based Operations*, *supra* note 14.

[108] JOINT CHIEFS OF STAFF, JOINT TARGETING, JOINT PUBLICATION 3-60 (Apr. 13, 2007), at I-8; David A. Deptula, EFFECTS-BASED OPERATIONS: CHANGE IN THE NATURE OF WAR (2001).

[109] Such strikes seek effects that "cascade." Presumably, the direct effects of removing key decision makers will ripple throughout subordinate echelons, with paralysis at one level cascading down to the next, and so forth. Types of effects are outlined in JOINT PUBLICATION 3-60, *supra* note 108, at I-8 – I-11.

and behavioural; models the enemy as a system of systems; and considers timing because the desirability of specific effects depends on the context in which they are created.

Effects may be direct or indirect. Direct effects are "the immediate, first order consequences of a military action unaltered by intervening events or mechanisms,"[110] for example, the results of the weapon's blast and fragmentation. By contrast, indirect effects are "the delayed and/or second- and third-order consequences of military action."[111] An example would be undermining enemy civilian morale by destroying the nation's military. The ultimate effects sought through an attack may be direct or indirect (or both).

EBO has the potential of enhancing the humanitarian ends of IHL with no detriment to military necessity. In particular, the approach fosters compliance with Article 57.3 of Protocol Additional I by systemizing the search for alternative targets.[112]

However, EBO may also negatively influence IHL compliance. This is apparent in the proposal of operational concepts urging a broad interpretation of military objectives. For instance, when technological asymmetry allows one party to a conflict to attack with almost complete impunity, coercing the other into engaging in (or ceasing) particular conduct becomes theoretically impossible. The advantaged party simply bombs its opponent into compliance with its wishes. Operation Allied Force serves as a classic example of a "coercive" campaign, for the intent was never to defeat President Slobodan Milosevic's army. Rather, it was to compel a return to the bargaining table and end systematic and widespread mistreatment of the Kosovar Albanian population.[113]

In a coercion campaign, the defining question is what to strike to force the enemy leadership into making the decision you desire.[114]

---

[110] *Id.*

[111] *Id.*

[112] "When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects." See also CIHL, *supra* note 43, Rule 2, which repeats this formula verbatim (except for substitution of the word "must" for "shall").

[113] The Statement of the Extraordinary Meeting of the North Atlantic Council on 12 April 1999, reaffirmed by the Heads of State and Government at Washington on 23 April, set forth NATO's demands. They included a cessation of military action, as well as ending violence and repression of the Kosovar Albanians; withdrawal from Kosovo of military, police, and paramilitary forces; an international military presence in Kosovo; safe return of refugees and displaced persons and unhindered access to them by humanitarian aid organizations; and the establishment of a political framework agreement on the basis of the Rambouillet Accords. Press Release M-NAC-1 (99) 51, (Apr.12, 1999); Press Release S-1 (99) 62, (Apr. 23, 1999).

[114] Coercion campaigns are also labelled "compellance campaigns." Robert Pape identifies three types of coercive military strategies. Punishment coercion campaigns

Effects-based operations are tailor-made for such campaigns because they mandate a hunt for those targets most likely to compel the decision-maker. The problem vis-à-vis IHL is that military capability may not be sufficiently valued by the enemy leadership to force their hand by holding it at risk. In such cases, the logical remedy may be to strike something which is *not* military in nature.

Recall Lieutenant General Michael Short's well-known comments as NATO air component commander for OAF: "I felt that on the first night the power should have gone off, and major bridges around Belgrade should have gone into the Danube, and the water should be cut off so the next morning the leading citizens of Belgrade would have got up and asked 'Why are we doing this?' and asked Milosevic the same question."[115] Short perceptively realized that weakening the Yugoslav military would not necessarily force Milosevic to accede to NATO demands. Rather, Milosevic feared losing the support of the population, and therefore his power base, far more.

Thus, the logic of EBO, particularly when applied in a coercive campaign, will sometimes lead planners towards targeting non-military objectives. Predictably, as EBO becomes increasingly possible due to technological asymmetry and doctrinal maturation, there have been calls for abandoning facets of the principle of distinction. For instance, one distinguished commentator has urged that:

> We need a new paradigm when using force against societies with malevolent propensities. We must hold at risk the very way of life that sustains their depredations, and we must threaten to destroy their world as they know it if they persist. This means the air weapon should be unleashed against entire new categories of

---

cause "suffering on civilians, either directly or indirectly by damaging the target state's economy. Bombing or naval blockades can cause shortages of key supplies such as food and clothing or deprive residents of electrical power, water, and other essential services." They seek to quickly compel the enemy leadership to comply with demands or turn the population against that government. Risk coercion strategies gradually degrade civilian and economic targets "in order to convince the opponent that much more severe damage will follow if concessions are not made." Denial coercion strategies "target the opponent's military ability to achieve its territorial or other political objectives, thereby compelling concessions in order to avoid futile expenditure of further resources." ROBERT PAPE, BOMBING TO WIN: AIRPOWER AND COERCION IN WAR, at 15-19 (1996); *see also* Paul C. Strickland, *USAF Aerospace Power Doctrine: Decisive or Coercive,* AEROSPACE POWER JOURNAL, Fall 2000, at 13; DANIEL BYMAN, MATTHEW C. WAXMAN, & ERIC V. LARSON, AIR POWER AS A COERCIVE INSTRUMENT (1999).

[115] Craig R. Whitney, *Crisis in the Balkins: The Commander; Air Wars Won't Stay Risk-Free, General Says*, N.Y. TIMES, June 18, 1999, at A1.

> property that current conceptions of LOAC put off-limits.[116]

Cited examples include "resorts, along with other entertainment, sports, and recreational facilities" and "factories, plants, stores, and shops that produce, sell, or distribute luxury products." This is EBO at its grandest, and it aptly illustrates how an asymmetrical doctrine may influence application of IHL.

On the other side of the doctrinal coin lies the informal but no less significant doctrine of intentionally resorting to violations of IHL and other methods of wearing away the distinction principle. As discussed *supra*, disadvantaged forces facing technologically superior forces will often resort to such tactics, either as a matter of survival or to effectively attack the enemy. But tactics become doctrine when they rise to the level of "[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives."[117] That is certainly occurring in the context of IHL violations now that the technological divide has become so dramatic, particularly during conflicts involving the United States and its closest allies. As discussed, it is but a short jump from weakening the principle of distinction to discarding it through the direct targeting of civilians and civilian objects. Although these actions may occur on the tactical level, at a certain point the enemy can be so incapable of militarily engaging its adversaries, that targeting protected persons and objects becomes doctrine. Terrorism represents a paradigmatic example of this dynamic.[118] Utterly incapable of defeating its enemy in force-on-force

---

[116] Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era,* STRAT. REV. 14 (Summer 2000). He would reserve such operations for societies with a "moral compass" that is "wildly askew." Nor would civilians or objects "genuinely indispensable to the survival of the noncombatant" be targeted. But "almost everything else would be fair game." *Id*.

[117] DOD DICTIONARY, *supra* note 8. Tactics merely involve "the employment and ordered arrangement of forces in relation to each other." *Id.*

[118] The United States has acknowledged this dynamic in its National Defense Strategy. It has also noted the need to develop defense strategies to cope with asymmetrical challenges to its military dominance:

> *Irregular challenges*. Increasingly sophisticated *irregular* methods - e.g., terrorism and insurgency - challenge U.S. security interests. Adversaries employing irregular methods aim to erode U.S. influence, patience, and political will. Irregular opponents often take a long-term approach, attempting to impose prohibitive human, material, financial, and political costs on the United States to compel strategic retreat from a key region or course of action.

engagements, terrorists strike at non-military centres of gravity. Faced with dramatic disparity of capabilities on the battlefield, military forces may come to find the same doctrinal approach rather rational. The insurgencies in Afghanistan and Iraq have sadly signalled this reality.[119]

C. Normative Asymmetry

Since customary IHL, at least in theory, governs all States, [120] legal asymmetry, in which belligerents are bound by differing legal norms, generally derives from treaty Party status. Most multilateral conflicts present a complex maze of applicability. Consider the war in Iraq. All major belligerents were Party to the 1949 Geneva Conventions. Beyond those four agreements, neither the United States nor Iraq was Party to Protocol Additional I. The fact that the U.K. was a Party imposed no legal obligations on British forces because the protocol only applies between a Party and non-Party State when the latter "accepts and applies the provisions thereof."[121] Iraq had not. The 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land (and its annexed Regulations) was inapplicable through

---

> Two factors have intensified the danger of *irregular* challenges: the rise of extremist ideologies and the absence of effective governance.
>
> Political, religious, and ethnic extremism continues to fuel conflicts worldwide.
>
> The absence of effective governance in many parts of the world creates sanctuaries for terrorists, criminals, and insurgents. Many states are unable, and in some cases unwilling, to exercise effective control over their territory or frontiers, thus leaving areas open to hostile exploitation.
>
> Our experience in the war on terrorism points to the need to reorient our military capabilities to contend with such irregular challenges more effectively.

National Defense Strategy, *supra* note 98, at 3.

[119] For a discussion of insurgency as an asymmetrical doctrine, see Thomas X. Hammes, *Insurgency: Modern Warfare Evolves into a Fourth Generation,* STRAT. F. (No. 214), Jan. 2005. *See also* J.G. Eaton, *The Beauty of Asymmetry: An Examination of the Context and Practice of Asymmetric and Unconventional Warfare from a Western/Centrist Perspective*, 2(1) DEF. STUD. 51 (2002); Robert M. Cassidy, *Why Great Powers Fight Small Wars Badly,* MIL. REV., Sept.-Oct. 2000, at 41; U.S. DEP'T OF ARMY, FIELD MANUAL 3-43, COUNTERINSURGENCY (Dec. 15, 2006).

[120] For an excellent summary of the nature and sources of customary international humanitarian law, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87:857 INT'L REV. OF THE RED CROSS 175 (2005).

[121] PI, *supra* note 43, art. 96.

operation of its general participation clause since Iraq was not a Party.[122] Although a number of other relevant IHL treaties avoid this result by providing that they remain operative between Parties thereto even if all belligerents are not Party, none applied on this basis.[123] Finally, the 1993 Chemical Weapons Convention did bind the U.K. and U.S. despite Iraq's non-Party status because it prohibits using chemical weapons "under any circumstances."[124] So other than the Geneva Conventions, the only relevant treaties that formally constrained all three major belligerents were the 1925 Gas Protocol and the 1972 Biological Weapons Convention. Resultantly, in Iraq, customary law, not treaty law, governed the conduct of hostilities. Given the complicated schemes for applicability of treaties, this is likely to be the case more often than not.

Even when bound by the same customary and treaty law, asymmetry can result from differing *interpretations* thereof. Most well known in this regard is the U.S. approach to the definition of "military objective." Article 52 of Protocol Additional I sets forth the classic definition: "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[125] Although the U.S. accepts this textual formula, it adopts a broader interpretation in practice. In particular, the *Commander's Handbook on the Law of*

---

[122] HIVR, *supra* note 50, art. 2. A general participation clause (*clausula si omnes*) precludes application of the treaty when all belligerents are not party to the treaty. The intent is to avoid the creation of multiple legal regimes in the same conflict.

[123] *E.g.*, Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (U.S./U.K. not a Party, although signatories); Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 31 U.S.T. 333, 16 In..L. M. 88 (Iraq not a Party); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 International Legal Materials 1523 (1980) (Iraq not a Party); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sep. 18, 1997, 36 In. L. M. 1507 (1997) (Iraq and US are not parties).

[124] Chemical Weapons Convention, *supra* note 103, art. 1.1.

[125] PI, *supra* note 43, art. 52(2). Protocols II and III of the Conventional Weapons Convention and the Second Protocol to the Cultural Property Convention, as well as many military manuals and training material (including those of the U.S.), repeat this formula. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II), 1980, as amended, 1996, art. 2.6, 35 In.L.M. 1206 (1980); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, art. 1.3, 1342 U.N.T.S. 171; Second Protocol to the Hague Convention of 1954 for Protection of Cultural Property in Event of Armed Conflict, 1996, art. 1(f), 38 In. L.M. 769 (1999). For manuals and training material, see JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK 12 (2004); NWP 1-14M, *supra* note 59, para. 8.2; U.K. MANUAL, *supra* note 79, para. 5.4.1; GERMAN MANUAL, *supra* note 89, sec. 442.

Naval Warfare, the most current of the American law of war manuals, includes "war sustaining" activities within the scope of the phrase.[126] Or consider the 1949 Third Geneva Convention's obligation to convene an Article 5 tribunal to determine the status of detainees when doubt as to their entitlement to prisoner of war status arises.[127] The U.S. agrees it is bound by this provision, but has made a blanket determination that no doubt exists about the status of any of the detainees at Guantanamo.[128] Some States disagree with this approach. Thus, *how* belligerents conduct themselves may be determined as much by their interpretation of the law as by the fact that the law binds them.

At times, asymmetry may actually drive the differing interpretations of IHL adopted by States. Take military objectives. To the extent a valued entity is vulnerable to enemy attack, there will be an incentive to exclude it from the ambit of military objectives. Conversely, the enemy has an incentive to include it. The debate over whether media stations are military objectives exemplifies this dynamic.[129]

Asymmetry in capabilities also powerfully influences *application* of IHL. This is primarily so with regard to the requirements

---

[126] "Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked." NWP 1-14M, *supra* note 59, para. 8.2.5. In the 1995 annotated version of the NWP 1-14M, this assertion is labelled a "statement of customary international law." U.S. Navy, Marine Corps, Coast Guard, Commander's Handbook on the Law of Naval Operations, NWP 1-14M, MCWP 5-2.1, COMDTPUB P5800.7, 1995, at n. 11, reprinted in its annotated version as Vol. 73 of the International Law Studies (U.S. Naval War College, 1999). For support, the Handbook cites General Counsel, Department of Defense, Letter of Sep. 22, 1972, reprinted in 67 AM. J. OF INT'L L. 123 (1973), as the basis for this characterization. U.S. joint doctrine adopts this approach. JOINT PUBLICATION 3-60, *supra* note 108, at E-2. The term "war sustaining" also appears in the instructions for the U.S. Military Commission at Guantanamo. DEPARTMENT OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2, CRIMES AND ELEMENTS FOR TRIALS BY MILITARY COMMISSION para. 5D (Apr. 30, 2003).

[127] "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." GCIII, *supra* note 50, art. 5.

[128] George Bush, Memorandum, Humane Treatment of Taliban and al Qaeda Detainees, Feb. 7, 2002, *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[129] It has been a contentious subject since NATO struck Belgrade's Radio Televisija Srbije (RTS) facility during Operation Allied Force in 1999. Litigation in the European Court of Human Rights ensued, but was eventually dismissed on jurisdictional grounds. Bankovic & Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom, Eur. Ct. Hum. Rts. App. No. 52207/99. The issue resurfaced when Coalition forces struck media facilities during Operation Iraqi Freedom. On those strikes, see Schmitt, *The Conduct of Hostilities during Operation Iraqi Freedom*, *supra* note 20.

for precautions in attack. Recall that the attacker must "do everything feasible to verify" the target's status as a military objective; select weapons and tactics with a view to minimizing collateral damage and incidental injury; apply the principle of proportionality; choose the target (from among potential targets offering similar military advantage) that poses the least danger to civilian lives and objects; and give "effective advance warning" of attacks, "unless circumstances do not permit."[130]

Technologically advanced militaries can achieve a far higher level of precautions than their opponents can. State-of-the-art ISR capabilities provide a fuller understanding of the target system and make possible a better estimate of likely collateral damage and incidental injury. Precision-guided munitions (PGM) limit unintended effects of a strike. Moreover, because PGMs are more accurate, the explosive charge needed to achieve desired results is typically smaller than in their unguided counterparts. Powerful C4ISR assets allow high-tech militaries to identify a greater number of potential targets and advanced forces possess weapons systems more capable of attacking them. Finally, because their advantages may be so dramatic that they can conduct operations with little risk, technologically superior forces have more opportunities to warn the civilian population of impending attack.

Of course, the legal standard that applies to belligerents is a constant. However, because they have greater ability to exercise precautions in attack, advanced militaries are held to a higher standard – as a matter of law – because more precautions are feasible. As the gap between "haves" and "have-nots" widens in 21st century warfare, this normative relativism will grow. In a sense, we are witnessing the birth of a capabilities-based IHL regime.

This is certainly apparent in the assessments produced in the aftermath of recent conflicts. The persistent refrain in each was a failure to exhaust the possibilities for precautions in attack. To illustrate the extent to which expectations have risen, recall that Human Rights Watch chose the title "*Off Target*" for its OIF report—even though the air campaign was undoubtedly the most precise in the history of warfare and despite the fact that Iraqi forces engaged in widespread, systematic, and unambiguous IHL violations. Thus, asymmetry creates a paradoxical situation. The more a military is capable of conducting "clean" warfare, the greater its legal obligations, and the more critical the international community will be of any instance of collateral damage and incidental injury (even when unavoidable).

The complexity of formal treaty applicability and interpretation is exacerbated by the fact that, as a matter of *policy*, States may require their troops to observe the terms of a treaty regardless of provisions

[130] PI, *supra* note 43, art. 57; *see also* CIHL, *supra* note 43, Rules 15-21.

therein that release them from compliance. It is, for example, difficult to imagine Germany, France, or the United Kingdom—all States that regularly deploy forces abroad—acquiescing to any violations of Protocol Additional I even in a conflict in which the agreement was inoperative.

Further, a belligerent may impose normative restrictions on its forces' conduct that are not derivative of law, but instead based purely on policy. As an example, Coalition rules of engagement in Iraq during the ground war forbade soldiers from targeting "enemy infrastructure (public works, commercial communications facilities, dams) lines of communication (roads, highways, tunnels, bridges, railways) and economic objects (commercial storage facilities, pipelines) unless necessary for self-defense or if ordered by your Commander."[131] In IHL, the limiting standards are merely that the infrastructure qualifies as a military objective and can be attacked consistent with the principle of proportionality. For policy reasons, such as keeping critical infrastructure intact in order to ease post-conflict recovery, the rules of engagement were more restrictive than the law. Thus, normative asymmetry derives from both policy and law.

As a practical matter, normative asymmetry between coalition partners may be more significant than that between opposing belligerents. Consider Rules of Engagement (ROE). ROE represent guidance to the warfighter based on operational, policy, and legal concerns. To the extent that partners are bound by differing legal (or policy) standards, they have two options. First, they may operate using different use of force ROE. This situation complicates coalition command and control, can be dangerous to friendly forces, and poses significant risk to civilians.[132] Alternatively, because no member will accept ROE that violate national legal and policy positions, a coalition may adopt common ROE incorporating the most restrictive standards from among those applicable to the partners. In either event, normative asymmetry shapes the "rules of the game."

Such differences may even find their way into operational planning. As an example, during OAF, all NATO allies possessed the power to veto missions. On multiple occasions, France played the "red card" to block missions.[133] Legal concerns certainly influenced its decisions about when to exercise this authority. This experience led, in part, to the U.S. decision to build a coalition of the willing *of its choice*

---

[131] CFLCC ROE Card, Iraq, 2003, at para. 1e, reprinted in OPERATIONAL LAW HANDBOOK, *supra* note 125, at 101.

[132] For an interesting discussion of the complications caused by forces operating with differing rules of engagement in the same area, see F.M. Lorenz, *Rules of Engagement in Somalia: Were They Effective?*, 42 NAVAL L. REV. 62 (1995).

[133] BBC News Online, *US General Condemns French "Red Card,"* October 22, 1999, news.bbc.co.uk/1/hi/world/482015.stm.

for Operation Enduring Freedom, rather than accept the NATO offer of involvement, and the unwieldy decision-making mechanism that would accompany it. Of course, aside from the formal right to veto a mission, the most restrictive approach may govern *de facto* merely because those bound by such norms will be hesitant to participate in a coalition where its partners act in a contrary manner, lest they be "tainted" through association. Therefore, survival of the coalition may dictate which norms apply.

Alternatively, legal and policy asymmetry may lead coalitions to turn to members with greater normative leeway to conduct certain missions. There may be good policy reasons for steering clear of being the coalition partner that executes the normatively sensitive operations, but such a scenario is nevertheless conceivable. One distinguished scholar has suggested that this is a likely prospect during maritime intercept operations (MIO).[134] In such operations, the nationality of warships is distinct and apparent. An intercept by one State's vessel is therefore less likely to be seen as "tainting" other States than would be the case in ground operations. Even ground-based situations can be imagined in which one coalition partner would take on tasks forbidden to its partners because the stakes are especially high or a national interest is specially affected for that State.

D. Participatory Asymmetry

The list of actors in the modern battlespace is becoming extraordinarily confusing. Many countries, most notably the United States, now employ private contractors to perform functions that were traditionally within the purview of military personnel.[135] Indeed, there are more contractors in Iraq today than all non-U.S. Coalition forces combined.[136] At the same time, consider the variety of forces facing the Coalition: the regular army; Republican Guards; Special Republic Guards; Fedayeen Saddam paramilitary forces; civilians impressed into service; groups led by tribal leaders whose authority was at risk; religious zealots fighting the Christians; those who wanted a political

---

[134] Discussion under Chatham House Rules a conference entitled "The Law of Armed Conflict: Problems and Prospects", Apr. 18-19, 2005, Royal Institute of International Affairs, London, U.K. The proceedings are at www.riia.org/pdf/research/il/ILParmedconflict.pdf.

[135] *See generally* Schmitt, *Humanitarian Law and Direct Participation*, *supra* note 61.

[136] Estimates on the number of contractors vary widely as there is no central registry documenting their presence. However, one source indicates there are roughly 100,000 government contractors (excluding subcontractors), including approximately 25,000 security contractors. Renae Merle, *Census Counts 100,000 Contractors in Iraq*, WASH. POST, Dec. 5, 2006, at D-1. There were 14,200 non-U.S. Coalition troops supporting operations in Iraq as of March 2008. GlobalSecurity.org, Non-U.S. Forces in Iraq, www.globalsecurity.org/military/ops/iraq_orbat_coalition.htm.

voice (Sadr and his Mahdi Army); those who had a relative killed, wounded, or insulted during the fighting; foreign jihadists; and pure criminals.[137]

Who is involved in a conflict will affect how the hostilities are conducted. This fact derives from two related factors: enforcement mechanisms and sanctions. First, many such participants are not subject to an internal disciplinary system designed to ensure compliance with IHL. Consider US civilians government employees and contractors in Iraq. Only recently has the Department of Defense begun to attempt to exert criminal jurisdiction over such individuals, and to date it has prosecuted none.[138] Of course, as should be apparent from the catalogue of participants on the Iraqi side, it may be that there is no disciplinary oversight at all of those engaging in hostilities.

Moreover, consider sanctions. Individuals who do not qualify as combatants will not enjoy the protections that the status offers upon capture. In particular, they may be punished under the domestic law of their captor (or another State) for their actions, including having attacked combatants. If they have committed war crimes, international tribunals (with jurisdiction), as well as national courts vis-à-vis crimes for which universal jurisdiction exists, may also try them.[139] Yet, as a practical matter, the fact that they are already punishable for participating in the conflict diminishes the incentives for complying with IHL. In a sense, they have less to lose than lawful combatants in violating IHL. Therefore, the make-up of the forces opposing each other influences the extent to which the participants will abide by IHL.

E. Ad Bellum or Moral Asymmetry

It is a foundational tenet of international law that the *jus ad bellum* and *jus in bello* are separate bodies of law with no normative

---

[137] Author interview with senior U.S. military intelligence officer.

[138] The Military Extraterritorial Jurisdiction Act subjects individuals employed by the US military abroad, whether directly or as contractors, to federal jurisdiction. Military Extraterritorial Jurisdiction Act, 10 U.S.C. § 3261 (2000). The Act was intended primarily to address crimes by contractors against U.S. military personnel and their dependents abroad. Also providing possible jurisdiction is the War Crimes Act of 1996, 18 U.S.C. § 2441 (2004), and the federal torture statute, 18 U.S.C. § 2340A (2000). The Department of Defense has recently emphasized the need to apply the authority. Deputy Secretary of Defense, Management of DoD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States, Sept. 25, 2007 (on file with author).

[139] On the principle of universality and war crimes, see Yoram Dinstein, *The Universality Principle and War Crimes,* in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 17 (Michael N. Schmitt & Leslie C. Green eds., 1998). On the subject generally, see Michael N. Schmitt, *Contractors on the Battlefield: The U.S. Approach*, 7 MILITAIR RECHTELIJK TIJDSCHRIFT 264 (2007).

influence on each other.[140] The fact that a State acts in violation of the *jus ad bellum* does not release its victim from adherence to the *jus in bello*. For instance, that the U.S. and its Allies were acting in legitimate collective defence in Afghanistan,[141] does not excuse mistreatment of prisoners they took on the field of battle.

Despite this truism, the fact remains that in most conflicts one side acts unlawfully, the other lawfully, with regard to the resort to armed force; they are dissimilarly placed vis-à-vis the *jus ad bellum*. In practice, this asymmetry exerts a powerful influence on the willingness of parties to observe IHL. To the extent Country A believes itself to have been legally wronged by Country B, there is a natural (and historic) tendency for it to view B's soldiers and citizens as less worthy of IHL's benefits. After all, they represent lawlessness. Why should they enjoy the equal benefits of the law?

Of course, the problematic reality is that both sides usually contend that they comply with international law . . . and the others do not.[142] Such claims, even in clear cases to the contrary, may well

---

[140] The US Military Tribunal at Nuremberg made this point in U.S. v. Wilhelm List et al. (The Hostages Trial):

> We concur in the views expressed in the following text on the subject: 'Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, and must be done by the belligerents themselves in making war against each other; and as between the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of International Law, it is inoperative in law and without any judicial significance,' is erroneous. The rules of International Law apply to war from whatever cause it originates. Oppenheim's *International Law,* II Lauterpacht, p.174.

THE UNITED NATIONS WAR CRIMES COMMISSION, VIII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 60 (1949).

[141] See analysis in Michael N. Schmitt, *Counter-terrorism and the Use of Force in International Law*, 32 ISRAEL Y.B. ON HUMAN RIGHTS 53 (2002).

[142] The classic example is the Gulf War of 1990-91, in which the Iraqi Revolutionary Command Council justified the annexation of Kuwait as follows: "What has befallen other states in the Arab lands befell Iraq when colonialism divested it of a dear part of it, namely Kuwait, and kept Iraq away from the waters to prevent it from acquiring part of its tactical and strategic abilities, and thus kept part of its people and part of its wealth away from the origin and the wellspring." *Excerpts from Iraq's Statement on Kuwait*, NEW YORK TIMES, August 9, 1990, at A18. The statement was issued six days following the Security Council's condemnation of the Iraqi attack as "breach of international peace

resonate with the aggressor's population, leadership, and military, and, at times, even with those outside the country. Perceptions are what matter in terms of shaping attitudes; attitudes often determine action.

Along the same lines, the parties may be morally asymmetrical. Despite justifiable discomfort with adjudging morality, the truth remains that in many conflicts one side acts immorally. Ethnic cleansing is a tragic contemporary example, one that led to claims that although the bombing of the Federal Republic of Yugoslavia in 1999 may have been illegal, it was nevertheless legitimate.[143] Whatever the objective reality, States understandably often demonize their opponents in order to shore up civilian and military morale and garner international support. For better or worse, conflicts continue to be viewed in terms of "good" and "evil." The persistence into the 21st century of ancient notions such as just war and jihad evidences this dynamic.[144] Indeed, one prominent scholar-practitioner has suggested applying IHL differently to a belligerent whose "moral compass" is "wildly askew."[145] There is no basis for distinctions founded on legal or moral asymmetry in IHL, but the reality is that such differences, real or perceived, matter.[146]

IV. CONCLUDING THOUGHTS

This article has identified various forms of asymmetry that influence the application or interpretation of IHL in 21st century armed conflicts. Clearly, the most visible influence is that exerted by technological differences in the military power of opposing sides. However, other forms of asymmetry also drive the willingness of participants to abide by the norms of IHL, or, perhaps more precisely, deviate from them.

The real danger is that violations of IHL by one side usually lead to corresponding violations by the other, thereby initiating a vicious

---

and security." The vote was 14-0 (Yemen did not participate). S.C. Res. 660 (Aug. 2, 1990).

[143] And the opposite may hold as well. A State acting may be acting legally, but illegitimately. An example would be an enforcement operation authorized pursuant to Chapter VII of the United Nations Charter that illegitimately intruded into the affairs of the target State. To presume the moral infallibility of the Security Council would be naïve.

[144] Abu Musab al-Zarqawi has reportedly justified the killing of innocents in suicide bombings against U.S. forces on precisely this basis: "The killing of infidels by any method including martyrdom" has been "sanctified by many scholars even if it means killing innocent Muslims…This legality has been agreed upon so as not to disrupt jihad…These operations are our lethal weapons against the enemy." *Al Qaeda Defends Killings,* INT'L HERALD TRIB., May 19, 2005, at 4.

[145] *See supra* note 116.

[146] Interestingly, the international community seems more tolerant of IHL violations by the weaker side. One might cynically conclude that it seems more "moral" (or at least justifiable) to deviate from the rules of the game when one is at the disadvantage.

cycle of lawlessness. Recall that the willingness of States to abide by humanitarian law is in part based on the notion of reciprocity. Parties agree to limit their actions during hostilities because they will benefit when their opponent does the same; IHL presumes corresponding interests among the belligerents. Yet, when asymmetry disrupts the presumption and one side violates the agreed rules, the practical incentive for compliance by the other fades. Instead, IHL begins appearing as if it operates to the benefit of one's foes. When that happens, the dictates of the law appear out of step with reality, perhaps even "quaint."[147] So, the real danger is not so much that the various forms of asymmetry will result in violations of IHL. Rather, it is that asymmetries may unleash a dynamic that undercuts the very foundations of this body of law.

[147] *See* Alberto R. Gonzales, Memorandum for the President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, Jan. 25, 2002, in which the White House Chief Counsel wrote that the war on terrorism "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions," *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/index.htm.

REHAB POTENTIAL 101: A PRIMER ON THE USE OF REHABILITATIVE POTENTIAL EVIDENCE IN SENTENCING

MAJOR CHARLES E. WIEDIE, JR.

Major Charles E. Wiedie, Jr. (B.A., Ohio State University (1992); J.D., University of Toledo, College of Law (1995)) is currently assigned as a Military Judge, Air Force Trial Judiciary, Western Region, Travis Air Force Base, California. He is a member of the Ohio Bar.

We are not engaged in a game where the score is counted by the "toughness" of the sentence or whether trial counsel "got the discharge." We are engaged in an aspect of national defense, which has a legitimate and ethical purpose -- to maintain good order and discipline in our armed forces…We would urge the military community to remain faithful to the role of the court-martial as a tool of justice and discipline, a tool which encourages men and women to obey lawful orders and the law, and not give the system over to personnel administration.[1]

I. INTRODUCTION

Courts-martial may involve findings and sentencing phases but a high percentage will only involve a sentencing phase. As such the importance of presenting a proper sentencing case cannot be over emphasized. Both sides in this adversarial proceeding have an interest in ensuring that only legally admissible evidence is presented to the sentencing body. As trial counsel, you do not want your case overturned on appeal because inadmissible evidence was admitted. As defense counsel, you want to make sure you zealously advocate for your client's rights.

Both the prosecution and the defense rely heavily on rehabilitative potential evidence to strengthen their sentencing cases. The rules may seem straightforward in theory, but their actual application in courts-martial often proves problematic. Both sides need to know how the rules apply to their side (in order to maximize the use of rehabilitative potential evidence) and how they apply to the other side (to prevent the introduction of otherwise inadmissible evidence). This analysis of the rules governing rehabilitative potential evidence will begin with a look at the legal framework for analyzing any sentencing evidence. Next, it will look at the definition of rehabilitative potential evidence. Finally, it will conclude by addressing areas where the application of the rules governing admission of rehabilitative potential evidence has often proven particularly troublesome. These areas include: the foundation for an opinion on rehabilitation potential; the basis for a rehabilitation potential opinion; opinions on rehabilitation potential based on the severity of offense; the introduction of specific instances of misconduct; the use of "euphemisms" for a punitive discharge in the context of rehabilitation potential evidence; testimony concerning the "future dangerousness" of an accused; issues related to mendacity; and trial counsel use of rehabilitation potential evidence.

[1] United States v. Aurich, 31 M.J. 95 (C.M.A. 1990).

II. THE FRAMEWORK FOR ADMISSIBLE SENTENCING EVIDENCE

An analysis of the admissibility of rehabilitative potential evidence should begin with the same analysis to which all sentencing evidence is subject: Military Rule for Courts-Martial (RCM) 1001.[2] RCM 1001 provides the framework for determining whether evidence is admissible during the sentencing phase of a trial.

In applying an RCM 1001(b) analysis, three questions must be answered. First, does the evidence fall into one of the specific categories outlined in RCM 1001(b)? Second, is the evidence in an admissible form?[3] And finally, is the probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?[4]

If the evidence offered is proper rehabilitative potential evidence, then the first hurdle to admission of the evidence is easily overcome. Evidence on rehabilitative potential is clearly admissible.[5] In seeking to admit evidence relating to rehabilitative potential, the proponent must next ensure that the evidence is in proper form. For trial counsel, such evidence may be introduced via the testimony of a witness or an oral deposition.[6] Defense counsel may also offer live witness or an oral deposition. The defense, however, has the additional option of offering character letters attesting to the accused's rehabilitative potential provided the rules of evidence are relaxed (or the government fails to object). If the military judge relaxes the rules of evidence based on a defense request, the prosecution can offer letters to rebut defense offered rehabilitative potential evidence. Lastly, rehabilitative potential evidence, like all evidence, must be subjected to a balancing test under Military Rule of Evidence (MRE) 403 to determine its admissibility. Assuming the rehabilitative potential evidence sought to be admitted complies with all of the other rules governing such evidence, survival of a MRE 403 balancing test generally will not be an issue.

---

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2008) [hereinafter MCM].
[3] United States v. Bolden, 34 M.J. 728 (N.M.C.M.R. 1991).
[4] MCM, *supra* note 2, MIL. R. EVID. 403 (2008). *See also* United States v. Zengel, 32 M.J. 642 (C.G.C.M.R. 1991); United States v. Martin, 20 M.J. 227 (C.M.A. 1985).
[5] *See* MCM, *supra* note 2, R.C.M. 1001(b)(5) and R.C.M.1001(c).
[6] MCM, *supra* note 2, R.C.M. 1001(b)(5)(A). An oral deposition offered under this rule must be in accordance with R.C.M. 702(g)(1).

III. WHAT IS REHABILITATIVE POTENTIAL EVIDENCE?

Any analysis of rehabilitative potential evidence must begin by clearly identifying what qualifies as rehabilitative potential evidence. Specifically, rehabilitative potential "refers to the accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[7] Before a witness may offer an opinion as to an accused's rehabilitative potential, it must be established that the witness has "sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority." [8] Once a proper foundation has been laid, the witness may offer an opinion as to the accused's previous performance as a service member and potential for rehabilitation. [9] Such an opinion must, however, be based on information known to the witness and the accused's personal circumstances.[10] The offense of which the accused has been convicted may not serve as the principal basis for the witness' opinion concerning the accused's rehabilitative potential.[11]

On direct examination, the witness is limited to answering whether the accused has rehabilitative potential and offering a brief quantification of the degree of the accused's rehabilitative potential. [12] Generally, the witness is not allowed to further elaborate on the accused's rehabilitative potential or describe the reasons why they hold such an opinion.[13] However, on cross-examination, the witness may be asked about relevant, specific instances of conduct.[14] Furthermore, the scope of the cross-examination may open the door to specific instances of conduct on redirect.[15]

The general concept of what does and what does not constitute rehabilitative potential evidence appears somewhat straightforward in the abstract. It is in the application of this definition and in the rules further established by court decisions that prove to make it more difficult in actual practice. To better understand how the definition of rehabilitative potential evidence is applied and how the various court decision effect this definition, one must look closer at the definition and the interpretation of that definition by the courts.

---

[7] MCM, *supra* note 2, R.C.M. 1001(b)(5).
[8] MCM, *supra* note 2, R.C.M. 1001(b)(5)(B).
[9] MCM, *supra* note 2, R.C.M. 1001(b)(5)(A).
[10] MCM, *supra* note 2, R.C.M. 1001(b)(5)(C).
[11] MCM, *supra* note 2, R.C.M. 1001(b)(5)(C).
[12] MCM, *supra* note 2, R.C.M. 1001(b)(5)(D).
[13] MCM, *supra* note 2, R.C.M. 1001(b)(5)(D) (discussion).
[14] MCM, *supra* note 2, R.C.M. 1001(b)(5)(E).
[15] MCM, *supra* note 2, R.C.M. 1001(b)(5)(F).

IV. APPLICATION OF THE RULES GOVERNING REHABILITATIVE POTENTIAL EVIDENCE AT TRIAL

A. Foundation for Opinion

An opinion from a witness who does not know an accused very well clearly would not be helpful to the sentencing body in determining an appropriate sentence. Therefore, a witness must possess sufficient information and knowledge about the accused's "character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offenses" in order to offer a "helpful," rationally based opinion.[16]

It must be recognized that the testimony of a witness as to their opinion of an accused's rehabilitative potential is limited by RCM 1001(b)(5).[17] This Rule does not allow a witness to provide an explanation as to why they hold such an opinion unless the door is opened on cross-examination.[18] Essentially, RCM 1001(b)(5) allows just one question: "What is the accused's potential for rehabilitation?"[19] Likewise, the answer to that question is limited by the Rule, requiring the witness to limit their answer to whether the accused has such potential.[20] The only leeway given the witness in answering that question is that they may use an adjective to describe their assessment of the accused's rehabilitative potential.[21] Even though a witness is prohibited, on direct examination, from providing the justification or basis for their opinion, they still are required to have a proper foundation for their opinion.[22]

Prior to the 1994 Amendments to the Manual for Courts-Martial, RCM 1001(b)(5) was silent on the need for a witness to have a proper foundation before expressing an opinion on the rehabilitative potential of an accused.[23] Rule 1001(b)(5) was amended to include a

---

[16] MCM, *supra* note 2, R.C.M. 1001(b)(5)(B) (codifying United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989)).
[17] United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*. (pointing out that there are numerous adjectives, such as good, no, some, little, great, zero, and much, that could be used to describe the witness' assessment of the accused's potential for rehabilitation).
[22] *Id*. (citing United States v. Kirk, 31 M.J. 84, (C.M.A. 1990)).
[23] R.C.M. 1001(b)(5) (1984), which simply provided "[t]he trial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence, in the form of opinions concerning the accused's previous performance as a service member and potential for rehabilitation. On cross-examination, inquiry is allowable into relevant and specific instances of conduct."

foundational requirement based on a line of cases that included *United States v. Ohrt*.[24]

In *Ohrt*, the accused was a noncommissioned officer with over 12 years of unblemished service in the Army and the Air Force. At trial, he was convicted of wrongful use of marijuana. During sentencing, the government called the accused's commander to testify concerning his opinion of the accused's potential for rehabilitation. Specifically, he was asked by trial counsel if he had an opinion on the accused's "potential for continued service in the United States Air Force."[25] The witness was permitted, over defense objection, to respond. He stated: "I believe he does not have potential."[26] In response to questions by a court member, the witness stated that the accused had not been offered nonjudicial punishment under Article 15, Uniform Code of Military Justice (UCMJ) for the offense of which he had been convicted because he felt there was no place in the military for the use of illegal drugs.

The court began its analysis by noting that in *United States v. Horner*,[27] they unambiguously stated that on the issue of rehabilitative potential "the commander's view of the severity of the offense . . . is simply not helpful to the sentencing authority."[28] The court also observed the risk of having a commander testify concerning an accused's rehabilitative potential raised the issue of command influence.[29] On the facts presented in *Ohrt*, the court held that, when considered along with his views of drug use in the military, the witness' opinion was inadmissible because no foundation had been laid to show that the opinion was based on the witness' view of the accused personally and his character and potential. The court acknowledged that the witness was never afforded an opportunity to testify as to the foundation for his opinion and that had he been given a chance to testify on this issue, he may have been able to provide such a foundation. Nonetheless, the court stated that the record was devoid of such a foundation and the testimony was therefore inadmissible. The court pointed out that the proper procedure when an adequate foundation is in question is to have the witness testify in an Article 39a, UCMJ session before allowing the witness to testify in the government's case in chief.

---

[24] 28 M.J. 301 (C.M.A. 1989).
[25] *Id*. at 307.
[26] *Id*.
[27] United States v. Horner, 22 M.J. 294 (C.M.A. 1986).
[28] *Id*. at 296.
[29] *Ohrt*, 28 M.J at 303. The court pointed out that some prosecutors attempt to use the rules relating to rehabilitative potential to offer testimony from the accused's commander in an attempt get a stiffer punishment, particularly a punitive discharge. The court stated that such witnesses "have no place in court-martial proceedings." To the contrary, the court noted, only witnesses who are helpful to the sentencing body in determining a fact in issue are appropriate witnesses. *Id.*

B. Basis for Opinion

Assuming a witness can demonstrate they are "not a stranger" to the accused (i.e. they have an adequate foundation), the witness can confirm that based on their knowledge of the accused they have been able to form "a rational, personalized opinion as to rehabilitation potential."[30] This is the basis for the opinion. Stated more precisely, the basis is the reason why the witness holds a particular opinion concerning an accused's rehabilitative potential. The basis for an opinion is most often based on personal observation, but it may also be based on information provided to the witness by others.[31]

During direct examination, RCM 1001(b)(5) does not allow a witness to go into specific instances of misconduct that serve as the reasons for the opinion.[32] If there is an issue as to whether the witness has a proper basis for their opinion, this should be addressed in a session held pursuant to Article 39a.[33]

In *Ohrt*, the issue with the commander's testimony not only related to the foundation for the opinion but the basis for the opinion. Even if the commander had testified about interaction with the accused that provided a sufficient foundation for having an opinion on the accused's rehabilitative potential, there was still an issue with the commander's reasons for holding such an opinion. Because no Article 39a session was held to further delve into the commander's reasons for believing the accused had no potential for rehabilitation, the court was left with the only reason provided by the commander on the record; that drug use was incompatible with military service.

The court pointed out that MRE 701 governs the admissibility of lay-opinion testimony and that MRE 701 applies to opinions offered under RCM 1001(b)(5).[34] The court identified two foundational requirements for such an opinion. First, the witness must have a rational basis for the opinion. Second, the opinion must assist the sentencing body in understanding the testimony of the witness or it must aid the sentencing body in determining a fact in issue. Therefore, the court reasoned, a rationally based opinion must come from someone who has adequate information about an accused's character, performance of duty as a service member, moral fiber, and determination to be rehabilitated. Additionally, the opinion offered must be based on an assessment of these factors.

---

[30] United States v. Clarke, 29 M.J. 582, 585 (A.F.C.M.R. 1989) (citing *Ohrt*, 28 M.J. at 304).
[31] United States v. Boughton, 16 M.J. 649 (A.F.C.M.R. 1983).
[32] United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990).
[33] *See generally Ohrt*, 28 M.J 301 (C.M.A. 1989).
[34] *Id*. (citing United States v. Susee, 25 M.J. 538, 540 (A.C.M.R. 1987)).

Because a hearing outside the presence of the members was not held to determine the basis for the commander's rehabilitative potential opinion, the record revealed only one reason in support of the commander's opinion: the commander's view that a punitive discharge was an appropriate punishment for those who used drugs. Given the lack of further information there were two possibilities with respect to the commander's opinion. First, that it was based exclusively on his view of drug users or, second, that his opinion was based on an assessment of the accused's character, performance of duty as a service member, moral fiber and determination to be rehabilitated. The only possibility that was supported by the facts presented was that the opinion was based on the commander's view of the nature of the offense. The commander's opinion of the accused's rehabilitative potential was inadmissible because it was based on his generalized view of drug users rather than being based on his assessment of the accused personally.

The commander's opinion in *Ohrt* was declared inadmissible, in part, because it was based on the nature of the offense of which the accused had been convicted; a concept that is discussed in more detail later in this article. When considering generally an issue that deals with the basis for an opinion on rehabilitative potential, it must be kept in mind that the opinion must be rational and personalized. If the reason offered to justify the opinion is unreasonable and/or unrelated to the question of rehabilitative potential, it should not be admitted. Additionally, if the opinion is based on the witness' general views and not specific to the accused's characteristics and situation, it is not admissible.

C. Opinion Based on Severity of Offense

Closely related to, and often intertwined with, issues relating to the basis for an opinion on rehabilitative potential are opinions based solely on the nature of the offense of which the accused was convicted. If a witness offers an opinion on rehabilitative potential that is premised exclusively on the severity of the offense, the witness does not have a basis for offering such an opinion because the opinion is not based on relevant information and knowledge possessed by the witness of the accused's personal circumstances.[35]

In *Horner*,[36] the accused was convicted of one specification of distribution of hashish. During sentencing proceedings, his commander

[35] *See* MCM, *supra* note 2, R.C.M. 1001(b)(5)(C); and United States v. Horner, 22 M.J. 294 (C.M.A. 1986).
[36] *Horner*, 22 M.J. at 294.

testified, over defense objection, that he did not think the accused "should be allowed to stay in the Army."

On cross-examination, trial defense counsel explored the basis for the commander's opinion. The commander stated his opinion that the accused lacked rehabilitative potential was based solely on the fact that the accused had been convicted of drug distribution. The commander further admitted that it was his opinion that no one who distributed drugs should be allowed to remain in the service "[r]egardless of the characteristics of the individual involved."[37]

Following the commander's statement about the basis for his opinion, trial defense counsel moved to strike the commander's testimony based on the fact that it did not address the accused's rehabilitative potential and was based solely on the nature of the offense of which the accused had been convicted. The military judge refused to strike the portion of the commander's testimony that dealt with his opinion as to the accused's rehabilitative potential.

While finding no prejudice to the accused, the court did state that the commander's statements were inappropriate. The court noted that it was clear on the record that the commander's opinion was not based on an individual assessment of the accused's character and rehabilitative potential. Rather, the court found the commander's opinion was based on his view of the nature of the crime. The court stated that "such testimony is simply not helpful to the sentencing authority."[38] Noting the absurdity of interpreting RCM 1001(b)(5) to allow witnesses to testify about their personal beliefs as to which crimes deserved which punishments, the court stressed that the function of a witness in this area is to convey their personal insight into the accused's personal circumstances.

The case of *United States v. Armon*[39] demonstrates how opinions on rehabilitative potential which are based on the severity of the offense can also be closely related to other evidence in aggravation, such as unit impact. Pursuant to his pleas, the accused was convicted of three specifications of making false official statements and four specifications of wrongfully wearing unauthorized military accouterments. The basis for the wrongfully wearing unauthorized military accouterments offenses was that the accused wore a Special Forces tab; a Special Forces combat patch, indicating that he had served in a combat zone with a Special Forces unit; the Combat Infantryman Badge (CIB); and a parachutist badge with a bronze star, indicating a parachute jump under combat conditions. The false official statements arose out of statements the accused made that he was entitled to wear

[37] *Id*. at 295.
[38] *Id*. at 296.
[39] 51 M.J. 83 (1999).

the accouterments in question. The government attempted, in its sentencing case, to show aggravating evidence of the adverse impact of the accused's crimes on his fellow soldiers.

One of the witnesses called by the government was Colonel Newman, the commander of the 3d Brigade, 82d Airborne Division. Colonel Newman had also been the commander of Company B, 1st Ranger Battalion, during the invasion of Grenada. One of the false official statements to which the accused pled guilty concerned his claiming to have taken part in a combat jump with the lst Ranger Battalion during the Grenada invasion.

Colonel Newman testified that he had a "poor" opinion about the character of soldiers who lie about service in Grenada.[40] He also testified that he had a "less than outstanding" opinion of the accused's character based on the fact that he lied about having been in combat in Grenada.[41] Finally, he testified that "as a two-time combat veteran" he would not want the accused around if he was going into combat.[42]

The defense counsel did not object to this testimony at trial but did establish on cross-examination that Colonel Newman did not really know the accused and that he was not familiar with the accused's service record.

Because the defense counsel failed to object at trial, the court applied the plain error analysis and found no plain error. Specifically, the court held that evidence of Colonel Newman's "emotional reaction" to the accused's crimes was admissible under RCM 1001(b)(4).[43] The court noted that that neither Colonel Newman nor the trial counsel specifically mentioned "rehabilitative potential." Rather, the court stated that he talked about the "close emotional bond" between soldiers who have served together in combat, and the personal offense he took when he learned that the accused had lied about his combat service.[44]

While not finding plain error, the court did note that Colonel Newman's testimony that he had a poor opinion of appellant's character violated RCM 1001(b)(5)(C) prohibition against opinion testimony based mainly on the nature of the offenses of which the accused was convicted.

Even though it did not find plain error, the court had a little more trouble characterizing Colonel Newman's testimony that he would not "want [the accused] around" in a combat jump. The court noted that this comment could be interpreted indirectly as testimony that Colonel Newman did not want the accused in his brigade, and if so interpreted, it would violate RCM 1001(b)(5)(D). However, the court found that

---

[40] *Id*. at 85.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 87.
[44] *Id*.

Colonel Newman's testimony was presented in the framework of illustrating how the accused's crimes had been personally offensive to other soldiers and was damaging to the trust and confidence vital among soldiers in combat. The court held that viewed in this manner, the testimony was permissible under RCM 1001(b)(4).

The government also called Sergeant First Class Hutchinson to testify during sentencing. Like Colonel Newman, SFC Hutchinson was a member of a unit in the 82d Airborne Division. SFC Hutchinson was entitled to wear the CIB, as well as a combat star on his jump wings, for the jump into Grenada. He testified about the importance of the CIB and combat star and how they give a soldier even more credibility with his fellow soldiers. He further stated that the accused's lies hurt him personally. Finally, he testified that the accused was "not capable of leading troops because he lied about his service."[45]

Trial defense counsel failed to object to SFC Hutchinson's testimony as well but did establish that SFC Hutchinson did not know appellant personally, had not served with him in a unit, and had not observed his duty performance.

On redirect, SFC Hutchinson testified that he absolutely would not want to serve in the same unit with the accused. Like with Colonel Newman's testimony, the court held that SFC Hutchinson's emotional reaction to the accused's crimes was admissible under RCM 1001(b)(4). The court held that his testimony did not go so far as to say there was no place in the Army for the accused and that his testimony about the accused's ability to lead related to the accused's noncommissioned officer status rather than his suitability for continued military service.

Less clear was whether SFC Hutchinson's testimony concerning the fact he would not want to serve in the same unit as the accused was inadmissible. The court noted that "[o]n its face, this testimony runs afoul of the spirit, if not the letter, of RCM 1001(b)(5)(D)."[46] Nonetheless, the court found that the testimony was offered in the context of unit morale and discipline and described the emotional pain inflicted on him by the accused's crimes. The court held that in this context it was admissible under RCM 1001(b)(4). The court went on to say that, even if there was error in admitting the testimony concerning SFC Hutchinson's desire not to serve in the same unit with the accused, it was not plain error.

Victim testimony about an accused's rehabilitative potential is another area of testimony that could raise a number of issues. If the victim has a proper foundation and basis for the opinion, it may very well be admissible. However, a victim's testimony as to how he would

[45] *Id*. at 85.
[46] *Id*. at 87.

feel if the accused received no punishment is not admissible as evidence of an accused's rehabilitative potential under RCM 1001(b)(5).[47]

A witness may offer a rehabilitative potential opinion that is based, in part, on the nature of the offense of which the accused has been convicted. The rules do not prohibit this. However, when an opinion is based in part on the nature of the offense, the witness must be able to articulate, when called upon to do so, the additional basis for their opinion that is not based solely on the nature of the offense of which the accused stands convicted.

D. Specific Instances of Misconduct

As noted, the prosecution may offer evidence of an accused's rehabilitative potential during the sentencing phase of trial, including opinions about an "accused's previous performance as a servicemember and potential for rehabilitation."[48] However, specific instances of conduct, even if they are the basis for the witness' opinion, are not admissible on direct examination by the trial counsel.[49] This prohibition against testifying about specific instances of conduct on direct examination applies to any opinion offered under RCM 1001(b)(5).[50]

The basis for a witness' opinion of the accused's rehabilitative potential is often based on specific instances of misconduct. This is entirely permissible. What is impermissible, however, is for a witness to expound on the reasons for their opinion on direct examination.[51] If there is an issue concerning an adequate basis for a rehabilitative potential opinion, that issue should be explored in an Article 39a, UCMJ, session, not in the presence of the members. If the defense opens the door during their cross-examination of the witness, the witness may explain the basis for their opinion which may include reference to specific instances of misconduct.[52]

While the government is limited, during direct examination, in addressing specific instances of conduct when offering an opinion on rehabilitative potential, the defense is not subjected to the same restraints. In addition to offering an opinion on rehabilitative potential,

---

[47] *See* United States v. Davis, 39 M.J. 281 (C.M.A. 1994). This is not to suggest that proper victim impact testimony is inadmissible during the sentencing phase of a trial. *See* MCM, *supra* note 2, R.C.M. 1001(b)(4).
[48] MCM, *supra* note 2, R.C.M. 1001(b)(5)(A).
[49] United States v. Gregory, 31 M.J. 236, 238 (C.M.A. 1990).
[50] United States v. Sheridan, 43 M.J. 682, 684 (A.F. Ct. Crim. App. 1995) (holding that R.C.M. 1001(b)(5) uses the term "rehabilitation potential" to include opinions concerning an accused's previous performance as a service member).
[51] United States v. Aurich, 31 M.J. 95, 96 (C.M.A. 1990).
[52] *See Aurich*, 31 M.J. at 96; United States v. Clarke, 29 M.J. 582, 584 (A.F.C.M.R. 1989); *Gregory*, 31 M.J. at 238; United States v. Powell, 49 M.J. 460, 465 (1998); and, United States v. Rhoads, 32 M.J. 114 (C.M.A. 1991).

the defense may, on direct examination, inquire into specific instances of good conduct. Such acts qualify for admission as evidence in mitigation.[53]

The prohibition against the government offering specific instances of misconduct on direct examination also applies to actions taken by the command in response to misconduct by the accused.[54]

Evidence is often introduced in the form of nonjudicial punishment, letters of reprimand, letters of counseling, etc, that address specific instances of misconduct on the part of the accused. These documents are admissible as "personal data and character of prior service of the accused."[55] While the sentencing body may consider properly admitted prior disciplinary action taken against the accused in assessing the accused's rehabilitative potential, a witness may not discuss the disciplinary actions under the guise of offering a rehabilitative potential opinion even though the disciplinary actions have already been admitted.[56]

The case of *United States v. Rhoads*,[57] demonstrates the risk trial counsel face in trying to offer testimony concerning the specific acts of the accused as aggravation evidence merely describing the accused's general attitude.

In *Rhoads*, the government called, as a sentencing witness, the accused's first sergeant to offer an opinion concerning the accused's rehabilitative potential. As part of that questioning, the witness was asked to explain the basis for his opinion.

The first sergeant testified that he had known the accused for approximately one year and that he had formed an opinion that the accused was "a below average soldier."[58] When asked why he held this opinion, the witness stated that it was based on the accused's "attitude towards superiors, his daily performance."[59] Trial counsel continued, asking the witness for his opinion concerning the accused's potential for further productive service, to which the witness responded he did not think the accused had such potential. Again trial counsel asked the witness to explain why he held this opinion. The witness responded that

---

[53] *See* MCM, *supra* note 2, R.C.M. 1001 (c)(1)(B) (stating that the defense may present matters relating to "particular acts of good conduct or bravery").

[54] *See Clarke*, 29 M.J. at 584 (finding error when the accused's commander was permitted to testify on direct examination that he had initiated administrative discharge proceedings against the accused for minor misconduct).

[55] *See* MCM, *supra* note 2, R.C.M. 1001(b)(2).

[56] *See* United States v. Estey, A.C.M. S30706, (A.F. Ct. Crim. App., Sept. 22, 2006) (unpublished) (finding error, albeit harmless, in allowing witness to discuss misconduct by the accused even though a letter of reprimand for the misconduct had been admitted as a prosecution exhibit).

[57] 32 M.J. 114 (C.M.A. 1991).

[58] *Id*. at 115.

[59] *Id*.

the accused had personally told him that he had no respect for him or the other NCOs in the battery.

The witness mentioned that the accused had previously transferred from another company and trial counsel asked why the transfer had occurred. Defense counsel objected to the question but the objection was overruled. The witness answered the question by stating that the accused had complained that he could not get along in the other company and that the NCOs in that company were picking on him. The transfer, the witness testified, was done to "rehab" the accused rather than seeking to administratively discharge him.[60] The witness also testified that the accused's misconduct had an adverse impact on morale and discipline in the unit, describing that the unit had recently seen a rash of what the witness termed disrespect cases.

The court held that, despite the trial counsel's attempts to portray the evidence otherwise, the testimony of the witness was merely an explanation of the reasons why he believed the accused possessed poor rehabilitative potential. In the court's opinion, the testimony went well beyond a simple accounting of the accused's general attitude.

While RCM 1001(b)(5) is most often discussed in relation to an opinion on an accused's rehabilitative potential, it also applies to opinions on an accused's previous performance as a servicemember. The rule prohibiting discussion of specific instances of misconduct on direct examination applies equally to any opinion offered under RCM 1001(b)(5).[61]

E. Euphemisms for a Punitive Discharge

As previously noted, the scope of a witness' opinion on rehabilitative potential is rather limited. The witness is restricted in their testimony to answering whether they think the accused has rehabilitative potential. In providing that answer, they may use an adjective characterizing the amount, or lack thereof, of the accused's rehabilitative potential, but they may not elaborate further. An issue that often arises is when the witness expresses an opinion on rehabilitative potential that is couched in terms of the accused's rehabilitative potential in the military. This issue can be interjected by the trial counsel, if the witness is asked if they have an opinion as to the accused "rehabilitative potential for continued service," or by the witness, by stating that the do not think the accused has rehabilitative potential in the military.

---

[60] *Id*.

[61] *See* United States v. Sheridan, 43 M.J. 682, 684 (A.F. Ct. Crim. App. 1995) (holding the military judge erred in permitting a witness to discuss specific misconduct of the accused when the witness was testifying about the accused's previous performance as a service member).

The court in *Ohrt*[62] discussed at length the interplay between an opinion on rehabilitative potential, a punitive discharge, and an administrative discharge. The court noted that there existed a "paradox" relating to the scope of an opinion on rehabilitative potential. The court framed the paradox as such:

> a. We should only retain those people in service who have rehabilitative potential.
> b. Thus, if a member does not have rehabilitative potential, he should not be retained.
> c. If he should not be retained, he should be discharged.
> d. If you ask a witness, "Does the accused have rehabilitative potential?"; He will answer, "No, he should be discharged."[63]

In fact, the lower court in *Ohrt* was evenly split on the issue of whether the military judge erred in allowing the accused's commander to testify that he did not believe the accused had rehabilitative potential for continued service.[64] Because the Air Force Court of Military Review was evenly split, the decision of the military judge was affirmed by operation of law.

Judge Murdock, speaking for one-half of the Air Force Court, wrote that while it would be inappropriate for a witness to suggest a specific type of discharge for the accused, it was not inappropriate for the witness to testify about retention because such testimony "recognizes that discharges are authorized punishments for certain offenses under the code and that information about this sentence component could reasonably assist the sentencing authority in determining an appropriate sentence." [65]

The Court of Military Appeals, however, rejected Judge Murdock's rationale.[66] The court reasoned that allowing a witness to testify concerning the appropriateness of a punitive discharge improperly invaded the province of the sentencing body to determine an appropriate sentence. The court likened testimony on the appropriateness of a punitive discharge to a witness expressing an opinion on the guilt or innocence of the accused. The court noted the rationale for prohibiting both was the same. The court further rejected the propriety of the use of euphemisms which it viewed as nothing more than a witness' endorsement of a particular sentence.

---

[62] United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989).
[63] *Ohrt*, 28 M.J.at 304.
[64] United States v. Ohrt, 26 M.J. 578 (A.F.C.M.R. 1988)
[65] *Id*. at 582.
[66] *Ohrt*, 28 M.J. at 304.

The court also spent a great deal of time addressing the history and role of the punitive discharge in the military justice system. Based on the historical background of the punitive discharge, the court concluded:

> RCM 1001(b)(5) was not designed to give the prosecutor an opportunity to influence court members to punish the accused by imposing a punitive discharge. It also was not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated.[67]

Applying its analysis of the law to the facts in *Ohrt*, the court held that the commander's testimony that the accused had no rehabilitative potential for continued service in the United States Air Force violated the rule against witness' recommending a specific punishment.

While the courts have made it clear that a prosecution witness may not offer an opinion that an accused has no rehabilitative potential for continued service in the military, the issue becomes less clear when neither the trial counsel nor the witness makes any reference to "rehabilitative potential for continued service" but the witness' opinion is based, in fact, on exactly that. The definition of rehabilitative potential provided in RCM 1001(b)(5) provides that "rehabilitative potential refers to the accused's potential to be restored … to a useful and constructive place in society." This definition would appear to suggest that an opinion based solely on an accused's rehabilitative potential for continued service, whether it is expressly couched in those terms or not, would be an improper opinion.

The Army Court of Military Review was faced with just this issue in *United States v. Sylvester*.[68] In *Sylvester*, the accused's company commander testified in sentencing that he had known the appellant personally for approximately a year and a half. The trial counsel asked the witness if he had an opinion as to the accused's rehabilitative potential for future service in the Army. The military judge, *sua sponte*, stepped in and instructed the trial counsel to rephrase the question. The trial counsel then asked the witness if he had an opinion as to the accused's rehabilitative potential.

The trial defense counsel objected. The defense asserted that they believed the witness' opinion was based on his opinion of the accused's rehabilitative potential for continued service despite the fact that the question had been reworded. The military judge overruled the

---

[67] *Id*. at 306.
[68] United States v. Sylvester, 38 M.J. 720 (A.C.M.R. 1994).

defense objection and allowed the witness to testify that he believed the accused had low rehabilitative potential.

On cross-examination, the defense established that the witness' appraisal of the accused's rehabilitative potential was based exclusively on his opinion of the accused's rehabilitation potential as it related to the military and not as member of society in the future. Following this questioning, the defense renewed their objection to the witness' testimony regarding the accused's rehabilitative potential. The military judge again overruled the objection.

The Army Court of Military Review found that the military judge had not abused his discretion in overruling the defense objection. The court stated that the *Horner*[69] court established the definition of rehabilitative potential as used in courts-martial and, if that court had wanted to, it could have prohibited rehabilitative potential opinions limited to a military context. The court noted that the *Horner* court did not do so. The court further noted that the Court of Military Appeals, despite many opportunities to do so, had failed to establish such a bright-line rule.

In justifying their decision finding no error in the admission of the evidence, the court cited Judge Sullivan's concurring opinion in *Aurich*, wherein Judge Sullivan stated that the Horner court "did not purport to prohibit all comments on military "rehabilitative potential" … assuming a proper basis for such an opinion had been established."[70] On appeal, the accused also argued that the reference to "military service" used during cross-examination violated the prohibition against the use of euphemisms.[71] The court noted that the military appellate courts have long prohibited the use of language by a witness that either directly or euphemistically conveyed the opinion of the witness that the accused should receive a punitive discharge.

The court held, however, that because the defense introduced the objectionable euphemism rather than the government, that it did not violate the bar against the use of such euphemisms. The court noted that had the trial counsel been allowed to ask the question as originally phrased, containing the euphemistic language, the question would have been objectionable. However, since the defense, through cross-examination, brought the language before the court in an attempt to challenge the admissibility and weight of the evidence, the court held that it would be inappropriate to rule the evidence inadmissible.[72] To do so, the court reasoned, would improperly extend the *Ohrt* prohibition on the use of euphemisms.

---

[69] United States v. Horner, 22 M.J. 294 (C.M.A. 1986).
[70] United States v. Aurich, 31 M.J. 95, 100 (C.M.A. 1990).
[71] United States v. Sylvester, 38 M.J. 720 (A.C.M.R. 1994).
[72] *Id*.

Despite the holding in *Sylvester*, there is an argument to be made that an opinion based solely on an accused's rehabilitation potential for continued service is inadmissible even if no mention of continued service is made. A witness who holds a rehabilitative potential opinion based solely on the nature of the offense of which the accused has been convicted would not be permitted to offer such an opinion even if their testimony did not specifically so state the basis. The testimony would be inadmissible because it lacked a proper basis. When a witness offers an opinion on rehabilitative potential that is clearly based on the witness' opinion of the accused's rehabilitative potential for continued service, the question arises as to whether they have a proper basis for their opinion. This is so because the definition of rehabilitative potential clearly refers to the accused's potential for rehabilitation in society and not the military. It seems somewhat counterintuitive that a witness' testimony would be admissible simply because they have chosen to ignore the definition of rehabilitative potential provided in the Rules for Courts-Martial and have instead substituted their own definition.

The question of whether the same rules relating to "no euphemisms" applied to the defense has been one with which the courts have struggled. Initially, many court decisions applied the rationale that "[t]he mirror image might reasonably be that an opinion that an accused could 'continue to serve and contribute to the United States Army' simply is a euphemism for, 'I do not believe you should give him a punitive discharge.'"[73] However, that was not the consensus opinion.[74]

The dispute has been settled by the decision in *United States v. Griggs*.[75] At trial, the accused was tried and convicted of various drug-related offenses. In sentencing, the defense offered character letters that contained statements such as "I would not hesitate to have SrA Griggs working for me or with me" and that he could continue to be "an asset to the mission."[76] The trial counsel objected on the grounds that the statements were recommendations for retention and would confuse the members. At trial, the defense conceded an understanding on their part that RCM 1001(b)(5) applied to the defense letters. The military judge ordered the disputed language redacted.

The Air Force Court of Appeals held that the military judge did not abuse his discretion by ordering the redaction and, even if he did,

---

[73] United States v. Ramos, 42 M.J. 392, 396 (1995); *see also* United States v. Hoyt, A.C.M. 33145, 2000 CCA LEXIS 180 (A.F. Ct. Crim. App. July 5, 2000) (holding that defense witnesses cannot comment on the inappropriateness of a punitive discharge).

[74] *See* United States v. Bish, 54 M.J. 860 (A.F. Ct. Crim. App. 2001) (noting that since the rule prohibiting euphemism falls under prosecution evidence (R.C.M. 1001(b)(5)(D)), "it does not appear to prohibit the defense from offering evidence that a member of the accused's unit wants him back").

[75] United States v. Griggs, 61 M.J. 402 (2005).

[76] *Id*. at 406.

the error was harmless.[77] The Air Force court even cited the confusion in this area of law as to whether such evidence is proper from the accused as a basis for its conclusion.

One such case adding to the confusion in this area of the law was *Ohrt*,[78] where the court expressly rejected the use of euphemisms without distinguishing between the prosecution and the defense. Another case that contributed to this uncertainty was *United States v. Ramos*.[79]

In *Ramos*, the accused presented three military witnesses on sentencing that knew the accused on a personal and professional basis. Each testified that they were willing to take the accused back into their units to work for them. Examination of one of the witnesses indicated that his opinion may have been based on his loyalty to the accused. After excusing the witness, the military judge instructed the members to disregard the witness' testimony on the issue of retention. The military judge's concern was that the members might confuse the issue of a punitive discharge with the issue of retention. The court observed that it did not find "unreasonable" the military judge's belief that the retention evidence testimony was inadmissible. Referencing the military judge's instruction, the court stated "it does not seem entirely unreasonable that the military judge viewed such testimony as out of bounds."[80] In so stating, the court noted:

> The mirror image [of the Government-witness euphemism] might reasonably be that an opinion that an accused could "continue to serve and contribute to the United States Army" simply is a euphemism for, "I do not believe you should give him a punitive discharge." If so, then such testimony would seem to be what the Ohrt court had in mind when it explicitly stated that "a witness—be he for the prosecution or the defense—should not be allowed to express an opinion whether an accused should be punitively discharged.[81]

In *Griggs*, however, the Court of Appeals for the Armed Forces disagreed with the lower court's holding and reversed the decision.[82] The court began by noting that the prohibition against a witness offering "an opinion regarding the appropriateness of a punitive discharge or

---

[77] United States v. Griggs, 59 M.J. 712 (A.F. Ct. Crim. App. 2004), *rev. granted*, 60 M.J. 315 (2004).
[78] United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989).
[79] 42 M.J. 392 (1995).
[80] *Id*. at 396.
[81] *Id*. (citing *Ohrt*, 28 M.J. at 304-305).
[82] *Griggs*, 61 M.J. 402.

whether the accused should be returned to the accused's unit" is contained in a section of the RCM that is titled "Matter to be presented by the prosecution."[83] The court further noted that RCM 1001(c), entitled "Matter to be presented by the defense," provides that the defense "may present matters in extenuation and mitigation." A matter in mitigation is evidence that is either introduced to decrease the punishment, which might otherwise be imposed by a court-martial, or provides grounds for a clemency recommendation.[84] RCM 1001(c)(1)(B) describes mitigation evidence as "evidence of the reputation or record of the accused in the service for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a servicemember."

The Court of Appeals of the Armed Forces recognized that there were two distinct questions that needed to be analyzed in determining whether the defense was permitted to introduce "so-called retention evidence."[85] The first question was whether the prohibition expressed in RCM 1001(b)(5)(D) applied to defense witnesses. The second question was, if such a prohibition did apply to defense witnesses, was such evidence still admissible as matters in mitigation.

In determining whether the prohibition expressed in RCM 1001(b)(5)(D) applied to defense witnesses, the court first tried to delineate the legislative intent behind the Rule. The court acknowledged that the placement of the prohibition under a section that referred to evidence to be introduced by the government suggested an "intentional" rather than an "inadvertent" use of a title. The court also noted, however, that the title to a rule is not necessarily controlling on the issue of legislative intent.[86]

Ultimately, the court determined that it had to go beyond the title of the rule and look to the language of the rule as well as how it has been applied by the courts. With respect to the text of the RCM, the court found that the title was consistent with the language that followed. Subsection (A) of the RCM speaks to the evidence "the trial counsel may present" and subsection (D), which addresses the scope of a rehabilitative potential opinion, places a limitation on what the trial counsel may present.

The court found its analysis of the case law interpreting the Rule not entirely helpful in light of the fact that prior decisions provided support for the positions of both sides of the debate. Many court opinions had held that an accused should be returned to duty were

---

[83] *Id*. at 406-407.
[84] MCM, *supra* note 2, R.C.M. 1001(c)(1)(B).
[85] *Griggs*, 61 M.J. at 407.
[86] *Id*. at 402 (citing United States v. Banker, 60 M.J. 216, 219-21 (2004), where the court looked beyond the title of M.R.E. 412 to determine the scope, meaning and intent of rule).

"classic mitigation evidence."[87] In once such case, *United States v. Aurich*,[88] two judges of the court opined that defense retention evidence had long been considered mitigation evidence rather than evidence of rehabilitative potential. However, the court also noted that the dicta of many military court decisions suggested that defense retention evidence was inadmissible because it was opinion evidence that the accused should not receive a punitive discharge.[89]

After discussing the decisions in *Ohrt* and *Ramos*, the court acknowledged that some past decisions seemed to indicate that RCM 1001(b)(5)(D) applied to witnesses for both the government and the defense. Nonetheless, the court held that "the better view is that RCM 1001(b)(5)(D) does not apply to defense mitigation evidence, and specifically does not preclude evidence that a witness would willingly serve with the accused again."

The court's rationale for its holding was three-fold. First, the court expressed the belief that such a reading of the rule was in line with the fact that the prohibition was found in a section of the rule entitled "Matter to be presented by the prosecution."[90] Second, the court noted that this so-called "retention evidence" has long been considered a classic matter in mitigation. Lastly, the court concluded that the legal policy behind the rule supported a prohibition against allowing government witnesses to provide retention evidence but that it did not support a similar ban on such testimony from defense witnesses.[91]

In reaching its conclusion, the court acknowledged the "thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge."[92] While permitting defense retention evidence, the court nonetheless reaffirmed the long standing principle that a witness may not testify as to their opinion that an accused should not receive a punitive discharge. The court stated that this specific prohibition was based on the fact that such testimony improperly invaded the province of the sentencing body in deciding an appropriate punishment and not on any prohibition contained in RCM 1001(b)(5)(D). The court

---

[87] *See* United States v. Aurich, 31 M.J. 95, 97 (C.M.A. 1990); *see also* United States v. Vogel, 37 C.M.R. 462, 463 (C.M.A. 1967); United States v. Guy, 37 C.M.R. 313, 314 (C.M.A. 1967); United States v. Robbins, 37 C.M.R. 94, 98 (C.M.A. 1966).

[88] *Aurich*, 31 M.J. at 95.

[89] *See Ohrt*, 28 M.J. at 304-305 (noting "a witness—be he for the prosecution or the defense—should not be allowed to express an opinion whether an accused should be punitively discharged."); United States v. Ramos, 42 M.J. 392, 396 (1995).

[90] *Griggs*, 61 M.J. at 402.

[91] *Id*. (observing that the chief concerns with such evidence from a government witness were related to requirement that the witness have a rational basis for their opinion and the need to avoid command influence).

[92] *Id*. (noting that an accused, obviously, cannot return to serve in his unit if he receives a punitive discharge).

expressed their belief that the concerns raised about the sentencing body confusing the issues of retention and a punitive discharge could be alleviated by a tailored instruction distinguishing between a punitive discharge and the mitigation evidence indicating that a particular witness is willing to serve with the accused again.

While permitting the admission of defense retention evidence as a matter in mitigation, the court stated that like all opinion evidence, the defense was still required to establish that the witness had a proper foundation for their opinion.

Two recent cases illustrated the application of the holding in *Griggs*. They are *United States v. Edwards*,[93] and *United States v. Winters*.[94]

In *Edwards*, the accused was convicted of failure to go to an appointed place of duty, three specifications of willful disobedience of a superior commissioned officer, false official statement, two specifications of wrongful use of marijuana, and breaking restriction on divers occasions.

At trial, the government objected to three questions posed by the defense to a defense witness, Gunnery Sergeant Fields. First, the defense asked the witness whether he had an opinion as to the accused's rehabilitative potential in the Marine Corps. Second, the defense asked the witness whether the accused could still be an asset to the Marine Corps. Finally, the defense asked the witness whether he would still want the accused as a member of his unit. The government's objection was that these questions called for "an opinion or a euphemism for whether or not to retain [the accused]."[95] All three objections were sustained by the military judge. The witness was, however, allowed to testify as to his opinion that the accused possessed rehabilitative potential for society in general and was able to recover from the effects of his crimes.

On appeal, the government conceded that the military judge erred in prohibiting the defense from asking the witness whether he would still want the accused as a member of his unit. Citing *Griggs*, the court noted that "retention evidence," i.e. defense rehabilitative potential evidence, is clearly evidence in mitigation and that the defense is not constrained by the limitations of RCM 1001(b)(5).[96] Finding merit in the defense's arguments, the court held that the military judge committed error by excluding all three questions. Under *Griggs*, the court held that all three questions related to legitimate and admissible retention evidence.

---

[93] 65 M.J. 622 (N-M. Ct. Crim. App. 2007).
[94] A.C.M. 32276, (A.F. Ct. Crim. App., Mar. 20, 2007).
[95] *Edwards*, 65 M.J. at 625.
[96] *Id*. (citing United States v. Hill, 62 M.J. 271, 272 (2006) (quoting *Griggs*, 61 M.J. at 407)).

In *Winters*, the defense offered a number of character statements on behalf of the accused. Trial counsel objected to two of the letters, arguing that the letter commented on the appropriateness of a punitive discharge.[97]

The military judge sustained the objection to a letter containing language that the accused deserved "another chance to excel in America's Air Force" but overruled the objection to a character letter stating that the author would be willing to work with the accused again either as a military or civilian member. The rationale of the military judge was that the first character letter was a comment on the appropriateness of a punitive discharge. On the other hand, the military judge found the language in the second letter to be precisely the type of language approved of in *Griggs*.

The court recognized that there is "a thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge."[98] In applying *Griggs* to the facts of the present case, the court held that the military judge correctly applied the law and did not abuse his discretion. The court additionally noted that even if there was error, such error was harmless.

What *Edwards* and *Winters* demonstrate is that there really is a "thin line" between defense retention evidence and comment on the appropriateness of a punitive discharge. Arguably, had the witness in *Winters* written that the accused could, if given another chance, excel in the Air Force rather than writing that the accused "deserved" such a chance to excel, then the statement would have fallen within the parameters of *Griggs*. Therefore, close attention must be paid to the precise language used when analyzing an issue involving the use of euphemistic language.

Once the defense offers so-called "retention evidence" the issue then becomes what, if any, recourse the government has to respond to this often powerful evidence. In *Aurich*,[99] the court addressed when a commander's testimony on the accused's rehabilitative potential might be relevant and helpful. The court noted, in part, that when an accused "opens the door" by bringing witnesses before the court who testify that they want him or her back in the unit, the Government is permitted to prove that it is not a consensus view of the command.

---

[97] *Winters*, A.C.M. 32276, (A.F. Ct. Crim. App., Mar. 20, 2007). The language objected to in the letters was "[i]n closing I would like to state that [the appellant] deserves another chance to excel in America's Air Force. It would be a terrible waste of a good Airman and I honestly think she's learned a valuable lesson from [the] mistake that could be deemed as a career ending decision" and "[i]n closing I would like to state that [the appellant] could come work for me as a military or civilian member any time any place." *Id.*

[98] *Id*.

[99] United States v. Aurich, 31 M.J. 95 (C.M.A. 1990).

The concept of government rebuttal evidence to defense retention evidence was addressed again in *Griggs*.[100] The court recognized the concern expressed by the government that the government would have no means to respond to retention evidence presented by the defense. However, the court stated the government did have a means for responding to such evidence. The court noted that the government could answer such testimony with evidence that the opinion of the defense witness or witnesses was not a consensus view of the command.[101]

Even before *Griggs* was decided, the courts had addressed the issues involving the basis and foundation for a rehabilitative potential opinion offered to rebut evidence offered by the defense. The courts have held that *Ohrt* and *Horner* rules also apply to government rebuttal witnesses in order to keep unlawful command influence out of the sentencing proceedings. [102] Thus, a proper foundation and a rational basis are still required for expressing an opinion on rehabilitative potential even if the opinion is offered as rebuttal evidence.

In *United States v. Pompey*,[103] the Court of Military Appeals heard a government appeal of an Air Force Court of Criminal Appeals decision setting aside the accused's sentence. The service court had found that the military judge erred in allowing a government rebuttal witness to testified concerning his opinion on the accused's rehabilitative potential despite a lack of rational basis for holding such an opinion.[104]

At trial, the defense offered a letter from the accused's civilian supervisor which stated in part that she "would not hesitate" to have the accused work for her again.[105] To rebut the defense character letter, the government called the accused's first-line military supervisor. Over the objection of the defense, the military judge allowed the witness to testify. During his testimony on direct examination, the witness testified that he did not want the accused to be returned to the unit. On cross-examination, the witness stated that he had a low opinion of the accused's duty performance. When pressed by the defense counsel, the witness conceded that he previously had a high opinion of the accused

---

[100] *Griggs*, 61 M.J. 402 (2005).
[101] *Id*. at 410, citing *Aurich*, 31 M.J. at 96-97 (stating "if an accused 'opens the door' by bringing witnesses before the court who testify that they want him or her back in the unit, the Government is permitted to prove that that is not a consensus view of the command").
[102] United States v. Pompey, 33 M.J. 266 (C.M.A. 1991); *But see also Aurich*, 32 M.J. 95 (C.M.A. 1990) (observing that where defense witnesses testify they want accused back in unit, the government may prove that that is not a consensus of the command).
[103] 33 M.J. 266 (C.M.A. 1991).
[104] United States v. Pompey, 32 M.J. 547 (A.F.C.M.R. 1990).
[105] *Id*. at 267.

and that his opinion only changed upon learning of the offenses of which the accused was convicted.

The Court of Military Appeals noted two issues in the case. The first issue dealt with a broader question of what law applied to evidence offered to rebut defense "retention evidence." The question posed by the court was whether the rationale of the *Ohrt* and *Horner* cases applied to rebuttal evidence offered by the government under RCM 1001(d) or was it limited solely to rehabilitative evidence offered by the government in its case-in-chief under RCM 1001(b)(5).[106] The second issue dealt with the application of the law to the facts of this particular case. With regards to this issue, the court noted that the question was, if the rationale of the *Ohrt* and *Horner* cases did apply equally to rebuttal evidence, did the rebuttal witness' testimony violate this line of cases because the witness lacked "a rational basis for" his conclusions.[107] The court expressed two concerns relating to opinions on rehabilitative potential evidence offered by the government. The court emphasized the requirement that the witness have a rational basis for their opinion and the need to avoid command influence in the sentencing process. These necessities, the court noted, applied equally to evidence in aggravation and rebuttal evidence. The court stated that if an opinion on rehabilitative potential lacked the proper foundation or raised the risk of command influence, the testimony was objectionable whether presented in the government's sentencing case-in-chief or as rebuttal evidence.

The court recognized the concerns raised by the trial judge and the dissenting opinion at the Air Force Court of Criminal Appeals[108] that it was unfair to allow the defense to present retention evidence and then foreclose the prosecution preclude from answering such evidence with its own rehabilitative potential opinion evidence.[109] However, the court opined that such a view failed to understand the rationale for the court's holding. The court explained the basis for it holding in the following manner:

> [i]f the defense evidence as to rehabilitation lacks "a rational basis"—for instance, if the witness knows little or nothing about the individual accused, his character, and his performance—that evidence is objectionable as irrelevant and immaterial. The Government's remedy is exclusion of the defense evidence by timely objection or motion to strike—and not so-called rebuttal by equally irrelevant and immaterial opinion to the

[106] *Pompey*, 33 M.J. at 266.
[107] *Id*. (citing *Ohrt*, 28 M.J. at 304).
[108] *Pompey*, 32 M.J. 547, 551-53 (A.F.C.M.R. 1990).
[109] *Pompey*, 33 M.J. 266 (C.M.A. 1991).

> contrary. The Government cannot overcome waiver of its objection with the subsequent proffer of inadmissible evidence. On the other hand, if the defense evidence as to rehabilitation is properly based, it is not relevant "rebuttal" to offer an opinion to the contrary, unless that opinion also is properly based.[110]

Summarizing its point, the court concluded that a witness must have a rational basis for their opinion no matter which side offers such evidence and regardless of when in the proceeding such evidence is offered. Clearing up any confusion that might have previously existed, the court uncategorically stated "*Ohrt* and its progeny apply fully to rebuttal" evidence.[111]

The court then turned its attention to applying the law to the particular facts of the case at hand. Noting that earlier cases made it clear that an opinion of the accused's rehabilitation based solely on the nature of the offense of which the accused was convicted was irrelevant, the court concluded that a determination that the government's rebuttal witness' opinion was based solely on the severity of the offense was "inescapable." The opinion offered by the witness was merely a generalized view concerning airmen who used cocaine and simply did not assist the members it making their determination as to an appropriate sentence.

Although much confusion has existed in the past with regard to the use of euphemisms, recent case law has cleared up that confusion. In its case-in-chief, neither the trial counsel nor their witness may use a euphemism for a punitive discharge. The defense, if properly worded, may use such a euphemism in its case-in-chief. If the defense opens the door, the prosecution may rebut this evidence with testimony that the views expressed by the defense witnesses are not the consensus of the command. However, a prosecution rebuttal witness must possess a proper foundation and basis for their opinion and their opinion cannot be based primarily on the offense or offenses for which the accused is to be sentenced.

F. Future Dangerousness

Encompassed within the rehabilitative potential of an accused is the risk, if any, the accused poses for reoffending. The accused's risk of reoffending, or future dangerousness, is a proper matter for consideration by the sentencing body.[112] If evidence is presented on this

---

[110] *Id*. (citations omitted)
[111] *Id*. at 270.
[112] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-5-21 (15 Sept. 2002) [hereinafter BENCHBOOK].

subject in the form of an opinion, the witness offering the opinion must be qualified to give such an opinion and they must have a proper foundation and basis for their opinion. Witness testimony on future dangerousness most often comes from an expert witness. While future dangerousness could be an issue in sentencing proceedings covering a myriad of crimes, it is most often seen, at least at the appellate level, in cases involving sexual assault. Close analysis of the cases addressing this area of the law is necessary to get a better picture of when such testimony is permissible and when it is not.

Following a conviction for a drug related offense, the defense, in *United States v. Gunter*,[113] presented evidence concerning the accused's rehabilitative potential for retention in the Air Force. The government attempted to rebut this evidence with the testimony of an expert witness on drug abuse and counseling. The Court of Military Appeals upheld the admission of the witness' testimony that the accused's rehabilitative potential was poor. The witness did not personally know the accused, nor had he personally treated the accused, but he had reviewed the accused's drug rehabilitation file which included "the available information regarding appellant's progress in the rehabilitation program, including notes about his character, his efforts at rehabilitation, his determination to be rehabilitated, and other information relevant to his becoming drug-free."[114] The court found that there was "no doubt" the witness in question had a sufficient basis to offer such an opinion.[115]

The Court of Military Appeals, in *United States v. Williams*,[116] was faced with the question of whether the trial judge erred in admitting testimony from an expert witness during sentencing concerning the future dangerousness of the accused.

The accused was convicted, contrary to his pleas, by a military judge sitting alone of rape, robbery, sodomy, and aggravated assault. The government called an expert witness during the sentencing phase of the trial. The military judge recognized the witness as an expert in the area of forensic psychiatry without objection.

The expert witness testified that he had interviewed each of the accused's victim's and described the impact of the accused's crimes on each of the victims. The expert witness then testified concerning "statistical recidivism" and "the factors contributing to reoffense."[117] The expert witness then offered an evaluation of accused's crimes in relation to the factors he had discussed.

---

[113] United States v. Gunter, 29 M.J. 140 (C.M.A. 1989).
[114] *Id*. at 141.
[115] *Id*. at 142.
[116] United States v. Williams, 41 M.J. 134 (C.M.A. 1994).
[117] *Id*. at 136.

The expert witness indicated that he had reviewed the report of investigation relating to the accused and listened to the testimony during the accused's trial. The trial counsel then asked the witness if, based on his training and experience and the facts of the accused's case, he had an opinion concerning the dangerousness of the accused.

The trial defense counsel objected to the question, arguing that it called for speculation and the witness did not have a sufficient basis for offering such an opinion because he had never interviewed the accused. The military judge overruled the objection.

The expert witness then summarized the series of crimes of which the accused was convicted, noting that each additional criminal act raised more questions about the accused's dangerousness and violence. After his recitation of the chronology of all of the accused's crimes, the expert stated "I think I would have no choice but to conclude that this is a dangerous man."[118]

The Air Force Court of Military Review held that the military judge erred in allowing the testimony at issue because "'future dangerousness' testimony is not relevant to rehabilitative potential under RCM 1001(b)(5)."[119] That court determined, however, that no prejudice to the accused had occurred.

While the Court of Military Appeals agreed that the admission of the evidence in question did not result in any prejudice to the accused, the court refused to "accept the broad conclusion made by the court of Military Review regarding admissibility of expert opinions or predictions about future dangerousness under RCM 1001(b)(5)."[120] The Court of Military Appeals framed the question at issue as whether a properly qualified psychiatric expert's predictions of future dangerousness is a proper matter for sentencing under RCM 1001(b)(5).

The court noted that a long line of cases, starting with *Horner*,[121] had accepted a liberal interpretation of the term "potential for rehabilitation" and established a long line of case law addressing the limitations and application of RCM 1001(b)(5).[122]

The court further pointed out that the cases relied on by the lower court, *Aurich*[123] and *United States v. Claxton*,[124] did not deal with an expert witness' opinion concerning the future dangerousness of an

---

[118] *Id*. at 137.
[119] United States v. Williams, 35 M.J. 812, 817 (A.F.C.M.R. 1992).
[120] *Williams*, 41 M.J. at 137.
[121] *Horner*, 22 M.J. 294 (C.M.A. 1986).
[122] *Williams*, 41 M.J. at 137 (citing *Pompey*, 33 M.J. at 270; United States v. Claxton, 32 M.J. 159 (C.M.A. 1991); United States v. Corraine, 31 M.J. 102 (C.M.A. 1990); *Aurich*, 31 M.J. 95; United States v. Wilson, 31 M.J. 91 (C.M.A. 1990); *Kirk*, 31 M.J. 84; United States v. Cherry, 31 M.J. 1 (C.M.A. 1990); United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989); *Ohrt*, 28 M.J. 301).
[123] *Aurich*, 31 M.J. at 96-97
[124] 32 M.J. 159 (C.M.A. 1991).

accused but rather addressed the need to limit command influence in sentencing such as a commander's opinion of the rehabilitative potential of an accused.[125] The court noted other cases in which they had approved of the use of expert testimony on the future dangerousness of an accused.[126] Specifically, the court stated that their opinion in *Stinson*[127] supported "[a] basic inference that … a qualified expert's testimony on future dangerousness may be relevant rehabilitative potential evidence."[128]

While the court declined to provide an all-encompassing definition of the term "potential for rehabilitation," they did conclude that "the term is broad enough to encompass the type of expert opinion on future dangerousness offered" by the expert witness in this case.[129]

Imprecise or inartful language on the part of trial counsel or the witness can turn what otherwise might be admissible testimony into inadmissible testimony as evidenced by the case of *United States v. McElhaney*.[130] In that case, the accused was tried and convicted of attempt to commit rape, attempt to commit carnal knowledge with a child under 16 years of age, carnal knowledge with a child under 12 years of age, carnal knowledge with a child under 16 years of age, sodomy with a child under 16 years of age, and four specifications of indecent acts with a child under 16 years of age.

The Government called one presentencing witness, Dr. Morales, a child psychiatrist, who testified concerning the accused's rehabilitative potential and victim impact. The defense objected to the expert's testimony about rehabilitative potential, arguing that the witness did not have a proper foundation to offer such an opinion. The defense asserted that the witness had not examined the accused, had not reviewed his medical or personnel records, and had gained all of his information about the accused from the victim and observations in court. The defense further asserted that it was concerned that the witness would, under the umbrella of "rehabilitative potential," diagnose the accused as a pedophile despite the fact that he had not examined the accused. The military judge allowed the witness to testify about specific victim impact and "future dangerousness of the accused." The military judge also let the witness testify that the accused's behavior was "consistent"

---

[125] *Williams*, 41 M.J. 134.
[126] *Id*. (citing United States v. Stinson, 34 M.J. 233 (C.M.A. 1992) (holding a family advocacy therapist, could offer an opinion concerning the accused's "prognosis for rehabilitation" despite the fact the therapist had not interviewed the accused) and *Gunter*, 29 M.J. at 142 (holding that a qualified expert, having "'a rational basis' upon which to form an opinion" may provide testimony about the "chances" of overcoming drug addiction)).
[127] *Stinson*, 34 M.J. at 238.
[128] *Williams*, 41 M.J. 134.
[129] *Id*. at 139 (citing *Horner*, 22 M.J. 294).
[130] 54 M.J. 120 (2000).

with the "profile" of a pedophile, but ruled that the Government could not state that the accused had been diagnosed a pedophile.[131]

The witness testified in presentencing that the accused met the criteria for pedophilia and that his risk of reoffending was high. As to rehabilitative potential, he testified:

> Pedophilia in general has a very poor prognosis. All the research shows that the best that one could hope for would be for somebody to get to the point in their lives where they are so afraid of the legal system that they may not act on their urges or impulses, or that the actual urges or impulses go away completely is very unlikely [sic], so that people around this person is [sic] always at risk.[132]

The military judge asked the witness to talk specifically about the accused after pointing out that his statement was a generalization. At that point, the witness testified:

> It's consistent with a poor prognosis would be [sic] that the person was brought in by the legal system. A good prognosis would be somebody who is so disturbed by their behavior that they sought help before the legal system had to intervene. So, based on that, he meets the criteria for somebody with a poor prognosis.[133]

Noting that future dangerousness is an appropriate consideration for an opinion on rehabilitative potential, the lower court affirmed the military judge's ruling.[134] The lower court further stated that the fact that the witness had never examined the witness went to the weight of his testimony rather than its admissibility.

The Court of Appeals for the Armed Forces noted that RCM 1001(b)(5)(A) permits the presentation of evidence on rehabilitative potential but that RCM 1001(b)(5)(B) requires that this evidence be based on a proper foundation i.e., that the witness possess "sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority."[135]

After discussing the witness' lack of contact with the accused, the court acknowledged that such lack of contact generally bears upon the weight to be given to an expert's testimony, not its admissibility.

---

[131] *Id*. at 133.
[132] *Id*.
[133] *Id*.
[134] *McElhaney*, 50 M.J. 819, 831 (A.F. Ct. Crim. App. 1999).
[135] *McElhaney*, 54 M.J. 120.

Despite this general rule, the court stated that there were other aspects of the case that made the admission of the witness' opinion on the accused's rehabilitative potential inappropriate.

The court took issue with the fact that the witness had no knowledge of the accused's medical history because he had not reviewed any medical or personnel records. The court was further troubled by the fact that the witness' testimony that the accused's behavior was consistent with pedophilia essentially resulted in identifying the accused as a pedophile. The court was of this opinion because the witness' opinion on the accused's rehabilitative potential was based on the assumption that the accused was a pedophile. Additionally, the witness did not offer a specific opinion on the rehabilitative potential of the accused but rather provided an opinion on the rehabilitative potential of pedophiles in general without providing any information on the basis for his opinion on the rehabilitative potential of pedophiles. Furthermore, despite the urging of the military judge, the witness failed to tie his opinion to the accused specifically. The court concluded by holding that the military judge erred in permitting the witness to testify about the future dangerousness of the accused as it related to pedophilia.

In *United States v. Patterson*,[136] the accused was convicted, consistent with his pleas, to multiple offenses involving the sexual abuse of his daughter as well as failing to obey a lawful order and damaging military property.

On appeal, the accused complained that the military erred in allowing a government witness to testify about the treatment of pedophiles despite the fact that the accused had not been diagnosed as a pedophile and the witness was unqualified to offer an opinion as to the accused's amenability to treatment.

The government's expert witness had interviewed the accused's wife, had examined the accused's daughter and talked with her therapist. The witness did not, however, examine the accused. The defense stipulated at trial that the witness was an expert in general psychiatry and child and adolescent psychiatry. The trial judge sustained a defense objection to the witness testifying about "any psychiatric orders or disorders that [the accused] may have."[137] The witness noted the daughter's "provocativeness" and opined that it was due to her father's explicit and implicit rewarding of such behavior. On the prompting of trial counsel, the witness explained the concept of grooming by stating that it was "particular description of activities in a pedophile."[138] At that point, the defense counsel objected. The military judge overruled the

[136] 54 M.J. 74 (2000).
[137] *Id*. at 76.
[138] *Id*.

objection stating that he would consider the testimony with respect to how the offense were committed and what went into committing them.

The witness went on to describe grooming in detail explaining that it was "a fairly well documented phenomena of what certain individuals do to seduce children."[139] The witness then stated that he saw evidence of grooming in the accused's daughter's description of what occurred and identified specific conduct by the accused that she viewed as grooming.

After eliciting this information, the trial turned the witnesses attention to his personal experiences in the treatment of adults who had "groomed" young children for sexual abuse and her knowledge of the literature on the success rate for treatment of individuals who groomed children. The witness noted that despite many different approaches to such treatment, nothing had proved particularly effective.

In addressing the accused's complaint on appeal that the military judge erred in allowing the witness to testify about "the habits of pedophiles" and the absence of effective "treatment programs for pedophiles," the court stated that the witness did not actually testify that the accused was a pedophile.[140] Rather, the witness testified that "grooming" was a term that described certain activities of a pedophile and "grooming" occurred in this case. Because the military judge expressly stated that he would not consider any testimony concerning the accused's psychiatric or psychological condition because the witness had not personally examined the accused. The court concluded that, even if the witness implicitly labeled the accused as a pedophile, it was not a violation of the military judge's ruling that he would not consider the witnesses testimony relating to "any psychiatric orders or disorders that the accused may have."[141] Rather, the court viewed the expert witness' testimony as aggravation evidence in light of the fact the testimony was offered to describe the impact the crimes did and would have on the accused's daughter. The expert witness' description of the "grooming" behavior was relevant because in the witness' expert opinion the victim's unusual flirtatious or provocative behaviors were attributable to such grooming.[142]

---

[139] *Id*.
[140] *Id*. at 77.
[141] *Patterson*, 54 M.J. at 76 (citing United States v. Davis, 44 M.J. 13, 17 (1996) and United States v. Kinman, 25 M.J. 99, 100-01 (C.M.A. 1987)) (finding appellate court assumes that military judge will do what he says he will do). *See generally* MCM, *supra* note 2, MIL. R. EVID. 105 (evidence may be admitted for one purpose but be restricted in its use for other purposes).
[142] *Id*. at 78 (citing United States v. Irwin, 42 M.J. 479, 483 (1995)) (holding evidence of threats made to a victim of rape during the rape were admitted to show the special impact of that offense on the victim). *See also* United States v. Wilson, 47 M.J. 152, 155 (1997) (allowing evidence of victim's special circumstances, which gave rise to enhanced impact of offense on victim); United States v. Jones, 44 M.J. 103, 104 (1996)

With respect to the accused's claim that the expert witness' testimony concerning the lack of success in treating individuals who groom children for sexual abuse, the court noted that this testimony may have violated the military judge's earlier ruling limiting the scope of the expert's testimony. Nonetheless, the court held that trial defense counsel did not specifically object on this basis and that, under a plain error standard, there was no error in the admission of this evidence.

In *United States v. Prato*,[143] the accused was convicted, in accordance with his pleas, of rape, indecent assault, indecent acts, and indecent language. On appeal, the accused argued that the military judge committed plain error by considering the testimony of the accused's own expert witness during cross-examination, that the accused "hypothetically" fit the "diagnosis" for pedophilia.

During sentencing, the accused presented the testimony of a clinical psychologist regarding the rehabilitative potential of abused children. Trial counsel did not object but also asked the court to recognize the witness as an expert in the rehabilitative potential of abusers. In the end, the military judge recognized the witness as an expert in "psychology and specifically dealing with the psychological effects of physical and sexual abuse on children."

On direct examination, the witness stated that he had been in the courtroom throughout the sentencing proceedings and had heard the accused's siblings testify about the extensive physical, psychological, and sexual abuse the accused was subjected to during his childhood. The accused also presented an unsworn statement detailing the same abuse for which the witness was also present. Defense counsel concluded by asking the witness to offer his opinion of the accused's rehabilitative potential, based on what he heard concerning the abuse suffered by the accused as a child. The witness stated, in response to the question, that assuming the accused's siblings had testified truthfully, the accused's rehabilitative potential was "better than average." The witness qualified his opinion by stating that he assumed, for purposes of the question, that the accused had no history of alcohol or drug abuse.

On cross-examination, trial counsel asked the witness about the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), which the witness identified as the "definitive authority" used to make diagnoses of mental disorders, including pedophilia. Trial counsel then asked the witness, based on the evidence he had heard during the trial and the DSM-IV, to offer an opinion as to whether the accused fit the diagnosis for pedophilia. While pointing out that he had never treated or even talked with the accused, the witness conceded that the accused

---

(finding evidence of accused's medical condition subjecting victim to risk of fatal disease relevant as aggravating circumstance).

[143] United States v. Prato, N.M.C.M. 9901690, (N-M. Ct. Crim. App., May 13, 2002).

"hypothetically" fit the DSM-IV diagnostic criteria for pedophilia. The witness further testified that the DSM-IV stated that "the course is usually chronic" meaning the disorder could continue for a "number of years." No objection was made to the witness' testimony on cross-examination.

Defense counsel, on redirect, elicited that while pedophilia is difficult to treat, such treatment can be successful. The witness went on to clarify, based on a question by the military judge, that if a pedophile receives treatment, it is possible that the individual will not engage in further such abuse.

On appeal, the accused argued that the government extracted testimony from the witness to demonstrate a lack of rehabilitative potential for pedophiles in order to justify a lengthy sentence. The appellant maintained that since no one, let alone the witness, had ever diagnosed him as a pedophile, evidence concerning the difficulty in rehabilitating pedophiles was irrelevant and inadmissible.

Stating that there was no error, let alone plain error, the court held the accused's argument to be without merit. Citing RCM 1001(b)(5)(A),[144] the court stated there is no requirement for a diagnosis of pedophilia prior to admitting such evidence. The court further noted there was precedent for allowing an expert witness to testify about an accused's lack of rehabilitative potential and risk of reoffending in child sexual abused cases, even when the expert knew little of the accused's background and had not personally treated the accused.[145] The court stated that the fact that an exert witness has not treated the accused went to the weight to be afforded such testimony rather than its admissibility.[146]

Distinguishing its holding from *McElhaney*,[147] the court pointed out that, in *McElhaney*, the expert assumed that the accused was a pedophile and the offered an opinion on the general rehabilitative potential of pedophiles.[148] In *Prato*, the defense asked the witness to render an opinion on the accused's rehabilitative opinion based on the abuse the accused had suffered as a child. The government, through its cross-examination, simply tested the basis for the witness' opinion.[149] The opinion elicited by the defense that the accused had better than average rehabilitative potential was based on the same amount of

---

[144] *Id*. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(5)(A), (1998) (specifically permitting the presentation of evidence in the form of knowledgeable opinions concerning the accused's potential for rehabilitation)).
[145] *Id*. (citing *Stinson*, 34 M.J. at 238-39).
[146] *Id*. (citing *Stinson*, 34 M.J. at 238-39).
[147] *McElhaney*, 54 M.J. at 120.
[148] *Prato*, N.M.C.M. 9901690 (N.M. Ct. Crim. App., May 13, 2002).
[149] *Id*. (stating that this cross-examination functioned in the nature to explain, repel, counteract, or disprove the evidence introduced by the accused) (citing R.C.M. 1001(d); and United States v. Banks, 36 M.J. 150, 166 (C.M.A. 1992)).

information, or lack thereof, as the opinion brought out by the government on cross-examination. Because the defense chose to introduce such evidence, the government was rightfully permitted to question assumptions upon which the earlier opinion was based. The opinion drawn out by the government was not elicited to show that the accused was a pedophile but rather was offered to demonstrate that absent a personal examination of the accused, the accused could just as likely be a pedophile needing extensive rehabilitation. The court emphasized that the witness never presented an explicit diagnosis based on an examination of the accused.

The courts have clearly held that a witness may testify about the future dangerousness of an accused within the context of offering an opinion on rehabilitative potential. The witness must, however, have an adequate foundation for forming the opinion and an adequate basis for the opinion. Before a witness can offer such an opinion, it must be shown that they are the proper person to provide this information. For someone offering an opinion on the future dangerousness of a convicted sex offender, they must have sufficient training, knowledge and experience to form an opinion that would be helpful to the sentencing body. The witness does not have to have personally treated or even interviewed the accused, but they must have reviewed sufficient records and/or evidence to have a basis for forming their opinion. When a witness testifies about future dangerousness both counsel and the witness must ensure that the opinion is based on the personal characteristics and circumstances of the accused rather than on sex offenders in general.

G. Mendacity

The issue of mendacity occurs in a court-martial when an accused pleads not guilty and testifies on his own behalf denying having committed the offenses in question but is subsequently convicted. When this occurs, the question becomes whether the sentencing body should be able to consider the fact that the accused lied to them and, if so, how should they consider it.

Under common law, this was not an issue because defendants could not testify on their own behalf. [150] Over time this rule was eroded and defendants were able to testify in their own defense. Before the issue of mendacity became an issue in military courts, the United States Supreme Court addressed its applicability in the federal court system.

In *United States v. Grayson*,[151] the trail judge, before announcing sentence, stated on the record that he had increased the

[150] *See* Ferguson v. Georgia, 365 U.S. 570, 573 (1961).
[151] 438 U.S. 41 (1978).

accused's sentence based on the fact that he had lied while testifying. The Supreme Court noted, "the sentencing judge is obligated to make his decision on the basis, among others, of predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation."[152] Recognizing that the judge in the federal court system had a lot of latitude in acquiring information upon which to base a sentence, the Court held that an accused's mendacity as a witness on his own behalf is relevant to his rehabilitative potential. Thus, the Court concluded, mendacity is a proper consideration in determining an appropriate sentence. The Court noted, however, that nothing requires a judge to increase the sentence of an accused because the accused is determined to have lied on the stand.

Following the Supreme Court's decision in *Grayson*, the issue became what, if any, role mendacity had in determining an appropriate sentence for an accused in a military court-martial. That question was answered in *United States v. Warren*.[153]

In *Warren*, the accused testified in his defense and denied distributing methamphetamine. During sentencing argument, trial counsel argued to the members that they should consider the fact that the accused lied to them in determining an appropriate sentence. Specifically, trial counsel said:

> And it also needs to be demonstrated to this individual that lying about it is going to subject him to severe punishment. So I would ask you to separate this man from the service punitively. And also give him the maximum period of confinement. . . . Maybe that will teach him the importance of telling the truth and not being involved in drug offenses, especially in dealing drugs.[154]

On appeal, the accused argued that the military judge erred in allowing trial counsel to make an improper argument urging the members to consider the fact that the accused lied in determining an appropriate sentence. The accused asserted that *Grayson* should not apply to courts-martial for two fundamental reasons. First, the accused argued that a court-martial, unlike a federal district court, is limited in what it may consider in determining an appropriate sentence. Second, the accused reasoned that the differences between the sentencing schemes in courts-martial and federal district courts precluded application of the *Grayson* rationale to courts-martial.

---

[152] *Id*. at 47-48.
[153] 13 M.J. 278 (C.M.A. 1982).
[154] *Id*. at 279-280.

The court recognized that the decision in *Grayson* was predicated, at least in part, on the fact a federal district judge is essentially unrestrained in what he or she may consider in arriving at a sentence. In the military criminal system, the sentencing body may only consider those things properly admitted before the court. The limitations on what a court-martial may consider, the court opined, does not prohibit members from considering "matters already properly before the court; neither does it restrict their consideration of logic, common sense, and events which they themselves have properly observed in the court-room during the trial."[155] The court concluded that the Rules for Courts-Martial did undermine the reasoning behind *Grayson*.[156]

Likewise, the court did not find that the differences between the federal district court system and the military court system necessitated abandoning the logic underlying the decision in *Grayson*. First, the court did not finding compelling the argument that a trial judge is in a far better position to evaluate the impact of false testimony on an accused's rehabilitative potential. Even if members placed too much emphasis on an accused's perjury because of a lack of other information upon which to base a sentence, the court noted that there are special rights afforded an accused in the court-martial process that offset such an inappropriate increase in the sentence adjudged. Unlike the federal system, the sentence imposed on a military member is subjected to a unique sentence review, that of the convening authority. A convening authority, who is often provided with a great deal of information about the accused through the clemency process, can reduce the sentence imposed in cases where it looks as though the sentencing body put too much emphasis on the accused's mendacity. Furthermore, the concern that members might give too much weight to the accused's false testimony can be alleviated by instructions from the military judge advising the members of the proper consideration of the false testimony in arriving at a proper sentence.

Upon concluding that mendacity was an appropriate factor to consider in arriving at a sentence, the court also acknowledged the propriety of trial counsel referring to an accused's mendacity in their sentencing argument.[157] The court did note, however, that limits must be placed on the use of mendacity evidence.

---

[155] *Id*. at 283.
[156] *Grayson*, 438 U.S. 41 (1978).
[157] *Id*. The Court rejected appellate defense counsel argument that even if *Grayson* applied in courts-martial that trial counsel should not be allowed to argue this consideration to the court, stating

> What we said in United States v. Lania, 9 M.J. 100, 104 (C.M.A. 1980), regarding general deterrence as an appropriate sentencing consideration applies with equal logic here "[s]ince general deterrence is suitable for consideration in sentencing . . . there is no

The court clarified that *Grayson* did not hold that an accused's sentence should be increased because of false testimony but rather that such false testimony was merely a factor that may considered in evaluating an accused's rehabilitative potential. The court further cautioned that "any over-emphasis by trial counsel which amounts to an invitation to the court 'to rely on' this factor 'to the exclusion of' others 'borders on inflammatory argument.'" [158]

The court provided a series of elements that should be covered by a military judge when instructing members on the use of an accused's mendacity in arriving at an appropriate sentence. The factors outlined by the court have been incorporated into the instruction in the Military Judge's Benchbook on mendacity.[159] These factors, which should be included in the instructions, are: (1) mendacity should play no role whatsoever in the members' determination of an appropriate sentence unless they conclude that the accused did lie under oath to the court; (2) that such lies must have been, in their mind, "willful and material" before they can be considered in their deliberations; and, (3) that the mendacity of the accused may be considered by them only insofar as they conclude that it, along with all the other circumstances in the case, bears upon the likelihood that the accused can be rehabilitated and that they may not mete out additional punishment for the false testimony itself.

The court also provided guidance on when such instructions should be given. The court deemed it appropriate to give such an instruction when trial counsel argues in their sentencing argument that the members should consider the accused's mendacity and, even when trial counsel does not mention mendacity, if the military judge determines that the members may believe the accused lied to them and is concerned that the members may misuse this in arriving at a sentence. The court cautioned, however, against giving a mendacity instruction over the objection of the defense.[160]

As stressed by the *Warren* court, members may consider an accused's mendacity but they must do so in the proper manner. Mendacity relates to an accused's rehabilitative potential. In *United*

> reason to insulate this factor from argument by trial counsel." If the Government is to be allowed an opportunity to present argument on sentence, see United States v. Olson, 22 C.M.R. 32 (C.M.A. 1956), then we can find no basis to prevent trial counsel from reminding the court members that general deterrence should be borne in mind.

Id.

[158] *Id*. (citing *Lania*, 9 M.J. at 104).

[159] BENCHBOOK, *supra* note 112, Ch. 2, Sec. V, para. 2-5-23.

[160] *Id*. (noting such instructions "may prove counter-productive.") (citing United States v. Wray, 9 M.J. 361 (C.M.A. 1980)).

States v. Rench,[161] the military judge instructed the members that, if they believed the accused had been "less than candid" with them while testifying on the merits, they could consider it as a matter in aggravation.[162] *Rench* was tried before the Court of Military Appeals decided *Warren*,[163] and *United States v. Cabebe*.[164]

In *Rench*, the trial counsel said nothing of the accused's alleged false testimony during sentencing argument and the defense counsel did not object to the military judge's instruction. The court found it appropriate for the military judge to sua sponte instruct the members with respect to the accused's truthfulness given the facts of the case. The court noted, however, that once a judge determines to sua sponte provide instruction to the members, the judge is required to provide correct instructions.

Not all cases, the court reasoned, that result in a conviction involve an untruthful accused. However, in light of the fact that the members convicted the accused despite his claimed alibi, it was clear to the court that the members believed that the accused had lied. Furthermore, the court noted, given that the alleged lies dealt with an alibi defense, it was obvious that such lies were willful and material. Although the military judge failed to instruct the members on these aspects of mendacity issue, it was unnecessary in light of the undisputable fact that the members had determined that the accused had lied and that his lie was willful and material.

The more perplexing issue, in the court's view, was the military judge's instruction on how the members could use the mendacity evidence. Alleged false testimony on the merits is not a matter in aggravation; rather it goes to the issue of an accused's rehabilitative potential. While the military judge incorrectly characterized the mendacity evidence as evidence in aggravation, the court held that when considering the military judge's instructions as a whole, the members were properly advised concerning the use of the accused's alleged false testimony.[165]

The court concluded that the detailed precautionary instructions outlined in *Warren* were unnecessary based on the facts of this case and that the instructions that were provided were unlikely to have resulted in the members' improper consideration of the false testimony in question.

---

[161] 14 M.J. 764 (C.M.R. 1982).
[162] *Id*. at 765.
[163] *Warren*, 13 M.J. 278 (C.M.A. 1982).
[164] 13 M.J. 303 (C.M.A. 1982) (also holding that an accused's false testimony could properly be considered by the sentencing body on the issue of an accused's rehabilitative potential).
[165] *Rench*, 14 M.J. at 764 (noting that the military judge first instructed the members that, "Although you must give due consideration to all matters in mitigation and extenuation, as well as those in aggravation, you must keep in mind that the accused is only to be sentenced for the offenses of which he has been found guilty today.").

While trial counsel may properly argue an accused's mendacity during sentencing argument, trial counsel must be careful not to over emphasize the consideration of this issue. In *United States v. Jenkins*,[166] the accused was convicted, contrary to his pleas, of thirty-seven specifications of larceny, twenty-five specifications of forgery, one specification each of wrongfully using and one specification of making an Armed Forces Identification Card.

On appeal, the accused complained that the trial counsel committed plain error by urging the court members to increase the accused's punishment for allegedly false testimony during findings. The trial counsel's sentencing argument repeatedly referenced "trust and honor" and that the accused was a "thief and a liar" who lied to the members. In arguing for the imposition of a dishonorable discharge, the trial counsel stated

> Dishonorable Discharge is the only way this Marine should get out of the Marine Corps. He lied to you, gentlemen. He lied on that stand, and he lied to you. Each and every one of you, he lied to you. Dishonor. Dishonorable discharge.[167]

At trial, the defense counsel did not object to the trial counsel's argument or request a curative instruction.

The instructions on sentencing provided by the military judge included the standard mendacity instruction.[168] The military judge also instructed the members that the arguments and recommendations of counsel on sentence were "their recommendations and only their individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel."[169]

The court began by citing the well established general rule of law that "a trial counsel 'may strike hard blows, [but] he [or she] is not at liberty to strike foul ones.'"[170] On the issue of mendacity, the court cited the holding in *Warren*.[171]

Taking into consideration the instructions provided by the military judge and recognizing that court members are presumed to follow the military judge's instructions,[172] the court held that there was no plain error. While the *Jenkins* court did not find, based on the facts of

---

[166] 54 M.J. 12 (2000).
[167] *Id*. at 18.
[168] *Id*.; *see also* BENCHBOOK *supra* note 112, para. 2-5-23.
[169] *Jenkins*, 54 M.J. at 18.
[170] *Id*. at 19 (citing United States v. Stargell, 49 M.J. 92, 93 (1998), quoting Berger v. United States, 295 U.S. 78, 88 (1935)).
[171] *Warren*, 13 M.J. 278 (C.M.A. 1982).
[172] *Jenkins*, 54 M.J. at 20 (citing United States v. Garrett, 24 M.J. 413, 418 (C.M.A. 1987), and United States v. Ricketts, 1 M.J. 78, 82 (C.M.A. 1975)).

this case, that the trial counsel argued the accused's mendacity to the exclusion of all other sentencing factors, trial counsel must be cautious in crafting a sentencing argument that relies heavily on the accused's mendacity.

Clearly, the sentencing body in a court-martial may consider the fact that they believe an accused lied to them in determining an appropriate sentence. Specifically, the sentencing body may consider whether the accused lied as it affects the accused's rehabilitative potential.[173] They may not, however, increase the punishment based on the untruthful testimony and it is not a matter in aggravation.

H. Trial Counsel Use of Rehabilitative Potential Evidence

In order to zealously represent their client, the United States, trail counsel will want to offer evidence which will justify their sentence recommendation. Rehabilitative potential evidence can often strengthen the government's sentencing case. If a witness has the proper foundation and basis for their opinion, such testimony may be admissible. An option that will often seem attractive to trial counsel is presenting testimony from the accused's commander or first sergeant concerning their opinion of the accused's rehabilitative potential. Trial counsel should be cautious when seeking to offer evidence from such witnesses unless the defense first offers "retention evidence."

That is not to suggest that the government should never offer evidence on an accused's rehabilitative potential unless the defense first opens the door but trial counsel should be alert to the offering of such evidence that stretches the rules concerning rehabilitative potential evidence beyond their permissible limits. Trial counsel should ensure that their prospective witness is the right person to offer such an opinion. They must know the accused well enough to establish an adequate foundation for their opinion. A commander or first sergeant will rarely have had enough personal contact with an accused to satisfy the foundational requirements. Even if a commander, first sergeant or any other witness has had sufficient contacts with the accused, trial counsel must ensure that the witness has a proper basis for the opinion. The opinion cannot be based solely on the nature of the charges for which the accused is to be sentenced and their opinion must be rational and personalized to the accused. Unless the defense places it in issue, the witness should not base a rehabilitative potential opinion on the accused's rehabilitative potential for continued service.[174] Once a proper foundation and basis have been established, the scope of the witness' opinion should be limited to whether or not the accused has

[173] United States v. Graham, 46 M.J. 583 (A.F. Ct. Crim. App. 1997).
[174] *But see Sylvester*, 38 M.J. 720

rehabilitative potential. An adjective to describe the amount, or lack thereof, of the accused's rehabilitative potential may be used.

Once evidence has been introduced relating to an accused's rehabilitative potential, counsel may argue this factor but they must be sure to place it in the proper context. It is a mitigating factor if an accused has rehabilitative potential. The accused's lack of rehabilitative potential is not, however, an aggravating factor and should not be argued at such. [175] Trial counsel argument concerning evidence introduced on the subject of rehabilitative potential must only be argued relating to the accused's rehabilitative potential. While evidence of an accused's rehabilitative potential may justify a lesser sentence than might otherwise be warranted under the facts of the case, the accused's lack of rehabilitative potential should not result in an accused receiving a sentence that is more harsh than is justified based on the other appropriate factors for determining an appropriate sentence. Finally, the fact that an accused pled not guilty to an offense of which he was ultimately convicted is not an appropriate factor for consideration in determining the accused's rehabilitative potential.[176]

V. CONCLUSION

Rehabilitative potential evidence can be powerful evidence in the sentencing portion of a court-martial. The rules permit both sides to take advantage of this often-compelling evidence. However, both sides must be aware of the limits of such evidence. Despite the attractiveness of this type of evidence, rehabilitative potential is only one of many factors a sentencing body may consider in arriving at an appropriate sentence.

[175] United States v. Loving, 41 M.J. 213 (C.M.A. 1994) (holding that the military judge's characterization of accused's disciplinary record and his company commander's testimony about accused's duty performance as aggravating circumstances was error since lack of rehabilitative potential is not an aggravating circumstance).
[176] United States v. Jones, 30 M.J. 898 (A.F.C.M.R. 1990).

RETHINKING THE IMPACT OF SALES TAXES ON GOVERNMENT PROCUREMENT PRACTICES: UNINTENDED CONSEQUENCES OR GOOD POLICY?

CAPTAIN MICHAEL D. CARSON

Captain Michael D. Carson (B.S., Embry-Riddle Aeronautical University (1996); J.D., Washburn University School of Law (1999); LL.M. University of Missouri-Kansas City School of Law (1999); The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia (2008)) is a an acquisition attorney assigned to the Contract Law Division, Office of the Staff Judge Advocate, Air Force Materiel Command Law Office, Wright-Patterson Air Force Base, Dayton, Ohio. He is a member of the bars of Kansas and Missouri.

An unlimited power to tax involves, necessarily, a power to destroy[1]

I. INTRODUCTION

Tax considerations influence financial decisions of all businesses and the impact of sales taxes on Government[2] procurement practices is no exception.[3] It is estimated that federal procurement is a $378-billion-a-year business, involving nearly six million procurement actions.[4] The most obvious burden imposed by any form of taxation is the economic burden of the tax itself. As the Government continues to contract out more functions which are traditionally done in-house, the Government will face an increasing tax burden.[5] Although the United States Constitution is silent regarding state taxation of Government instrumentalities, immunity has nonetheless been implied by the courts.

Government immunity from state taxation derives from the United States Supreme Court's decision in *McCulloch v. Maryland*.[6] In *McCulloch*, the Court recognized that the freedom of one sovereign from taxation by another sovereign is a fundamental aspect of the United States federal system.[7] This absolute federal immunity from state taxation was greatly restricted in the decades following *McCulloch* but the core of the doctrine remains.[8] At present, protection from state taxation is determined by the "legal incidence of tax."[9] Thus, purchases made directly by the Government are immune from state and local taxation.[10] However, when the Government decides to contract-out a

---

[1] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

[2] The use of the term "Government" herein refers to the United States Federal Government.

[3] *See* Kenneth Weckstein & David Kempler, *Tax Considerations in Government Contracting*, 85-10 Briefing Papers 1 (October 1985).

[4] *See* FEDERAL PROCUREMENT REPORT FY 2005, FEDERAL PROCUREMENT DATA SYSTEM 13, http://www.fpdsng.com/downloads/FPR_Reports/2005_fpr_section_I_total_federal_views.pdf (last visited Nov. 26, 2007).

[5] *See* Memorandum from Edward R. Jones, Deputy Assistant Inspector General for Auditing, Department of Defense, subject: Report on the Audit of DOD Immunity from State Taxation (Project No. OCA-0075) (15 Feb. 1991) (on file with author) [hereinafter Jones Memo].

[6] *McCulloch,* 17 U.S. (4 Wheat.) at 316.

[7] *Id.* at 432.

[8] *See* United States v. New Mexico, 455 U.S. 720, 733 (1982) ("While '[one] could, and perhaps should, read M'Culloch . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality'") (quoting First Agricultural Bank v. State Tax Comm'n, 392 U.S. 339, 350 (1968) (dissenting opinion)).

[9] *New Mexico*, 455 U.S. at 735.

[10] *See id*. at 733 ("[a] State may not, consistent with the Supremacy Clause, U.S. Const. Art VI, cl 2, lay a tax 'directly upon the United States'" (citing Mayo v. United States, 319 U.S. 441, 447 (1943)); s*ee also* 48 C.F.R. § 29.302(a) (2007) (stating that purchases

particular project or tap into the expertise of industry leaders, the right to an exclusion from state and local taxes may not necessarily rest on the Government's immunity.[11] Instead, absent an exemption by the taxing jurisdictions, the contractor's purchase of goods and services might trigger state and local sales taxes.[12] Consequently, state and local sales taxes imposed on private contractors and passed through to the Government, whether through cost-reimbursement or otherwise built into the overall contract price,[13] can severely reduce the Government's buying power.[14]

This article analyzes whether the "legal incidence of tax" is the appropriate test to apply in Government contractor immunity cases when United States sovereignty is at stake. This article also addresses the need to critically look at the federal immunity doctrine and explores an alternative approach that examines the economic substance of a particular state sales tax through the common law doctrine of substance over form. A firm understanding of the impact of state and local sales tax on Government contracting initiatives, like the Department of Defense's (DOD) competitive sourcing program[15] and the privatization of military housing,[16] is crucial to formulating successful contract strategies, developing effective contracts, and achieving maximum efficiencies and savings. Failure to achieve projected savings from competitive sourcing and military housing privatization will handicap the DOD's ability to maintain its day-to-day readiness or continue critical modernization programs without seeking additional funding

---

and leases made by the Government are generally immune from state and local taxation).

[11] *See New Mexico*, 455 U.S. at 734-36.

[12] *See* 48 C.F.R. § 29.303(b).

[13] *See infra* Section V discussing firm-fixed-price and cost-reimbursement contracts provided under the Federal Acquisition Regulation.

[14] *See generally* American Forces Press Service, *Army Business Initiative Council Recommendations*, DEFENSE AT&L, Jan-Feb 2005, at 52.

[15] *See* OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, Aug. 4, 1983 (Revised May 29, 2003) [hereinafter CIRCULAR A-76]; s*ee also* Valerie Bailey Grasso, CRS REPORT FOR CONGRESS, *Defense Outsourcing: The OMB Circular A-76 Policy,* Jun. 30, 2005 at 1, *available at* http://www.fas.org/sgp/crs/natsec/RL30392.pdf [hereinafter CRS REPORT] ("Outsourcing is a decision by the government to purchase goods and services from sources outside of the affected government agency").

[16] *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186 (Feb. 1996), which amended chapter 169 of title 10 United States Code, to add a new subchapter entitled Alternative Authority to Construct and Improve Military Housing (codified as amended at 10 U.S.C.S §§ 2871-2885 (Lexis 2007)); CRS REPORT, *supra* note 15, at 2 ("[U]nder the umbrella of outsourcing, privatization occurs when the government ceases to provide certain goods or services. When an activity is privatized, the level of the government's involvement is altered, and the government may exercise any one of a number of options").

from Congress.[17] Obtaining additional funds will prove to be a challenging and painful process for future military leaders as the battle for the taxpayers' dollar escalates.[18] In fact, many states have already made a preemptive strike by proposing big sales tax increases to pump up their own sluggish revenues.[19]

Part II of this article begins with an introduction to state sales and use taxes including a look at their increasing importance to state governments.[20] Part III outlines the development of the federal immunity doctrine from *McCulloch* to the present, and includes an in-depth examination of the tests developed by the Supreme Court in determining a contractor's implied constitutional exemption from state taxation. Part IV tests the current federal tax immunity law against two of the DOD's cost-savings initiatives—competitive sourcing and military housing privatization—demonstrating its inadequacy. Part V then proposes an alternative solution by examining the substance of the state levied sales or use tax rather than its form. Finally, Part VI addresses the future of the federal immunity doctrine and the policy decisions that must be addressed before any changes are made.

II. BACKGROUND AND GENERAL PRINCIPLES APPLICABLE TO SALES AND USE TAXES

Before addressing the impact of sales taxes on Government procurement initiatives, this article will preview the basic principles and guidelines associated with a state imposed sales or use tax. This section introduces key concepts associated with a tax levied upon the sale of goods and services and forms the foundation for the analysis and conclusions presented in subsequent parts of this article.

---

[17] *See generally* CRS REPORT, *supra* note 15, at 1 (stating that as a result of the reduction in force structure following the end of the Cold War, the DOD must further reduce spending to achieve greater cost savings to finance weapons and military equipment modernization).

[18] *See* ROBERT D. HORMATS, THE PRICE OF LIBERTY: PAYING FOR AMERICA'S WARS 281 (2007) (stating that "Social Security, Medicare, and Medicaid dwarf defense spending and all other parts of the budget and their costs are accelerating rapidly").

[19] *See, e.g.,* Dennis Caucon, *States Look to Sales Tax for Funds*, U.S.A. TODAY, Oct. 30, 2007, at A-1 (stating that the governors of Maryland and Indiana each propose increasing their state's sales tax 1 cent in order to raise over $1 billion in revenue for their respective states).

[20] It is beyond the scope of this article to discuss property tax and ad valorem taxes and their application to government procurement activities. In his article, *Article: State Property Tax Implications for Military Privatized Family Housing Program*, Philip Morrison presents an excellent overview of state property tax implications applicable to the military housing privatization initiative. *See* Philip D. Morrison, *Article: State Property Tax Implications for Military Privatized Family Housing Program*, 56 A.F. L. REV. 261 (2005).

A. Sales and Use Taxes Defined

Sales taxes are creatures of state law comprising the most significant source of tax revenue for state governments in the nation.[21] Three distinguished authorities have defined a sales tax as "any tax which includes within its scope all business sales of tangible personal property at the retailing, wholesaling, or manufacturing state, with the exceptions noted in the taxing law."[22] The most significant form of sales taxation in the United States is the state retail sales tax (hereinafter "state sales tax"), which consists of a "broad-based tax on the sale of goods and selected services to the ultimate consumer."[23] Although various types of sales taxes have endured a long history throughout the world,[24] the state sales tax movement was the states' response to an acute revenue need borne of the Great Depression.[25] Currently, forty-five states and the District of Columbia impose some form of sales tax.[26]

State sales tax statutes generally contain similar features operating in a uniform manner.[27] Despite their similarities, however,

---

[21] U.S. Census Bureau, State Government Tax Collections: 2006 (Mar. 30, 2007), http://www.census.gov/ govs/statetax/0600usstax.html [hereinafter State Collections].

[22] WALTER HELLERSTEIN, STATE TAXATION, ¶ 12.01, (3d ed. 2007), *available at* 1999 WL 1398962 (quoting R. HAIG & C. SHOUP, THE SALES TAX IN THE AMERICAN STATES 3 (1934)).

[23] HELLERSTEIN, *supra* note 22.

[24] *See* ALFRED BUEHLER, GENERAL SALES TAXATION: ITS HISTORY AND DEVELOPMENTS, 2-5 (1932).

[25] RICHARD POMP & OLIVER OLDMAN, STATE AND LOCAL TAXATION, 6-6 (3d ed. 1998). The first state to enact a sales tax in response to the economic problems brought on by the Great Depression was Mississippi in 1932. John Due, *The Nature and Structure of Sales Taxation*, 9 VAND. L. REV. 123, 127 (1956).

[26] Delaware, New Hampshire, Montana, Oregon and Alaska do not have state sales taxes. Alaska, however, uses the sales tax extensively at the local level. *See generally* POMP & OLDMAN, *supra* note 25.

[27] *See* HELLERSTEIN, *supra* note 22. The broadly drafted manner in which the terms "gross receipts" and "retail sale" are defined is markedly consistent between the states. *See, e.g.,* N.M. STAT. ANN. § 7-9-3.5(A)(1) (LEXIS 2007). New Mexico defines the term "gross receipts" as:

> The total amount of money or the value of other consideration received from selling property in New Mexico, from leasing or licensing property employed in New Mexico, from granting a right to use a franchise employed in New Mexico, from selling services performed outside New Mexico, the product of which is initially used in New Mexico, or from performing services in New Mexico. In an exchange in which the money or other consideration received does not represent the value of the property or service exchanged, 'gross receipts' means the reasonable value of the property or service exchanged.

Id. Kansas defines the term "gross receipts" as:

sales taxes typically fall into one of three categories—vendor taxes, consumer taxes and a hybrid category.[28] Under vendor type sales tax statutes, the legal incidence of the tax falls on the gross receipts of the seller, who, therefore, has primary responsibility for paying the tax.[29] For example, Illinois imposes a tax on the seller's gross receipts for the privilege of selling tangible personal property to consumers.[30] With consumer type sales taxes, however, states impose a tax on the retail "sale" of tangible personal property or services, and are measured by the sales price to the buyer.[31] Thus, rather than being a tax on the seller's gross receipts, the legal incidence of the tax falls on the purchaser or consumer who is primarily responsible for paying the tax.[32] The seller serves purely as an agent who is responsible for collecting the tax on the state's behalf. Hybrid taxes contain features of both with the primary

---

> The total selling price or the amount received as defined in this act, in money, credits, property or other consideration valued in money from sales at retail within this state; and embraced within the provisions of this act. The taxpayer, may take credit in the report of gross receipts for: (1) An amount equal to the selling price of property returned by the purchaser when the full sale price thereof, including the tax collected, is refunded in cash or by credit; and (2) an amount equal to the allowance given for the trade-in of property.

KAN. STAT. ANN. § 79-3602(o) (2006). Kansas further defines "retail sale" or "sale at retail" as "any sale, lease or rental for any purpose other than for resale, sublease or subrent." KAN. STAT. ANN. § 79-3602(jj). Missouri defines "gross receipts" as:

> The total amount of the sale price of the sales at retail including any services other than charges incident to the extension of credit that are a part of such sales made by the businesses herein referred to, capable of being valued in money, whether received in money or otherwise; except that, the term 'gross receipts' shall not include the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit.

MO. REV. STAT. § 144.010(1)(1) (LEXIS 2007). Missouri further defines "sale at retail" as "any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration." MO. REV. STAT. § 144.010(1)(10).

[28] HELLERSTEIN, *supra* note 22 (citing JOHN DUE & JOHN MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 28-29 (2d ed. 1994)).

[29] *Id.*

[30] HELLERSTEIN, *supra* note 22 (citing Illinois Retailers' Occupation Tax 35 ILL. COMP. STAT. ANN. § 120/2).

[31] HELLERSTEIN, *supra* note 22 (citing JOHN DUE & JOHN MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 28-29 (2d ed. 1994).

[32] HELLERSTEIN, *supra* note 22.

responsibility for paying the tax falling upon both the purchaser and the seller who charges, collects and remits the tax to the state.[33]

As a way to avoid paying a particular sales tax or to obtain a lower sales tax rate, consumers would often travel outside the state to purchase property.[34] A state cannot tax the privilege of selling property where the sale takes place beyond its borders.[35] To compensate for such tax avoidance and the resultant loss of revenue, state legislatures enacted the compensating, or use tax, to tax the privilege of using, storing, or consuming property within the state, regardless of the place of purchase.[36] Thus, a use tax is designed to protect a state's revenues by eliminating the advantages of shopping for the forum with the lowest tax rate. It also protects local sellers from out-of-state competitors who are able to offer the same goods and services at a much lower price because of a lower or nonexistent tax burden.[37] A use tax also complements the sales tax and generally applies to the use of goods and services that have not already been subjected to a sales tax.[38] As such, unless otherwise noted, all references in this article to sales taxes and exemptions apply to use taxes as well.

B. Tax Computation

As previously mentioned, the seller either pays or collects sales taxes from the purchaser on a transaction-by-transaction basis.[39] The sales tax is thus maintained as a discrete charge apart from the price of the item purchased.[40] In determining the sales tax due, the applicable sales tax rate is applied against the purchase or sales price, which is generally the consideration paid for goods or services by the buyer.[41]

---

[33] *Id.* (citing JOHN DUE & JOHN MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 28-29 (2d ed. 1994) (operationally hybrid type taxes are closer to consumer type taxes because sellers are not given the opportunity to absorb the tax).

[34] *See* WALTER HELLERSTEIN, STATE TAXATION, ¶ 16.01, (3d ed. 2007), *available at* 1999 WL 1399001 (citing JOHN DUE & JOHN MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 245 (2d ed. 1994).

[35] The taxing power of any state extends to all persons, property and business within its jurisdiction. 84 C.J.S. TAXATION 7, 14 (2001).

[36] *See* HELLERSTEIN, *supra* note 34 (citing JOHN DUE & JOHN MIKESELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 245 (2d ed. 1994)).

[37] *See id.*

[38] *See, e.g.,* Consumers Co-operative Ass'n v. State Comm'n of Rev and Taxation, 256 P.2d. 850, 853 (Kan. 1953) (describing the Kansas Retailers Sales Tax Act and Kansas Compensating Tax Act as "complementary and supplementary to each other and are construed together generally"); s*ee also* HELLERSTEIN, *supra* note 34 ("[I]n order to avoid double taxation, every state imposing a use tax allows a credit against its use tax for sales or use tax paid to other states.").

[39] *See supra* Section II.A.

[40] *See* HELLERSTEIN, *supra* note 22.

[41] *See, e.g.,* WASH. REV. CODE § 82.08.020 (LEXIS 2007). The state of Washington

For example, the amount of sales tax due on a $1,000,000 purchase at a rate of six percent would be $60,000.[42] The seller collects this amount and remits it to the taxing authority.[43] In comparison, the measure of a state's use tax generally is at the same rate as the sales tax, although it may be described as consideration paid to the seller.[44]

The example above illustrates the tax implications in a relatively small purchase pursuant to a Government contract. Projects involving the purchase of higher value of supplies will involve much higher sales taxes. Unless a state exemption applies or the Government contractor is immune from taxation, sales taxes can greatly reduce the DOD's purchasing power and undercut cost-savings goals sought under housing privatization and competitive sourcing initiatives by increasing the cost of the Government's contracts.

---

levies a tax on each retail sale which is equal to six and five-tenths percent of the selling price. *Id.* Washington further defines the terms "selling price" or "sales price," as:

> The total amount of consideration, except separately stated trade-in property of like kind, including cash, credit, property, and services, for which tangible personal property, extended warranties, or services defined as a 'retail sale' under WASH. REV. CODE § 82.08.050 are sold, leased, or rented, valued in money, whether received in money or otherwise.

WASH. REV. CODE § 82.08.010(1)(a). The terms "buyer," "purchaser," and "consumer" are defined as:

> Every individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise, municipal corporation, quasi municipal corporation, and also the state, its departments and institutions and all political subdivisions thereof, irrespective of the nature of the activities engaged in or functions performed, *and also the United States or any instrumentality thereof*.

WASH. REV. CODE § 82.08.010(3) (emphasis added).

[42] This assumes there are no applicable state sales tax exemptions. The amount of the sales tax will vary by state taxing authority.

[43] *See, e.g.*, KAN. STAT. ANN. § 79-3607 (2006) (stating that the levied tax must be remitted to the director of taxation).

[44] *See, e.g.*, KAN. STAT. ANN. § 79-3703(a) (2006) (use tax levied on "consideration paid by the taxpayer"); MO. REV. STAT. § 144.610 (2007) (use tax levied on "sales price"). The use tax measure will never be broader than the sales tax measure as it would then lose its character as a complementary tax and would constitute a facially discriminatory tax on out-of-state purchases. *See also* HELLERSTEIN, *supra* note 34.

III. THE DEVELOPMENT OF THE FEDERAL IMMUNITY DOCTRINE

The United States Constitution does not directly address the conflict of intergovernmental taxation.[45] Instead, federal immunity from state taxation derives from the Supreme Court's decisions.[46] Any theory of federal tax immunity, whether judicially implied constitutional immunity or a congressional shielding of federal operations from state and local taxation, rests upon an effort to prevent one sovereign from interfering with the governmental functions of another.[47] Recognition of federal immunity, however, restricts a state's taxing power.[48] Historically, states have aggressively asserted jurisdiction over Government contractors denying constitutional tax immunity.[49] Indeed, the evolution of the federal tax immunity doctrine has undergone a number of transformations with the courts left trying to protect United States sovereignty while not derogating state taxing powers.[50]

The seminal case of *McCulloch v. Maryland*[51] first launched the intergovernmental tax immunity doctrine. Since then, Supreme Court decisions have gone through two relatively distinct phases.[52] First, for more than a century, the Court invalidated a number of state and local tax statutes that directly, and often rather indirectly, impacted the Government.[53] In the second phase, the 1937 *James v. Dravo Contracting Co.*[54] decision began a period of constriction of the federal immunity doctrine which continues to this day.[55]

A. Implied Constitutional Immunity

The doctrine of implied constitutional immunity derives from the Supreme Court's decision in *McCulloch v. Maryland*.[56] In *McCulloch*, the state of Maryland sought to impose a tax on the operations of the Bank of the United States.[57] The tax statute provided

---

[45] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).
[46] *See id.* at 427-28; United States v. New Mexico, 455 U.S. 720, 735 (1982).
[47] *See* James v. Dravo Contracting Co., 302 U.S. 134, 150 (1937).
[48] *Id.*
[49] *See* CHARLES TROST & PAUL HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAX § 6:19 (2d ed. 2007).
[50] *See generally New Mexico*, 455 U.S. at 730-35.
[51] 17 U.S. (4 Wheat.) 316 (1819).
[52] *See* Sealy H. Cavin, Jr., *Federal Immunity of Government Contractors from State and Local Taxation: A Survey of recent decisions and their impact on Government Policies*, 61 DENV. L.J. 797, 797 (1983-1984).
[53] *Id.* at 798.
[54] 302 U.S. 134 (1937).
[55] *See* Cavin, *supra* note 52, at 798.
[56] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[57] *See id*. at 320.

that banks operating in Maryland "without authority from the state"[58] could issue bank notes only on stamped paper sold by the state.[59] The amount of the tax was two percent of the face value of the notes.[60] Chief Justice Marshall, speaking for a unanimous Court, rejected the Maryland taxing scheme.[61] Marshall reasoned in his now famous dictum that because the power to tax is the power to destroy, Maryland's efforts to tax the Bank of the United States' operations amounted to an unconstitutional "tax on the operation of an instrument employed by the Government of the Union to carry its powers into execution."[62] Thus, the Court invalidated Maryland's tax law as applied to the federal entity based on its application of the Supremacy Clause.[63]

Ultimately, the *McCulloch* Court was concerned with the lack of political checks in place to prevent the state from abusing its taxing power with respect to federal activities.[64] Therefore, a per se rule was

---

[58] *Id.*

[59] *Id.* at 321.

[60] *See id.* at 320-21.

[61] *Id.* at 436.

[62] *Id.* at 427, 436-37.

[63] *Id.* at 427. Finding no express provision in the Constitution exempting the Bank of the United States from the state's power to tax, the Court stated "[I]t is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must therefore keep it in view, while construing the constitution." *Id.* The Supremacy Clause, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

[64] *See McCulloch*, 17 U.S. (4 Wheat.) at 428-29. The Court stated:

> The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax the legislature acts upon it constituents. This is in general a sufficient security against erroneous oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the Government of the Union have no such security, nor are the right of a state to tax them sustained by the same theory. Those means are not given by the people of a particular state, not given by the constituents of the legislature, which claim the right to tax them, but by the people of

needed to avoid the "perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of power."[65] Therefore, absent political representation in state legislatures, the Court established an absolute immunity from state taxation.[66] As a result, the doctrine of federal immunity from state and local taxation emerged.

For more than a century after the *McCulloch* decision, the Court broadened the immunity doctrine into a sweeping prohibition against nondiscriminatory[67] state taxes on the Government and its instrumentalities.[68] Relying on *McCulloch*, the Court declared state taxes invalid if the direct economic burden was borne either directly or indirectly by the Government.[69] In addition, the Court applied the federal immunity umbrella to invalidate gross receipts and taxes on Government contractors,[70] property taxes imposed on federal securities owned by private parties,[71] and income taxes on the wages of federal employees.[72] The courts continued the broad application of federal immunity from state taxation from the McCulloch decision in 1819 for more than one hundred years.

B. The Rejection of Absolute Immunity

Beginning in the 1930s, the Supreme Court began to narrow its broad view of constitutional immunity from state taxation as the

---

> the all the states. They are given by all for the benefit of all—and upon theory, should be subjected to that government only which belongs to all.

Id.

[65] *Id.* at 430.

[66] *Id.* at 431-32.

[67] The Supreme Court has approached the question of discrimination by inquiring into whether the Government or those with whom it deals are bearing an economic burden not borne by other similarly situated taxpayers. *See* United States v. City of Detroit, 355 U.S. 466 (1958); United States v. County of Fresno, 429 U.S. 452 (1977); Washington v. United States, 460 U.S. 536 (1983).

[68] *See* Cavin, *supra* note 52, at 799.

[69] *See, e.g.,* Owensboro National Bank v. Owensboro, 173 U.S. 664 (1899) (nondiscriminatory Kentucky state tax on national bank invalidated); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738 (1824) (Ohio tax of $50,000 per year on Second Bank of the United States invalidated).

[70] *See, e.g.*, Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) (finding independent contractor exempt from a state sales tax on the sale of goods to the Government).

[71] *See, e.g.*, Weston v. Charleston, 27 U.S. (2 Pet.) 449 (1829) (holding property tax imposed by a local government on federal securities owned by private parties was unconstitutional).

[72] *See, e.g.*, Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842) (holding tax on compensation of a captain in the United States revenue cutter service to be constitutionally offensive under the federal immunity doctrine announced in *McCulloch*).

Government's commercial role increased and with it the volume of activity exempt from state taxation.[73] Also during this time the Great Depression caused many states to enact sales tax statutes, replacing the income tax as a primary revenue source.[74]

Recognizing the expanding commercial role of the Government and the dependency of the states on sales tax revenues, the Supreme Court changed its view of federal immunity in the landmark case of *James v. Dravo Contracting Co*.[75] *Dravo* rejected the concept of absolute immunity and began a rapid retreat of burgeoning federal constitutional freedom from taxation.[76] Remarkably, the *Dravo* Court appeared to turn its back on clear and overwhelming precedent[77] in holding that a state can impose a nondiscriminatory tax on the gross receipts of a private contractor under a construction contract with the Government.[78] What followed was the emergence of the legal incidence test.

1. *Emergence of the Legal Incident Test*

The *Dravo* Court rejected the economic burden argument for federal immunity and instead formulated the legal incidence doctrine.[79] The essence of this doctrine is that a state tax is valid if it is not directly levied on the Government, if it is not discriminatory, and if it is not declared invalid by the Congress.[80] Additionally, *Dravo* abandoned the idea that shifting of the financial burden of a tax to the Government is enough, by itself, to prohibit a state or local tax.[81] Still, the Supreme Court recognized the competing interest of the two sovereigns. In a slight twist from its previous decisions regarding federal immunity, the Court produced the following passage from a Supreme Court decision on state immunity from federal taxation:

---

[73] *See* WALTER HELLERSTEIN, STATE TAXATION, ¶ 22.01, (3d ed. 2007), *available at* 1999 WL 1399067.
[74] *See* Tax History Project, Franklin Roosevelt, Agriculture and New York Property Taxation (Nov. 14, 2003), http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/9acf1ed9d129fee785256dfe005981fd?OpenDocument.
[75] 302 U.S. 134 (1937).
[76] *See* United States v. Detroit, 355 U.S. 466 (1958) (upholding a city use tax imposed on nonexempt users of federal tax exempt property); United States v. County of Fresno, 429 U.S. 452(1977) (upholding state imposed taxation of federal employees on their use of housing owned by the Government's Forest Service).
[77] *See Dravo Contracting Co.*, 302 U.S. at 161-86 (Roberts, J., dissenting) and cases cited therein.
[78] *Id.* at 161.
[79] *See* Thomas Reed Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757, 758 (1945).
[80] *Dravo Contracting Co.*, 302 U.S. at 149, 161.
[81] *See id.*

> The power to tax is no less essential than the power to borrow money, and, in preserving the latter, it is not necessary to cripple the former by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental instrumentality and there is only a remote, if any, influence upon the exercise of the functions of the government.[82]

In distinguishing its past precedents, the Court made a conscious effort to accommodate both competing interests while partially rejecting *McCulloch's* absolute immunity doctrine.[83]

Under the *Dravo* facts, the tax was found to be upon the gross receipts of a private contractor, not the Government.[84] The Court decided that even if it assumed that the tax on the private contractor may increase the cost to the Government, that fact alone would not invalidate the state tax.[85]

This assumption by the *Dravo* Court eventually became law when the Supreme Court, in *Alabama v. King & Boozer*,[86] upheld Alabama's authority to collect a sales tax from a Government contractor performing a cost-plus-fixed-fee contract.[87] The Alabama statute in question makes the contractor as purchaser liable for the tax to the seller, who then adds to the sales price the amount of the tax.[88] The Government argued that the legal incidence of the tax was on the Government and not the contractor who ordered and paid for the

---

[82] *Id.* at 150 (quoting Willcuts v. Bunn, 282 U.S. 216, 225 (1931)). State immunity from federal taxation originated with the Court's decision in Collector v. Day, 78 U.S. (11 Wall.) 113 (1871).

[83] *See Dravo Contracting Co.*, 302 U.S. at 155-57.

[84] *Id.* at 159.

[85] *Id.* 157-58. As to possible dangers to the Government from resulting burdens, the Court stated:

> There is the further suggestion that if the present tax of two per cent is upheld, the State may lay a tax of twenty per cent or fifty percent or even more, and make it difficult or impossible for the Government to obtain the service it needs. The argument ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference through any attempted state action.

Id. at 160-61.

[86] 314 U.S. 1 (1941).

[87] *Id.* at 14. *See infra* Section V.B discussing cost-reimbursement contracts.

[88] *Id.* at 9. On this point, the Court stated "[W]ho, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority). *Id.* at 9-10.

supplies.[89] However, the Court held that the nondiscriminatory character of the tax made it permissible, even though the full economic incidence of the tax indisputably fell on the Government.[90] As a result, the Court sanctioned a tax which was passed through in total to the Government.[91] The Alabama tax went further than the tax in *Dravo* which was merely a possible or potential burden on the government; the tax was a clear and ascertainable economic burden on the Government.[92]

2. *State Taxation of Government Contractors*

Following the *Dravo* and *King & Boozer* decisions, the analysis regarding constitutional immunity of the United States from state and local taxation is two fold.[93] First, absent Congressional consent, no state or local government may impose taxes directly on the Government itself, or an agency or instrumentality so entwined with the Government that the two cannot realistically be viewed as separate entities.[94] Nor may a state or local government impose taxes the legal incidence of which falls upon the Government or its instrumentalities.[95] Second, even though the legal incidence of a tax may not fall on the Government, the tax may not discriminate against or severely interfere with Government operations.[96]

a. Examining the Relationship Between the Government and Its Contractors

In determining whether Government contractors are immune from state taxation, the Supreme Court has examined a number of differing contractual arrangements between the Government and its contractors. In *United States v. New Mexico,*[97] three contractors held

[89] *Id.*
[90] *Id.* at 8-9.
[91] King & Boozer sold lumber to Government cost-plus contractors which were constructing an Army camp for the Government. *Id.* at 6.
[92] *Id.* at 8.
[93] *See* Cavin, *supra* note 52, at 819.
[94] United States v. New Mexico, 455 U.S. 720, 735 (1982). The Court has consistently defined the nature of a federal instrumentality when determining immunity from state and local taxation. *See id.* at 736-37 ("virtually . . . an arm of the Government") (quoting Department of Employment v. United States, 385 U.S. 355, 359-60 (1966); *New Mexico*, 455 U.S. at 737 ("integral parts of [a governmental department]," and "arms of the Government deemed by it essential for the performance of governmental functions," (quoting Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942).
[95] *See* James v. Dravo Contracting Co., 302 U.S. 134, 149 (1937); *New Mexico*, 455 U.S. at 735.
[96] *See* Cavin, *supra* note 52, at 819 (citing *New Mexico*, 455 U.S. at 735, note 11).
[97] 455 U.S. 720 (1982).

management contracts with the Atomic Energy Commission (AEC).[98] These contracts were unique in that they were intended to facilitate long-term private management of Government owned research and development facilities.[99] The terms of the contracts were typical of all AEC atomic facility management agreements and provided for the Government to reimburse the contractors for their allowable costs under the contract plus a fixed annual fee.[100] However, there were other contractual terms which are significant to understanding the Court's holding.

For example, title to all tangible personal property purchased by the contractors passed directly from the seller to the Government and the Government bore the risk of loss.[101] The contracts also provided for Government control over the disposition of all Government-owned property.[102] In addition, an advance funding procedure was used whereby the Government provided funds in advance of contract performance to meet the contractors' costs.[103] These factors, taken together, appear to portray the contractors as "agents" of the government and therefore immune from taxation.[104] However, prior to July 1, 1977, the Government's contracts with the three contractors did not even refer to the contractors as Government agents.[105]

On the other hand, the Supreme Court listed the following factors indicating the three contractors were not agents of the AEC.

---

[98] *Id.* at 722-23. Responsibility for the Government's nuclear program was transferred from the AEC to the Energy Research and Development Administration in 1975, and to the Department of Energy in 1977. *Id.* at 723, note 1.

[99] *Id.* at 723. Due to the complex and intricate contractual provisions, the Court noted that it was "virtually impossible to describe the contractual relationship in standard agency terms." *Id.*

[100] *Id.* at 723-24.

[101] *Id.* at 724-25.

[102] *Id.* at 725.

[103] *Id.* at 724-26.

[104] *Id.* at 735 ("tax immunity is appropriate . . . when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities.")

[105] *Id.* at 726. The Court stated that "On that date—some two years after the commencement of this litigation—the agreements were modified to state that each contractor 'acts as an agent [of the Government] . . . for certain purposes,' including the disbursement of Government funds and the 'purchase, lease, or other acquisition' of property." *Id. But see* 48 C.F.R. § 29.303 (2007).

> (a) Prime contractors and subcontractors shall not normally be designated as agents of the Government for the purpose of claiming immunity from State or local sales or use taxes. Before any activity contends that a contractor is an agent of the Government, the matter shall be referred to the agency head for review. The referral shall include all pertinent data on which the contention is based, together with a thorough analysis of all relevant legal precedents.

Id.

First, the contractors placed orders with third-party suppliers in their own name and held themselves out as the buyers.[106] Second, the contractors were not required to obtain advance approval from the Government for each purchase.[107] Third, the Government readily disclaimed liability for acts committed by the contractors' employees.[108] In addition, the Government maintained that the contractor's employees could not have any direct claim against the Government for labor-related grievances.[109] Finally, the Court noted that the contracts had been amended two years after commencement of litigation to provide that the contractors were agents of the Government for certain limited purposes.[110]

The Government conceded that the legal incidence of the gross receipts and use taxes fell on the contractors.[111] The Supreme Court unanimously agreed and showed little hesitation in concluding that "the contractors remained distinct entities pursuing 'private ends,' and that their actions remained commercial activities carried on for profit."[112] However, with greater difficulty, the Court also concluded that New Mexico had also properly applied its sales tax to sales from other vendors to the contractors.[113] Here, the Government, relying on the case of *Kern-Limerick v. Scurlock*,[114] argued that the contractors were procurement agents of the Government and therefore the sales should be treated, in essence, as a sale to the Government.[115]

In *Kern-Limerick*, the government contractor, Kern-Limerick, acted as a purchasing agent for the Government under a cost-plus-fixed-fee contract to supply tractors to the Navy.[116] In this capacity, Kern-Limerick was subject to an Arkansas sales tax for tractors purchased in Arkansas.[117] Much like *New Mexico*, the contract provided that title passed directly from the seller to the Government and the Government

---

[106] *Id.* at 725.
[107] *Id.* at 743.
[108] *Id.* at 725.
[109] *Id.* at 725.
[110] *Id.* at 726-27. The Court observed: "At the same time, however, the United States denied any intent 'formally and directly [to] [designate] the contractors as agents,' . . . and each modification stated that it did not 'create rights or obligations not otherwise provided for in the contract.'" *Id.* at 727. The Court went on to state: "We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows 'any government functionary to draw the constitutional line by changing a few words in a contract.'" *Id.* at 737 (citing Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 126 (1954) (dissenting opinion).
[111] *New Mexico*, 455 U.S. at 738.
[112] *Id.* at 739 (citing United States v. Boyd, 378 U.S. 39, 44 (1964)).
[113] *See New Mexico*, 455 U.S. at 741-43.
[114] 347 U.S. 110 (1954).
[115] *New Mexico*, 455 U.S. at 742.
[116] *Kern-Limerick*, 347 U.S. at 111.
[117] *Id.*

was directly responsible to the seller for the purchase price.[118] However, in this case the Supreme Court ruled that the Arkansas sales tax was invalid holding the legal incidence of the tax fell directly upon the Government through its agent, Kern-Limerick.[119]

Despite the complexity of the *New Mexico* sales tax, the Court highlighted the factual differences between *Kern-Limerick* and *New Mexico* and concluded that "the contractors have a substantial independent role in making purchases and that the identity of interests between the Government and the contractors is far from complete."[120] Therefore, even though title to the property passed directly from the seller to the Government, the transaction did not constitute a purchase by Government.[121]

Seventeen years later, in *Arizona Department of Revenue v. Blaze Construction Co*.,[122] the Supreme Court reaffirmed its decision in *New Mexico* in holding that Arizona may impose a nondiscriminatory tax upon a private company's proceeds from contracts with the Government.[123] Under the facts of *Blaze*, the Federal Lands Highways Program gives the Government the authority to finance road construction and improvement projects on federal public roads, including those on Indian reservations.[124] The allocation of funds and the planning of specific projects are distributed among various Government agencies.[125] The authority to construct Indian reservation roads lies with the Commissioner of Indian Affairs.[126] For a period of several years, Blaze Construction Company (Blaze) contracted with the Government, through the Bureau of Indian Affairs, to construct, repair, and improve roads on a number of Indian reservations.[127] Upon contract completion, the Arizona Department of Revenue issued a tax deficiency

---

[118] *Id.*
[119] *See id.* at 122-23.
[120] *See* United States v. New Mexico, 455 U.S. 720, 742-43 (1982). In this regard, the Court stated:

> In *Kern-Limerick* . . . [t]he contractor . . . identified itself as a federal procurement agent, and when it made purchases title passed directly to the Government; the purchase orders themselves declared that the purchase was made by the Government and that the United States was liable on the sale. Equally as important, the contractor itself was not liable for the purchase price, and it required specific Government approval for each transaction.

Id. at 742 (quoting *Kern-Limerick,* 347 U.S. at 120-21).
[121] *New Mexico*, 455 U.S. at 743.
[122] 526 U.S. 32 (1999).
[123] *Id.* at 36-38.
[124] *See id.* at 34-35.
[125] *See id.* at 34.
[126] *See id.*
[127] *See id.*

assessment against Blaze for failing to pay Arizona's transaction privilege tax on the contract proceeds.[128]

In reaching its decision in *Blaze*, the Court articulated the following three rationales for upholding the Arizona tax: Blaze was not an agency or instrumentality of the Government,[129] the incidence of the tax fell on Blaze, not the Government,[130] and Congress had not expressly exempted Government contractors from taxation.[131] Not surprisingly, these rationales are identical to those the Court outlined in its *New Mexico* opinion.[132] The Court commented that "this 'narrow approach' to the scope of governmental tax immunity 'accorded with competing constitutional imperatives, by giving full range to each sovereign's taxing authority.'"[133] Thus, according to the Court, any expansion of constitutional immunity given to the Government and its instrumentalities must be expressly provided for by Congress.[134]

b. State Discrimination Against Government Contractors

Despite the Supreme Court's narrowing of the Government's immunity in cases involving nondiscriminatory taxes, the Court has adhered to the fundamental principle that the Supremacy Clause prohibits state taxes that discriminate against the Government.[135] Thus, state taxes on Government contractors are invalid if they discriminate against the Government.[136] As will be shown, this is not always the case.

In *Washington v. United States*,[137] the Government sought declaratory and injunctive relief and an order for refund of sales tax revenues which the state of Washington had collected from contractors engaged in construction of Government projects.[138] The Government alleged that the sales tax was invalid under the Supremacy Clause of the

---

[128] *See id.*
[129] *Id.* at 36.
[130] *Id.*
[131] *Id.*
[132] Because the Bureau of Indian Affairs contracted with Blaze to build, repair, and improve roads on the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham, and San Carlos Apache Indian Reservations, the Supreme Court also held that federal law did not shield Blaze from the Arizona tax because Blaze was considered the equivalent of a non-Indian for purposes of the Court's analysis and the tribes on whose reservations the work was performed had not assumed contracting responsibility under the Indian Self-Determination and Education Assistance Act. *Id.* at 35, 38.
[133] *Id.* at 35 (quoting United States v. New Mexico, 455 U.S. 720, 735-36 (1982)).
[134] *Blaze*, 526 U.S. at 36.
[135] *See New Mexico*, 455 U.S. at 735 note 11.
[136] *Id.*
[137] 460 U.S. 536 (1983).
[138] *Id.*

United States Constitution.[139] Prior to 1941, the State of Washington treated building contractors as consumers for sales tax purposes.[140] The legal incidence of the tax was on the contractor; whether he was under contract with the Government or with a private entity.[141]

In 1941, Washington amended its sales tax system as applied to private construction contractors by defining the landowner, rather than the private contractor, as the consumer.[142] In doing so, Washington shifted the legal incidence of the tax to the landowner, who was then required to pay tax on the full price of the construction project.[143] This change was aimed at increasing the overall tax base by including the contractor's mark-up on materials, labor costs and profit.[144] When the Government was the landowner, however, Washington could not collect any tax on the sale because the Supremacy Clause also prohibits states from taxing the Government directly.[145] Thus, Washington lost all sales tax revenues on Government construction projects.[146]

In 1975, Washington eliminated the complete tax exemption for construction work purchased by the Government.[147] As a result, the state now divided construction contractors into two categories: (1) those performing construction services on real property owned by the Government; and (2) those performing construction services for the state or a private party.[148] With regard to the first category, the legal incidence of the sales and use taxes was on the Government construction contractors and they were liable for the taxes on material incorporated in their projects.[149] With respect to construction contractors for the state or private parties, however, there were no sales or use tax liability for materials incorporated in their projects. Instead, the legal incidence of the taxes fell upon the landowners and they were liable for tax on the full price of the project including labor costs, costs of materials and mark-ups thereon, and profit.[150] Thus, taxes on Government contracts are applied at the contractor level, whereas taxes on state or private parties are applied at the landowner level for non-federal projects. The Government argued that the tax was invalid

---

[139] *Id.* at 538.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.* at 538 (citing United States v. New Mexico, 455 U.S. 720 (1982)).
[146] *Washington*, 460 U.S. at 538-39.
[147] *Id.* at 538-39, note 3. This change was affected by redefining certain critical terms, such as "consumer, retail sale and sale at retail." *Id.*
[148] *Id.* at 539.
[149] *Id.* at 540. This did not include labor costs, mark-ups and any profit.
[150] *Id.* at 550.

because Washington had circumvented the Government's tax immunity by unconstitutionally discriminating against its private contractors.[151]

In response to the Government's argument that the Supreme Court not consider the economic burden on the contractor and the land owner together, the Court noted that the tax rate imposed on all construction transactions was always equal, and the difference between the tax imposed on the private contractor and the Government contractor was that the amount of tax was less for the Government contractor.[152] The Court further stated, "[t]he Federal Government and federal contractors are both *better off* than other taxpayers because they pay less tax than anyone else in the State. This hardly seems, on its face, to be the mistreatment of the Federal Government against which the *Supremacy Clause* protects."[153] Looking at the whole tax structure, the Court rejected the notion that the Washington statutory scheme did not provide a political check on abusive taxations by the state.[154] Instead, the Court concluded that as long as the tax imposed on Government contractors is an integral part of a Washington's tax system that applies equally to the entire state, "there is little chance that the State will take advantage of the Federal Government by increasing the tax."[155]

In the end, the Supreme Court concluded that the state of Washington, through its amended tax scheme, had not singled out Government contractors for discriminatory treatment.[156] Instead, the state of Washington took measures to avoid imposition of a tax directly on the Government, while at the same time not forfeiting tax revenues.[157] Therefore, according to the Court, the state did not violate the Supremacy Clause.[158]

C. Federal and State Statutory Immunity

Congress has the power to expand, modify, waive, or define the scope of immunity from state taxation by specific legislation.[159] In fact, Congress did just that for the AEC by passing the Atomic Energy Act of

---

[151] *Id.* at 541.
[152] *Id.* at 542.
[153] *Id.* (emphasis in original).
[154] *Id.* at 545.
[155] *Id.* at 546.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *See, e.g.*, Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95 (1941) (Congress has the power under the Necessary and Proper Clause, U.S. CONST. art I, § 8, in furtherance of its lending function, to immunize federal land banks from state sales taxes); *see also* Director of Revenue v. CoBank ACB, 531 U.S. 316 (2001) ("[I]mplied immunity becomes an issue only when Congress has failed to indicate whether an instrumentality is subject to state taxation").

1946.[160] The sales tax protection contained in the Atomic Energy Act was short lived as it was repealed six years later following the Supreme Court's decision in *Carson v. Roane-Anderson.*[161]

In *Roane-Anderson*, the Supreme Court considered a Tennessee sales and use tax imposed on AEC management contractors.[162] This case differed from other tax immunity cases in that section 9(b) of the Atomic Energy Act of 1946 expressly prohibited state and local taxation of AEC activities.[163] As a result, the Court found that Congress had expressly exempted AEC contractors from state taxation because the "operations of management contractors were AEC activities."[164] In response to the *Roane-Anderson* decision Congress repealed the tax exemption provision of section 9(b),[165] in an effort to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies."[166] In explaining the statutory change, the Senate Report contained the following:

> This decision has the effect of affording the Atomic Energy Commission an exemption from State and local taxation much broader in scope than that available to the other departments and agencies of the Federal Government, which rely only upon the constitutional immunity of the Federal Government for their exemption from taxation. The Supreme Court, in *Alabama v. King and Boozer*, 314 U.S. 1 (1941), established the principle that the constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States. Thus, the Atomic Energy Commission's contractors, by reason of the statutory exemption as interpreted by the Supreme Court, are entitled to an exemption from taxation which is not enjoyed by comparably situated contractors of other agencies and departments. A number of States have expressed the view that section 9 (b), as interpreted in the *Roane-Anderson* decision carves out an area of exemption from State and local

[160] Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 765.
[161] 342 U.S. 232 (1952).
[162] *Id.* at 232-33.
[163] *Id.* at 233.
[164] United States v. New Mexico, 455 U.S. 720, 744 (1982) (citing *Carson*, 342 U.S. at 234).
[165] Amendment to Atomic Energy Act of 1946, Pub. L. No. 83-262, 67 Stat. 575.
[166] *New Mexico*, 455 U.S. at 744 (quoting S. REP. NO. 83-694, at 3 (1953)).

> taxation which deprives State and local governmental units of substantial revenue, particularly in those areas in which the Atomic Energy Commission carries on large scale activities.[167]

Rather than according all Government contractors the same treatment by exempting all from state and local sales tax, Congress chose to eliminate the AEC exemption. The states' tax revenue apparently required the repeal. Congress appeared content with the additional costs the lack of statutory immunity would likely add to the Government's procurement budget.

Despite the lack of federal statutory authority exempting a contractor from state and local taxation, many states contain exemption clauses of their own. For example, some state statutes may contain an express exemption for sales made to the Government or its instrumentalities, or a provision in general terms declaring that the sales tax shall not be applicable in a situation where it could not be constitutionally imposed.[168] Thus, some states will allow the Government's immunity to pass through to the contractor if certain

---

[167] S. REP. NO. 83-694, at 2 (1953).

[168] *See, e.g.*, N.M. STAT. ANN. § 7-9-13(A)(1) (exempting from the gross receipts tax the receipts of the United States or any agency, department or instrumentality thereof); s*ee also* FAR 29.302:

> (a) Generally, purchases and leases made by the Federal Government are immune from State and local taxation. Whether any specific purchase or lease is immune, how-ever, is a legal question requiring advice and assistance of the agency-designated counsel.
>
> (b) When it is economically feasible to do so, executive agencies shall take maximum advantage of all exemptions from State and local taxation that may be available. If appropriate, the contracting officer shall provide a Standard Form 1094, U.S. Tax Exemption Form (see Part 53), or other evidence listed in 28.305 (a) to establish that the purchase is being made by the Government.

Id.; FAR 29.303, which states, in relevant part:

> (b) When purchases are not made by the Government itself, but by a prime contractor or by a subcontractor under a prime contract, the right to an exemption of the transaction from a sales or use tax may not rest on the Government's immunity from direct taxation by States and localities. It may rest instead on provisions of the particular State or local law involved, or, in some cases, the transaction may not in fact be expressly exempt from the tax. The Government's interest shall be protected by using the procedures in 29.101.

Id.

conditions are met.[169] In addition, states may allow an exemption pertaining to the sale of tangible personal property for resale; typically referred to as the "sale for resale" exemption.[170]

IV. PRIVATIZATION AND COMPETITIVE SOURCING INITIATIVES

In an effort to become more competitive in the marketplace, private corporations have historically slashed costs and increased efficiencies by downsizing workforces, consolidating facilities, and outsourcing non-core functions.[171] Similarly, the end of the Cold War and the reduction of DOD spending create a strong need to reform the manner in which the Government procures goods and services.[172] To ensure current and future readiness in a fiscally constrained environment, the DOD has turned to privatization and competitive sourcing as a way to free up resources for it highest priorities.[173] However, there is one significant difference in outsourcing between the DOD and the private sector—privatization and competitive sourcing for the DOD results in increased exposure to state and local sales taxation.

A. Overview of Competitive Sourcing

According to longstanding national policy, the Government will not compete with its citizens, but instead should rely on commercial sources for the goods and services it needs.[174] Provided, of course, these

---

[169] For example, Colorado permits the purchase of building materials to be exempt from tax for construction work for the U.S. Government. COLO. REV. STAT. § 39-26-114 (LEXIS 2007) Georgia provides an exemption for overhead items that are sold to and used by a contractor in performance of a contract with the federal government. GA. CODE ANN. § 48-8-3 (LEXIS 2007) South Carolina provides a sales and use tax exemption for tangible personal property purchased by contractors that have been appointed in writing as an agent of the federal government. S.C. CODE ANN. § 12-36-2120(29) (LEXIS 2007).

[170] *See* Richard Wall & Robert Malyska, *Government's Title to Pencils, Paper Clips, and other Overhead Items (or Award Ribbons, Half-Eaten Sandwiches and Funeral Flowers*, 32 PUB. CONT. L.J. 563, 564 (2003).

[171] *See* Steven Shen, *Motorola to Increase Outsourcing of Handset in 2008*, DIGITIMES, Dec. 17, 2007, *available at* http://www.digitimes.com/news/ a20071217PB205.html (Motorola is expected to expand its outsourcing policy by increasing the ratio of ODM handsets to its total output to 50% in 2008 compared to 40% in 2007); Steve Lohr, *At I.B.M., a Smarter Way to Outsource*, THE NEW YORK TIMES, Jul. 5, 2007, *available at* http://www.nytimes.com/2007/07/05/business/05outsource.html?_r=1&ref=business&pagewanted =all&oref=slogin# (I.B.M. employs 53,000 people in India, up from 3,000 in 2002; in India, the salaries for computer programmers are still about a third of those in the United States).

[172] *See* CRS REPORT, *supra* note 15, at 1.

[173] *Id.*

[174] *See* CIRCULAR A-76, *supra* note 15. Circular No. A-76 sets the policies and procedures that executive branch agencies must use in identifying commercial-type

goods and services can be procured more economically from commercial sources.[175] Competitive sourcing is a process used by the Government to procure goods and services from commercial sources outside of the affected agency.[176] Traditionally, this means the agency "transfers a function performed by an in-house organization to an outside service provider."[177] The agency still provides appropriate oversight, however, the outside organization is typically granted some degree of flexibility regarding the how the work is performed.[178]

The Federal Activities Inventory Reform (FAIR) Act of 1998[179] outlines the statutory requirements for identifying and reporting commercial activities that may be subject to competitive sourcing. In addition, the Office of Management and Budget (OMB) Circular A-76, dated May 29, 2003, provides instructions for conducting competitions and preparing estimates.[180]

In general, Circular A-76 provides an analytical framework the Government uses to decide the best provider for the products and services it needs.[181] The FAIR Act, on the other hand, originally published as the regulatory guidance of Circular A-76, codified the requirement to conduct an annual inventory of commercial activities.[182]

---

activities and determining whether these activities are best provided by the private sector, by government employees, or by another agency through a fee-for-service agreement. The current revised OMB Circular A-76 policy was first issued in 1966. CRS REPORT, *supra* note 15, at 3, note 9.

[175] *See id.*

[176] CRS REPORT, *supra* note 15, at 1.

[177] *Id.* at 2. The CRS REPORT further quotes from a 1996 Report of the Defense Science Board:

> Outsourcing often refers to the transfer of a support function traditionally performed by an in-house organization to an outside service provider. Outsourcing occurs in both the public and private sectors. While the outsourcing firm or government organization continues to provide appropriate oversight, the vendor is typically granted a degree of flexibility regarding how the work is performed. In successful outsourcing arrangements, the vendor utilizes new technologies and business practices to improve service and delivery and/or reduce support costs. Vendors are usually selected as the result of a competition among qualified bidders.

Id. at 2 (quoting Department of Defense, Office of the Undersecretary of Defense for Acquisition and Technology, *Report of the Defense Science Board, Task Force on Outsourcing and Privatization*, (Aug. 1996)).

[178] *See* CRS REPORT, *supra* note 15, at 2.

[179] Pub. L. No. 105-270, 112 Stat. 2382 (1998), as amended by Pub. L. No. 109-115, Div. A, Title VIII, § 840, 119 Stat. 2505 (2005) (codified as amended at 31 U.S.C.S. § 501 note) (LEXIS 2007).

[180] *See* CIRCULAR A-76, *supra* note 15.

[181] CIRCULAR A-76, *supra* note 15.

[182] *See* Federal Activities Inventory Reform Act of 1998, 31 U.S.C. §501.

Under the FAIR Act, each Government agency must provide the OMB a list of the commercial functions performed in that agency that are not inherently governmental.[183] In addition, the FAIR Act provides that each time the Government agency considers contracting out for the performance of an activity included on the FAIR Act inventory, the agency must use a competitive process in selecting the contractor.[184] Moreover, the Government agency must ensure that when a cost comparison is used, all costs are considered and the costs considered are realistic and fair.[185] For example, Army Regulation 5-20 requires an evaluation of the impact state and local sales tax payments paid by the contractor for Government materials and supplies will have on any costs savings to the Government.[186]

B. Overview of Military Housing Privatization Initiative

In general, privatization takes place when the Government stops providing certain goods and services directly.[187] Unlike competitive sourcing, however, privatization involves a transfer of ownership and not just a transfer of performance.[188] Thus, when an activity is privatized, using the Military Housing Privatization Initiative (MHPI)[189] as an example, the level of Government involvement is altered.

In 1996, Congress established the MHPI as a tool to help the military improve the quality of life for its service members by improving the conditions of military provided housing.[190] Under the provisions of the MHPI, Congress provided the DOD with a number of special authorities with a goal toward eliminating its aging housing facilities.[191] The MHPI implementation provisions are unlike traditional military construction methods.[192] Rather, the MHPI contains a number

---

[183] *See id.* at § 2(a). The term "inherently governmental function" means a function that is so intimately related to the public interest as to require performance by Government employees. § 5(2).
[184] *See id.* at § 2(d).
[185] *Id.*
[186] *See* U.S. DEP'T. ARMY REG. 5-20, COMPETITIVE SOURCING PROGRAM para. 1-4(r)(18)(k) (May 23, 2005).
[187] *See* CRS REPORT, *supra* note 15, at 2.
[188] *See generally id.*
[189] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 2801(a)(1), 110 Stat. 186 (February 1996), amended chapter 169 of title 10, United States Code, to add a new subchapter entitled Alternative Authority To Construct and Improve Military Housing (codified as amended at 10 U.S.C.S. §§ 2871-2885 (LEXIS 2007)).
[190] *See id.*
[191] *See* Captain Stacie A. Remy Vest, *Military Housing Privatization Initiative: A Guidance Document for Wading Through the Legal Morass*, 53 A.F. L. REV. 1, 2 (2002).
[192] *See id.* at 7.

of unique features designed to meet the intent of Congress—"MHPI was designed and developed to attract private sector financing, expertise and innovation to provide necessary housing faster and more efficiently than traditional Military Construction processes would allow."[193] Thus, Congress included the ability to lease existing federal property to private development companies.[194] Unlike traditional military construction projects, ownership of the privatized housing units is vested in the private developer—not the DOD.[195] After the project is awarded the developers then build, own, and manage the housing units for a number of years.[196] In return, the military tenants provide the developer with an income stream through assignment of their Basic Allowance of Housing with pay allotments.[197] The military service Secretaries can also enter into direct loans and loan guarantees in order to assist the developer in financing the military housing project.[198]

In addition to receiving financial assistance from the DOD, the private developer will likely seek private financing as well.[199] This is very different from traditional methods where the Government pays a contractor, usually a fixed price, upon completion of the project and owns all the houses, equipment, and eventual management of the new units.[200] Under MHPI, however, the private developers own the housing units which are then placed in leaseholds for a suitable period of time.[201]

> Traditionally, the Government conducts an acquisition to retain an architect and engineering firm to develop designs and specifications for housing units, indicating exactly how they are to be built. The Government then conducts another negotiated acquisition, issuing a solicitation structured under FAR Part 36 to obtain offers from construction contractors. Once received, the Government will negotiate with the offerors regarding the specifications of the project, price, and other factors, make a selection decision and award a contract to the offeror whose proposal represents the best value to the Government. The contractor then builds the houses on the installation.

Id., note38.

[193] OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE, INSTALLATIONS AND ENVIRONMENT, MILITARY HOUSING PRIVATIZATION, *available at* http://www.acq.osd.mil/housing/mhpi.htm (last visited Dec. 21, 2007).

[194] *See* 10 U.S.C.S. § 2878.

[195] *See* Morrison, *supra* note 20, at 266.

[196] *See id.*

[197] *See* 10 U.S.C.S. § 2882. The amount of the basic allowance for housing for a member will vary according to the pay grade in which the member is assigned or distributed for basic pay purposes, the dependency status of the member, and the geographic location of the member. 37 U.S.C.S. § 403(a)(1).

[198] *See* 10 U.S.C.S. § 2873.

[199] *See* Morrison, *supra* note 20, at 266.

[200] *See id*.

[201] *See* 10 U.S.C.S. §§ 2874 and 2878.

C. Consequences of Applying the Legal Incidence of Tax

Congress has directed the DOD to competitively source their commercial activities in order to produce quality goods and services at fair and reasonable costs.[202] Yet, competitive sourcing is useful only to the extent it produces savings.[203] As discussed above, purchases of goods and services made directly by the Government are immune from state taxation.[204] However, when a contractor in performance of a Government contract makes the purchase, the right to an exclusion from state and local taxes may not necessarily rest on the Government's immunity.[205] Instead, immunity must be found in a statutory exemption, if available, from Congress or the particular taxing jurisdiction.[206]

Consider the following scenario: The Government conducts an A-76 study to determine whether to transfer routine maintenance at a military installation in State X from in-house performance to contract. Pursuant to the terms of the proposed contract, the Government contractor will be required to furnish all supplies and materials needed in performance of the maintenance contract. State X imposes a tax upon the retail sale of tangible personal property and services purchased in the state. Applying the legal incidence of tax test to this procurement action, a court would first determine if the legal incidence of tax fell on the Government.

Prior to the A-76 study, State X could not tax the purchase of supplies and materials by the military installation. This is because the legal incidence of the sales tax would be directly on the Government as the purchaser. However, once the maintenance service is moved to contract, any purchase of supplies or materials by the contractor pursuant to the terms of the contract would be subject to State X sales tax because the legal incidence of tax would fall on the private contractor. This assumes, of course, the State X tax is not applied in a discriminatory manner, which would be the court's second prong of the analysis.[207] As a result, these additional sales tax costs, in turn, would be passed through to the Government or otherwise built into the overall contract price, depending on the form of contract used. Although the

---

[202] CRS REPORT, *supra* note 15, at 14 (citing U.S. OFFICE OF MANAGEMENT AND BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA FOR FY 2002 (Washington: OMB, 2001)).

[203] *See generally* CIRCULAR A-76, *supra* note 15 (stating one of the policies of competitive sourcing is to ensure the American people receive maximum value for their tax dollars).

[204] *See* United States v. New Mexico, 455 U.S. 720, 733 (1982). *See also supra* Section III.

[205] FAR, *supra* note 10, at 29.303(b). *See also supra* Section III.

[206] *See id.*

[207] *See supra* Section III.B.2. discussing the Supreme Court's two-pronged analysis.

legal incidence of the tax falls on a non-governmental entity, the economic incidence of the tax clearly falls on the Government.

Similarly, the move to privatization of military family housing is not going unnoticed by state and local governments.[208] The development and construction of several hundred new housing units around a military installation can have a positive impact on the local community's tax revenues.[209] Aside from the creation of additional jobs, sales tax revenues are generated as a result of local purchasing of building materials and supplies.[210] Ultimately, the potential tax revenues resulting from a MHPI project to state and local authorities can be extraordinary.[211]

Congress has not exempted MHPI projects from state and local sales and use taxes jurisdiction. Instead, the MHPI authorizes direct loans and loan guarantees, [212] rental occupancy guarantees,[213] and differential payments to supplement service members' housing allowances.[214] By using available Government assets, the DOD seeks to entice the private sector to use its capital to invest in construction and renovation of military housing.[215] However, completion of a housing development can be greatly delayed when the private developer is financially unable to complete the housing project or repay the Government loan guarantee.

Despite the various guarantees from the Government, private developers can and will run into financial difficulties. Recently, American Eagle Communities encountered financial difficulties and had to stop construction at three separate Air Force installations and fell two years behind at a fourth.[216] As a result, the Air Force is now left to try and re-bid the projects to another developer. The specifics behind the financial difficulties have not been disclosed but the developer indicated

---

[208] *See* Morrison, *supra* note 20, at 266.
[209] *See id.*
[210] *See id.*
[211] *See id.*
[212] *See* 10 U.S.C.S. §2873.
[213] *See id.* at § 2876.
[214] *See id.* at § 2877.
[215] *See* GENERAL ACCOUNTING OFFICE, MILITARY HOUSING: CONTINUED CONCERNS IN IMPLEMENTING THE PRIVATIZATION INITIATIVE, GAO/NSIAD-00-71 (Mar. 30, 2000), http://www.gao.gov (GAO Reports, Fiscal 2000, National Defense). Available assets may include existing housing units and land. 10 U.S.C.S. § 2878. It may also include BAH members are authorized to receive when renting MHPI housing units. 10 U.S.C.S. § 2882.
[216] *See* Erik Holmes, *Privatized Houses Cut Way Back at 4 Bases,* AIR FORCE TIMES, Nov. 2, 2007 (American Eagle Communities and a related company stopped work at Little Rock AFB, AR; Patrcick AFB, FL; Moody AFB, GA; and fell two years behind at Hanscom AFB, MA).

that costs for the projects were expected to exceed anticipated demand for the military houses.[217]

Sales tax burdens, then, are virtually inevitable. Because all cost savings to the Government resulting from greater efficiency of operation by contractors, or from a system of competitive bidding, would at least partially be offset by the tax burden, an understanding of the tax liability likely to be faced by contract operators is critical to an intelligent evaluation of management options. In addition, an understanding of the impact on United States sovereign resulting from state taxation of Government procurement operations is critical when determining whether the legal incidence of tax is the appropriate test to apply. Perhaps the courts should adopt an alternative test by looking at the economic substance of a transaction rather than its legal form when evaluating state taxation of Government contractors.

V. AN ALTERNATIVE TO THE LEGAL INCIDENCE RULE

The power to tax is one of the most important incidents of sovereignty.[218] However, a right to tax without limit or control is essentially a power to destroy.[219] Indeed, tax conflicts have existed between states and Government instrumentalities and contractors for nearly one hundred and ninety years. One notable reason for the continuous conflict is the unique sovereignty implications.[220] In an effort to forestall this "clashing sovereignty,"[221] the Supreme Court has described the tax immunity doctrine as "a 'much litigated and often confused field,' one that has been marked from the beginning by inconsistent decisions and excessively delicate distinctions."[222] Moreover, nowhere else in the law does the validity of taxation seem to turn so great an extent on the mere form of taxation in question.

A. Substance Over Form in Federal Tax Cases

According to current Supreme Court jurisprudence, the dispositive analysis in adjudicating Government contractor tax immunity cases is determining where the legal incidence of the tax falls.[223] In terms of sales and use tax statutes, the statutory language

---

[217] *See id.*
[218] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 370 (1819).
[219] *Id.* at 427.
[220] The Supreme Court granted certiorari in United States v. New Mexico, 455 U.S. 720 (1982) to consider "the seemingly intractable problems posed by state taxation of federal contractors." *Id.* at 730.
[221] *McCulloch*, 17 U.S. (4 Wheat.) at 430.
[222] *New Mexico*, 455 U.S. at 730 (quoting United States v. City of Detroit, 355 U.S. 466, 473 (1958)).
[223] *See* Arizona Dept of Revenue v. Blaze Const. Co. Inc., 526 U.S. 32, 36 (1999).

determines the legal incidence of the tax. The entity legally responsible for paying the tax bears the legal incidence of the tax.[224] Alternatively, economic substance of the tax focuses on the entity that is ultimately responsible for paying the tax.[225] Beginning with *Dravo*, the Supreme Court has abandoned the economic incidence test in contractor tax immunity cases.[226] Thus, when the legal incidence of the tax falls on the Government, the state cannot enforce the tax.[227] When the legal incidence falls on the Government contractor, however, state taxation is permitted, provided it does not discriminate against or severely interfere with Government operations.[228] The legal incidence test elevates form over substance, and allows state legislatures to shift the economic burden of tax to the Government.

Some scholars have suggested that "the unique features of tax law, including its high level of detail, frequent revision, and largely self-contained nature, require a special set of interpretive tools."[229] In particular, these scholars have argued that the underlying structure or purpose of the tax law may dictate results that are difficult or impossible to reach using nontax interpretive methods.[230] Just as important, however, the revenue effect of particular tax decisions and their consequences for real-world transactions is also relevant. As will be shown below, purposive analysis has a strong appeal in tax cases.

Courts use the judicially created doctrine of substance over form to adjudicate tax cases based on the economic substance of a transaction rather than its legal form.[231] The doctrine first originated in *Helvering v. Gregory*,[232] in which the Court held that the taxpayer's transaction lacked substance and was nothing more than "an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else."[233] In *Gregory*, the taxpayer, Mrs. Gregory, held all of the stock of United Mortgage Corporation (United), which in turn held the stock of Monitor Corporation (Monitor).[234] Mrs. Gregory wished to

---

[224] *Id.* at 36.
[225] *See* Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 222-23 (1928).
[226] *See* Section III, *supra* and the discussion of cases cited therein.
[227] *New Mexico*, 455 U.S. at 735.
[228] *Id.*
[229] Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 678. (1998). *See* Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, *2* FLA. TAX REV. 492 (1995); Deborah A. Geier, *Commentary: Textualism and Tax Cases*, 66 TEMP. L. REV. 445 (1993); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code,* 64 N.C. L. REV. 623 (1986).
[230] *See* Livingston, *supra* note 229, at 678.
[231] Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 700 (2003).
[232] 69 F.2d 809 (2d Cir. 1934), *affd*, 293 U.S. 465 (1935).
[233] 293 U.S. at 470.
[234] *Id.* at 467.

withdraw the Monitor stock from United so that she could sell it without incurring tax liability.[235] Since a straightforward distribution of the Monitor securities to her in anticipation of the sale would have been taxable as a dividend, she devised a scheme whereby the stock was transferred from United to a newly formed subsidiary, Averill Corporation (Averill), in exchange for Averill's stock.[236] United then distributed Averill's stock to Mrs. Gregory in a transaction that qualified as a tax-free spin-off or corporate reorganization under the Revenue Act of 1928.[237] Mrs. Gregory subsequently sold the Averill stock to a third party, recognizing long-term capital gain on the sale.[238] After the series of transactions was complete, it was clear that Mrs. Gregory had used the reorganization rules to secure favorable capital gain treatment for what, in substance was an ordinary dividend distribution.[239]

The Board of Tax Appeals (BTA) ignored the substance of the transaction and upheld the tax-free corporate reorganization treatment on the ground that "a statute [the reorganization statute] so meticulously drafted must be interpreted as a literal expression of tax policy."[240] In the BTA's view, Averill was entitled to recognition, despite its transitory life as a vehicle to transfer the securities from United to Mrs. Gregory, the sole shareholder.[241] The Second Circuit, however, reversed the BTA's decision, holding that the transaction did not qualify as a "reorganization" when the purpose of the statutory definition of that term was taken into account.[242]

The Supreme Court affirmed the Second Circuit's decision[243] In the Court's view, the purpose of the conveyance was not to reorganize the business, but rather to transfer the original corporation's assets to the shareholder, Mrs. Gregory.[244] With this decision, the Court created the substance over form doctrine.

Two other cases of notable importance in the substance over form area are *Crane v. Commissioner*[245] and *Commissioner v. Tufts.*[246] *Crane* involved the treatment of gain when the taxpayer transferred property encumbered by liabilities. In *Crane*, the taxpayer was the sole

---

[235] *Id.*
[236] *Id.*
[237] Revenue Act of 1928, § 112(i)(1)(b) (currently I.R.C. § 368(a)(1) (1991)), discussed in *Gregory*, 293 U.S. at 468-69.
[238] *Gregory*, 293 U.S. at 467.
[239] *Id.*
[240] Gregory v. Commissioner, 27 BTA 223, 225 (B.T.A. 1932), *rev.*, 69 F.2d 809 (2d Cir. 1934).
[241] *Id.*
[242] *Gregory*, 69 F.2d at 809.
[243] *Gregory*, 293 U.S. at 470.
[244] *Id.*
[245] 331 U.S. 1 (1947).
[246] 461 U.S. 300 (1983).

beneficiary under the will of her deceased husband.[247] At his death, they owned an apartment building that was mortgaged for an amount equal to its fair market value of $262,000.[248] The amount of the mortgage was $255,000 and included additional interest in default in the amount of $7000.[249] Following her husband's death the taxpayer operated the building just over six years.[250] During this time she claimed tax deductions for depreciation and other expenses, but did not make payments upon the mortgage principal.[251] Unable to make a profit and facing foreclosure, the taxpayer sold the building to a third party for $3000.[252] Upon the sale, the taxpayer reasoned that her basis was limited to the equity in the property (zero), and that her gain on the sale was limited to the amount received, $2500.[253] The Tax Commissioner disputed this claim and asserted that the taxpayers' basis was $262,000, reduced by $28,000 in depreciation deductions.[254] The Supreme Court agreed and further found that the taxpayer realized $255,000 in income when the buyer relieved her of the mortgage. As a result, her net gain was not $2500, but instead was $24,000.[255]

Commissioner v. Tufts involves facts similar to *Crane*, except the taxpayer's property had declined in value to an amount less than the nonrecourse loan. The property was conveyed to a third party purchaser, subject to the original loan, but without any additional consideration.[256] The Supreme Court held that the taxpayer must include in the amount realized on the transaction the full face amount of the nonrecourse loan, even though the property was worth less than this amount at the time of the transfer and the taxpayer accordingly would have been unlikely ever to repay the loan.[257] *Tufts* extends the logic of *Crane*, suggesting that relief from nonrecourse debt must be treated as

---

[247] *Crane*, 331 U.S. at 3.
[248] *Id.* at 4. For simplicity, the numbers in *Crane* have been rounded.
[249] *Id.* at 3.
[250] *Id.* at 3-4.
[251] *Id.*
[252] *Id.*
[253] Taxpayer sold the apartment to a third party for $3,000 cash, subject to the mortgage, and paid $500 expenses of the sale. *Id.* at 3.
[254] *Id.* at 4-5.
[255] *Id.* at 4. The Internal Revenue Code provides that "[t]he gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis" I.R.C. § 1001(a) (1994). Amount realized is the "sum of any money received plus the fair market value of the property (other than money) received." I.R.C. § 1001(b) (1994).
[256] Commissioner v. Tufts, 461 U.S. 300, 302-03 (1983). The property had been purchased for approximately $1.85 million and its basis reduced, by depreciation deductions, to $1.45 million. *Id.* at 303, note1.
[257] *Id.* at 317.

income regardless of whether it would have been in the taxpayer's economic interest to repay the loan.[258]

The statute at issue in both *Crane* and *Tufts* stated that the amount realized on a sale of property shall be "the sum of any money received plus the fair market value of the property (other than money) received."[259] The statute was silent, however, regarding whether a transfer of debt-encumbered property results in taxable income. As such, the taxpayers in *Crane* and *Tufts* argued the literal meaning of the statute, albeit unsuccessfully, that the amount realized from the transfer should not include the debt.[260] However, *Crane* and *Tufts* can be classified as purposive decisions where the Court has placed substance over form to prevent taxpayers from being unjustly enriched through loan provisions.[261]

Although these cases involve the Internal Revenue Service's (Service) use of substance over a taxpayer's form, the substance over form doctrine extends concordant treatment to both the Service and taxpayers. "This preference for substance over form in tax matters extends to claims of petitioner and respondent alike."[262] Moreover, "one should not be garroted by the tax collector for calling one's agreement by the wrong name."[263] Thus, just as the Service can look through the form initially adopted by the taxpayer, the taxpayer can similarly disregard her own form in favor of a transaction's true substance.

One of the classic cases articulating a taxpayer's right to assert substance over form is *Bartels v. Birmingham*.[264] In *Bartels*, the taxpayers, dancehall operators, entered into contracts with various bandleaders.[265] Those contracts provided that the taxpayers were the employers of the bandleaders and their musicians.[266] At trial, the

---

[258] *Id*. at 312-13.
[259] I.R.C. § 1001(b).
[260] *See* Livingston, *supra* note 229, at 693.
[261] *Id.* at 691.
[262] Schmitz v. Commissioner, 51 T.C. 306, 317 (1968), *aff'd sub nom*. Throndson v. Commissioner, 457 F.2d 1022 (9th Cir. 1972).
[263] Pacific Rock & Gravel Co. v. United States, 297 F.2d 122, 125 (9th Cir. 1961).
[264] 332 U.S. 126 (1947). In 1971, Unemployment Insurance Code Section 680 (Stats. 1971, ch. 1281, § 1), was enacted stating:

> Certain persons contracting for the services of musicians are 'employers' for unemployment insurance purposes. The undisputed underlying legislative intent of section 680 was to reverse the effect of judicial rulings that musicians who contracted to provide services under the form B union contract were nevertheless independent contractors and not common law employees of the entertainment entity which hired them.

Far West Services, Inc. v. Livingston, 156 Cal. App. 3d 931, 935 (Cal Ct. App. 1984).
[265] *Bartels*, 332 U.S. at 127-28.
[266] *Id.*

taxpayers argued, in direct contravention of the contracts, that the bandleaders were themselves independent contractors and were the employers of their own musicians.[267] The Supreme Court disregarded the Service's attempt to hold the taxpayers to the legal form they had adopted and instead allowed the dancehall operators to argue, and ultimately to establish, that in substance the bandleaders were independent contractors.[268] The Court concluded that "the contractual language did not authorize the Service to collect taxes from one not covered by the taxing statute."[269]

These cases demonstrate that courts have employed the use of the judicially created doctrine of substance over form to protect the integrity of the tax system. Substance over form provides the courts with the ability to adjudicate tax cases based on the economic reality of the transaction and helps ensure that taxpayers abide by the purpose of the particular taxing statute. Conversely, examining a taxpayer's purpose behind a particular transaction over the Service's literal interpretation also enforces the legitimacy of the tax code. Thus, without substance over form, the tax law becomes a hollow shell subject to the whim of a few carefully structured transactions.[270]

B. Analysis of the Rationales in Support of Economic Incidence of Tax

Sales and use taxes have been the subject of many, perhaps a majority, of the cases dealing with federal immunity in the context of Government contracts. The impact of cases like *New Mexico* and *Washington*, in a formalistic sense, indicates that any sales or use tax, the incidence of which is on the contractor, is valid. Moreover, these cases expose the potential revenues that may be obtained by a state under the proper tax scheme. *New Mexico* is particularly notable because of the amount of tax liability ultimately stipulated between New Mexico and the United States.[271] The amount agreed to and ultimately paid to the state was approximately $280 million.[272] In *Washington*, the state legislature amended its sales tax scheme in order derive additional revenue from contractors doing business with the Government. Indeed, reexamination of federal tax immunity seems all the more urgent in view of the Supreme Court's tendency to reason across the various areas of constitutional tax immunity.

---

[267] *Id.* at 130.
[268] *Id.* at 131.
[269] *Id.* at 132.
[270] Noel Cunningham & James Repetti, *Textualism and Tax Shelters*, 24 VA. TAX. REV. 1, 2-3 (2004).
[271] *See* Cavin, *supra* note 52, at 832.
[272] *Id.*

Substance-over-form principles can override a result achieved by a technical reading of the text of a particular statute.[273] Textualism, on the other hand, requires that statutes be implemented on the basis of what the text means.[274] *Washington* is a decision where the Supreme Court put form over substance to the benefit of the state because the amended sales tax statutes had no relationship to economic realities. The Court could have used the common law doctrine of substance over form to evaluate the policy underlying the Washington tax scheme. Washington's principal source of revenue was the sales and use tax.[275] In order to eliminate the tax exemption enjoyed by Government contractors and increase revenues, Washington amended its sales tax system moving the legal incidence of the sales tax back on the contractor.[276] As a result, the Court determined that for Government

---

[273] *See* Madison, *supra* note 231, at 717.
[274] *Id.* at 700-01.
[275] Washington v. United States, 460 U.S. 536, 537 (1983).
[276] *Id.* at 538-39. In this regard, the Court noted from the decision of the Court of Appeals:

> The manner in which this was accomplished is somewhat complex. The change was effected by substitute House Bill No. 86, enacted into law as Chapter 90, Laws of 1975 (amending Wash. Rev. Code §§ 82.04.050 and 82.04.190); Section 5 of Substitute House Bill No. 2736, enacted into law as Section 5 of Chapter 291, Laws of 1975 (amending Wash. Rev. Code § 82.04.050) and House Bill No. 1229, enacted into law as Chapter 1, Laws of 1975-76 (amending Wash. Rev. Code §§ 82.12.010 and 82.12.020). These statutes added the following definition of 'consumer' to Wash. Rev. *Code § 82.04.190*:
>
> 'Consumer' means the following:
> . . .
> '(6) Any person engaged in the business of constructing, repairing, decorating, or improving new or existing buildings or other structures under, upon or above real property of or for the United States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Any such person shall be a consumer within the meaning of this subsection in respect to tangible personal property incorporated into, installed in, or attached to such building or other structure by such person.'
>
> 'These statutes further expressly excluded from the definition of 'consumer' 'the United States, instrumentalities thereof, and county and city housing authorities created pursuant to chapter 35.82 RCW in respect to labor and services rendered to their real property.' Wash. Rev. Code § 82.04.190(4). Wash. Rev. Code § 82.04.050 was also amended so as to redefine 'retail sale' and 'sale at retail' to exclude expressly from their scope contracts calling for the improvement, repair or construction of real property owned by the

projects the legal incidence of the tax fell on the contractor rather than the Government landowner.[277] Although the Court focused its decision on whether the state circumvented the Government's immunity by identifying a federal activity for different tax treatment, the Court nevertheless took a textualist approach missing an opportunity to decide the case based on economic realities. This approach has its perils, however, because it shows how a state can manipulate a tax statute so that the legal incidence falls on a non-governmental instrumentality. Thus, by changing a few words in a tax statute, the state is able to essentially tax Government operations as long as the nondiscriminatory legal incidence of the tax is on the contractor. The fact that the economic incidence of the tax falls on the Government has been deemed irrelevant by the Court.[278] However, analysis of the economic incidence may be evidence of legislative intent as to who is actually intended to pay the tax.

For example, in *United States v. Mississippi Tax Commission*,[279] a Tax Commission regulation required payment of a tax in the form of a wholesale markup to be collected by out-of-state liquor distillers and suppliers to military installations in the state.[280] The amount of the markup was between 17-20%.[281] The Tax Commission did not attempt to collect the tax directly from the nonappropriated fund activities, but instead compelled the out-of-state suppliers to collect the tax for it.[282] The Supreme Court found that the Tax Commission clearly intended that out-of-state suppliers pass on the markup to the military purchasers.[283] As such, according to the Court, the legal incidence of the markup was plainly upon the military and therefore prohibited.[284] In

---

> United States or any of its instrumentalities and to include sales of materials to prime contractors engaged in construction work on federally-owned property. As with the sales tax, the liability of federal prime construction contractors for the State's use tax arose basically from the inclusion of such contractors within the meaning of the term 'consumer,' and the use of that term in Wash. Rev. Code § 82.12.020, under which the use tax is levied.

Id. at 540, note 3 (quoting United States v. Washington, 654 F.2d 570, 573, note 6 (9th Cir. 1981).

[277] *Washington*, 460 U.S. at 539-40.

[278] *See* United States v. New Mexico 455 U.S. 720, 735-36 (1982).

[279] 421 U.S. 599 (1975).

[280] *Id.* at 605-06.

[281] *Id.*

[282] *Id.* at 607.

[283] *Id.* at 609. The Tax Commission had informed the distillers and suppliers that the markup "must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base." *Id.*

[284] *Id.* The courted noted: "Finally, even in the absence of this clear statement of the Tax Commission's intentions, obviously economic realities compelled the distillers to pass on the economic burden of the markup." *Id.* at 610 note 8.

deciding this case, the Court looked at the economic burden of the tax in determining the Tax Commission's intent. Thus, statutory incidence depends not on legal liability for the tax but on legislative intent. In addition to considering substance over form, the economic realities may be a strong indication of intent.

Seven years later, the Supreme Court decided *New Mexico*, which involved the application of New Mexico's gross receipts and use taxes upon three Government contractors. The state of New Mexico imposed a gross receipts tax which operated as a tax on the sale of goods and services.[285] In addition, a compensating use tax was also levied "for the privilege of using property in New Mexico."[286] Neither tax, however, was imposed on the "receipts of the United States or any agency or instrumentality thereof," or on the "use of property by the United States or any agency or instrumentality thereof."[287] The Court determined that because the statute places the legal incidence on the Government contractors, the gross receipts and compensating use taxes were valid.[288]

The Court applied a substance over form analysis in determining that constitutional tax immunity requires something more than "the invocation of traditional agency notions."[289] The Court further stated, "[W]e cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows 'any governmental functionary to draw the constitutional line by changing a few words in a contract.'"[290] However, this is exactly what the state did in *Washington* when it amended its sales tax system.

By not continuing its substance over form analysis when determining the legal incidence of the gross receipts and use tax, the

---

[285] *See* United States v. New Mexico, 455 U.S. 720, 727 (1982). *See also supra* Section III.

[286] *Id.* at 727 (quoting N.M. STAT. ANN. § 72-16A-7).

[287] *New Mexico*, 455 U.S. at 728 (quoting N.M. STAT. ANN. §§ 72-16A-12.1, 72-16A-12.2).

[288] *New Mexico*, 455 U.S. at 735. Prior to 1967, the New Mexico Bureau of Revenue did not attempt to tax government contractors. *Id.* at 728, note 9.

[289] *Id.* at 737.

[290] *Id.* (quoting Kern-Limerick, Inc., 347 U.S.110, 126 (1954) (dissenting opinion)). In further response to the government's argument that its contractors were tax-exempt because they were federal agents, the Court stated:

> Should the [Atomic Energy] Commission intend to build or operate the plant with its own servants and employees, it is well aware that it may do so and familiar with the ways of doing it. It chose not to do so here. We cannot conclude that [the contractors], both cost-plus contractors for profit, have been so incorporated into the government structure as to become instrumentalities of the United States and thus enjoy governmental immunity.

New Mexico, 455 U.S. at 736 (quoting United States v. Boyd, 378 U.S. 39, 48 (1964).

New Mexico Court ignored it previous decision in *Mississippi*[291] and took a textualist approach in deciding the case on the plain-language of the statues. Thus, according to the Court, if the government performs the work itself, then tax immunity applies.[292] However, when the government contracts out, for example, to tap the expertise of industry, then its operations will be subject to taxation.[293] Even though the legal incidence falls on the Government contractor, the economic costs are ultimately passed on to the Government. There are, however, some limitations imposed by the Federal Acquisition Regulation (FAR).[294]

The FAR addresses state and local taxes in one of two ways. First, cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract.[295] This type of contract is generally suitable for use when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use a fixed-price contract.[296] State and local taxes are generally allowable costs and reimbursable to the contractor under cost-type contracts.[297] Thus, under cost-reimbursement contracts, contractors serve as conduits for the payment of taxes. However, as they have primary responsibility for the payments of taxes incurred as the result of purchasing goods and services, their position is not without some degree of risk. For example, liability under a consumer type sales tax would be imposed on the contractor upon the retail sale of tangible personal property or services in performance of the contract. Provided the terms of the contract allow reimbursement, the sales taxes would be considered allowable costs.[298] Conversely, improper payment of taxes or taxes not accrued in accordance with generally accepted accounting principles may result in non-reimbursable costs to the contractor.[299]

Firm-fixed-price contracts, on the other hand, generally provide for a price that is not subject to any adjustment on the basis of the contractor's cost-experience in performing the contract.[300] This type of contract places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.[301] Thus, as opposed to a cost-

---

[291] United States v. Tax Comm'n of Mississippi, 421 U.S. 599 (1975).
[292] *New Mexico*, 455 U.S. at 736.
[293] *Id.* at 737.
[294] The FAR is a system that codifies and publishes "uniform policies and procedures for acquisition by all executive agencies." 48 C.F.R. §1.101.
[295] *Id.* at 16.301-1.
[296] *Id.* at 16.301-2.
[297] *Id.* at 31.205-41.
[298] *See id.* at 31.205-41(a)(1) (stating that "Federal, State and local taxes are allowable types of costs provided they are required to be and are paid or accrued in accordance with generally accepted accounting principles").
[299] *Id.* at 31.205-41(a)(1) and (2).
[300] *Id.* at 16.202-1.
[301] *Id.* at 16.202-1.

type contractor, a fixed price contractor usually includes its estimated taxes in the contract price and is not otherwise compensated for such expenses.[302] There are circumstances, however, when special tax clauses may include or exclude from the contract price a specific after-imposed or after-relieved federal, state or local tax.[303]

Despite these restrictions, an examination of the substance and economic reality of a particular sales or use tax statute provides a better outcome and results in greater savings to the Government. Applying the rationale adopted in *Washington*, states are generally free to structure statutes to shift the tax's legal incidence. From a purposive approach, the purpose of the statute seems clear, to tax the Government's procurement activities by statutorily placing the legal incidence of the tax on non-government instrumentalities. Thus, unless the state tax discriminates or interferes with the Government's operations, it will be allowed. If this remains the test, no tax, however great, can prevent the functioning of the government, "so long as the United States' taxing and borrowing powers remain adequate to meet the ordinary expenses of its operations and the added costs of state taxes."[304]

VI. THE FUTURE OF THE FEDERAL IMMUNITY DOCTRINE

If the purpose of any intergovernmental tax immunity doctrine is to prevent one sovereign from interfering with the governmental functions of another, it must also take into account countervailing state interests and the policy reasons behind them. An absolute prohibition against states levying taxes legally incident on the Government undoubtedly serves a legitimate interest in preventing interference with Government operations.[305] However, such absolutism could also have the affect of eroding the state tax base.

The power of taxation by the states is vitally important to the United States system of government.[306] Many years before the Supreme Court decided *McCulloch*, Alexander Hamilton thought that the individual states should possess their own separate and independent authority to "raise their own revenues for the supply of their own wants."[307] In addition, the courts have also been mindful of the policy

---

[302] *Id.* at 16.202-1.
[303] *Id.* at 29.401-3, 52.229-3, 52.229-4.
[304] James v. Dravo Contracting Co., 302 U.S. 134, 172 (1937) (Roberts, J., dissenting).
[305] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427-31 (1819).
[306] *Id.* at 425 ("That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments—are truths which have never been denied").
[307] THE FEDERALIST NO. 32 (Alexander Hamilton) (Daily Advertiser ed., 1788). Hamilton further stated:

considerations surrounding a state's ability to tax. For example, in *Michelin Tire Corp v. Wages*,[308] the Supreme Court addressed the ability of a state to impose a nondiscriminatory ad valorem property tax on imports which increased the cost of the goods.[309] In upholding the state tax, the Court stated:

> [S]uch taxation is the quid pro quo for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods.[310]

From a policy perspective, it may make more sense that a purchaser of goods and services be held financially accountable for the very protections it enjoys from the state.[311] The *Michelin* case further illustrates this point by also highlighting the Court's ability to safeguard the states' power to tax while also balancing the equitable considerations at stake.[312] Such equitable trade-offs, however, should be decided in the proper forum—through the political process.

The Court in *McCulloch* was concerned with the lack of political checks in place to prevent the state from abusing its taxing power with respect to Government activities.[313] However, by the time *Dravo*[314] was decided, this concern had subsided as the Court recognized the power of Congress to protect the performance of the functions of the Government by preventing any attempted state taxation.[315] Forty-five years later in *New Mexico*,[316] the Court

---

> And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

Id.

[308] 423 U.S. 276 (1976).

[309] *See id.* at 288.

[310] *Id.* at 289 (citing Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1852)).

[311] *See generally* Peggy Venable, *School Finance Drives Texas Budget, Tax Talks*, BUDGET AND TAX NEWS, Apr. 1, 2005 (Texas proposes raising the state sales tax in order to cover a shortfall in school finance).

[312] *Michelin*, 423 U.S. at 288-89.

[313] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 317, 428–29 (1819).

[314] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[315] *Id.* at 161.

expounded upon this rationale when it stated that any expansion of tax immunity for Government contractors must come from Congress.[317] The Court further explained that the allocation of responsibility is more appropriate for the political process because "it is uniquely adapted to accommodating the competing demands" between two sovereigns.[318] Thus, the Court has drawn the line with respect to expansion of the federal immunity doctrine instead leaving any future changes in the hands of Congress.

If Congress is to make any meaningful policy decisions concerning the state and local taxation of Government contractors, it will likely want to consider other areas where the states' ability to tax has been limited. First, Congress has already enacted legislation to prevent state taxation in areas where the states otherwise would be free to tax. The Servicemembers Civil Relief Act[319] limits the states' power to tax the personal income and personal property of military personnel who are stationed in the state solely by reason of military orders.[320] In general, the states are not allowed to treat military personnel as residents of the state for personal income or property tax purposes.[321] The states are also prohibited from treating military compensation of such service member as compensation derived from sources within the state.[322] The second area Congress must take into consideration is whether or not the federal reservation or military installation is exempt from property tax and ad valorem taxes as this could also deprive the states of much needed revenue.[323]

When debating the competing interests at stake, an analysis of the amount of contracting activity across the various states should also be considered. For example, in those states with very little or no Government procurement activity, the competing interests at stake are minimal. However, those states where a large portion of the procurement budget is spent are in the best position to increase their sales tax revenues at the expense of the Government.[324] In turn, the Government has a legitimate interest in controlling this additional cost. However, from a policy perspective, it makes no sense why local taxpayers should subsidize the benefits actually received by the

---

[316] United States v. New Mexico, 455 U.S. 720 (1982).
[317] *Id.* at 737 (citing James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937); Carson v. Roane-Anderson Co., 342 U.S. 232, 234 (1952); *see also* Arizona Dept. of Rev. v. Blaze Const. Co. Inc., 526 U.S. 32, 38 (1999) (finding Congress had not expressly exempted the contractor's activities from taxation).
[318] *New Mexico*, 455 U.S. at 737-38.
[319] Servicemembers Civil Relief Act, 50 U.S.C.S. § 501–593 (LEXIS 2007).
[320] *Id.* at § 571.
[321] *Id.* at § 571(a).
[322] *Id.* at § 571(b).
[323] *See generally* Morrison, *supra* note 20.
[324] *See* Cavin, *supra* note 52, at 835.

Government and its employees from the taxing state.[325] These issues, to include numerous others, will likely need to be debated before any changes are made to the intergovernmental tax immunity doctrine.

VII. CONCLUSION

Sales and use tax implications encompass the entire spectrum of Government procurement practices. As a result, controversies have arisen with disagreements over sovereignty—one sovereign's ability to tax against the others ability to be immune. Historically, conflicts have arisen when states attempt to impose their sales and use taxes on Government contractors. Despite the judicial constriction of federal immunity, the Supreme Court has maintained the central theme to federal immunity from state taxation is the protection of federal functions from interference.[326] However, by ignoring the judicially created doctrine of substance over form, the Court has not found it necessary to protect the federal fisc in order to protect the federal function. When applied to tax disputes involving federal income tax, substance over form provides the courts the ability decide cases based on the economic reality of the tax statute. Similarly, courts can use this judicially created tool in determining whether a state's sales and use tax law violates U.S. Constitutional principles. Thus, while the legal incidence of the tax may fall on the Government contractor, the economic reality is that the burden falls on the United States.

---

[325] *See generally* Timothy Wheeler, *Army Urged to Share Cost of Local BRAC Upgrades*, BALTIMORESUN.COM, Sep. 11, 2007, http://www.baltimoresun.com /news/local/bal-te.md.brac11sep11,0,7889852,print.story (State and local officials are asking the Army assist with road and transit upgrades due to millions of dollars in tax revenues being lost as a result of the developments being built on tax exempt military installations. Although the Fort Meade expansion could reach $1 billion, county officials have estimated $5 billion in infrastructure improvements to serve the work force and associated households).

[326] *See* James v. Dravo Contracting Co., 302 U.S. 134, 156-57 (1937); United States v. New Mexico, 455 U.S. 720, 736, note 11 (1982).

THREE'S A CROWD: WHY MANDATING UNION REPRESENTATION AT MEDIATION OF FEDERAL EMPLOYEES' DISCRIMINATION COMPLAINTS IS ILLEGAL AND CONTRARY TO LEGISLATIVE INTENT

MAJOR TIMOTHY J. TUTTLE

Major Timothy J. Tuttle (B.A. University of Kansas, (1990); J.D. University of Nebraska College of Law (1999); LL.M George Washington University (2007)) serves as Chief, Administrative Litigation Branch-East, Labor Law Field Support Center, Air Force Legal Operations Agency in Rosslyn, Virginia. He is a member of the Nebraska Bar.

I. INTRODUCTION

Section 717 of the Civil Rights Act prohibits discrimination by the federal government against applicants and employees based on race, color, religion, sex and national origin.[1] It is every federal agency's responsibility to ensure a discrimination-free workplace and to respond appropriately to discrimination complaints. A vital tool in responding to discrimination complaints in the workplace is mediation, which is an informal alternative dispute resolution (ADR) method in which both parties are encouraged to speak freely and to which confidentiality is key. In discrimination complaints brought by federal employees who are represented by bargaining units, however, the principles of mediation arguably come into conflict with a union's right of representation.

Labor organizations which represent federal employees have the right to be present at formal meetings concerning grievances between members of a bargaining unit and management.[2] However, allowing union participation in meetings in which the mediation of discrimination complaints is conducted works against a "core principle" of ADR, confidentiality. Three court cases have weighed these competing interests with differing results. This article provides short summaries of the equal employment opportunity (EEO) complaint process and of how mediation works in general. Next, it analyzes the relevant statutory and administrative law concerning this issue. Finally, the article discusses the cases in which this issue was in dispute. The article focuses on the most recent, and most relevant, of the cases, the U.S. Court of Appeals for the District of Columbia's decision in *Department of the Air Force, Dover Air Force Base v. Federal Labor Relations Authority*.[3]

The courts, particularly the *Dover AFB* court, have made several errors which have forced government agencies to invite unions to participate in mediation of discrimination complaints brought by its bargaining unit members. The courts' errors include: deferring to the Federal Labor Relations Authority (FLRA)[4] in its interpretation of a statutory process governed by the EEOC, failing to consider the text of the Civil Rights Act (Title VII)[5] in its analysis of a process mandated by that Act, using a Labor statute to determine if a process created by Title VII is a "formal" process, failing to look to either Title VII or the

---

[1] Civil Rights Act of 1964 §717, 42 U.S.C. § 2000e-16(a) (2008).
[2] 5 U.S.C. § 7114(a)(2)(A) (2008).
[3] Department of the Air Force, Dover Air Force Base v. Federal Labor Relations Authority, 316 F.3d 280 (D.C. Cir. 2003).
[4] The Federal Labor Relations Authority is the entity charged with carrying out the provisions of the Federal Service Labor Management Relations Statute, 5 U.S.C. § 7101-7135, which governs the relationships between federal agency management and bargaining units which represent federal government employees.
[5] 42 U.S.C. § 2000e (2008).

Federal Service Labor Management Relations Statute (FSLMRS)[6] to determine if a complaint made pursuant to Title VII is a "grievance" for the purpose of the FSLMRS, summarily dismissing the requirements of the Administrative Dispute Resolution Act (ADRA), and ignoring or mischaracterizing the mandates of the Privacy Act.[7] The result of the courts' misinterpretation of the law is a disincentive to enter into mediation by both the complainant and management. This disincentive is contrary to the individual complainant's right to have his or her allegation resolved appropriately, quickly, and at the lowest level possible. Additionally, the result of the *Dover AFB* case thwarts the purpose of the Civil Rights Act, to ensure a discrimination-free workplace.

While this article argues a union does not have a right of representation at mediation of discrimination complaints brought pursuant to the Civil Rights Act, the article does not contend union officials should be prohibited from representing complainants when the complainants have chosen union officials as their personal representatives, or when the claims have been made pursuant to negotiated grievance procedures. Rather, this article contends that unions do not have an independent right to represent their own interests in mediation of discrimination complaints brought pursuant to Equal Employment Opportunity Commission (EEOC) regulations.

II. SUMMARY OF THE EEO COMPLAINT PROCESS

A federal employee wishing to file a complaint of discrimination against his or her employer starts the process by meeting with an EEO counselor in his or her agency. This begins the pre-complaint process.[8] The EEO counselor will provide the employee notice of his or her rights and responsibilities and will conduct a limited inquiry into the allegations.[9] The agency has 30 days from the date of initial contact to conduct this inquiry.[10] During this pre-complaint phase of the process, the counselor is prohibited from revealing the identity of the complainant without his or her permission.[11] The counselor is instructed to encourage informal resolution of the dispute, to include ADR. If both parties agree to ADR, the pre-complaint period is extended to 90 days.[12] If the parties are unable to resolve the dispute, at

---

[6] 5 U.S.C. §§ 7101-35 (2008).
[7] 5 U.S.C. § 552a (2008).
[8] This is also known as the "informal complaint" process. The term "informal complaint" has confused courts.
[9] Equal Employment Opportunity Commission Management Directive 110, (Nov. 9, 1999) [hereinafter EEO MD 110]
[10] *Id.* The complainant can agree to extend the pre-complaint phase.
[11] 29 C.F.R. § 1614.105(g).
[12] 29 C.F.R. § 1614.105(b)(2)(F).

the end of the pre-complaint period the counselor issues the complainant a notice of final interview, which discusses what occurred in regard to settlement attempts during the informal process, the individual's right to pursue the complaint through the formal process, and the requirements of a formal complaint. Upon receipt of notice of final interview, the complainant has 15 days to file a formal complaint of discrimination.[13]

When a federal agency receives a formal complaint of discrimination, it analyzes the allegation to determine if the complainant has made a proper claim of discrimination.[14] The agency then sends the complainant a letter informing him or her if the complaint is accepted or dismissed. If the entire claim or a portion of the claim is accepted, the agency must investigate the claim and provide a report to the complainant within 180 days of the filing of the complaint. ADR is available during the formal complaint process as well as the pre-complaint process, and the investigators are encouraged to promote settlement discussions during the investigation.[15] The complainant's identity does not remain confidential in the investigatory process and may be disclosed to the persons the complainant has identified as being responsible for the allegedly discriminatory actions.[16] After receipt of the investigator's report, the complainant may elect either a hearing before an EEOC Administrative Judge or to receive a final decision from the agency.[17]

III. SUMMARY OF MEDIATION PROCESS

Mediation is the most popular form of ADR by federal agencies and their employees in employment related disputes.[18] In mediation, a neutral third party who has no decision-making authority works with the parties to reach an acceptable resolution. During a mediation session, the mediator typically makes procedural suggestions to encourage settlement. A mediator can also make substantive suggestions to increase the range of solutions being considered by the parties. Usually, a mediator will work with the parties individually, in caucuses, to discuss potential solutions and to create proposals to present to the opposing party. These private sessions are vital, as parties often provide

---

[13] EEO MD 110, *supra* note 9, Chapter 2.

[14] An improper claim of discrimination would include a claim that an agency discriminated based upon some non-protected category: for example, based upon a complainant's favorite college football team. While it may not be proper under the Civil Service laws to discriminate against Kansas State Wildcat fans, it is not a violation under the Civil Rights Act to do so and a complaint brought through the EEO process would properly be dismissed.

[15] EEO MD 110, *supra* note 9, Chapter 3, para. II.C-D.

[16] EEO MD 110, *supra* note 9, Chapter 2, para. VI.4.

[17] EEO MD 110, *supra* note 9, Chapter 5.

[18] EEO MD 110, *supra* note 9, Chapter 3, para. VIII.A.

information to the mediator in these individual sessions which would not normally be shared with the other party. While the mediator cannot provide this information given in confidence to the opposing party, he or she can use the information to help fashion a settlement option acceptable to both sides.

Confidentiality is vital to mediation. The EEOC's guidance on complaint processing states: "Confidentiality is essential to the success of all ADR proceedings . . . Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of ADR information." [19] Open discussion leads to better understanding of the issues on both sides and results in more satisfying solutions. Without confidentiality there is no open discussion; without open discussion an acceptable result to both sides is far less likely.

While each mediator's goal is to enable the parties to create their own acceptable settlement of the issue, a mediator may be more or less directive in pursuing an agreement. Some mediators merely set the stage for bargaining, make few procedural suggestions, and intervene only in the event of an impasse. Other mediators may choose to become more actively involved in providing substantive suggestions for resolution to the parties. Regardless of their style, the mediator's goal is to get the parties to the dispute create their own solution to the issue. In order to achieve this goal, open collaboration is necessary.

IV. STATUTORY AND REGULATORY MANDATES FOR USE OF ADR

A. The Civil Rights Act Requires ADR

The Civil Rights Act explicitly directs federal agencies to attempt ADR to informally resolve discrimination complaints when possible:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall endeavor* to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.[20]

There is no clearer indication of the meaning of a law than the text of a statute. "[T]he meaning an ordinary speaker of the English language

[19] EEO MD 110, *supra* note 9, Chapter 3, para. VII.A.3.
[20] 42 U.S.C. § 2000e-5 (2008) (emphasis added).

would draw from the statutory text is the alpha and omega of statutory interpretation."[21] Since the text of the Civil Rights Act dictates an attempt at informal resolution of potentially meritorious claims, it is clear the drafters intended the methods listed be attempted and be informal.

The definition of the informal methods mandated by the Civil Rights Act further illustrates the point; Black's Law Dictionary defines the terms as follows:

> Conference. A meeting of several persons for deliberation, for the interchange of opinion, or for the removal of differences or disputes;[22]
>
> Conciliation. The adjustment and settlement of a dispute in a friendly, unantagonistic manner. Used in courts before trial with a view towards avoiding trial and in labor disputes before arbitration. *See* Arbitration; Court of Conciliation; *Mediation*; Pre-trial conference; Settlement. (emphasis added)[23]
>
> Persuasion. The act of persuading; the act of influencing the mind by arguments or reasons offered, or by anything that moves the mind or passions, or inclines the will to a determination.[24]

These definitions make clear Congress was intending agencies attempt methods such as mediation, which is specifically mentioned in the definition of conciliation, throughout the process to try to settle claims of discrimination informally.[25]

---

[21] WILLIAM ESKRIDGE, JR. PHILIP FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 228 (2000).
[22] BLACK'S LAW DICTIONARY 296 (6th ed. 1990).
[23] *Id.* at 289, 290.
[24] *Id.* at 1145.
[25] The language directing the Commission to resolve complaints informally after investigation was part of the original bill establishing the Civil Rights Act in 1964. In 1972 the Civil Rights Act was amended to apply to federal agencies as well. The EEOC has authority to make rules pursuant to the Civil Rights Act. 42 U.S.C. §2000e-16(a) (2008). In 29 C.F.R. §§ 1614.104 and 1614.108, the EEOC delegated the responsibility for investigating and processing discrimination complaints to the individual agencies. Although not expressly stated, it is implied the statutory mandate to attempt to resolve discrimination claims informally after investigation was delegated to the agencies along with the responsibility to conduct the investigation itself. Finally, § 118 of the Civil Rights Act of 1991, passed after the authority to investigate and process claims had been delegated to the individual federal agencies, specifically encouraged the use of ADR to resolve claims. § 118 is codified in a note at 42 U.S.C. 1981 and reads: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute

B. EEOC Rules Mandate ADR

In addition to the statutory mandate contained within the text of the Civil Rights Act, EEOC rules also require that federal agencies create ADR programs for the settlement of discrimination complaints. EEOC regulations direct agencies to "maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies"[26] and to "[e]stablish and maintain an alternative dispute resolution program."[27] The ADR program "must be available for both the pre-complaint process and the formal complaint process."[28]

The courts, and other federal agencies, should defer to EEOC regulations in the processing of complaints filed under the Civil Rights Act. Yielding to the authority of a federal agency in carrying out the mandates of its founding statute is known as *Chevron* deference. *Chevron* deference is described as follows: "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute."[29]

The Civil Rights Act gives the EEOC authority to create rules and regulations,[30] which is sufficient to accord it *Chevron* deference. "We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." [31] Since the EEOC rules mandate agencies create an ADR program which must be available throughout the EEO complaint process, and since Congress delegated the authority for these matters to the EEOC, federal agencies must follow these rules and the courts should defer to them.

---

resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

[26] 29 C.F.R. § 1614.102(a) (2008).

[27] 29 C.F.R. § 1614.102(b)(2) (2008).

[28] *Id.*

[29] United States v. Mead Corporation, 533 U.S. 218 (2001) at 226-27 (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc, 467 U.S. 837, 843-44 (1984)).

[30] 42 U.S.C. § 2000e-16 (2008).

[31] *See Mead,* 533 U.S. at 226-27.

V. STATUTORY AND REGULATORY REQUIREMENTS OF CONFIDENTIALITY

A. The Civil Rights Act and Confidentiality of Information

The Civil Rights Act not only mandates an attempt at informal resolution of discrimination complaints, it also mandates confidentiality in regard to information elicited during informal resolution attempts. The text of the Civil Rights Act speaks directly to the importance of keeping information disclosed in ADR sessions conducted to resolve discrimination complaints private. Referring to mandated ADR sessions:

> Nothing said or done during and as part of such informal endeavors may be made public by the Commission . . . Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both.[32]

Clearly, the Civil Rights Act requires confidentiality in both the processing of discrimination complaints and in ADR sessions held pursuant to those complaints. In fact, the Act makes all information regarding the complaint confidential, "[c]harges shall not be made public by the Commission,"[33] and even provides for criminal penalties as punishment for the release of information pertaining to discrimination complaints.

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding[34] . . . . Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1000, or imprisoned not more than one year.[35]

---

[32] 42 U.S.C. § 2000e-8 (2008).
[33] 42 U.S.C. § 2000e-5 (2008).
[34] The term "proceeding" is not defined in the Civil Rights Act, but is used multiple times. According to the context in which it is used in the Civil Rights Act, "proceeding" is the equivalent of a formal hearing. Mediation would not be considered a proceeding in this context since mediation is, by definition, an informal process.
[35] 42 U.S.C. § 2000e-8 (2008).

The Supreme Court weighed in on the confidentiality provisions of the Civil Rights Act in *Equal Employment Opportunity Commission v. Associated Dry Goods Corp*.[36] In *Assoc. Dry Goods*, the lower court ruled on the issue of whether the parties in the dispute, the complainant and the respondent and their representatives, were considered part of the "public" to which disclosure of information regarding the complaint was forbidden. The Supreme Court held the parties should not be considered part of the public as understood in the Civil Rights Act, thus the information could be disclosed.[37]

Whether agencies should be required to allow union representation in mediation of discrimination complaints was not at issue in *Assoc. Dry Goods*,[38] but the Court's reasoning illuminates how to determine who should be allowed to receive information about complaints.

> Section 706(b) states that "[c]harges shall not be made public." 42 U.S.C. § 2000e-5(b). The charge, of course, cannot be concealed from the charging party. Nor can it be concealed from the respondent, since the statute also expressly requires the Commission to serve notice of the charge upon the respondent within 10 days of its filing. Thus, the "public" to whom the statute forbids disclosure[39] of charges cannot logically include the parties to the agency proceeding. And we must infer that Congress intended the same distinction when it used the word "public" in § 709(e), 42 U.S.C. § 2000e-8(e).[40]

The Court in *Assoc. Dry Goods* acknowledged the Civil Rights Act prohibited release of information regarding discrimination complaints to the public. However, the statute does not define "public."[41] The Court recognized the absurdity of the conclusion that Congress meant to restrict the information from the charging party, for it was the source of

---

[36] 449 U.S. 590 (1981).
[37] *Id.* at 598.
[38] Although *Assoc. Dry Goods* pertains to the application of the Civil Rights Act to private organizations and not government agencies, the opinion still provides valuable insight into the reasoning of the Supreme Court on the confidentiality of EEO complaints.
[39] In footnote 14, the Court reasoned: "The language in § 709(e) [42 U.S.C. § 2000e-5(b)] forbidding disclosure 'in any manner whatever,' seems clearly to refer to the means of publication, and not to persons to whom disclosure is forbidden." *Assoc. Dry Goods*, 449 U.S. at 599.
[40] *Id.* at 598.
[41] *Id.* at 596.

the information in the complaint. The Court also decided Congress could not have meant to prohibit the EEOC from releasing the information regarding the charge to the respondent because another section of the statute requires the EEOC to serve notice of the charge on that party.

This decision does not explicitly say only the charging party, the respondent, and their representatives are allowed to receive information regarding a discrimination complaint. However, the reasons Congress intended to distinguish the parties from the general public, as identified by the Court, apply to no other individual or group. No other groups or individuals are the source of the complaint, nor are any other groups or individuals statutorily mandated to be informed of the complaint. Certainly neither reason for disclosing the information would apply to a complainant's union, unless the claimant selected a union official as his or her representative in the complaint process, as discussed earlier in this article. In that situation, the union official would have the same right to information regarding the complaint as the complainant or any other chosen representative.

Additionally, the *Assoc. Dry Goods* Court cited legislative history from the creation of the Civil Rights Act to explain the prohibition against releasing complaint information.

> Senator Humphrey, the cosponsor of the bill, explained that the purpose of the disclosure provisions was to prevent wide or unauthorized dissemination of unproved charges . . . . "The amendment . . . is aimed at the making available to the general public of unproven charges."[42]
>
> . . . .
>
> The other cosponsor of the Senate bill, Senator Dirksen, explained § 706(b)'s prohibition of any "public" disclosure of matters revealed during informal conciliation attempts as follows: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy."[43]

Disclosing information regarding discrimination complaints to unions, or to any of the complainants' or alleged perpetrators' coworkers, is contrary to the Civil Rights Act's legislative intent as illuminated by the

[42] *Id.* at 599 (citing 110 Cong. Rec. 12819 (1964) at 12723).
[43] *Id.* (citing 110 Cong. Rec. 8193 (1964)).

Court. Senator Humphrey's statement indicates Congress understood the damage that unproven allegations can cause. This is particularly true if the charges are spread throughout a workplace where it is likely the complainant, the subject of the complaint, and the union officials all work.

Senator Dirksen's explanation demonstrated Congress recognized the importance of privacy when working through the complex and sometimes embarrassing issues involved in discrimination complaints. Bringing a third party, which represents neither the complainant nor the subject of the complaint but its own interests, into the process reduces the likelihood that the parties will be "forthcoming and candid, without fear that frank statements may later be used against them" which is the stated intention of EEOC's ADR Policy Statement confidentiality mandate.[44] There may be no other party whose presence might cause management to be less "forthcoming and candid"[45] than the union, except perhaps the press.

If a union is allowed to attend all mediation sessions regarding discrimination complaints filed by the employees it represents, it could be involved in virtually all EEO mediation sessions. If a union had information from a complaint which supported a different employee's position in a later claim, the union would have a direct conflict; the confidentiality of the information received in the mediation session versus the duty to represent the interests of all bargaining unit employees. Management, knowing this and not willing to trust the union to resolve the issue in favor of not using the information, would likely choose not to divulge the information in the first place.

Information gained in a mediation session need not be used in a subsequent mediation to give a union leverage. A leak to the press regarding an admission of fault or an embarrassing incident would be far more damaging than the matter arising in another complaint. Even the possibility of such an action could shift the balance of bargaining power to the point that management may be unwilling to be fully open in mediation sessions where union representatives are present.

Even if union officials were legally bound not to disclose information they receive in mediation sessions, it would not eliminate the incentive for agencies to limit the information they disclose. While you can forbid an individual from publicly disclosing information and punish them for doing so, it is much more difficult to police the internal dispersal of information within an organization like a union. Once a union had information perceived damaging toward management, (i.e. like the agency's admission that a supervisor made sexist comments),

---

[44] EEO MD 110, *supra* note 9, Appendix H; Equal Employment Opportunity Commission Notice Number 915.002 (Jul. 10, 1997); Alternative Dispute Resolution Policy Statement, Equal Employment Opportunity Commission (Jul. 17, 1995) para. 3.
[45] *Id.*

they may have a significant incentive to use that information to embarrass or leverage management. An argument could be made that by not using such information to gain leverage which would provide benefits to the bargaining unit as a whole, the union is not fulfilling its duty to represent the entire unit. Regardless, agencies are not going to trust the union to "do the right thing" and not use information they gain during mediation any more than the union is likely to trust management reciprocally. This lack of trust is neither party's fault; it simply arises from the nature of the relationship. Requiring the presence of a union official during an EEO mediation works against the goal of an open and honest discussion between the complainant and management.[46] Deterring open and honest discussion, or any discussion at all, between complainants and management works against the purpose of the Civil Rights Act: to ensure a discrimination free workplace. The whole process is geared toward this purpose. If management is not made aware of problems, it cannot act to remedy them. Employees have a right to a discrimination free workplace. Reducing the effectiveness and limiting the use of one of management's methods of uncovering discrimination contravenes that right.

Additionally, a union's presence in the mediation of a discrimination complaint creates a chilling effect on complainants by deterring them, at least in certain situations, from being "forthcoming and candid, without fear that frank statements may later be used against them."[47] If the complaint involves a union officer, steward, or a strong supporter of the union, an employee would likely not want the union present. Although the union's duty to represent all members of the bargaining unit fairly would restrict the union representative from using the information against the claimant, the same problem of policing the dissemination of information within the union exists. The claimant may not believe the union representative will keep the information from its officers or its strong supporters, so they may not bring the charge or enter into mediation at all. This disincentive to enter into mediation effectively takes away a powerful remedial tool, violating the complainant's rights under the Civil Rights Act.

The complainant would also want to limit knowledge of the information if the complaint involves especially lurid or embarrassing details, as often the case in sexual harassment cases. Again, the complainant may be unwilling to trust almost anyone with the

[46] If the complainant chooses a union official as representative in the process, there is obviously a union representative in the mediation sessions who is privy to all information shared. This is unavoidable as the complainant has the right to a representative of his or her choice. It is likely management is not fully open in providing information in some situations where a union official attends in the role of complainant representative.

[47] *Id.*

information. Adding parties to the procedure would increase fear the information will be spread at the work place. Permitting a union to represent its own interests in discrimination mediation creates incentives for both the complainant and the agency which are contrary to the intended open and candid environment. This works against the purpose of mediation, the informal resolution of discrimination complaints, to which frank and forthcoming discussions are vital.[48]

Union presence at ADR sessions creates a great disincentive to attempt ADR for both management and the complainant. Even if the parties attempt mediation in the face of this deterrent, union attendance limits open and honest discussion from both management and the complainant. This violates the complainant's right to have his or her complaint processed per the Civil Rights Act and works against the main purpose of the statute, to create a discrimination-free federal workplace. ADR is specifically provided for in the Civil Rights Act. Removing this tool, or making it less effective due to parties unwillingness to be fully open, takes away one of the complaint's most effective methods of resolving his or her issue and one of management's methods of ensuring it is providing a discrimination free workplace.

The *Assoc. Dry Goods* opinion identifies whom Congress intended to have access to information regarding discrimination complaints; the parties. Unions whose bargaining unit employees have filed complaints are not parties to the matter. While they may have an interest in the matter, their interests are outweighed by the complainant's right to have his or her allegation fully addressed and by the collective interest in management providing a discrimination-free workplace. In addition, the Court acknowledged Congress' intent to keep information regarding discrimination complaints, and mediation sessions to resolve them, private. Allowing unions to represent their own interests in the processing of discrimination complaints directly conflicts with this intent. The Court's holding illuminates why unions should not have the right to attend mediation sessions regarding discrimination complaints brought pursuant to EEOC rules: Congress intended they (and all non-parties) be excluded because the purposes of the Civil Rights Act will be best "achieved if the investigation and conciliation are carried on in privacy."[49]

B. EEOC Rules and Rulings Mandate Confidentiality

EEOC rules also mandate confidentiality of information pertaining to discrimination complaints. Charges of discrimination are

[48] EEO MD 110, *supra* note 9, Chapter 3.II.A.3 and Appendix H, EEOC ADR Policy Statement, *supra* note 44.
[49] *Assoc. Dry Goods,* 449 U.S. at 599 (citing 110 Cong. Rec. 8193 (1964)).

not to be made public by agencies investigating complaints. While, the EEOC rules do not expressly state this, reading the rules for federal agencies as a whole leads to this conclusion. The EEOC rules state: "The investigation of complaints shall be conducted by the agency against which the complaint has been filed."[50] Additionally, the rules say, "Hearings are part of the investigative process and are thus closed to the public,"[51] it is clear the agency's investigation as a whole is to be closed to the public.

The EEOC's Management Directive makes clear the Commission's intention that information disclosed pursuant to ADR methods be kept confidential is much clearer. The EEOC considers confidentiality to be essential as part of the ADR "core principle" of fairness.[52]

> Confidentiality is essential to the success of all ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in § 574 of ADRA, specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. Parties who know that their ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them.. . .
>
> Confidentiality must be maintained by the parties, by any agency employees involved in the ADR proceeding and in the implementation of an ADR resolution, and by any neutral third party involved in the proceeding.[53]

While Management Directives and Policy Statements may not speak with the force of statutory law or administrative rules, the EEOC identifies two statutory mandates of confidentiality in its ADR Policy Statement.[54] "[T]he Commission will be guided by the nondisclosure provisions of the Civil Rights Act and the confidentiality provisions of ADRA which impose limitations on the disclosure of information."[55] Thus, the EEOC interprets both the Civil Rights Act and the ADRA as

---

[50] 29 C.F.R. § 1614.108(a) (2008).
[51] 29 C.F.R. § 1614.109(e) (2008).
[52] *Id.*
[53] EEO MD 110, *supra* note 9*,* at Chapter 3.II.A.3.
[54] The EEOC also recognizes the Privacy Act's prohibition on releasing information regarding discrimination complaints to unions. This critical issue will be discussed later in this article.
[55] EEO MD 110, *supra* note 9, Appendix H; EEOC ADR Policy Statement, *supra* note 44*,* at para. 7.II.B.3.

supporting their directives requiring confidentiality. Additionally, this directive requiring confidentiality should receive *Chevron* deference[56] because it is binding on the agencies subject to the Civil Rights Act per EEOC rules implemented pursuant to notice and comment requirements.[57]

Several EEOC rulings have also required confidentiality of settlement discussions.[58] In them the complainants attempted to use statements made in an ADR session as the basis for additional allegations, which the EEOC subsequently rejected. These rulings illuminate the EEOC's interpretation of its own rules and processes and of the statute which created the EEOC,[59] the Civil Rights Act. Thus, they should be binding per *Chevron*.[60]

In *Sacramone v. USPS*, for example, a complainant alleged his postmaster insulted and belittled him in a mediation session.[61] In its holding in the matter, the EEOC upheld the Administrative Law Judge's (ALJ) dismissal of the complaint for failure to state a claim, ruling: "[s]ettlement negotiations, including any statements or proposals, are to be treated as confidential and privileged to facilitate a candid interchange to settle disputes informally." [62]

In *Harris v. Department of the Navy*,[63] the complainant asked the EEOC to reconsider the denial of his complaint alleging reprisal. The allegation claimed an agency executive officer rejected settlement terms of a previous complaint as reprisal for previous EEO activity.

---

[56] *Mead,* 533 U.S. at 226-227. See discussion on *Chevron* in section IV.B. of this article.

[57] 29 C.F.R. § 1614.104(a) mandates compliance with EEOC Management Directives. It reads: "Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through § 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's Management Directives."

[58] See Sacramone v. United States Postal Service, EEOC Office of Federal Operations, Appeal No. 01A52251 (Feb. 16, 2006). See also Harris v. Department of the Navy, EEOC Request No. 05941002 (Mar. 23, 1995); Elliott v. United States Postal Service, Appeal No. 01A52921 (Jun. 23, 2005); Dupor v. United States Postal Service, Appeal No. 01A35372 (Oct. 19, 2004); Andrews v. United States Postal Service, Appeal No. 01A34613 (Dec. 1, 2003); and, Montague v. Army, EEOC Request No. 05920231, May 7, 1992 citing Olitsky v. Spencer Gifts, Inc., 842 F.2d 123, 126-127 (5th Cir. 1988).

[59] Also know as its "enabling" or "organic" statute. Department of the Air Force, Dover Air Force Base v. Federal Labor Relations Authority, 316 F.3d 280, at 285 (D.C. Cir. 2003).

[60] *Chevron*, 467 U.S. at 837.

[61] The basis of the complainant's claim is not clear in the opinion. The complainant alleged discrimination based upon a disability and reprisal for prior discrimination complaints.

[62] Sacramone v. United States Postal Service, Office of Federal Operations, Appeal No. 01A52251 (Feb. 16, 2006).

[63] Harris v. Navy, EEOC Request No. 05941002 (Mar. 23, 1995).

When the Commission originally dismissed the case, it held matters in settlement negotiations were confidential and could not be made the basis for future complaints. The complainant requested reconsideration of the decision because, he said, the Commission failed to recognize his complaint was at the "formal[64]" stage when the settlement offer was rejected by the executive officer. The commission denied the request for reconsideration of the claim for the following reasons.

> A settlement agreement may be reached at any stage of the complaint process and the regulations do not differentiate between informal complaints and formal complaints. See generally 29 C.F.R. § 1614.603. As stated in the previous decision, settlement negotiations, including any statements and proposals, are to be treated as confidential and privileged to facilitate a candid interchange to settle disputes informally.[65]

Thus, the EEOC has made a determination that its mandates of confidentiality apply to both formal complaints and to those in the pre-complaint stage.

These cases illustrate the EEOC's interpretation that mediation sessions brought pursuant to its direction are confidential and privileged, regardless of whether they were conducted in the pre-complaint or formal complaint stage. The EEOC's decisions requiring confidentiality in the process it set up should be binding per *Chevron*.[66]

C. The ADRA Mandates Confidentiality of Mediation Sessions

The EEOC's ADR Policy Statement on ADR specifically states the confidentiality provisions of the Administrative Dispute Resolution Act (ADRA)[67] apply to ADR of EEO complaints,[68] including mediation sessions. The ADRA generally prohibits neutrals[69] from voluntarily disclosing, or being required to disclose, any "dispute resolution

---

[64] A complaint is required to go through a pre-complaint stage prior to filing an actual complaint of discrimination. An allegation in the pre-complaint stage is considered an "informal" complaint and an actual, filed compliant is considered a "formal" complaint. The processing of discrimination complaints is discussed in Part II of this article.

[65] Harris v. Navy, EEOC Request No. 05941002 (Mar. 23, 1995).

[66] *Chevron*, 467 U.S. at 837. See section IV.B. of this article for a discussion on *Chevron* deference.

[67] 5 U.S.C. § 571-581 (2008).

[68] EEO MD 110, *supra* note 9, Appendix H; EEOC ADR Policy Statement, *supra* note 44, at Chapter 7.II.B.3.

[69] A mediator is the neutral in a mediation session.

communication"[70] or any communication made in confidence to the neutral unless all of the parties to the mediation and the neutral consent. This includes, of course, the requirement that a neutral not disclose to one party information received in confidence during a private caucus with the other party. There are several exceptions to the prohibition, such as a disclosure required pursuant to a court order.[71] Likewise, the parties in mediation are prohibited from disclosing any "dispute resolution communication," except for certain exceptions, including that the communication was created by the party wising to disclose the information.[72] The ADRA does not have any mandates requiring confidentiality from non-parties, indicating it is likely Congress did not consider the potential inclusion of non-parties in the process, other than witnesses.

Communications protected under the ADRA are exempt from disclosure under the Freedom of Information Act (FOIA).[73] § 574(j) of the ADRA reads: "A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3)."[74] Congress intended, under almost all circumstances, information communicated in ADR sessions covered by the ADRA be kept confidential. The EEOC policy statement on ADR makes the ADRA guidelines mandatory for federal agencies when using ADR in the EEO context.[75] Mandating union presence in mediation of represented federal employees' EEO complaints is contrary to Congress' clear purpose of maintaining privacy in ADR.

---

[70] A "dispute resolution communication" is defined in the ADRA as "any oral or written communication prepared for the purpose of a dispute resolution proceeding." *5* U.S.C. § 571(5) (2008).

[71] 5 U.S.C. § 574(a) (2008).

[72] 5 U.S.C. § 574(b) (2008).

[73] 5 U.S.C § 552 (2008).

[74] The Freedom of Information Act, at § 552(b)(3), reads in part: "This section does not apply to matters that are . . . . specifically exempted from disclosure by statute (other than § 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."

[75] "EEOC's revised regulations at 29 C.F.R. § 1614.102(b)(2) required agencies to establish or make available an alternate dispute resolution program. . . .The Commission has developed an ADR Policy which sets forth core principles regarding the use of ADR." EEO MD 110, *supra* note 9, Chapter 3, para. I. "[T]he Commission will be guided by the nondisclosure provisions of the Civil Rights Act and the confidentiality provisions of ADRA which impose limitations on the disclosure of information." EEO MD 110, *supra* note 9 Appendix H; EEOC ADR Policy Statement, *supra* note 44, at paragraph 7.II.B.3.

D. Disclosure of Information Regarding Discrimination Complaints Is Forbidden by The Privacy Act.

Perhaps the most powerful argument against giving unions the right to represent themselves in mediations of its unit members' discrimination complaints comes from the Privacy Act,[76] which restricts federal agencies from releasing personal information they have gathered pursuant to their mission. The application of the Privacy Act is not dependent upon a court ruling regarding whether to interpret a case using the Civil Rights Act, the ADRA, or the FSLMRS. Unless there is an exception in another law, like the Freedom of Information Act (FOIA), the Privacy Act applies in all cases of release of information by the federal government. Thus, there is no question the Privacy Act applies to the release of information in EEO files as long as the information in question is considered a "record" and is located within a "system of records."[77]

5 U.S.C. § 552a(b) reads: "Conditions of disclosure. No agency shall disclose *any* record which is contained in a system of records by *any means of communication* to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains."[78] (Emphasis added) There is no exception for non-personal or non-confidential information. Federal government agencies are prohibited from releasing any information in a record located within their systems of records by any means of communication without consent. Thus, if a discrimination complaint is considered a record and is located within a system of records, a government agency cannot disclose any information regarding the complaint to a union, not even orally, unless the person making the complaint consents in writing. It would even be a violation to notify another of the existence of that record, unless the person to whom the record pertained gave his or her permission.

There are several exceptions to the rule prohibiting disclosure, none of which apply to the issue discussed in this article. In particular, the exception listed at 5 U.S.C. § 552a (b)(2), "unless disclosure of the record would be—required under section 552 of this title" (FOIA), is not applicable pursuant to the provisions of the ADRA,[79] as discussed previously.

The EEOC has determined that information agencies gather regarding discrimination complaints is covered by the Privacy Act, thus is not to be disclosed to others, particularly to unions, without the

[76] 5 U.S.C. § 552a (2008).
[77] 5 U.S.C. § 552a(b) (2008).
[78] *Id.*
[79] 5 U.S.C. § 574(j) (2008).

consent of the complainant. The applicable EEOC Management Directive reads:

> Agencies must be mindful of obligations they may have under collective bargaining agreements to discuss development of ADR programs with representatives of appropriate bargaining units. Agencies must also be mindful of the prohibitions on the disclosure of information about individuals imposed by the Privacy Act. All pre- and post-complaint information is contained in a system of records subject to the Act. Such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to a union unless the complaining party elects union representation or gives his/her written consent.[80]

Although government agency policy directives do not have the force of law, like a statute or a rule implemented through the formal rulemaking process, this directive not to disclose information regarding discrimination complaints should receive *Chevron* deference because it is binding on government agencies per EEOC rules implemented pursuant to notice and comment requirements.[81] The argument that information agencies gather regarding discrimination complaints is covered by the Privacy Act becomes even more convincing, and the EEOC's interpretation should receive even greater weight, after looking at the text of the Privacy Act.

The analysis to determine whether a discrimination complaint is a record contained in a system of records begins by looking at the definitions in the Privacy Act. The relevant terms are defined in the following ways:

> "record" means any item, collection, or grouping of information about an individual that is maintained by an agency. . . and that contains his name, or the identifying

---

[80] EEOC MD 110, *supra* note 9, Chapter 3.

[81] 29 C.F.R. § 1614.104(a) mandates compliance with EEOC management directives:

> Each agency subject to this part shall adopt procedures for processing individual and class complaints of discrimination that include the provisions contained in §§ 1614.105 through 1614.110 and in § 1614.204, and that are consistent with all other applicable provisions of this part and the instructions for complaint processing contained in the Commission's management directives.

> number, symbol, or other identifying particular assigned to the individual.[82]
>
> "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.[83]

Next, the complaint process must be analyzed to determine if the information associated with it fits within the terms defined in the Privacy Act and thus is protected. The Air Force EEO process provides an example of a typical federal government method for processing discrimination complaints. In the Air Force process, as discussed in Section II of this article, a civilian employee who desires to file a complaint of discrimination must first meet with an EEO counselor to begin the "precomplaint phase" of the process.[84] The counselor records the information related in the meeting in an electronic intake form in order to conduct a limited inquiry, attempt to resolve the issue, and create reports.[85] The complainant's name, address, unit information, and specific reasons why the employee believes he or she is the victim of discrimination are recorded on the intake form. The intake form is kept in an electronic system of records. The EEO counselor has 30 days to complete the inquiry and attempt resolution, at the completion of which he or she will hold the "final interview"[86] with the complainant, ending the precomplaint stage.

If the complainant is not satisfied with the results of the precomplaint process and wishes to file a formal complaint, he or she submits the information relating to the complaint on Department of Defense Form 2655 (DD 2655), *Complaint of Discrimination in the Federal Government*. Similar to the electronic intake form, the form used for formal complaints contains fields for a complainant's name, address, work information, and specifics for why the employee feels he or she was the victim of discrimination.

The plain reading of the text of the Privacy Act indicates the information recorded by an Air Force EEO counselor in the pre-complaint stage and contained on DD 2655 both constitute records for the purpose of the Act. They are both groupings of information collected about the complainant which contain his or her name. They are also both contained in a system of records as defined in the Act

---

[82] 5 U.S.C. § 552a(a)(4) (2008).
[83] 5 U.S.C. § 552a(a)(5) (2008).
[84] *Id.*
[85] EEOC MD 110, *supra* note 9, Chapter 2 and Appendix A.
[86] 29 C.F.R. § 1614.105(d).

because they are under control of the agency and can be retrieved by either the name of the complainant. In addition, the EEOC has recognized the Air Force's system of discrimination records is covered by the Privacy Act. Besides being specifically addressed in an EEOC management directive,[87] the EEOC has published notice of the entire Department of Defense's systems of discrimination complaint records in the Federal Register as part of the general notice provided by the EEOC.[88] Disclosure to labor unions for collective bargaining or representational purposes is not listed under the routine uses, so neither is authorized under the Privacy Act without the complainant's consent.

The Supreme Court has considered how the Privacy Act affects the information an agency may provide a union. In *Department of Defense v. Federal Labor Relations Authority*,[89] the Court clarified how the Privacy Act applies to union demands for information pursuant to the FSLMRS. The Court ruled the Privacy Act's prohibition from releasing personal information applied to a union's request for federal employees addresses, regardless of the fact release of the information would further the purpose of the Labor statute. "The terms of the Labor Statute in no way suggest that the Privacy Act should be read in light of the purposes of the Labor Statute."[90] Thus, the Department of Defense properly denied the union request for employee addresses.

In *DOD v. FLRA*, two unions filed unfair labor practice charges with the FLRA after the DOD refused to give them the addresses of employees in the bargaining units. The FLRA, rejecting the DOD's argument that disclosure of the addresses was prohibited by the Privacy Act, held the DOD was required to provide the information pursuant to 5 U.S.C. § 7114(b)(4),[91] and ordered the DOD to provide the addresses to the union. The DOD appealed to the Fifth Circuit which upheld the FLRA ruling and then appealed to the U.S. Supreme Court.[92]

The Court analyzed the FSLMRS mandate which "provides that agencies must, 'to the extent not prohibited by law,' furnish unions with data that are necessary for collective-bargaining purposes."[93] The Court

---

[87] EEOC MD 110, *supra* note 9, Chapter 3.
[88] 67 Fed. Reg. 49338 (Jul. 30, 2002).
[89] 510 U.S. 487 (1994).
[90] *Id.* at 497.
[91] 5 U.S.C. § 7114(b)(4) reads: "The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation . . . to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data . . . (A) which is normally maintained by the agency in the regular course of business; (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;"
[92] *DOD v. FLRA*, 510 U.S. at 491-92.
[93] *Id.* at 491.

went on to recognize the requested employee addresses were records covered the Privacy Act. "Therefore, unless FOIA would require release of the addresses, their disclosure is 'prohibited by law' and the agencies may not reveal them to the unions."[94]

The Court then considered the application of FOIA to the release of information in agency files. It said:

> First, in evaluating whether a request for information lies within the scope of a FOIA exemption, such as Exemption 6, that bars disclosure when it would amount to an invasion of privacy that is to some degree "unwarranted," "a court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect."[95]
>
> Second, the only relevant "public interest in disclosure" to be weighed in this balance is the extent to which disclosure would serve the "core purpose of the FOIA," which is "contribut[ing] significantly to public understanding of the operations or activities of the government."[96]

Thus, the purposes of the FSLMRS are not to be considered in a Privacy Act/FOIA analysis. The only relevant consideration in *DOD v. FLRA* was in balancing the privacy of the individuals concerned with the purposes of the FOIA, which is to "'shed light on an agency's performance of its statutory duty,' or otherwise let citizens know 'what their government is up to.'"[97]

The unions argued that the Court should distinguish their situation from the facts in the Court's previous *Reporters Committee* decision because the request for the addresses was made pursuant to the FSLMRS, not FOIA. They maintained that, to give full effect to all three statutes involved and to permit unions to carry out their statutory duties of representation, the Court should include the policy considerations of the FSLMRS in its balancing analysis under FOIA. The Court disagreed, reasoning:

> Disclosure of the home addresses is prohibited by the Privacy Act unless an exception to that Act applies. The terms of the Labor Statute in no way suggest that

---

[94] *Id.* at 493-94.
[95] *Id.* at 495, (quoting Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 776 (1989).
[96] *Id.* (quoting *Reporters Committee*, 489 U.S. at 775).
[97] *Id.* at 497, (quoting *Reporters Committee*, 489 U.S. at 773).

> the Privacy Act should be read in light of the purposes of the Labor Statute. If there is an exception, therefore, it must be found within the Privacy Act itself . . . the fact that respondents are seeking to vindicate the policies behind the Labor Statute is irrelevant to the FOIA analysis.[98]

The Court identified that Congress never created an exception to the Privacy Act for information "'necessary' for collective bargaining purposes."[99] Nor did it create a "special status under FOIA" for collective bargaining purposes.[100] The Court continued:

> Speculation about the ultimate goals of the Labor Statute is inappropriate here; the statute plainly states that an agency need furnish an exclusive representative with information that is necessary for collective-bargaining purposes only "to the extent not prohibited by law." 5 U.S.C. § 7114(b)(4). Disclosure of the addresses in this case is prohibited "by law," the Privacy Act. By disallowing disclosure, we do no more than give effect to the clear words of the provisions we construe, including the Labor Statute.[101]

The Court's decision clearly indicates there are no exceptions to the Privacy Act except those contained in the Act itself and in FOIA. It specifically demonstrates that labor unions have no special status under the Act, even if they are pursuing policies in accordance with the FSLMRS.

This case is instructive as it identifies that the Court has considered the Privacy Act and its application to union requests for information. Under the holding in DOD v. FLRA, government agencies are prohibited from providing information regarding discrimination complaints to unions. Additionally, they have an even stronger argument for withholding information regarding mediation of discrimination complaints from unions because the ADRA provides a specific exemption from FOIA for ADR communications.[102] Since information contained within the EEO records would certainly be disclosed in the mediation of a discrimination complaint, it is a violation of the Privacy Act for government agencies to allow union

---

[98] *DOD v. FLRA*, 510 U.S. at 498-99.
[99] *Id.*
[100] *Id.*
[101] *Id.* at 502-03.
[102] 5 U.S.C. § 574(j) (2008).

representatives to be present in EEO mediation sessions unless the complainant specifically requests their presence.

It is also a violation to simply notify a union of a discrimination complaint filed under an EEO process without first obtaining the complainant's permission. In a Fifth Circuit case from 2005, *Jacobs v. National Drug Intelligence Center*,[103] the court found: "A myriad of cases has held or assumed that the Act protects against oral disclosures." Thus, as long as the information came from a record located within a system of records, it is protected by the Privacy Act. It doesn't matter how it is relayed. Telling a union about a discrimination case is a violation unless the complainant has specifically authorized such disclosure.

A lower court specifically acknowledged the EEOC's requirement of confidentiality and addressed how the Privacy Act applies to information gathered to process complaints. *Stewart, et al., v. Rubin,*[104] decided by the D.C. District Court, concerned a class action in which a group of agents in the Bureau of Alcohol, Tobacco, and Firearms (ATF) complained that a settlement agreement between the ATF and a group of African American agents resulted in reverse discrimination. The plaintiffs wanted access to information brought forward during negotiations. Denying plaintiffs access to details of settlement negotiations, the court said:

> These objectors first believe that the claims proceedings pursuant to the Settlement Agreement should be public. The non-public nature of the claims processing and proceedings, however, is consistent with the current regulatory scheme for the processing of EEO complaints, which provides for non-public hearings and treats the entire complaint file as subject to the Privacy Act. See 29 C.F.R. Part 1614.[105]

---

[103] 423 F.3d 512, (5th Cir. 2005), 517-518, (citing: Orekoya v. Mooney, 330 F.3d 1 (1st Cir. 2003); Doe v. U.S. Postal Service, 317 F.3d 339 (D.C. Cir.2003); Krieger v. Fadely, 211 F.3d 134 (D.C. Cir.2000); Pippinger v. Rubin, 129 F.3d 519 (10th Cir. 1997); Henson v. NASA, 14 F.3d 1143 (6th Cir. 1994); Kimberlin v. U.S. Dep't of Justice, 788 F.2d 434 (7th Cir. 1986); Bartel v. Federal Aviation Administration, 725 F.2d 1403 (D.C.Cir. 1984); Doyle v. Behan, 670 F.2d 535 (5th Cir. 1982); Stokes v. Comm'r of Soc. Sec. Admin., 292 F.Supp.2d 178 (D.Me. 2003); Sullivan v. U.S. Postal Serv., 944 F.Supp. 191 (W.D.N.Y. 1996); Romero-Vargas v. Shalala, 907 F.Supp. 1128 (N.D.Ohio 1995); Brooks v. Veterans Administration, 773 F.Supp. 1483 (D.Kan. 1991); Savarese v. U.S. Dep't of Health, Educ., & Welfare, 479 F.Supp. 304 (N.D.Ga. 1979)) (all involving the oral disclosure of information).

[104] 948 F.Supp. 1077 (D. D.C. 1996).

[105] *Id.* at 1101.

Thus, the district court recognized that confidentiality regarding discrimination complaints was consistent with the Civil Rights Act and EEOC rules and that the information regarding complaints was protected from disclosure by the Privacy Act.

The text of the Privacy Act and the Supreme Court's holdings in *DOD v. FLRA*[106] and *Reporters Committee*[107] clearly demonstrate how government agencies are forbidden from disclosing information regarding individual discrimination complaints to outside parties, including unions, unless the complainant agrees to the disclosure. The mandates of the Privacy Act apply regardless of the legitimacy of competing interests. If an exception to the Privacy Act is not codified in a statute, it does not exist and the information cannot be released.

VI. THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS ACT DILEMMA

The Federal Service Labor-Management Relations Act (FSLMRS) is the statute governing labor relations for employees of the federal government. Two sections are particularly relevant for the issue analyzed in this article. Unions have both the authority and the obligation to represent the interests of all the employees in a bargaining unit pursuant to 5 U.S.C. § 7114(a)(1).[108] Under 5 U.S.C. § 7114(a)(2)(A) unions have the right to be present at all formal discussions between management and union members if the discussion concerns a "grievance."[109]

Thus, a union is required to represent all members of the bargaining unit and is entitled to representation at any formal discussions regarding grievances. Agencies have no authority to place conditions on that right.

As the representative of the entire bargaining unit, a union that has been recognized as the exclusive representative of a bargaining unit certainly has a stake in the outcome of some discrimination complaints.

---

[106] 510 U.S. 487 (1994).
[107] 489 U.S. 749 (1989).
[108] 5 U.S.C. §§ 7114(a)(1) states:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for . . . all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

[109] 5 U.S.C. § 7114(a)(2), "An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at . . . any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance."

The terms of a discrimination complaint settlement may include the complainant's promotion, transfer, or additional training, all of which may come at the expense of another bargaining unit member receiving that opportunity. In *Department of Veterans Affairs v. FLRA,* the Tenth Circuit Court of Appeals noted: "the resolution of one individual complaint may bear on the rights of other bargaining unit employees."[110]

Nonetheless, even though the rest of a bargaining unit may have a stake in the outcome of the mediation of discrimination complaint, union representation still must be disallowed. The rights of individual employees to be free from discrimination must trump the rights of the bargaining unit as a whole. As discussed later in the section of this article involving the *Dover AFB* case, the *NTEU* decision from the D.C. Circuit Court of Appeals, citing the Supreme Court's decision in *Franks v. Bowman Transportation Co.,*[111] stated: "Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit."[112] Requiring union representation in mediation of discrimination complaints creates a preference for bargaining unit rights over an individual's right to combat discrimination, which is the opposite of what Congress intended.

As discussed in the section analyzing the ADRA, having a union representative present when not specifically requested deters complainants from making complaints and from entering in the mediation process. It causes management to be less forthcoming as well, which works against the complainant's interest in fully understanding what took place and thwarts the purpose of the Civil Rights Act, to ensure a discrimination free workplace.

Adding a requirement that the union keep information they learn during a mediation session private would not help, since it is very difficult to determine when this confidentiality is breeched internally. Both claimants and management understand this, which could cause either or both parties to be less forthcoming. Additionally, if the FSLMRS gives unions the right to be represented at mediations of complaints brought by bargaining unit members, government agencies have no authority to put conditions on that right, including a requirement a union sign a confidentiality agreement prior to attending the mediation session. Thus, a union could refuse to sign any such document and would still be allowed to attend the mediation.

---

[110] 3 F.3d 1386, 1390 (10th Cir. 1993).
[111] 424 U.S. 747 (1976).
[112] NTEU v. FLRA, 774 F.2d 1181 (D.C. Cir. 1985).

The union could argue they already have a prohibition on releasing information harmful to any employee inherent in their duty to represent the interests of all parties, including the complainant.[113] This promise of confidentiality will not reassure a complainant who is bringing an allegation against a union officer or steward. Requiring a complainant to specifically request the union not be allowed to attend is problematic, as any election to do so raises a red flag to the union that someone important to them may be involved.

Thus, even though a union does have a stake in the outcome of mediation of discrimination complaints, they must not be allowed to attend as the rights of individual employees to respond to discrimination and the Civil Right Act's purpose in ensuring a discrimination free workplace must take priority. In addition, the union's interest in the outcome of the process does not change the fact that informing them of the existence of a discrimination complaint without the consent of the complainant is a violation of the Privacy Act, and the Supreme Court said the Privacy Act is not to be interpreted "in light of the purposes of the Labor Statute."[114]

VII. CASE LAW REGARDING REQUIRING UNION REPRESENTATION AT MEDIATION OF REPRESENTED FEDERAL GOVERNMENT EMPLOYEE DISCRIMINATION COMPLAINTS

The issue of whether union representation is required by the FSLMRS during mediation of discrimination complaints has been considered twice by the Ninth Circuit and once by the D.C. Circuit. The Ninth Circuit determined union attendance is not required in these mediation sessions and the D.C. Circuit held unions must be allowed at these meetings. This split in the circuits has not been resolved by the Supreme Court. Of the two, the Ninth Circuit's decisions are the most consistent with the Civil Rights Act, EEOC direction, the ADRA, the Privacy Act, and Supreme Court holdings. Those decisions, however, also have their flaws. This article will analyze these three cases chronologically, addressing the most recent, and most significant, case last, the D.C. Circuit's *FLRA v. Dover Air Force Base*[115] decision.

---

[113] 5 U.S.C. § 7114(a)(1) (2008).
[114] *DOD v. FLRA*, 510 U.S. at 498-99.
[115] 316 F.3d 280 (D.C. Cir. 2003).

A. Internal Revenue Service Center, Fresno, California v. Federal Labor Relations Authority

1. *Summary of the IRS Fresno Decision*

In 1983, the Ninth Circuit considered *Internal Revenue Service Center, Fresno, California v. Federal Labor Relations Authority (IRS Fresno)*,[116] in which the question of whether a union had the right to be represented during a pre-complaint[117] mediation of an allegation of discrimination was at issue. The discrimination complaint central to the case was filed by an employee represented by the union. The court ruled the union was not entitled to notice of and presence at the meeting per 5 U.S.C. § 7114(a)(2)(A) because the mediation was conducted pursuant to an EEOC-mandated attempt at "informal" resolution of the allegation. Thus, the court ruled, the mediation was not a formal meeting.[118] Additionally, the court held the meeting did not concern a "grievance" under 5 U.S.C. § 7114(a)(2)(A) because "the EEOC procedure is unrelated to and separate from the contractual grievance process."[119] The court did not reach the issue of whether informing the union about the informal complaint would be a violation of the Privacy Act.[120]

In *IRS Fresno*, a female employee alleged she was the victim of gender discrimination when told she would have to accept a two-step grade reduction if she accepted a transfer into a training position. After receiving the offer she contacted the personnel office which informed her she was qualified for a much higher rating. The employee contacted the local union steward, who also served as the vice-president of her local union chapter. The union steward suggested she file a complaint with the equal employment opportunity (EEO) office and a contractual grievance,[121] since the contractual grievance process specifically excluded discrimination claims. The complainant filed an allegation with the EEO office which assigned the investigation to the head EEO officer of the agency. The complainant chose the union steward as her personal representative to assist her in the EEO process.[122]

The EEO officer conducted the pre-complaint investigation in accordance with the applicable EEOC rules at 29 C.F.R § 1613.213(a)[123] by interviewing the complainant and her supervisor and suggesting the

[116] 706 F.2d 1019 (9th Cir. 1983).
[117] Also known as "informal stage."
[118] *IRS Fresno,* 16 F.3d at 1023-24.
[119] *Id.* at 1024.
[120] *Id.* at 1025.
[121] The contractual grievance apparently alleged something other than discrimination; the decision did not identify the basis of the grievance, however.
[122] *Id.* at 1021-22.
[123] Since superseded by 29 C.F.R § 1614.105.

parties try to resolve the allegation informally. The union steward, acting not on behalf of the union but in her role as the employee's representative in the meeting, was the only union official aware of or given notice of the meeting. The meeting ended without an acceptable resolution to the parties.[124]

Subsequently, the union filed an unfair labor practice charge against the IRS, pursuant to which the FLRA regional office issued a complaint "that the IRS had committed an unfair labor practice by holding a formal discussion concerning a grievance or condition of employment without providing the union an opportunity to be represented at the discussion, in violation of 5 U.S.C. § 7114(a)(2)(A)."[125] At the hearing, the administrative law judge ruled the union did have a right to attend the meeting, but that the union steward's attendance, even in her role as employee representative, fulfilled the IRS's duty in this respect. Upon the union's appeal, the FLRA concurred with the ALJ that the union did have a right to notice and attendance at the meeting,[126] but disagreed that the union steward's attendance fulfilled the IRS's obligation and held "the union had an interest in being present at the EEO pre-complaint conciliation conference independent of representing" the employee.[127] The FLRA's ruling did not distinguish between joint discussions, where all parties are present, and private caucuses, where mediators meet individually with one party in private, thus its ruling requiring an invitation to the union would apply to both.

The IRS appealed the FLRA decision to the Ninth Circuit Court of Appeals. The IRS argued the FLRA's interpretation of 5 U.S.C. § 7114(a)(2)(A) of the FSLMRS conflicted with the EEOC's rules regarding investigation of discrimination complaints. 29 C.F.R. § 1613.213(a) (1982)[128] mandated confidentiality of an accuser's identity until after a formal complaint of discrimination was filed. In addition, the IRS argued the FLRA's interpretation of the FSLMRS conflicted with the Privacy Act.[129]

As the *IRS Fresno* court began its analysis, it pointed out the FLRA in its decision was not interpreting the FSLMRS, the statute it was created to administer, but the Civil Rights Act and EEOC regulations created pursuant to the Act. Thus, the court determined the FLRA's decisions in this area were not to be given "considerable

---

[124] *IRS Fresno*, 16 F.3d at 1022.
[125] *Id*.
[126] The FLRA held the union had a right to attend the session because they decided it constituted a discussion of a "grievance," as opposed to "general conditions of employment" which is what the ALJ determined was discussed.
[127] *IRS Fresno*, 16 F.3d at 1022.
[128] Superseded in 1992.
[129] *IRS Fresno*, 16 F.3d at 1021.

weight" or a great deal of deference.[130] In other words, the *IRS Fresno* court ruled the FLRA's interpretation was not to be given what would become *Chevron* deference.[131]

The *IRS Fresno* court then contrasted 5 U.S.C. § 7114(a)(2)(A), which mandates the union have an opportunity to be represented "at any formal discussion between the agency and an employee which concerns any grievance, personnel policy, or general condition of employment." with 29 C.F.R. § 1613.213(a) which prohibited "an EEO counselor from revealing the identity of a person consulting him before the person files a formal complaint of discrimination."[132] The court held the representation requirements of 5 U.S.C. § 7114(a)(2)(A) were not applicable to the EEO pre-complaint conciliation conference because it was not a formal discussion. While the FLRA determined the meeting was a formal discussion because it was held in a conference room, was pre-scheduled, and was attended by the employee's supervisor, the *IRS Fresno* court determined the FLRA had overlooked the "most critical circumstance," that the meeting was part of an EEO procedure designed to resolve discrimination allegations on an "informal basis."[133]

The *IRS Fresno* court then analyzed the EEOC complaint procedure to explain its ruling the mediation was not a formal discussion.

> The EEO counselor is required not only to give advice and to investigate but "to seek a resolution of the matter on an informal basis." 29 C.F.R. § 1613.213(a). This opportunity for informal resolution is clearly a key element in the EEOC complaint procedure; the EEOC requires employees alleging discrimination to exhaust the precomplaint procedures of 29 C.F.R. §§ 1613.213 before filing a formal complaint and activating formal steps in the EEOC process. [134]

The court went on to discuss the previously-cited statement regarding confidentiality Senator Dirksen made when offering an amendment to the Civil Rights Act of 1964: "The maximum results from the voluntary approach will be achieved if the investigation and conciliation are carried on in privacy. If voluntary compliance with this title is not achieved, the dispute will be fully exposed to the public view

---

[130] *Id.* at 1023.
[131] *Chevron* was decided in 1994, the year after *IRS Fresno*. See discussion of *Chevron* deference in section IV.B. of this article.
[132] *IRS Fresno,* 16 F.3d at 1023.
[133] *Id*. (citing 29 C.F.R. § 1613.213(a)).
[134] *Id.* at 1024.

when a court suit is filed."[135] While this statement was made when passing the bill prohibiting discrimination in the private sector, the *IRS Fresno* court believed the provisions it discusses "illustrate Congress' concern with the confidentiality of EEOC investigations and its belief that such confidentiality is important in achieving voluntary compliance with the goals of the Civil Rights Act."[136]

The *IRS Fresno* court also held the union had no right to attend the mediation because the discrimination complaint was not a "grievance" under 5 U.S.C. § 7114(a)(2)(A).[137] The court found the FLRA had incorrectly applied the FSLMRS definition of grievance from 5 U.S.C. § 7103(a)(9)[138] to EEOC procedures which were "discrete and separate from the grievance process to which 5 U.S.C. §§ 7103 and 7114 are directed."[139] Basically, the court held the rules under the FSLMRS did not apply to the EEOC process.

The court explained this holding by discussing the purpose of the union's status as the exclusive representative of the employees in the bargaining process.

> As exclusive representative, the union has responsibility for administering the collective bargaining agreement and has an obvious interest in being present when a dispute governed by the grievance procedure it negotiated is discussed or resolved. However, the EEOC procedure is unrelated to and separate from the contractual process . . . . The union's interest in the statutory EEOC procedure is not the same as its interest in the contractual grievance process. It has duties and obligations under the negotiated grievance mechanism, for example, but it has no such institutional role in the EEOC process. There is no reason it should have the same rights in the EEOC procedure as it does in the contractual grievance process.[140]

This demonstrates the *IRS Fresno* court understood that, in a negotiated grievance procedure, the union asserts a collective right, whereas in a discrimination complaint an individual right is at stake, and the union has no role regarding that individual right unless chosen by the complainant as personal representative.

---

[135] *Id.* (citing 110 Cong. Rec. 8193 (1964)).
[136] *IRS Fresno,* 16 F.3d at 1024.
[137] *Id.*
[138] "any complaint . . . by an employee concerning any matter relating to the employment of the employee"
[139] *IRS Fresno,* 16 F.3d at 1024.
[140] *Id.* at 1024-25.

Because the court held the mediation was not a formal discussion per the FSLMRS and the complaint under the EEOC procedure did not constitute a grievance, the court did not rule on whether the FLRA's decision to mandate union representation at mediation of discrimination complaints violated the Privacy Act.[141]

The Ninth Circuit decision in *IRS Fresno* is consistent with the Civil Rights Act and EEOC direction at the time.[142] Nonetheless, the court could have done much to clarify the rules regarding union presence in mediation of discrimination complaints if it had: 1) discussed the general prohibition in the Civil Rights Act against making charges public; 2) pointed out the Civil Rights Act requires an effort at informal resolution of complaints both before and after a formal complaint is filed; and, 3) addressed the fact that releasing information in a discrimination complaint file is contrary to the Privacy Act. Had the court properly addressed these issues, subsequent court and FLRA decisions would have had to consider and thoroughly analyze these issues, rather than summarily dismiss them.

2. *The Civil Rights Act and Confidentiality of Discrimination Complaints*

The *IRS Fresno* court's first error was in focusing its holding on the EEOC rule which stated: "The . . . [c]ounselor shall not reveal the identity of an aggrieved person . . . until the agency has accepted a complaint of discrimination."[143] While an agency's rules regarding how its organic statute should be interpreted are powerful, the actual statutory text is the clearest expression of the law and Congress' intention. The ruling should have been based upon the text of the Civil Rights Act.

As discussed in the first section of this article, the Civil Rights Act clearly expresses Congress' intent to restrict the release of information regarding discrimination complaints. "Charges shall not be made public by the Commission"[144] In addition, the Act makes it a criminal offense "to make public in any manner whatever any information obtained by the Commission . . . prior to the institution of any proceeding . . . involving such information."[145] These sections of the Civil Rights Act do not expressly prohibit employees of government agencies who are conducting investigations of discrimination[146] from

---

[141] *Id.* at 1025.
[142] EEOC MD 110, *supra* note 9, which became effective Nov. 9, 1999.
[143] 29 C.F.R. §1613.213(a).
[144] 42 U.S.C. § 2000e-5 (2008).
[145] 42 U.S.C. § 2000e-8 (2008).
[146] 42 U.S.C. § 2000e-16 (2008).

disclosing this information. However, these paragraphs[147] were written when the law was originally passed in 1964, nearly a decade before Congress made the Civil Rights Act applicable to government agencies. At the time they were written, only EEOC personnel would have had information regarding discrimination complaints, so it was natural to write the prohibition from disclosure to cover only them. The Civil Rights Act delegated the authority to investigate claims to the individual government agencies.[148] It is a reasonable assumption Congress also intended to delegate the responsibility for keeping those investigations, and the complaints that led to them, confidential.

Congress clearly intended to keep discrimination complaints confidential. Their intent did not change when the responsibility for conducting investigations was delegated. The prohibition from making discrimination complaints public applies not only to the EEOC, but also to the government agencies fulfilling the EEOC's duties under the Civil Rights Act.

The *IRS Fresno* decision was also flawed in that it did not mention the *Dry Goods* case, even though the case had been decided by the Supreme Court only two years prior. *Dry Goods* held Congress intended to allow information regarding discrimination complaints to be disclosed to the parties in the matter, but not to others.[149] Although the employer in the *Dry Goods* case was not a federal agency and pre-complaint mediation was not at issue, the case elucidates the Court's understanding of Congress' desire to keep discrimination complaints from public disclosure. The Court's ruling also states discrimination charges are not to be disclosed in either the precomplaint phase or after a complaint has been filed.

In *Dry Goods,* the Court discusses how the Civil Rights Act forbids "disclosure of charges" at the same time it mandates service of the charges on the respondent.[150] Service of charges can only occur after a formal complaint has been filed because there is no actual charge until that time. If Congress had intended to prohibit disclosure of only pre-complaint charges of discrimination, there would be no discussion of how service of charges must be excluded from the prohibition, because there would be no prohibition once a formal charge was filed. While Congress may not have done the most artful drafting in its creation of the many bills that comprise the Civil Rights Act, in *Dry Goods* the Court recognized Congress' intent to prohibit public disclosure of discrimination complaints throughout the process, up to an EEOC hearing.

---

[147] 42 U.S.C. § 2000e-5, 42 U.S.C. § 2000e-8(2008).
[148] 42 U.S.C. § 2000e-16 (2008).
[149] *Equal Employment Opportunity Commission v. Associated Dry Goods Corp*, 449 U.S. 590, 598 (1981).
[150] *Id.* at 598.

In its *IRS Fresno* ruling, the Ninth Circuit court erroneously focused on an EEOC rule which prohibited disclosure of the identity of an employee alleging discrimination during the precomplaint process. The purpose of this rule was likely to shield the complainant's identity from the alleged perpetrator of the discrimination while the EEO counselor attempted to resolve the issue. In focusing on this rule and not looking at the entire statute or at a then-recent Supreme Court case, the *IRS Fresno* court failed to use the most powerful argument for allowing the IRS to keep the union out of the mediation session: the statute prohibits public disclosure of discrimination complaints in general.

3. *The IRS Fresno Decision and Informal Resolution of Complaints*

The *IRS Fresno* decision also failed to clearly distinguish the contextual difference between a "formal complaint of discrimination,"[151] which indicates the EEOC-mandated precomplaint process has been completed and an actual complaint has been filed, and resolving a discrimination complaint on an "informal basis,"[152] meaning without having an administrative judge adjudicate the case in an EEOC administrative hearing. The Civil Rights Act directs the EEOC and government agencies to attempt to resolve discrimination complaints informally; the statute does not distinguish between precomplaint and formal complaint stages. The failure to differentiate between an "informal" complaint and an "informal process" of dispute resolution causes confusion in the *FLRA v. Dover Air Force Base* case,[153] discussed below, in which the D.C. Circuit considered whether a union had the right to attend a mediation regarding a discrimination complaint held after a formal complaint was filed.

Congress intended for "informal methods of conference, conciliation, and persuasion" to be used to resolve discrimination complaints after "investigation,"[154] which takes place after a formal complaint has been filed. Thus, the mandate directing government agencies to engage in informal methods of resolution clearly continues to be in force after a charge has been filed. The *IRS Fresno* court seemed to recognize this as it analyzed the facts and discussed how the attempt at settling the dispute using mediation is resolving it on an "informal basis."

---

[151] *IRS Fresno*, 16 F.3d at 1023.
[152] *Id.*
[153] 316 F.3d 280 (D.C. Cir. 2003).
[154] 42 U.S.C. § 2000e-5 [706](b) (2008).

> The meeting was convened by Thompson under the EEOC procedure[155] by which an EEO counselor seeks to resolve discrimination charges in the precomplaint stage on an 'informal basis.' Given that basis and the purpose of the meeting, the discussion was informal rather than formal.[156]

Here, the court properly focuses on the "informal basis" of the meeting and not the status of the complaint at the time of the meeting. Later in the opinion, however, the court seems to get confused about the difference between a formal complaint and informal resolution of the dispute.

> This opportunity for informal resolution is clearly a key element in the EEOC complaint procedure; the EEOC requires employees alleging discrimination to exhaust the precomplaint procedures of 29 C.F.R. § 1613.213 before filing a formal complaint and activating formal steps in the EEOC process.[157]

While the Civil Rights Act requires an attempt at informal resolution of a discrimination complaint after a formal charge has been filed, the court in *IRS Fresno* seems to be saying that after a formal complaint is filed, the "formal steps in the EEOC process" are activated, implying that all steps from there on are "formal." In actuality, the Civil Rights Act mandates an "opportunity for informal resolution" throughout the process, even after the formal complaint is filed.

The Ninth Circuit overlooked the text of the Civil Rights Act and based its decision on an EEOC regulation which was applicable to only the precomplaint stage of the process. The language of the Civil Rights Act clearly demonstrates Congress' desire for informal resolution of complaints throughout the process. Had the *IRS Fresno* court's decision focused on the text of the statute, it could have established that informal settlement processes are to be attempted throughout the complaint cycle and created a more useful precedent.

4. *The Privacy Act Issue*

Finally, because its ruling was based on other grounds, the Ninth Circuit declined to rule on the application of the Privacy Act to the FLRA's order. As discussed in the first section of this article, the

---

[155] 29 C.F.R. § 1613.213(a).
[156] *IRS Fresno,* 16 F.3d at 1023-24.
[157] *Id.* at 1024.

Privacy Act clearly prohibits release of records regarding discrimination complaints. If the Privacy Act is properly applied, it would be dispositive of all other issues, so it was a mistake for the *IRS Fresno* court to decide not to consider the issue. The Privacy Act issue was addressed later by the D.C. Circuit in *Dover AFB v. FLRA,*[158] though with an incorrect result, which will be discussed later in this article.

B. Luke Air Force Base v. Federal Labor Relations Authority

1. *Summary of the Luke AFB Decision*

In 1999 the Ninth Circuit heard another case in which a labor union's right to be represented at a mediation session held pursuant to EEOC rules was at issue. This time, however, a formal complaint of discrimination had been filed by the aggrieved employee prior to the mediation. In *Luke Air Force Base vs. Federal Labor Relations Authority and American Federation of Government Employees, AFL-CIO, Local 1547 (Luke AFB)*,[159] in an unpublished opinion, the Ninth Circuit Court of Appeals again held the union had no right to representation at mediation sessions conducted to resolve EEO complaints.

In *Luke AFB,* like *IRS Fresno*, the union contract excluded discrimination complaints from its grievance procedure.[160] Thus, the complainant, a bargaining unit employee who alleged retaliation for a prior discrimination complaint which was subsequently found to have no merit,[161] filed a formal complaint of discrimination pursuant to EEOC regulations. The claimant had already fulfilled the requirement for precomplaint processing in the original complaint. She chose the president of her union as her personal representative for the complaint process and mediation.[162]

At the time, discrimination complaints against Department of Defense (DOD) agencies were investigated by a DOD organization called the Office of Complaint Investigation (OCI).[163] As part of the OCI investigation, the investigator met with the complainant, her representative and the complainant's supervisor in an attempt to resolve the dispute. The complainant's representative, the union president, left the meeting early. There was no resolution at the end of the initial

[158] *Dover AFB*, 316 F.3d 280 (D.C. Cir. 2003).
[159] 1999 U.S. App. LEXIS 34569.
[160] *Id.*
[161] 54 F.L.R.A. No. 75 (Aug. 13, 1998) Appendix 2, para. A.
[162] *Luke AFB*, 1999 U.S. App. LEXIS 34569.
[163] U.S. DEP'T OF AIR FORCE, INSTR. 36-1201, DISCRIMINATION COMPLAINTS, Attachment 1 (Jul. 25, 1994). The OCI has been replaced by the Investigations and Resolutions Division (IRD). U.S. DEP'T OF AIR FORCE, INSTR. 36-1201, EQUAL EMPLOYMENT OPPORTUNITY COMPLAINTS, paragraph 20.4 (Feb. 12, 2007)

session so a follow-up meeting was scheduled for the next day. No one informed the union president or any union official of the scheduled second session. At the second meeting, in which the union president was not present, the complainant signed a settlement agreement.[164]

Subsequently, the union filed unfair labor practice charges against Luke AFB with the FLRA. The ALJ assigned to the case found Luke AFB had violated § 7114 of the FSLMRS because it did not give the union notice of and opportunity to be present at the second meeting with the complainant. The FLRA adopted the ALJ's decision.[165]

In its decision the FLRA specifically included private caucuses between the mediator and the employee as sessions in which the union is entitled to be present. The Air Force contended that the session in dispute was not between management and an employee because the attorney representing management was not present. "The record shows that at that mediation/investigation session, the chief EEO counselor was 'in and out of the room' relaying the employee's position regarding a proposed settlement agreement to the Judge Advocate General attorney and returning to present the Respondent's position to the employee."[166] The FLRA ruled: "Even if they were communicating exclusively through the chief EEO counselor, it is clear that both the employee and the Judge Advocate General attorney were engaged in responding to each other's settlement positions, and that they were no less engaged than if they had been speaking face-to-face—as they had been speaking the previous day. A normal mediation technique is to have people in different rooms with someone going back and forth conducting the negotiation. The Union's interest and right to be represented at face-to-face negotiations of a grievance applies as well, in our view, to a negotiation conducted through a mediator." (references omitted).[167]

The Air Force appealed the decision to the Ninth Circuit Court of Appeals. The court's analysis was very brief and mostly relied on its earlier decision in *IRS Fresno*. The court began its reasoning by stating: "We may set aside a decision issued by the FLRA only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[168] Basically, the court determined the FLRA's decision should receive *Chevron* deference.[169] The court then held the FLRA acted

---

[164] *Luke AFB*, 1999 U.S. App. LEXIS 34569.
[165] *Id.*
[166] 54 F.L.R.A. No. 75, at 725.
[167] *Id.*
[168] *Id.* (quoting Department of Veteran's Affairs Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994)).
[169] Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc, 467 U.S. 837, 843-44 (1984).

arbitrarily and capriciously in deciding Luke AFB committed an unfair labor practice.

The court went on to analyze the union's right to representation. "In order for the union to possess a right to representation at a meeting, the following must exist: There must be (1) a discussion, (2) which is formal, (3) between the representatives of the government employer and the unit employee or her representatives (4) concerning a grievance."[170] Looking to its earlier *IRS Fresno* decision, the court held the meeting conducted pursuant to EEOC procedures did not concern a grievance for which § 7114 of the FSLMRS was created. In addition: "The fact that the collective bargaining agreement explicitly excludes discrimination claims from the grievance procedure also suggests that these claims are not grievances."[171] Since the court held the meeting did not concern a grievance, the fourth element of § 7114 was not met and the union had no right to attend the meeting. The issue regarding union attendance at private caucuses was not addressed.

The *Luke AFB* decision was consistent with *IRS Fresno*, so the proper result was reached, but the Ninth Circuit made two important errors. The court mistakenly analyzed the dispute by using labor law (the FSLMRS) rather than by using the Civil Rights Act and EEOC interpretations thereof and the court ignored the question of whether the mediation session was a formal discussion. Regardless, since this case was unpublished, it has little precedential value.

2. *Deference Granted to FLRA in Interpreting an EEOC Process*

In *IRS Fresno*, the Ninth Circuit identified the fact that the FLRA was not interpreting its own organic statute, the FSLMRS, but the Civil Rights Act. Thus, the FLRA's decision at issue in the *IRS Fresno* case received little deference.[172] In *Luke AFB*, however, the same court seems to forget this and indicates it will give the FLRA great discretion in its decision, "We may set aside a decision issued by the FLRA only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[173] This is incorrect and inconsistent with *IRS Fresno*. The FLRA's decision should not have been granted great deference as it was not an interpretation of the FSLMRS, but of the procedures set up by the EEOC pursuant to the Civil Rights Act. The *Luke AFB* court then ruled the FLRA's decision was arbitrary and capricious. This effectively negated the issue, but it

---

[170] *Id.* (citing General Serv. Admin. v. American Fed'n of Gov't Employees, 48 F.L.R.A. 1348, 1354 (1994)).
[171] *Id.*
[172] *IRS Fresno,* 16 F.3d at 1023. *Chevron* was decided the year prior to *IRS Fresno*.
[173] *Luke AFB,* 1999 U.S. App. LEXIS 34569. The court is essentially giving *Chevron* deference to the FLRA's decision.

set a bad precedent of deferring to the FLRA's authority in interpreting the Civil Rights Act.

3. *Decision Did Not Consider Whether Mediation Was a Formal Discussion*

The *Luke AFB* decision has another failing as well. The *Luke AFB* court ignored the "formality" issue by moving directly to whether or not the meeting concerned a "grievance." It should have identified that the Civil Rights Act describes "methods of conference, conciliation, and persuasion" as informal.[174] Had the *Luke AFB* court properly identified the informality of the mediation process, it could have cited the ruling in *IRS Fresno* that the "most critical circumstance" was that the meeting was part of an EEO procedure designed to resolve discrimination allegations informally.[175] This would have been the proper analysis of the EEOC procedure, using the EEOC rules and the Civil Rights Act, rather than by trying to fit the EEOC process into the labor law context.

The court should have ruled the Civil Rights Act defines these mediation sessions as informal, thus the union has no right to attend, in addition to following its prior ruling in *IRS Fresno* that discrimination complaints are not grievances within the meaning of the FSLMRS. Remaining silent on this issue creates the impression, though incorrect, that the court believed this element of the § 7114 test[176] was met, and that the court understood the meeting to be formal.

4. *Failure to Rule on ADRA or Privacy Act Issue*

Similar to the *IRS Fresno* decision, the *Luke AFB* court declined to rule on the application of either the ADRA or the Privacy Act to the FLRA's order. Again this was a mistake by the Ninth Circuit since the Privacy Act issues would have been dispositive of the case. These issues were addressed later by the D.C. Circuit in *Dover AFB v. FLRA,*[177] and are analyzed below.

---

[174] 42 U.S.C. § 2000e-5 [706] (b).
[175] *IRS Fresno*, 16 F.3d at 1023.
[176] General Serv. Admin. v. American Fed'n of Gov't Employees, 48 F.L.R.A. 1348, 1354 (1994).
[177] 316 F.3d 280 (D.C. Cir. 2003).

C. Dover Air Force Base v. Federal Labor Relations Authority

1. *Summary of the Dover AFB Decision*

In 2003, the Court of Appeals for the District of Columbia Circuit ruled on a case with the same issue as 9th Circuit's *IRS Fresno* and *Luke AFB* cases: does a union have a right to be represented at a mediation conducted pursuant to EEOC regulations regarding an allegation of discrimination brought by an employee represented by the union. In *Dover Air Force Base v. Federal Labor Relations Authority and American Federation of Government Employees, Local 1709 (Dover AFB),*[178] the D.C. Circuit court held that the FSLMRS definition of "grievance" does include discrimination complaints filed pursuant to EEOC rules, thus the union does have the right to be represented at these mediation sessions. The court rejected the Air Force's additional arguments that requiring union representation in EEO mediations would violate the ADRA and the Privacy Act.[179]

The complainant in *Dover AFB* filed a formal EEO complaint of discrimination pursuant to part 1614 of the EEOC regulations following a suspension he had received. Similar to *IRS Fresno* and *Luke AFB*, the applicable collective bargaining agreement excluded discrimination claims from the negotiated grievance procedure. The complainant requested mediation of the issue, which was subsequently conducted by a contract mediator. The only individuals participating in the mediation were the mediator, the complainant and an Air Force attorney representing management. The parties failed to resolve the allegation during the six-hour mediation. The complainant's union was neither notified of nor given the opportunity to attend the session. [180]

Consequently, the complainant's union filed an unfair labor practice complaint against the Air Force with the FLRA, and a hearing was conducted by an ALJ. The ALJ found the discrimination complaint addressed in the mediation was a grievance covered by § 7114(a)(2)(A) of the FSLMRS, thus the Air Force had committed an unfair labor practice by failing to notify and offer the union the opportunity to attend the mediation.[181]

The Air Force appealed the ALJ decision to the FLRA, citing the Ninth Circuit's opinion in *Fresno* that complaints made pursuant to EEOC procedures do not constitute "grievances" as defined by the FSLMRS.[182] However, the FLRA upheld the ALJ's decision, relying on the D.C. Circuit's opinion in *National Treasury Employee's Union v.*

---

[178] 316 F.3d 280 (D.C. Cir. 2003).
[179] *Id.* at 286.
[180] *Id.* at 283.
[181] *Id.* at 283.
[182] *Id.* at 284.

Federal Labor Relations Authority (NTEU).[183] The court in *NTEU* held: "section 7121 provides that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures,"[184] such as those filed under EEOC regulations. The FLRA rejected all of the Air Force's arguments, which will be discussed as they were addressed by the appellate court.[185] Regarding union attendance at private caucuses between a mediator and a member of a bargaining unit, the FLRA reaffirmed its precedent set in its *Luke* case which required union invitation to those sessions.[186]

The Air Force appealed the FLRA's decision to the D.C. Circuit Court of Appeals, which began its analysis by stating its disagreement with the Air Force's argument that an EEO compliant is not a grievance, noting its prior opinion in *NTEU*. The *Dover AFB* court ruled it would not distinguish *NTEU* from the present case as requested by the Air Force, even though *NTEU* concerned a Merit Systems Protection Board (MSPB) proceeding rather than an EEO procedure. In so ruling, the court said, "our analysis in *NTEU* relied upon the text, structure, and legislative history of the Act[187] and did not rest on the type of grievance in question . . . . [A]ccordingly, we will read the term 'grievance' as we did in that case."[188]

Next, the *Dover AFB* court applied the *Chevron*[189] test to the FLRA's construction of the FSLMRS right of union representation, granting the FLRA "considerable deference" because the court believed the FLRA was exercising "its special function of applying the general provisions of the [Act] to the complexities of federal labor relations."[190] It determined the statutory language of 5 U.S.C. § 7114(a)(2)(A)[191] "was not unambiguous,"[192] so it moved to *Chevron* step 2. The court held the FLRA's interpretation of 5 U.S.C. § 7114(a)(2)(A), that the union had a right to be represented at the mediation of a formal EEO complaint filed

---

[183] 774 F.2d 1181 (D.C. Cir. 1985).
[184] *Dover AFB*, 316 F.3d at 284 (citing *NTEU*, 774 F.2d at 1187).
[185] Dover Air Force Base and American Federation of Government Employees, Local 1709, 57 F.L.R.A. no. 65.
[186] *Id.* at 307.
[187] Federal Labor Management Relations Statute, 5 U.S.C. § 7114(b)(4)(B) (2008).
[188] *Dover AFB*, 316 F.3d at 285.
[189] *Chevron*, 467 U.S. at 837. See discussion of *Chevron* deference in section IV.B. of this article.
[190] *Id.* (citing National Federation of Federal Employees, Local 1309 v. Department of the Interior, 526 U.S. 86, 99 (1999)).
[191] 5 U.S.C. § 7114(a)(2)(A) reads: A union "shall be given the opportunity to be represented at—(A) any formal discussion between one or more representatives of the agency and one of more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment."
[192] *Dover AFB*, 316 F.3d at 285.

by one of its members, was a "natural reading of the broad statutory language"[193]and thus, appropriate. Although the *Dover AFB* court identified that 80% of the time the parties were in individual caucuses with the mediator, outside the presence of the opposing party, its ruling it did not distinguish between joint sessions and individual caucuses.[194] Thus, its requirement that a union be invited to attend mediation sessions of bargaining unit members applies for both joint sessions between the parties and private caucuses between the mediator and the employee.

The court then returned to the application of its earlier decision in *NTEU*, identifying the FLRA's consistency with that case. The *Dover AFB* court stated the problem with the Air Force's argument that the Ninth Circuit's opinion in *IRS Fresno* applied was that the D.C. Circuit court in *NTEU* specifically disagreed with the Ninth's Circuit's reasoning in *IRS Fresno*. Citing *NTEU*, the *Dover AFB* court concluded that "*IRS Fresno* appears 'to be based primarily on its conclusion that the precomplaint conference did not constitute a 'formal' discussion' rather than on its brief analysis of the grievance issue."[195]

The decision next considered the Air Force's attempt to distinguish the EEO complaint at issue in *Dover AFB* from the MSPB complaint which was at issue in *NTEU*. In doing so, the Air Force pointed out that the Ninth Circuit had treated these types of complaints differently in *IRS Fresno* and *Department of Veteran's Affairs Medical Center v. Federal Labor Relations Authority (VA Med Ctr)*.[196] Contrary to the Air Force's argument, however, the *Dover AFB* court pointed out "the Ninth Circuit itself has noted that our reasoning in *NTEU*, rejecting the *IRS Fresno* analysis, is more persuasive than that court's own reasoning in *IRS Fresno*."[197]

The Air Force also argued the complainant's individual rights should trump the union's collective rights. In doing so it relied on language from *NTEU*: "in the case of grievances arising out of discrimination . . . Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former."[198] The court countered this argument by clarifying the point it made in footnote 12 of *NTEU*: "a *direct* conflict between the rights of an exclusive representative under § 7114(a)(2)(A) and the *rights* of an employee victim of discrimination should . . . presumably be resolved in

---

[193] *Id.*
[194] *Id.* at 283.
[195] *Id.* at 286.
[196] 16 F.3d 1526 (9th Cir. 1994).
[197] *Dover AFB*, 316 F.3d at 286 (citing *VA Med Ctr*, 16 F.3d at 1534, note 4).
[198] *Id.* (quoting *NTEU,* 774 F.2d at 1189, note 12).

favor of the latter."[199] The court said there was no direct conflict in this case.[200]

The Air Force contended mandating union representation in mediation of EEO complaints violated the confidentiality provisions of ADRA. The court said this argument failed because the terms of the ADRA did not prohibit union attendance at ADR proceedings, but "concern only the confidentiality of communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding."[201] In a footnote, the court also questions whether the ADRA applies in *Dover AFB* since the ADRA "by its terms is voluntary and merely supplements, rather than limits, other available ADR techniques."[202]

The Air Force asserted the FLRA's decision would violate the Privacy Act. The *Dover AFB* court's answer was similar to its response to the ADRA argument: the Privacy Act does not prohibit union attendance at ADR proceedings, it protects the confidentiality of records. Additionally, the court ruled, "this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation of confidential information in violation of the Privacy Act."[203]

Finally, the Air Force maintained requiring union representation in mediation of EEO complaints would violate ADR "Core Principles" as addressed in Section VII, Chapter 3, of EEOC Management Directive 110. The *Dover AFB* court dismisses this argument by concluding it "amounts to no more than the Air Force's doubt that union representatives can keep confidential matters confidential. Union representatives are often in the position of having to maintain confidentiality."[204] The court continued: "even assuming that an inconsistency between an agency manual and a statute constitutes a conflict, the Air Force again fails to show a conflict with the FLRA's construction of section 7114(a)(2)(A)."[205]

At the end of its opinion, the D.C. Court of Appeals did acknowledge that their decision might be different if a complainant did not want the union to attend the mediation. "We do not foreclose the possibility that an employee's objection to union presence could create a "direct" conflict that should be resolved in favor of the employee as described in footnote 12 of *NTEU*."[206] Since there was no evidence the

---

[199] *Id.* (emphasis in original).
[200] *Id.* at 286.
[201] *Id.* (citing 5 U.S.C. § 574).
[202] *Id.* at 287, note 1.
[203] *Id.* at 286-87.
[204] *Id.* at 287.
[205] *Id.*
[206] *Id.* (citing *NTEU,* 774 F.2d at 1189, note 12).

complainant objected to union presence in the mediation in *Dover AFB*, the court found there was no "direct" conflict as described in *NTEU*.

The D.C. Circuit's opinion in *Dover AFB* is flawed for many reasons, causing it to reach an incorrect decision. The court erroneously: 1) granted *Chevron* deference to the FLRA's interpretation of an EEOC process; 2) analyzed whether an EEO complaint is a grievance for the purposes of the FSLMRS without consulting the applicable statute for the complaint, the Civil Rights Act; 3) disregarded the issue of whether a mediation session of an EEO complaint is a formal discussion trigging a union's right of representation; 4) relied on *NTEU*, an unsound prior decision, to determine whether a discrimination complaint was a grievance for the purpose of the FSLMRS rather than looking at the issue anew; 5) summarily dismissed the argument that mandating union representation at a mediation violated the Administrative Dispute Resolution Act (ADRA) with minimal analysis of the issue; and, 6) summarily dismissed the argument that providing the union notice of and opportunity to attend mediation sessions regarding discrimination complaints violates the Privacy Act.

2. *Incorrect Grant of Chevron Deference*

The court's first error was deciding to grant *Chevron* deference to the FLRA's prior decision. As recognized by the Ninth Circuit in *IRS Fresno*, the FLRA was not interpreting its own "enabling or organic statute,"[207] but was interpreting the Civil Rights Act and EEOC rules and procedures set up pursuant to that statute.

Early in the *Dover AFB* opinion, the court explicitly identified the EEOC's responsibility for conducting the mandates spelled out in that statute: "The authority for enforcing the Civil Rights Act resides with the Equal Employment Opportunity Commission."[208] However, when the court determined whether a mediation conducted pursuant to EEOC regulations was a "grievance," they did so using the FLRA's interpretation of the FSLMRS, rather than the EEOC's interpretation of the Civil Rights Act and the EEOC regulations created in furtherance thereof.

The court basically allowed the FLRA to determine the meaning of the Civil Rights Act, rather than look to EEOC guidance on the meaning of its organic statute and the process created therein. This error poisoned this decision, and the prior decisions of both the ALJ and the FLRA.

---

[207] *Dover AFB*, 316 F.3d at 285.
[208] *Id.* at 281, (citing 42 U.S.C. § 2000e-4 (2000)).

3. A *Grievance in the Context of the Civil Rights Act?*

The proper process for analyzing whether a "complaint" alleging a violation of the Civil Rights Act constitutes a "grievance" under the FSLMRS is by first looking at the terms of the Civil Rights Act itself. We look to the Civil Rights Act rather than to FLRA case law because the context from which the issue arises is that of a discrimination complaint. Additionally, as the D.C. Circuit itself noted in its *NTEU* decision citing the Supreme Court's decision in *Franks v. Bowman Transportation Co.,*[209] "Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former. The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., provides that the right of an aggrieved employee to complete relief takes priority over the general interests of the bargaining unit." The *Dover AFB* court attempts to water down this note in *NTEU* by explaining it meant "direct" conflict. However, the idea of a "direct" conflict is not mentioned in *Franks*. The *NTEU* decision can't explain away what the Supreme Court meant in the original 1976 opinion: the protection of victims of discrimination will not be denied merely because the action may affect the interests of other employees.[210]

To determine whether a discrimination "complaint" pursuant to the Civil Rights Act should be considered a "grievance" under the FSLMRS, one must look to the text of the Civil Rights Act for definitions of the term. Unfortunately, neither grievance nor complaint is specifically defined in the Civil Rights Act. Both of these terms, however, are used in the act and much can be learned by the context in which they are mentioned.

The term "grievance" is used once in the Civil Rights Act, as part of the definition of "labor organization." "The term 'labor organization' means a labor organization . . . which exists for the purpose . . . of dealing with employers concerning grievances."[211] This use of the term demonstrates grievances are something unions deal with and that Congress did consciously consider the term "grievance" when creating the Civil Rights Act.

The term "complaint" is used seven times in the Civil Rights Act. It is used twice in the context of an action filed in a court, as in § 2000e-5. [Section 706](g)(1): "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice. . . ."

---

[209] 424 U.S. 747 (1976).
[210] *Franks*, 424 U.S. at 775.
[211] 42 U.S.C. § 2000e (2008).

The term "complaint" is also used five times in the Civil Rights Act to mean an allegation which has been filed with the appropriate authority, but which is short of an action filed in a court. It is used in this context three times in § 2000e-16.

The term "charge" is not used in EEOC regulations, so it appears not to be at issue in the *Dover AFB* case. However, it is used throughout the Civil Rights Act (over 30 times) in the exact same context as the second use of complaint. In the context of the Civil Rights Act, charge means allegation filed with the appropriate authority. For example, § 2000e-3 states (emphasis added): "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." In addition, see § 2000e-5 (b), where the term is used nine times in this context.[212]

It is unclear why Congress chose to use two different terms, complaint and charge, to mean the exact same thing. What is clear, however, is that Congress did understand the difference between a complaint and a grievance. In the only mention of grievance in the Civil Rights Act, there is absolutely no indication Congress intended the term to include a complaint or claim of discrimination under the provisions of the statute. The only reason the term grievance was used in the Act at

---

[212] 42 U.S.C. § 2000e-5 reads:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer, employment agency, labor organization . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

all was to clarify the definition of union, which was necessary because unions are subject to the provisions of the Civil Rights Act. By using the term grievance in the way it did, however, Congress demonstrated it had not merely overlooked the term in creating the statute. Instead, it intended a complaint to mean something different and independent of a grievance. Had the *Dover AFB* court consulted the Civil Rights Act to interpret the process for resolving alleged violations of that act, it would have come to the proper conclusion that a discrimination complaint is not a grievance, and would have reversed the FLRA's decision.

To further clarify if a "complaint" of discrimination made pursuant to EEOC regulations should have been considered a "grievance" in *Dover AFB*, the court should have analyzed the EEOC regulations guiding the complaint process. Since the EEOC has been given the authority to create and enforce rules pursuant to the Civil Rights Act, its interpretations in this area should be given *Chevron* deference, not the FLRA's. The EEOC's rules pertaining to government agencies are very clear in distinguishing a complaint of discrimination under the EEO process from a grievance under a negotiated grievance procedure. Consider 29 C.F.R. § 1614.301, titled "Relationship to negotiated grievance procedure:"

> When a person is employed by an agency subject to 5 U.S.C. 7121(d) and is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a *complaint* or a *grievance* on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both . . . An aggrieved employee who files a *complaint* under this part may not thereafter file a *grievance* on the same matter . . . Any such *complaint* filed after a *grievance* has been filed on the same matter shall be dismissed without prejudice . . .[213] (Emphases added)

---

[213] 29 C.F.R. § 1614.301 (2008). The portions of 29 C.F.R. § 1614.301 which have been edited out for brevity's sake also demonstrate the difference between "grievance" and "complaint." They read:

> An election to proceed under this part is indicated only by the filing of a written *complaint*; use of the pre-complaint process as described in § 1614.105 does not constitute an election for purposes of this section . . . . An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written *grievance*. An aggrieved employee who files a *grievance* with an agency whose negotiated agreement permits the acceptance of *grievances* which

The EEOC rule is clear, a grievance pertains to an allegation brought pursuant to a negotiated grievance procedure, and a complaint is an allegation made pursuant to the EEO rules. By carefully explaining how an employee who files a discrimination "complaint" is prohibited from filing a "grievance" covering the same matter, and vice versa, this section of *1614* makes it absolutely certain the EEOC distinguishes the meaning of a complaint under the EEO process from the meaning of a grievance under a negotiated grievance procedure. They are not the same. Had the *Dover AFB* court properly consulted the EEOC rules to interpret the complaint process set up therein, it would have come to the conclusion that a discrimination complaint using the EEOC-designated process is not a grievance under the FSLMRS, thus the union had no right to attend the mediation in question.

4. *Failure to Consider Mediation Session as a Formal Discussion*

In addition to consulting the Civil Rights Act and EEOC rules to determine if a discrimination complaint was a "grievance," the *Dover AFB* court should have looked to these authorities to determine whether the mediation was a "formal discussion" for the purposes of the FSLMRS. Instead, the court ignored the issue and simply related: "The ALJ concluded that the mediation constituted a formal discussion within the meaning of section 7114(a)(2)(A) of the Act" without any analysis of how the ALJ came to this conclusion.[214] This is a massive oversight. Formality of a meeting is one of the four elements the FLRA uses to determine if a union has a right of representation;[215] a conclusion that a

---

> allege discrimination may not thereafter file a *complaint* on the same matter under this part 1614 irrespective of whether the agency has informed the individual of the need to elect or of whether the *grievance* has raised an issue of discrimination . . . . Any such *complaint* filed after a *grievance* has been filed on the same matter shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The dismissal of such a *complaint* shall advise the complainant of the obligation to raise discrimination in the *grievance* process and of the right to appeal the final *grievance* decision to the Commission.

Id. (emphasis added).

[214] *Dover AFB*, 316 F.3d at 283.

[215] General Services Administration, Region 9 and American Federation of Government Employees, Council 236, 48 F.L.R.A. 1348, 1354 (1994) (*GSA I*). A union will have the right to representation at a meeting under 5 U.S.C. § 7114(a)(2)(A) if each of the four criteria are met: 1) there is a discussion; 2) which is formal; 3) between a representative of an agency and a union-represented employee or the employee's representative; 4) concerning a grievance or general condition of employment.

meeting is not formal would be dispositive of a case. Yet, the *Dover AFB* court chose not to consider this critical issue.

Since the *Dover AFB* court neglected to consider the formality of the mediation session but implicitly accepted the ALJ's ruling, an analysis of the ALJ's reasoning and the FLRA's acceptance of it are in order. Although the mediation in question was conducted pursuant to EEOC regulations guiding the provisions of the Civil Rights Act, the ALJ failed to consult either of those authorities to determine whether the session was formal. This interpretive error is similar to the one the *Dover AFB* court made in ignoring EEOC regulations and the Civil Rights Act when determining whether or not a discrimination complaint should be considered a grievance.

Instead of consulting the Civil Rights Act and EEOC rules, the ALJ used a seven-factor totality of circumstances test from FLRA case law to conclude the mediation session was formal.[216] Subsequently, the FLRA concurred with the ALJ's decision to apply FLRA case law rather than EEOC guidance. Unlike the ALJ or the *Dover AFB* court, however, the FLRA specifically addressed the conflict between its ruling and EEOC direction.

> The fact that the EEOC has required agencies to establish ADR procedures in an effort to informally resolve complaints is not determinative of whether a meeting to discuss such a complaint is a formal discussion under § 7114(a)(2)(A). Rather, that determination can be reached only after application of the Authority's formal discussion criteria.[217]

The FLRA went on the say that, although the EEOC has released guidance on this issue, it need not be followed.

> We recognize that the EEOC has opined, in the comments announcing its ADR rule, that the activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act . . . . However, we reject the Respondent's argument that *Chevron* requires that we defer to the EEOC's view in this regard. First, interpretations which lack the force of law – do not warrant *Chevron*-style deference . . . . The EEOC's comments do not

[216] Dover Air Force Base and American Federation of Government Employees, AFL-CIO, Local 1709, Case No. WA-CA-00262, at B.2 (2001).
[217] Dover Air Force Base and American Federation of Government Employees, Local 1709, 57 F.L.R.A. no. 65, 304, 306 (2001).

> have the force of law. Second, *Chevron* only grants an agency deference when it is offering a permissible construction of the statute which it administers. The passage quoted from the Federal Register reflects that the EEOC has interpreted the Federal Service Labor-Management Relations Statute which is administered by the Authority, not the EEOC.[218] (Citations omitted)

Although the FLRA's resolution of the apparent conflict between the FSLMRS and the Civil Rights Act is incorrect, it admirably acknowledged the issue and made a clear decision. The *Dover AFB* court passed over this critical issue without even mentioning the FLRA had ruled on it. The court merely mentioned that the ALJ, who analyzed the issue only using FLRA case law and ignored the fact the EEOC had issued guidance on the issue, determined the meeting was formal.[219] Two agencies had published conflicting opinions on a critical issue in the *Dover AFB* case: whether an ADR session constitutes a formal meeting under 5 U.S.C. § 7114 (a)(2). This should have indicated to the *Dover AFB* court that the issue is both unsettled and important enough to be considered by the court. The *Dover AFB* court, however, passed on the opportunity to clear the confusion.[220]

Analyzing the FLRA's conclusion in its *Dover* decision that prior FLRA decisions should take precedence over EEOC guidance and the text of the Civil Rights Act, it is clear the FLRA is doing exactly what it accuses the EEOC of in its opinion: interpreting the other agency's organic statute. In its ruling defining the nature of an EEOC process, the FLRA usurped the EEOC's authority to interpret its enabling statute.

Because of the nature of the controversy, it is unlikely this issue would be considered in an EEOC hearing, which would allow the Commission to challenge the FLRA's interpretation. The formality of discrimination complaints isn't normally disputed in EEOC hearings. Thus, the FLRA ruling is the only interpretation reasonably available for review by a court. The EEOC could issue a rule regarding its interpretation,[221] but the rulemaking process is infinitely more difficult than making a ruling in an administrative hearing. The fact the FLRA has a forum for ruling on the issue may procedurally give it the upper hand, however, the EEOC's opinion on the matter is confirmed by the text of the Civil Rights Act, which should lead a reviewing court to determine the EEOC's interpretation is the correct one.

---

[218] *Id.* at 306, 307.
[219] *Dover AFB*, 316 F.3d at 283.
[220] *Id*.
[221] See recommended EEOC action in section IX of this article.

The controversy in the *Dover AFB* case arises from a mediation session held pursuant to the Civil Rights Act, not the Federal Service Labor-Management Relations Statute. Nevertheless, it is appropriate to use the Labor statute to identify the criteria necessary to determine whether union representation was required at the meeting between management and bargaining unit employees. To determine whether mediation meets the criteria, however, it is proper to look to the statute and rules that created and govern the mediation session at the center of the controversy to determine its formality.

When discussing the formality of the process it set up, the EEOC is interpreting its own rules and organic statute, not the Federal Service Labor-Management Relations Statute as alleged by the FLRA. For this issue, the EEOC should be given deference in its interpretation. To quote the FLRA in its *Dover AFB* decision, "*Chevron* only grants an agency deference when it is offering a permissible construction of the statute which it administers."[222] In interpreting the formality of a mediation session undertaken pursuant to the Civil Rights Act, the EEOC is "offering a permissible construction of the statute which it administers."[223] When the FLRA interprets that same mediation session, it is interpreting a statute another agency administers.

An EEOC interpretation of whether the mediation of a complaint of discrimination filed pursuant to the Civil Rights Act is a "formal discussion" should be given great deference; however, the greatest weight should be given to the interpretation found within the text of the statute itself. The Civil Rights Act mandates the EEOC use informal methods to resolve discrimination complaints.[224] "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion."[225] This language clearly demonstrates that Congress intended "the methods of conference, conciliation, and persuasion" to be considered informal.

As discussed earlier, the definitions of these terms in Black's Law Dictionary[226] demonstrate that mediation of discrimination complaints is indeed a method of conference, conciliation and persuasion. Mediation fits so clearly within these definitions that it is specifically mentioned within the definition of conciliation.[227] To

---

[222] *Dover AFB*, 57 F.L.R.A. no. 65, 304, 306 (citing *Chevron*, 467 U.S. at 837).
[223] *Id.*
[224] It is assumed this mandate was delegated to the individual government agencies when the responsibility for investigating and processing individual claims of discrimination was delegated to them under §1614.108(a).
[225] 42 U.S.C. § 2000e-5 (emphasis added).
[226] See *supra* notes 22-24 and accompanying text.
[227] See definition of "conciliation," *supra* note 23.

further demonstrate the point, Black's Law Dictionary defines mediation as a:

> Private, *informal* dispute resolution process in which a neutral third person, the mediator, helps disputing parties to reach an agreement. The mediator has no power to impose a decision on the parties. *See also* Alternative Dispute Resolution; Arbitration; Conciliation.[228] (Emphasis added)

Congress' intent that mediation of discrimination complaints be considered an informal process is unmistakable upon a review of the text of the Civil Rights Act. Had the *Dover AFB* court chosen not to ignore the "formal meeting" question but had properly analyzed the issue using the text of the Civil Rights Act, it would have determined in *Chevron* step one that the mediation of the discrimination complaint was not a formal meeting.[229]

The mandate requiring agencies to attempt informal resolution of discrimination complaints exists even after a formal complaint has been filed. The statute, 42 U.S.C. 2000e-5, commands agencies "after such investigation" to "endeavor to eliminate any such alleged unlawful employment practice by informal methods" Since investigation only occurs after a formal complaint has been filed, it is clear Congress intended for the "methods of conference, conciliation, and persuasion" conducted after a formal complaint is filed to be considered informal.

The use of the term "formal complaint" has caused some courts confusion, including the Ninth Circuit in *VA v. FLRA*.[230] These courts fall into the trap of 'comparing apples to oranges' by equating a "formal complaint" with a "formal basis" of complaint resolution.[231] They assume Congress intended that once a "formal complaint" is filed, the rest of the process of complaint resolution is "formal." This is an incorrect reading of the statute, as it is clear Congress intended for informal methods of dispute resolution to continue throughout the process.

Although the *Dover AFB* court did not analyze the issue of whether the mediation was a formal discussion for the purposes of requiring union representation under the FSLMRS, there is evidence in the opinion that the court fell into the trap of equating the formal grievance with a formal process, leading to the conclusion that the

---

[228] BLACK'S LAW DICTIONARY 981 (6th ed. 1990).

[229] *Chevron* step one looks at a statute to see if it is "unambiguous." Since the Civil Rights Act unambiguously notes these methods are informal, a court should go no further and rule the methods to be informal.

[230] 16 F.3d 1526.

[231] *Id.* at 1532.

mediation was a formal meeting. Quoting its decision in *NTEU*, the court states: "*IRS Fresno* appears 'to be based primarily on its conclusion that the precomplaint conference did not constitute a 'formal' discussion' rather than on its brief analysis of the grievance issue."[232] The *Dover AFB* court seems to have read the *IRS Fresno* decision to say the mediation was informal merely because it was a "precomplaint conference." This weakness in the *IRS Fresno* case was discussed earlier in this article. The mediation in *IRS Fresno* was informal because mediation is an "informal method" as described in the Civil Rights Act.[233]

The text of the Civil Rights Act[234] demonstrates the *Dover AFB* court's interpretation of the *IRS Fresno* decision to be contrary to Congress' intent. Agencies are directed to attempt to resolve complaints using "informal methods" of dispute resolution even after the investigation has begun, which occurs after the formal complaint has been filed. Congress intended for mediation of discrimination complaints to be informal, regardless of whether a complaint has been filed.

While not as powerful as an interpretation based upon the statutory text, an interpretation based upon EEOC regulations related to the issue should receive *Chevron* deference since, in the regulations, the EEOC is "offering a permissible construction of the statute which it administers."[235] While the EEOC regulations do not directly address the issue of formality, the text of the EEOC rules[236] infers the process should be informal. The mandate od29 C.F.R. § 1614.102(b)(2) requires government agencies to create an alternative dispute resolution program which "must be available for both the pre-complaint process and the formal complaint process." Further, § 1614.104(b) directs the EEOC to ensure the "agency makes reasonable efforts to resolve complaints informally." Finally, § 1614.108(b) encourages agencies to "incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints." These provisions in the EEOC rules are indications the Commission has interpreted the ADR provisions it mandates to be informal and that these informal processes are to be used throughout the complaint cycle.

This EEOC interpretation is acknowledged by the FLRA in their *Dover AFB and AFGE* opinion: "the EEOC has required agencies to establish ADR procedures in an effort to informally resolve

---

[232] *Dover AFB*, 316 F.3d at 286.
[233] 42 U.S.C. § 2000e-5 (2008).
[234] *Id.*
[235] Dover Air Force Base and American Federation of Government Employees, Local 1709, (Dover AFB and AFGE) 57 F.L.R.A. no. 65, 304, 306.
[236] 29 C.F.R. § 1614

complaints"[237] Additionally, in that opinion, the FLRA stated: "We recognize that the EEOC has opined, in the comments announcing its ADR rule, that the activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act. 64 Fed. Reg. 37,644, 37,645 (1999)."[238]

The FLRA concluded the EEOC comments made when creating its ADR program should not be given *Chevron* deference because the comments did not have the force of law. However, the rules in *§ 1614* discussed above and acknowledged by the FLRA to require government agencies "to establish ADR procedures in an effort to informally resolve complaints"[239] do have the force of law so should receive *Chevron* deference. Most importantly, the text of the statute unambiguously states that these ADR procedures are informal, so the analysis should never get to the second stage of the *Chevron* test, determining if the agency interpretation is a "permissible construction of the statute."[240] The text of the Civil Rights Act, which mandates an attempt at informal resolution throughout the complaint process, should be controlling on this issue. The EEOC rules, which are consistent with the Act and are binding on federal agencies, should also be given deference.

5. *Misplaced Reliance on NTEU*

The D.C. Circuit Court should have consulted the Civil Rights Act and EEOC rules to determine whether an EEO complaint was a grievance for the purposes of 5 U.S.C. § 7114(a)(2)(A). However, even if one were to accept the FLRA's argument that the proper analysis should look to the FSLMRS for this interpretation, the *Dover* court failed to discover indications in that statute of how Congress did not intend to have a discrimination complaint be included in the meaning of grievance. Instead it relied on its previous decision in *NTEU* which, it said, relied "upon the text, structure, and legislative history of the Act and did not rest on the type of grievance in question."[241] A closer look at the *NTEU* case, however, illuminates serious flaws in the decision.

In the *NTEU* case, the D.C. Circuit Court of Appeals considered the question of whether an appeal filed pursuant to a statutory process was considered a grievance for the purposes of the FSLMRS provision requiring the opportunity for union representation at "any formal discussion" between members of the agency and employees of the unit

[237] *Dover AFB and AFGE*, 57 F.L.R.A. no. 65 at 306.
[238] *Id.*
[239] 29 C.F.R. §§ 1614.102(b)(2), 1614.104(b), 1614.108(b) (2008).
[240] *Chevron*, 467 U.S. at 843.
[241] *Dover AFB*, 316 F.3d at 285.

"concerning any grievance."[242] The statutory process at the center of the issue in *NTEU* was an appeal to the Merit Systems Protection Board (MSPB) which the FLRA had determined did not concern a grievance. The court reversed the FLRA decision by holding an appeal before the MSPB does concern a grievance; thus the union did have the right to be represented at any formal discussion concerning the appeal.[243] The *NTEU* court based its decision on a reading of the definition section of the FSLMRS, which defines "grievance" as: "any complaint by any employee concerning any matter relating to the employment of the employee."[244] By looking at just this section of the law, it appears Congress intended a grievance to cover all complaints relating to employment. The *NTEU* court adopted this conclusion and, in footnote 4 of its decision, the court uses an edited excerpt of 5 U.S.C. § 7121 to argue nothing in the FSLMRS indicates statutory complaints should be excluded from the definition of "grievance."[245] A thorough reading of the entire statute, however, illuminates that Congress did not intend for the term of "grievance" to be so widely defined. In a section of § 7121(d), edited out of note 4 of the *NTEU* decision with ellipsis marks, there is evidence Congress intended the meaning of "complaint" to be distinct from "grievance." The portion of § 7121(d) omitted from footnote 4 reads:

> An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely *initiates an action under the applicable statutory procedure* or timely *files a grievance* in writing, in accordance with the

---

[242] NTEU v. FLRA, 774 F.2d 1181 1183 (D.C. Cir. 1985) (citing 5 U.S.C. § 7114(a)(2)(A)).
[243] *Id.* at 1184.
[244] 5 U.S.C. § 7103(a)(9)(A).
[245] The court's footnote quotes 5 U.S.C. § 7121 (d) as follows:

> An aggrieved employee affected by a prohibited personnel practice under section 2302 (b) (1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both . . . . Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

> provisions of the parties' negotiated procedure, whichever event occurs first. (Emphasis added)

This demonstrates Congress intended an "action under the applicable statutory procedure" to be different from a "grievance" in the FSLMRS. If Congress had intended a grievance to encompass both statutory complaints and contractual complaints, it would have referred to both an action under the statutory procedure and a grievance under the labor contract as grievances. The *NTEU* interpretation of the FSLMRS, which it reaches by omitting this section of § 7121(d), renders the "initiates an action" language of the statute superfluous. This violates the rule against surplusage.[246] "A construction which would leave without effect any part of the language of a statute will normally be rejected."[247] Thus, the appropriate interpretation of § 7121(d) concludes an action under a statutory procedure is different than a grievance pursued under a negotiated grievance procedure.

Later in the *NTEU* decision the court stated: "Absent some more positive indication that Congress in fact meant in all circumstances to exclude the union from any formal discussion of matters raised in the alternative statutory procedures" it would reject the contention that actions under the statutory procedures were separate from grievances under the FSLMRS.[248] The court goes on to say: "Such a reading of 'grievance' strains the language of the statute at every turn."[249] However, Congress did give a positive indication that an "action under the applicable statutory procedure" should be distinguished from a grievance by referring to each separately in § 7121(d), the *NTEU* court simply decided to ignore this language in making its decision. Such a reading of 'grievance' doesn't "strain the language of the statute" but is based on text of the statute. By editing out this part of § 7121(d) from statutory language it cited in its decision, the *NTEU* court chose not only to ignore this wording, but to actively omit this language from its consideration.

The *NTEU* court continues its argument by stating § 7121(d) would not use the term "*aggrieved* employee" (emphasis in original)[250] to describe an employee who must choose either the negotiated grievance procedure or the statutory procedure unless both terms constituted a grievance. The *NTEU* court reasoned:

---

[246] Discussed in Exxon Corp. v. Hunt, 475 U.S. 355, 369 (1986); Kungys v. United States, 485 U.S. 759, 778 (1988); United States v. Alaska, 521 U.S. 1 (1997); Walters v. Metropolitan Educ. Ents., Inc., 519 U.S. 202 (1997); Rake v. Wade, 508 U.S. 464 (1993); Colautti v. Franklin, 439 U.S. 379, 392 (1979).
[247] P. ST.J. LANGAN, MAXWELL ON THE INTERPRETATION OF STATUTES, at 36 (1969).
[248] *NTEU,* 774 F.2d at 1187.
[249] *Id.*
[250] *Id.*

> if the term 'grievance' referred only to disputes pursued through negotiated grievance procedures, § 7121(d) and (e) would not be worded to require an '*aggrieved* employee*'* (emphasis supplied by court) to elect to pursue a remedy under either a negotiated procedure or a statutory procedure. An 'aggrieved' employee—*ie*., one with a grievance—would by definition necessarily pursue his grievance under a negotiated procedure.[251]

The court, however, never cites any statutory language, case law, or dictionary for its definition of "aggrieved." The term "aggrieved" is not defined in the FLMRS, and the context in which it is used in the Act does not clearly indicate whether the term is general, meaning it could identify a person with any claim of injustice, or specific, referring to one with a "grievance" which should be processed through a negotiated grievance procedure, as defined by the *NTEU* court. Contrary to the *NTEU* court's ruling, the term should not be assumed to mean "one with a grievance" simply because the words are similar. In the 42 U.S.C. § 2000e-5, Congress uses the terms "complaint," "grievance," and "aggrieved" in the following way: "An aggrieved employee who files a *complaint* under this part may not thereafter file a *grievance* on the same matter." (Emphasis added) Clearly, Congress recognizes an "aggrieved" individual does not necessarily mean someone who has filed a grievance under a negotiated grievance procedure, but can also be a person filing a complaint of discrimination under the EEOC process. The term is used similarly in EEOC regulations at 29 C.F.R. § 1614.301. Finally, in a search of thirteen definitions from six separate dictionaries,[252] only one defined "aggrieved" as "having a grievance."

The court in *NTEU* assumes that since the term aggrieved is structurally similar to the term grievance, they must mean the same thing. A search of dictionaries and at least one other section of the Code proves this reasoning to be flawed. The conclusion resulting from this

---

[251] *Id.*

[252] BLACK'S LAW DICTIONARY 296 (1990); WEBSTER'S NEW COLLEGIATE DICTIONARY (Merriam-Webster Inc., 1986); Dictionary.com, Dictionary.com Unabridged (v 1.1). Random House, Inc., http://dictionary.reference.com/browse/aggrieved (last visited Jun. 7, 2007); Dictionary.com, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, Fourth Edition. (Houghton Mifflin Company 2004) http://dictionary.reference.com/browse/aggrieved (last visited Jun. 7, 2007); Dictionary.com, KERNERMAN ENGLISH MULTILINGUAL DICTIONARY. (K Dictionaries Ltd.) http://dictionary.reference.com/browse/aggrieved (last visited Jun. 7, 2007); Dictionary.com, MERRIAM-WEBSTER'S DICTIONARY OF LAW. (Merriam-Webster, Inc.) http://dictionary.reference.com/browse/aggrieved (last visited Jun. 7, 2007).

reasoning, that any complaint an aggrieved employee has must be a grievance, is thus incorrect.

Further analysis of § 7121(d) leads to the question of why there is a separate process available for statutory complaints; why doesn't the union-negotiated process apply for all complaints and grievances? The answer lies in the fact that, in the grievance procedure, the union is asserting and defending collective rights held by all members of a bargaining unit. Appropriately then, the union has the final say on whether or not a grievance brought on behalf of an employee it represents will go to arbitration.[253] In contrast, complainants bringing an action under a statutory procedure are asserting an individual right in which the union has no role and in which the rights of the members of the bargaining unit as a whole may conflict. The employee's interest is in resolution of the issue. This process must be controlled by the individual complainant without outside interference from any person or organization, including a union.

Congress recognized the tension between collective rights and individual rights. To address this conflict, it created a separate process for each to ensure disputes would be handled appropriately.[254] This fact was recognized by the Ninth Circuit in *IRS Fresno*, when it determined that the union had no institutional role in processing of EEOC complaints.[255] Congress did not intend to give unions the ability to influence whether or how an individual or an agency will settle a discrimination complaint, but forcing their presence in mediation sessions gives them that power. The individual right of an employee to have his or her discrimination complaint addressed must be free from intervention or obstruction of a labor union.

In *NTEU*, the D.C. Circuit Court does identify language which offers some support for its holding that the term grievances in the FSLMRS includes statutory claims such as EEO complaints.[256] However, it not only ignores the contrary language discussed earlier, it asserts that no alternative interpretations exist.

> In the absence of congressional intent to the contrary or any plausible alternative interpretation of the statute by the FLRA, we find that the words of § 7114(a)(2)(A), which provide that an exclusive representative has the right to be present at *any* formal discussion of a grievance between management and a bargaining unit employee, assure the union a role in the alternative

[253] 5 U.S.C. § 7121(b)(1)(C)(iii).
[254] *Id.*
[255] *IRS Fresno*, 16 F.3d at 1024-25.
[256] *NTEU,* 774 F.2d at 1187.

> procedures so long as the statutory criteria of § 7114(a)(2)(A) are met.[257] (Emphasis in original)

The *NTEU* court either missed or ignored the evidence of contrary legislative intent within the text of the FSLMRS which leads to a "plausible alternative interpretation." The opinion's careful editing of § 7121 (d) in footnote 4 leads the reader to surmise they may have known the language indicating a contrary interpretation existed, but chose not to acknowledge it.

The *NTEU* court disregarded indications in the text of the FSLMRS that Congress intended complaints filed pursuant to statutory processes to be distinct from grievances filed pursuant to a negotiated grievance procedure. Unfortunately, the *Dover AFB* court did not reexamine the FSLMRS when concluding EEO complaints are grievances for the purposes of the FSLMRS, but merely relied on its decision in *NTEU*. This led to a continuation of a poor decision.

The court in *Dover AFB* did make one other relevant point regarding its *NTEU* analysis which merits discussion. The Air Force argued the *NTEU* decision, which ruled an MSPB appeal concerns a grievance, should be distinguished from the situation in *Dover AFB*, which pertained to an EEO mediation. The Air Force identified that the Ninth Circuit made this distinction between its ruling in *IRS Fresno* (EEO mediation) and its ruling in *Department of Veterans Affairs Medical Center v. FLRA* (MSPB appeal).[258] The *Dover* court responded by asserting there was a major flaw in the Air Force's argument. "the Ninth Circuit itself has noted that our reasoning in *NTEU*, rejecting the *IRS Fresno* analysis, is more persuasive than that court's own reasoning in *IRS Fresno*."[259] This appears to be quite a repudiation by the Ninth Circuit of its *IRS Fresno* decision. However, looking at the Ninth Circuit's more recent ruling in *Luke AFB*, the cited language has little effect.

In footnote 4 of *VA v. FLRA*,[260] the Ninth Circuit stated: "While *IRS Fresno* is not applicable here, we note that the reasoning of the District of Columbia circuit in *NTEU I*, rejecting the *IRS Fresno* analysis, is more persuasive." This is dicta, not a holding, located within a footnote. A much more convincing indication of the Ninth Circuit's view of any inconsistencies between its opinion in *IRS Fresno* and the D.C. Circuit's opinion in *NTEU* comes from the *Luke AFB* opinion. In *Luke AFB*, which was decided after *NTEU*, the Ninth Circuit followed *IRS Fresno* in holding that the mediation of an EEO dispute did not concern a grievance for the purpose of the FSLMRS,

---

[257] *Id.* at 1189.
[258] 16 F.3d 1526 (9th Cir. 1994).
[259] *Id.* at 1534.
[260] *Id.* at 1534.

thus the union had no right to representation.[261] While dicta praising the reasoning from another circuit court's opinion may be persuasive, the fact a court actually follows its own contrary case law in a later case is certainly more so and is truly indicative of the law in that circuit.

6. *Dismissal of Administrative Dispute Resolution Act Argument*

The *Dover AFB* court dismissed the Air Force's argument that the FLRA ruling violated the ADRA, reasoning that the "provisions of the ADR Act[262] cited by the Air Force concern only the confidentiality of the communications made at an ADR proceeding and do not address what persons or parties may attend an ADR proceeding."[263] This line of reasoning, however, makes no sense. The court acknowledges the ADRA "concern(s) the confidentiality of communications made at an ADR proceeding,"[264] but apparently fails to recognize that allowing other individuals to attend a mediation session makes it impossible to keep the communications made during the session confidential from them.

Following this line of thinking to its natural extreme leads to the conclusion that the mediation sessions could be open to the public, anyone could attend, and the ADRA would only apply to the subsequent release of communications made during the mediation. The *Dover AFB* court's ruling does not distinguish between the private caucuses and the joint sessions, thus even the complainant's individual caucus with the mediator would be open. Additionally, a thorough reading of the ADRA demonstrates that the confidentiality provisions of the Act are only applicable to the parties and the neutral.[265] Thus, while the parties and the neutral are forced to keep the information discussed confidential, any non-party attendee would be allowed to publicize any communications made during the session. This interpretation leads to an entirely absurd result, which certainly cannot be what Congress intended when creating the ADRA.

Even if the court ignores that its reasoning would allow the general public to attend these mediation sessions, it needs to acknowledge that the ADRA only imposes its confidentiality requirements upon the parties and the neutral. Thus, the union, which the court is requiring be represented at mediation sessions, is not subject to the confidentiality provisions of the Act. Consequently, while the parties cannot make public what has been discussed during mediation,

---

[261] *Luke AFB*, 1999 U.S. App. LEXIS 34569.
[262] The court incorrectly cites the ADRA as the "Alternative Dispute Resolution Act" at page 281 of the opinion, then refers to it as the "ADR Act" throughout the opinion.
[263] *Dover AFB*, 316 F.3d at 286.
[264] *Id.*
[265] 5 U.S.C. § 574(a) and (b).

the union can. As discussed earlier, management cannot put conditions on a union's representational rights under 5 U.S.C. §7114(a)(2)(A). If a union has a right per §7114(a)(2)(A) to be invited to a mediation, an agency cannot make a union's invitation contingent upon its signing a confidentiality agreement. Thus, if the ADRA does not prohibit a union from releasing the information disclosed in a mediation, which it doesn't since the union is a non-party, they can disclose all information they wish. This is also an absurd result, and cannot be what Congress intended when passing the confidentiality provisions of the ADRA.

A court could extend the confidentiality rules of the ADRA to include unions, but that would be writing into the law what Congress has not. The plain reading of the statute indicates the confidentiality provisions only apply to the parties and the neutral. As Justice Scalia said in the *DOD v. FLRA* opinion (quoting *Connecticut Nat. Bank v. Germain*): "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[266]

In the FLRA's *Dover AFB and AFGE*[267] decision, the Authority came to a more reasonable, yet still incorrect, conclusion, which the *Dover AFB* court mentioned but did not specifically adopt. The FLRA ruled that the union was "a party under the ADR Act because it was 'entitled as of right to be admitted,' 5 U.S.C. § 551(3),[268] pursuant to its formal discussion rights under section 7114(a)(2)(A)[269] of the (FSLMRS)."[270] While the reasoning that the union is a party in its own

---

[266] 510 U.S. 487 (1994) (quoting 503 U.S. 249, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)).

[267] 57 F.L.R.A. no. 65, 304, 306.

[268] 5 U.S.C. § 571 (10) ("'party' means - (A) for a proceeding with named parties, the same as in section 551(3) of this title;'"). 5 U.S.C. § 551 reads:

> Definitions: For the purpose of this subchapter—(2) 'person' includes an individual, partnership, corporation, association, or public or private organization other than an agency; (3) 'party' includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

[269] 5 U.S.C. § 7114(a)(2):

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment;

[270] *Dover AFB*, 316 F.3d at 284.

right provides an explanation for why the union should be allowed to attend a mediation session, as discussed earlier the union does have an interest in the result, it also leads to an absurd result.

Under the ADRA, the parties have equal rights. They have the right to decide whether to enter into ADR,[271] the right to approve or disapprove the chosen mediator,[272] the right to decide not to release information regarding communications within the mediation, [273] and the right to approve or disapprove any alternate disclosure rules.[274] Thus, if a union is considered a "party" for the purpose of the ADRA, it would have veto power over each of the aforementioned subjects. In fact, it would be able to veto each proposed use of ADR itself. If a particular union did not like the ADR process, or if it felt it could gain bargaining leverage by doing so, it could completely stop the use of ADR of EEO complaints by the members of its bargaining unit. This would directly interfere with a complainant's individual right to adjudicate his or her discrimination complaint in the manner he or she desires. This cannot be the intent of Congress. The ADRA and the mandate that agencies attempt ADR in EEO complaints were created to assist employees and management in informally resolving problems, not to give unions additional leverage. Unions must not be considered parties for the purpose of the ADRA.

The court points out that the FLRA, as an alternative, ruled the ADRA "contemplates the attendance and participation of 'nonparty

---

[271] 5 U.S.C. § 572(a): "An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding."

[272] 5 U.S.C. § 573(b): "A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties."

[273] 5 U.S.C. § 574(a)(1) reads:

> Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless – 1)all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

[274] 5 U.S.C. § 574(d)(1) reads:

> The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.

participants.' 5 U.S.C. § 574 (a)(1)(e)."[275] This is accurate, however, Congress was not referring to actual participants in the process, but meant witnesses when discussing nonparty participants. If Congress intended "nonparty participants" to mean a person or organization which would be participating in the entire process, it would have specifically applied the confidentiality rules to those entities as well. As discussed above, only the parties and neutrals are covered by the confidentiality provisions of the ADRA. Congress could not have intended for someone who is not covered by the confidentiality provisions of the ADRA to fully participate in an ADR session, for it would defeat the purposes of confidentiality, to provide for free and open discussion amongst the parties.

Finally, in a footnote, the *Dover AFB* court questioned whether the ADRA even applied to the case. "It is not entirely clear the ADR Act is applicable in this case. The ADR Act by its terms is voluntary and merely supplements, rather than limits, other available ADR techniques."[276] This is a proper reading of the ADRA, since agencies typically have the authority to use, or not to use, the provisions of the ADRA in their dispute resolution processes. However, the court ignores the fact that the EEOC has mandated the use of the ADRA by the Air Force and other government agencies. The EEOC's Policy Statement on ADR[277] specifically states the confidentiality provisions of the ADRA apply to ADR of EEO complaints. The provisions of the ADRA did apply to the *Dover AFB* case and, for the Air Force, they were not voluntary.

---

[275] *Dover AFB*, 316 F.3d at 284. For 5 U.S.C. § 574(a)(1), see *supra* note 216. 5 U.S.C. § 574(e) reads:

> If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

[276] *Dover AFB*, 316 F.3d at 287, note 1. 5 U.S.C. § 572(c) reads: "Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques."

[277] EEO MD 110, s*upra* note 9, Appendix H, EEOC ADR Policy Statement, at paragraph 7.II.B.3 ([T]he Commission will be guided by the nondisclosure provisions of the Civil Rights Act and the confidentiality provisions of ADRA which impose limitations on the disclosure of information.).

7. *Dismissal of Privacy Act Argument*

Like the argument that the FLRA's order violated the ADRA, the court rejected the Air Force's contention that mandating union participation at mediation sessions was contrary to the Privacy Act without analyzing the issue. As previously discussed, the government's Privacy Act argument could be its strongest since it is not contingent on which source of law the court chooses to consult. The Privacy Act always applies as long as the information is a record located within a system of records and there are no relevant exceptions.

The court ignored the issues inherent in a Privacy Act analysis. Instead, it ruled: "the Privacy Act concerns the confidentiality of records rather than what parties may attend an ADR proceeding, 5 U.S.C. § 552(a), and this case does not present a situation where the presence of a union representative in an ADR proceeding would result in the revelation of confidential information in violation of the Privacy Act."[278] The court cited no case law to support this interpretation of the Privacy Act.

The court's ruling is completely contrary to the text of the Privacy Act and to case law interpreting it. Under the Act, no personal information contained in government records is to be released unless a statutory exception applies.[279] There is no distinction between information which is "confidential" and which is not. In fact, the term "confidential" is not used in the Privacy Act.[280] The criterion that information must be "confidential" to be restricted under the Act does not come from the text of the statute and is actually at odds with it.

The court's conclusion that the Privacy Act does not apply since the Act does not say who may attend an ADR session also ignores the fact that, in order to provide the union "notice" of the mediation session, the EEO office would have to, at the very least, inform the union about the existence of a discrimination complaint. The complaint itself is located within the EEO office's system of records. Thus, the simple act of providing the union notice of the session is a violation of the Privacy Act.

In addition, the mediator, who is hired by the agency, will be discussing at least the facts making up the basis of the complaint. These facts will come from the complaint file located in the EEO office's system of records. Case law indicates this too would be a violation of the Privacy Act. In a Fifth Circuit case from 2005, *Jacobs v. National Drug Intelligence Center*,[281] the court found: "A myriad of

---

[278] *Dover AFB*, 316 F.3d at 286-87.
[279] 5 U.S.C 552(a).
[280] *Id.*
[281] 423 F.3d 512, (5th Cir. 2005), 517-518 (citing Orekoya v. Mooney, 330 F.3d 1 (1st Cir. 2003); Doe v. U.S. Postal Service, 317 F.3d 339 (D.C.Cir. 2003); Krieger v.

cases has held or assumed that the Act protects against oral disclosures." The court's reasoning in determining the Privacy Act does not create a conflict is not in consistent with the Act or with current case law.

The FLRA did consider the Privacy Act implications of providing information to a union in a 1997 exception to an arbitrator's award, *General Services Administration and American Federation of Government Employees Council 236* (*GSA II*).[282] However, the FLRA's decision was extremely flawed. In its *GSA II* ruling, which dealt with whether a union had a right to participate in negotiations regarding the settlement of a member of the bargaining unit's MSPB appeal, the Authority properly explained the standard for which a disclosure is covered by the Privacy Act.

> The courts hold that a 'disclosure' within the meaning of the Privacy Act is the actual retrieval of any information from a 'record' within the meaning of that Act. [283] However, in *Bartel*[284] the Court of Appeals for the District of Columbia Circuit held that the 'actual retrieval' standard is inapplicable where a disclosure is made by agency personnel who had a role in creating the record that contains the released information."[285]

The agency argued it could not allow the union to attend the settlement negotiations because information regarding the employee's substance abuse problems would be discussed, and the Privacy Act prohibited such disclosure.

Fadely, 211 F.3d 134 (D.C.Cir. 2000); Pippinger v. Rubin, 129 F.3d 519 (10th Cir. 1997); Henson v. NASA, 14 F.3d 1143 (6th Cir.1994); Kimberlin v. U.S. Dep't of Justice, 788 F.2d 434 (7th Cir.1986); Bartel v. Federal Aviation Administration, 725 F.2d 1403 (D.C.Cir. 1984); Doyle v. Behan, 670 F.2d 535 (5th Cir. 1982); Stokes v. Comm'r of Soc. Sec. Admin., 292 F.Supp.2d 178 (D.Me. 2003); Sullivan v. U.S. Postal Serv., 944 F.Supp. 191 (W.D.N.Y.1996); Romero-Vargas v. Shalala, 907 F.Supp. 1128 (N.D.Ohio 1995); Brooks v. Veterans Administration, 773 F.Supp. 1483 (D.Kan. 1991); Savarese v. U.S. Dep't of Health, Educ., & Welfare, 479 F.Supp. 304 (N.D.Ga. 1979)) (all involving the oral disclosure of information).

[282] 53 F.L.R.A. 925 (1997).

[283] The court stated: "The leading case articulating this 'actual retrieval' standard is Savarese v. United States Department of Health, Education, and Welfare,[283] where the court held that for disclosure to be covered by 5 U.S.C. § 552(a)(b) 'there must have initially been a retrieval from the system of records which was at some point a source of the information.'"

[284] Bartel v. Federal Aviation Administration, 725 F.2d 1403 (D.C. Cir. 1984). In *Bartel,* the court Referred to Wilborn v. Department of Health and Human Services, 49 F.3d 597, 601 (9th Cir 1995), which held that "'independent knowledge,' gained by the creation of records, cannot be used to sidestep the Privacy Act."

[285] *GSA II*, 53 F.L.R.A. at 934.

The Authority ruled against the agency, stating:

> The Agency argues that affording the Union the opportunity to attend settlement negotiations of MSPB appeals would necessarily result in the disclosure of the fact that an employee has appealed an adverse action to the MSPB and the fact that an adverse action had been taken against an identified employee. However, the Agency has not established that the Union's acquiring knowledge of those two events as a result of the Agency providing notice of, and the Union's attendance at, settlement negotiations would be related to information in, or retrieved from, a 'record' within the meaning of the Privacy Act.[286]

This begs the question, however, of where the information the agency was supposed to provide the union would come from. If the information did not come from records protected by the Privacy Act, or did not come from "'independent knowledge,' gained by the creation of records" per *Wilborn*,[287] where could this information have originated? It could not have appeared from thin air. The information must have been actually retrieved from a 'record,'[288] so it should have been protected by the Privacy Act.

GSA II was cited by the FLRA in subsequent cases regarding EEO complaints, *Luke II*[289]and *Forest Service Goleta.*[290] In both of these cases the Authority made similarly incorrect rulings by ignoring the fact that the information necessary to notify a union about an EEO complaint must come from a record located within a system of records; the EEO filing system is where such information is kept. In *Forest Service Goleta*, the court stated: "we find that the Respondent in this case has not demonstrated that the Union's acquisition of knowledge of the nature of the complaint as a result of the agency providing notice of, and the Union's attendance at, mediation and settlement discussions would require a retrieval of information in violation of the Privacy Act."[291] It is a mystery from where the FLRA believes that information would come, if not from the agency EEO files or from "'independent knowledge,' gained by the creation of records" per *Wilborn*.[292] The

---

[286] *Id.* at 935.
[287] *GSA II*, 53 F.L.R.A. at 934 (citing *Wilborn)*.
[288] *Id.*
[289] United States Department of the Air Force, Luke Air Force Base, Arizona 58 F.L.R.A. 528 (2003).
[290] United States Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, Calif., 60 F.L.R.A. 644 (2005).
[291] *Id*, at 653.
[292] *GSA II*, 53 F.L.R.A. at 934 (citing *Wilborn*).

information must be "actually retrieved" from an EEO file in order to tell the union a complaint exists, who the complainant is, and who the alleged perpetrator is. This information is certainly protected by the Privacy Act.

If the court had analyzed the Privacy Act issues properly in the *Dover AFB* case, it would have found the Act prohibited the Air Force from providing union notice of and opportunity to attend the mediation. The first two issues in the Privacy Act analysis concern whether the information is a record within a system of records.[293] These issues were analyzed earlier in this article; discrimination complaints are definitely records located within a system of records.

The final issue is whether there is an applicable exception to the Privacy Act prohibition against release of personal information. This issue was also discussed in the section of this article relating to the Privacy Act; neither FOIA nor the FSLMRS provides an exception to the Privacy Act for EEO records. Thus, the provisions of the Privacy Act apply and the Air Force cannot inform the union about the discrimination complaint. It doesn't matter that another statute gives the union the right to represent its own interests. As the Supreme Court stated in *DOD v. FLRA*: "Speculation about the ultimate goals of the Labor Statute is inappropriate here; the statute plainly states that an agency need furnish an exclusive representative with information that is necessary for collective-bargaining purposes only 'to the extent not prohibited by law.' 5 U.S.C. § 7114(b)(4)."[294] Since the Privacy Act prohibits the Air Force from disclosing information regarding mediation of employment discrimination complaints, the court should have ruled it did not have to provide the union notice of and opportunity to attend the mediation session in *Dover AFB*.

VIII. THE FLRA SOLUTION.

There are two potential solutions to remedy the FLRA's insistence that union representatives be included in mediation of EEO complaints. The first, as happened in the cases discussed above: a federal agency could refuse to provide notice or to allow a union representative to attend a mediation session, which would probably result in the filing of an unfair labor practice against the agency. The FLRA Regional Director's Office would likely issue a complaint in the matter, and the issue could work its way up to the FLRA for a precedential decision, and on to a Federal Appeals court if any party objects to the FLRA ruling.

---

[293] 5 U.S.C 552(a) (2008).
[294] *DOD v. FLRA*, 510 U.S. at 503.

This process is currently ongoing, as the Denver Regional Director's Office has filed exceptions with the FLRA on a recent Administrative Law Judge's order. The ALJ dismissed the complaint which alleged the Air Force violated the FSLMRS by failing to provide the union notice of a mediation session of a bargaining unit member's discrimination allegation.[295] In its exceptions, the Denver Regional Office argued the mediation constituted a formal meeting between management and a bargaining unit member. The Air Force is currently preparing its response.[296]

This case is not expected to be addressed for some time. Currently, there are two vacancies on the three-member FLRA, which is unable to act unless at least two seats are filled. Positions on the FLRA are made by Presidential appointment with the advice and consent of the Senate. With the election being held later this year, it is unlikely any appointments to the FLRA will be made until 2009. Thus, there is no resolution expected in this case until the middle part of next year.

The process of battling an FLRA Regional Director's office in administrative and judicial hearings is long, expensive, and unpredictable. All federal agencies work with a finite amount of money and resources, so choosing to fight to defend management rights does have an affect on an agency's ability to accomplish its mission. While litigating this issue through the process set up in the FSLMRS may lead to the proper result, that mediation of discrimination complaints be truly confidential discussions between the parties, it is more appropriate that the burden for ensuring this result be borne by the EEOC.

IX. THE MORE COMPLETE ADMINISTRATIVE SOLUTION: EEOC LIMITATION OF UNION ATTENDANCE TO COMPLAINANT'S REPRESENTATIVE

The most appropriate and certain method for complying with the Civil Rights Act, the Privacy Act, the Administrative Dispute Resolution Act, Supreme Court holdings, and Equal Employment Opportunity Commission direction in regard to this issue is for the EEOC to issue a rule restricting attendance at mediation sessions conducted pursuant to EEOC regulations to the principal parties, their representatives, and the mediator or mediators. Third parties, i.e witnesses, who could provide information to the principal parties and the mediator should also be allowed if both principal parties agree. Creating such a rule would allow the EEOC to regain control of one of its most effective processes of resolving discrimination complaints.

---

[295] Department of the Air Force, Davis-Monthan Air Force Base and American Federation of Government Employees, AFL-CIO, Local 2924, Case No. DE-CA-07-0377 (Jun. 13, 2008).

[296] Discussion of this case is limited due to the ongoing nature of the litigation.

Besides being contrary to law and legislative intent, requiring union representation in mediation of discrimination complaints works against the goal of free and frank discussion and creates a disincentive for both employees and management to engage in the process. If either party chooses not to engage in mediation due to the required presence of the union, it confounds the complainant's right to have his or her allegation resolved; perhaps the complaint which is defeated in litigation would have been settled through mediation. "A conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former." [297]

Additionally, creating a disincentive for mediating complaints is contrary to the purpose of the Civil Rights Act, to ensure a discrimination-free workplace. The earlier an agency receives the facts of a truly meritorious claim, the earlier it can correct any discriminatory conduct or procedures, thus ensuring a fairer workplace for the complainant and the entire workforce. Forcing union presence upon the parties to these disputes serves only the unions.

The EEOC may be reluctant to issue such a rule, for, much like the adjudicative process, the administrative rulemaking process can be a long, onerous process. Managing the extended notice and comment period, and considering the dozens of comments which would certainly be filed by both federal agencies and employee unions, would be time consuming and expensive.

Undergoing this process, however, will ensure the fairest result since the administrative rulemaking process allows for comments from both sides of the issue to be considered by the experts in the field, the EEOC. The EEOC created and enforces the rules and regulations regarding mediation of EEO complaints; it is the agency which should direct how the process is conducted.

Additionally, a rule created by the EEOC specifically addressing the issue would be entitled to *Chevron* deference by the courts. An EEOC rule would be much more definitive than almost any result from the adjudicative process. Appellate court rulings are not truly binding on the FLRA and the other Circuits. Thus, unless the Supreme Court was to rule on the issue, which is unlikely, an EEOC rule would be the most controlling. Using the rulemaking process would provide certainty and would create the most appropriate result.

Finally, the EEO complaint process belongs to the EEOC; they are best equipped to understand and resolve the issue. They are also the proper agency to bear the burden of resolving this issue, because it directly affects the mission of the organization. The issue of whether or not unions must be invited to mediation sessions of their bargaining unit members' discrimination complaints must be resolved by the EEOC.

---

[297] *Dover AFB,* 316 F.3d at 286.

The most current and most binding case law, *Dover AFB*, which requires union representation at mediation of bargaining unit members' EEO complaints, is contrary to the Civil Rights Act, the FSLMRA, the ADRA, and the Privacy Act. The courts have failed to interpret these statutes properly, and in doing so have frustrated Congress' intent to allow free, frank and open communication in attempts to settle discrimination complaints. The administrative fix is awaiting implementation.

CONTRACTORS OR ILLEGAL COMBATANTS? THE STATUS OF ARMED CONTRACTORS IN IRAQ

CAPTAIN DANIEL P. RIDLON

Captain Daniel P. Ridlon (B.A., Seattle University (2003); J.D., Harvard Law School (2006)) is the Chief of Military Justice, 30th Space Wing, Vandenberg Air Force Base, California. He is a member of the Washington Bar. *The author extends special thanks and appreciation to Professor Ryan Goodman, Rita E. Hauser Professor of Human Rights and Humanitarian Law, for all of his help in writing and editing this article.*

I. INTRODUCTION

On the night of April 5, 2004, Shiite militiamen attacked the Coalition Provisional Authority's headquarters in the city of Najaf. In the firefight that ensued, the defenders of the CPA headquarters were twice resupplied by helicopter, once evacuating a wounded Marine.[1] The engagement lasted several hours, with thousands of rounds being expended by the defenders[2].

While this might be considered a typical engagement for Coalition or Iraqi forces, many of the men defending the headquarters were neither. Instead, they were private security contractors from Blackwater Worldwide, a Virginia based private military firm (PMF).[3] Indeed, even the helicopters used to resupply the besieged contractors and to ferry a wounded Marine to safety belonged to Blackwater. After requesting assistance from U.S. forces, Blackwater was forced to use their own helicopters to support the defense.[4] Engagements such as this one are not atypical in the volatile security situation that is pervasive in Iraq.[5]

Since the end of the Cold War, the United States has decreased the size of its armed forces significantly. From 1989 to 1999, the size of the active duty military force has been reduced from 2,174,200 to 1,385,700.[6] As a result of this reduction, the military has become increasingly reliant on private contractors to fulfill a number of tasks which had previously been carried out by members of the military. The steady increase of contractors can be seen through the ratio of contractors to military personnel in recent conflicts. In the first Gulf War, that ratio was one to thirty-six,[7] and, by the initial phases of the second Gulf War, it had decreased to one to ten.[8] While the ratio of contractors to soldiers during the combat phase of the second Gulf War represented a significant increase in the use of contractors, it pales in comparison to the massive reliance on contractors in the reconstruction period. As of September 2007, there were roughly 160,000 contractors supporting the 150,000 U.S. soldiers in Iraq. This means that the

---

[1] Peter Singer, *Warriors for Hire* (2004), *available at* http://www.brookings.edu/views/articles/fellows/singer20040415.htm; Dana Priest, *Private Guards Repel Attack on U.S. Headquarters*, WASH. POST, Apr. 6, 2004, at A1.
[2] David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1.
[3] Singer, *supra* note 1.
[4] Priest, *supra* note 1, at A1.
[5] Barstow *supra* note 2, at A1.
[6] Michael E Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 A.F. L. REV. 111, 111 (2001).
[7] *Id.* at 111.
[8] Singer, *supra* note 1.

contractors supporting the mission actually outnumber the troops they are supporting.[9]

Over the years, the dramatic increase in contractors playing key roles in military operations has led to greater concerns over the status of these contractors. As they became further integrated into operations that brought them closer and closer to the front lines, the likelihood that they would be considered combatants increased. At the same time, as contractors became increasingly involved in combat operations, the military attempted to maintain a sharp dividing line between contractors and military personnel. Prior to the second Gulf War, military regulations limited contractors from being armed except in extreme situations, and only then did regulations permit them to carry side-arms.[10] These restrictions were fueled by concerns that armed contractors could lose their non-combatant status and become targets of attack.[11]

Despite the concerns about the status of contractors, the second Gulf War saw not only an expansion of the number of contractors per soldier, but also, for the first time, PMF personnel fought in tactical engagements alongside U.S. Soldiers.[12] Although exact figures are not available, it is estimated that there are currently between twenty thousand and thirty thousand armed PMF personnel operating in Iraq.[13] U.S. military figures reveal that the military alone has 6000 armed private security guards under contract.[14] PMF personnel in Iraq come from over 100 different firms operating in Iraq.[15] One firm, Global Risk Security, Ltd., has 1100 employees in Iraq, including 500 Nepalese Ghurkas and 500 Fijians.[16] When compared to contributions of nations participating in the Coalition during the invasion, this firm alone constitutes the sixth largest supplier of soldiers.[17]

As the conflict in Iraq continues, the role PMFs play has only increased. In 2005, PMF personnel protected between 200 and 300

---

[9] Jim Michaels, *Private Security Contractors' Role Grows in Iraq*, USA TODAY, Sept. 4, 2007, at A7.
[10] JOINT CHIEFS OF STAFF, JOINT PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, V-7 (Apr. 6, 2000) [hereinafter JOINT PUB. 4-0]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21(100-21), CONTRACTORS ON THE BATTLEFIELD (Jan. 2003).
[11] JOINT PUB. 4-0, *supra* note 10, at V-7.
[12] Singer, *supra* note 1.
[13] *Id*.; JENNIFER K. ELSEA & NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2007).
[14] Jim Michaels, *Private Security Contractors' Role Grows in Iraq*, USA TODAY, Sept. 4, 2007, at A7.
[15] Steve Fainaru, *Guards In Iraq Cite Frequent Shootings*, WASH. POST, Oct. 3, 2007, at A1.
[16] Singer, *supra* note 1.
[17] *Id.*

convoys per month.[18] By September 2007, this number had increased to 500 convoys per month.[19] This change in the role of contractors was accompanied by a revision in the military regulations that governed how contractors can be employed. Regulations that previously only permitted contractors to be armed for self-defense now allow for contractors to serve as armed guards.[20]

The massive increase in the number of contractors and expansion of their role in the conflict has also led to a huge increase in costs. It is estimated that the costs of providing security will account for up to twenty five percent of the eighteen billion dollars earmarked for reconstruction of Iraq.[21] The State Department alone spends over one billion dollars a year hiring armed contractors to protect its diplomatic personnel in Iraq.[22] During congressional hearings in 2007, it was estimated that almost four billion dollars had already been paid to private security companies as part of the reconstruction effort.[23]

The use of armed contractors has also led to concerns about regulating their behavior and how they use force. Pressure for regulation came not only from government officials and the media, but also from within the industry itself.[24] In reaction to these calls for increased regulation, the Coalition Provisional Authority, shortly before the handover of power, issued Memorandum 17 which set rules for the use of force by contractors and which called for the registration of all armed contractors.[25] These initial efforts at constraining PMFs were largely ineffectual and, in the overall chaos of Iraq, the conduct of PMF personnel remained a less than prominent issue. That all changed on September 16, 2007, when several armed Blackwater contractors defending a State Department convoy opened fire in a crowded intersection in Baghdad, killing 17 people and wounding 24 others.[26] Although the details of the shooting remain disputed, the incident catapulted PMFs and their practices into prominence in the media. This increased public awareness was accompanied by renewed calls to

---

[18] Jim Michaels, *Private Security Contractors' Role Grows in Iraq*, USA TODAY, Sept. 4, 2007, at A7.
[19] *Id*.
[20] *See* U.S. DEP'T OF DEFENSE, INSTRUCTION 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE ARMED FORCES para. 6.3.5 (Oct. 3, 2005) [hereinafter DODI 3020.41], *available at* http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf (last visited Sep. 14, 2008).
[21] Barstow, *supra* note 2, at A1.
[22] John M Broder & David Rohde, *Use of Contractors By State Dept. Has Soared*, N.Y. TIMES, Oct. 24, 2007, at A1.
[23] Elsea, *supra* note 13.
[24] *Id.*
[25] *See* Coalition Provisional Authority Memorandum Number 17, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/cpamemo.pdf
[26] Paul von Zielbauer & James Glanz, *Under Siege, Blackwater Takes On Air Of Bunker*, N.Y. TIMES, Oct. 25, 2007, at A1.

increase the regulation of PMF practices, including some calls that PMF personnel be brought under U.S. civilian criminal jurisdiction.[27]

While a great deal of attention has been given to possible legal mechanisms for regulating PMFs, the question of the legal status of armed contractors in Iraq has received far less attention. What is the status of armed contractors under the Geneva Conventions? Are they unlawful combatants, like al-Qaeda, or are they civilians who are acting in self-defense? This article explores these questions in an attempt to determine the status of armed PMF personnel under the Geneva Conventions and the laws of war. It begins by examining what legal framework applies to the current conflict and then, after briefly examining the history of PMFs, considers what their legal status is under international humanitarian law.

II. WHAT LEGAL FRAMEWORK GOVERNS THE CONFLICT IN IRAQ?

The first issue that must be addressed in any examination of the legal status of PMFs operating in Iraq is: What legal framework applies to the conflict in Iraq? This determination will depend largely on whether the conflict in Iraq is considered an international armed conflict between two nations who are parties to the Geneva Conventions, or an internal armed conflict. If the conflict is considered an international armed conflict, then the entire elaborate system of International Humanitarian Law embodied in the Geneva Conventions and other relevant treaties apply to the conflict. If, on the other hand, the conflict is considered an internal armed conflict, the conflict is governed by a much less elaborate legal framework.

Article 2 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) defines when the convention applies to an armed conflict. It states that, "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[28] Thus, for the conventions to apply a conflict must meet two criteria. First, it must be an armed conflict. Secondly, the conflict must be between two or more nations who are parties to the Geneva Conventions.

Both Iraq and the United States are parties to the Geneva Convention.[29] Thus, the second Gulf War represented a conflict between two or more "High Contracting Parties," meeting both criteria

---

[27] Eric Schmitt & Thom Shanker, *Pentagon Sees One Authority Over Contractrors*, N.Y. TIMES, Oct. 17, 2007, at A1.

[28] Convention Relative to the Treatment of Prisoners of War, August 12, 1949, art. 2, 20 U.S.T. 3316, 75 U.N.T.S. 135.

[29] Lori Fisler Damrosch, et al., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW 427 (2001).

for the Geneva Convention to apply in its entirety. While the applicability of the Convention to the initial stages of the second Gulf War is clear, what is less clear is whether or not the Convention continues to apply to the conflict today. The continued applicability of the Geneva Convention will rest on whether the conflict in Iraq continues to be an international armed conflict between two or more parties to the Convention, or whether it has been transformed into an internal armed conflict.

In a memo dated January 10, 2006 the Department of Defense Deputy General Counsel (DOD GC) stated that, "it may be assumed that military operations both in Afghanistan and Iraq began as international armed conflicts and continue to constitute international armed conflicts."[30] The rationale behind this determination was not provided. Instead, the memorandum stated simply that the issue had been "previously discussed."[31] Unfortunately, this previous discussion is not available. While this rationale would help understand DOD GC's perspective, it is not necessary to evaluate their claims.[32]

---

[30] Memorandum from the U.S. Department of Defense Deputy General Counsel for International Affairs on Request to Contract for Private Security Companies in Iraq, to the Staff Judge Advocate, U.S. Central Command, 2 (Jan. 10, 2006) (on file with author). The relevant portions of this document state:

> a. As previously discussed, for purposes of addressing this question, it may be assumed that military operation both in Afghanistan and Iraq began as international armed conflicts and continue to constitute international armed conflicts.
>
> > (1) An international armed conflict may consist of several phases. In these cases, the conflicts have involved a period of major combat operations where uniformed forces of a government engage uniformed forces of an opposing government. In Iraq, that phase concluded on or about May 1, 2003, as the United States and its Coalition partners defeated the Ba'athist regime of Saddam Hussein. In Iraq, this was followed by the occupation phase as the United States and the coalition exercised power until governance authority was handed over to the Interim Iraqi Government on June 28. 2004. Currently, operations both in Iraq and Afghanistan are in the transition, or stability operations, phase of an international armed conflict. (In Iraq, operations may also be characterized as post occupation.) Application of the law of war in the fact situation presented by current operations should not be viewed as the same as during a period of major combat operations of an international armed conflict.

Id.

[31] *Id.*

[32] This memorandum is a formal legal opinion from DOD GC. However, it is unclear to what extent the content of the memorandum represents U.S. Government policy. Furthermore, this opinion is the only available guidance on this subject from DOD GC.

Applying the definition in Article 2 of the Geneva Convention to the current conflict in Iraq, it is apparent, despite DOD GC's assessment to the contrary, that the conflict is not an international armed conflict. As stated previously, the war in Iraq began as an international armed conflict between two or more "High Contracting Parties." However, it is difficult to construe the conflict as it exists currently in the same light. On 28 June 2004, the United States handed over sovereignty to the Iraqi government.[33] Immediately following the handover of sovereignty, the President made numerous statements that the United States and its allies would leave Iraq if the Iraqi government made the request.[34] By returning sovereignty to Iraq, the United States has indicated that Iraq is no longer an occupied territory, but is instead an independent nation that can request United States withdrawal of forces like any other ally in whose country we have military assets. Within this context, it is difficult to claim that the United States continues to be engaged in an armed conflict with a "high contracting party," such that the Geneva Convention applies. The current situation in Iraq is conflict between the Iraqi government and its allies, including the United States, and dissident elements within Iraq. These dissident elements are non-governmental entities, and they are not parties to the Geneva Convention. While some part of the insurgency may be comprised of elements of the former Iraqi regime, according to the United States' own assertions, these elements no longer represent the government of Iraq. Thus, although there is still armed conflict occurring in Iraq that meets the first element of the test for when the Geneva Conventions apply, the conflict is not "international" because it does not involve fighting between two states that are parties to the convention. Instead the conflict in Iraq is an internal armed conflict which is not governed by the full body of international humanitarian law.

Oddly, after claiming that Iraq is currently an international armed conflict, the DOD GC's memorandum goes on to undercut that assertion. The memo explains that international armed conflicts have several phases. The first is the major combat operation phase during which uniformed forces of the nations fight.[35] In Iraq, the memo claims that this phase ended around 1 May 2003, when, "the United States and its Coalition partners defeated the Ba'athist regime of Saddam

---

It is unclear if the legal interpretations contained in the document have been updated or superseded.

[33] Mark Mazzetti, *The Conflict in Iraq: U.S. Will Shift From Fighting to Training*, L.A. TIMES, Jan. 18, 2005, at A1.

[34] Steve Negus & Patti Waldmeir, *Sadr Followers Plan Campaign to Oust U.S.*, FIN. TIMES, Apr. 11, 2005, at 8.

[35] *See* Memorandum from the U.S. Department of Defense Deputy General Counsel for International Affairs, *supra* note 30.

Hussein."[36] The next phase is the "occupation" phase, which ended in Iraq when the "governance authority was handed over to the Interim Iraqi Government on June 28, 2004."[37] In addressing the current state of affairs, the memo states that, "[c]urrently, operations both in Iraq and Afghanistan are in the transition, or stability operations phase of an international armed conflict. (In Iraq, operations may also be characterized as post-occupation.)"[38] This description appears to contradict the memo's previous statement that the conflict in Iraq is currently an international armed conflict. The term "post-occupation," itself suggests the conflict between the United States and Iraq has ended. Furthermore, how could the conflict continue to be "international" when the occupation has ended and the United States is engaged in stabilizing a government who is a party to the Geneva Conventions rather then fighting it? Indeed, following its characterization of the current conflict in Iraq as "post-occupation," the memorandum states, "[a]pplication of the law of war in the fact situations presented by current operations should not be viewed the same as during a period of major combat operations of an international armed conflict."[39] Thus while the DOD GC's memorandum states that the conflict in Iraq is an international armed conflict, their own analysis undercuts that assertion.

Although the majority of the Geneva Convention no longer applies to the conflict in Iraq, which is presently not an "international armed conflict," understanding the status of contractors under the convention remains extremely important. The role of PMFs in the conflict in Iraq is part of a trend toward increasing privatization that will continue long past this current conflict. In future international armed conflicts, it is likely that PMFs will continue to play a role similar to that which they play in the current conflict. In these future conflicts, the Geneva Conventions will be applicable and the status of PMFs may be a critical issue.

Because the Geneva Convention often focuses on the characteristics of the individual and because of the diverse nature of PMF operations in Iraq, it is important to note that this analysis will necessarily consider the general trends of PMF operations and policies. Thus the analysis may not apply to every PMF or every individual PMF employee, but will instead attempt to discuss the majority of PMFs. It is also critical to reinforce the fact that this analysis only applies to those PMF personnel who are armed. Some PMF personnel are participating in the conflict in support roles in which these personnel neither possess

---

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*

nor use weapons.[40] However, for the purpose of this article the term PMF will be used, but will only encompass armed PMF personnel.

Before beginning an examination of armed PMF personnel operating in Iraq, it is important to have a firm understanding of PMFs and the historical trends which led to their development. With this basis in mind, this article will then explore PMF personnel's status under international law, and then contrast this analysis with that conducted by other scholars.

III. HISTORY OF PRIVATE MILITARY FIRMS

Private military firms are the latest evolution in the market for military expertise and personnel. The individuals who supply this expertise have historically been referred to as mercenaries. However, use of the term mercenary to describe PMFs is problematic in several ways. First, the definition of the term itself is subject to wide debate. Although several treaties have attempted to define the term, many critics have noted the shortfalls of these definitions.[41] For example, the Additional Protocol I to the Geneva Convention defines a mercenary as any person who:

> (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for material gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and, (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Critics have noted this definition, variants of which are used in several treaties, relies on the subjective motivations of the individual as part of the definition and thus are subject to easy circumvention.[42]

---

[40] *See* Singer, *supra* note 1.

[41] *See* Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 37-41 (1999).

[42] *See* P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 529 (2004). *See also* Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to recognize and regulate Private*

The term, "mercenary," is also problematic as applied to PMFs because the term, depending on which definition is used, does not necessarily apply to PMFs. Whether or not an employee of a PMF could be described as a mercenary depends both on the definition chosen, and the particular services offered by that individual and the PMF they work for. Finally, the term "mercenary," in its popular usage, has negative connotations which may be unjustified when applied to PMFs.

Despite the problematic nature of associating PMFs with mercenaries, there are enough similarities to warrant the conclusion that, whether or not PMFs are mercenaries, they are the latest evolution of the mercenary industry and have developed historically from the mercenary tradition. Thus, understanding the development of PMFs requires a basic understanding of the history of mercenaries, and especially their development in the second half of the twentieth century.

Mercenaries have played a role in warfare, to varying degrees, throughout most of history. The first known historic reference of the use of mercenaries is during the reign of King Shulgri of Ur between 2094-2047 BCE.[43] Mercenaries were a common element of warfare in early Greek city states, but fell into disfavor during the Persian and Peloponnesian wars.[44] Following the end of the Peloponnesian war, the use of mercenaries reemerged as an important part of warfare in Greece.[45] Mercenaries continued to play a role in warfare being used by Alexander the Great, and by the Roman Empire.[46] These examples of the use of mercenaries are illustrative of the pervasive use of mercenaries in the ancient world.

Mercenaries were also employed throughout the Middle Ages. The use of mercenaries during this period was often driven by the need of Kings and other nobility to supplement or replace the military support from their feudal vassal's whose military obligations were limited.[47] This period also saw the first known examples of companies of mercenaries. Although groups of mercenaries had existed previously,[48] the more formal innovation of a company of mercenaries represented a

---

Military Companies, 176 MIL. L. REV. 1, 42, 59-60 (2003); UNITED KINGDOM FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION 28, 7 (2002) [hereinafter BRITISH GREEN PAPER].

[43] P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 20 (2003).

[44] IAIN G. SPENCE, HISTORICAL DICTIONARY OF ANCIENT GREEK WARFARE 204-205 (2002).

[45] *Id.*

[46] SINGER, *supra* note 43, at 21.

[47] ANTHONY MOCKLER, THE MERCENARIES 43 (1969).

[48] For example, in the early 5th Century the Romans employed tribes of barbarians as mercenaries. R. ERNEST DUPUY AND TREVOR N DUPUY, ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT 167 (1977).

move in the direction of organization which would later evolve in to modern PMFs. The first such company was Harold Hardaade's Norse mercenaries who first fought on behalf of the Byzantium Empire in 1032 A.D. as a separate entity and later formed a permanent mercenary component of the Byzantine Army. This group is considered by some to be the first mercenary company to exist.[49] The first years of the 14th Century saw further organizational innovation of mercenaries as the Grand Catalan Company was formed and became the first "free company" of mercenaries.[50] A "free company" of mercenaries was a group of mercenaries who jointly marketed their military skills as a unit to a perspective employer.[51] This organizational structure represented yet another step in the direction of modern PMFs and continued to be an important organizational structure for mercenaries.

Mercenaries were also prevalent in some regions outside for Europe. In China, from the 8th Century until the 13th Century, mercenaries fulfilled an important role in the military structure. In the late T'ang dynasty (589-907) economic and social changes had begun to reshape the composition of the Chinese army from a force primarily composed of conscripts to one composed of mercenaries.[52] By the mid 8th Century, mercenaries had become the primary element of the army.[53] Mercenaries continued to be the central part of the army through the end of the T'ang Dynasty (589-907) and through the Five Dynasties (907-960).[54] During the reign of the Sung dynasty (960-1279), conscripts were entirely replaced by mercenaries.[55] In this period, the Sung continually employed a massive mercenary army, which at times reached a strength of over one million.[56] The massive financial burden caused by such a large mercenary army strained the state's fiscal capacity.[57] Despite the prevalence of mercenaries for a period of over five hundred years, mercenaries all but disappeared from China following the fall of the Sung dynasty (960-1279) to outside invaders who replaced them with a warrior class drawn from their own ethnic background.[58]

In Renaissance Italy, mercenaries played an especially prominent role in warfare between the independent city states.[59] There,

---

[49] Milliard, *supra* note 42, at 3.
[50] *See* SINGER, *supra* note 43, at 24-25.
[51] *Id.*
[52] CH'-I-CH'ING HSIAO, THE MILITARY ESTABLISHMENT OF THE YUAN DYNASTY 5-6 (1978).
[53] *Id.* at 5.
[54] *Id.*
[55] *Id.* at 6.
[56] *Id.* at 7.
[57] *Id.* at 7.
[58] *Id.* at 7-8.
[59] ANTHONY MOCKLER, THE MERCENARIES 43 (1969).

the model of the free company was replaced with a system in which states contracted with mercenary commanders, condottiera, who then recruited the number of mercenaries required by the contract.[60] The condottiera who fought for a city-state did so with no loyalty, outside the contractual obligation, to that state.[61] Indeed, the condottiera focused not only on fighting their enemies, but also in attempting to take prisoners to gain money from ransom.[62]

Despite the prevalence of the condottiera system in Italy, free companies continued to be an important sector of the mercenary economy throughout Europe. Although mercenary companies came from many countries throughout Europe, Switzerland became a major supplier of mercenary companies during the 17th and 18th centuries.[63] The widespread employment of Swiss mercenary companies led one historian to refer to Switzerland as a "nation of mercenaries."[64] German mercenaries were also employed extensively throughout the period, participating in numerous conflicts including the American Revolution.[65]

While the 17th and 18th Century had seen extensive use of mercenaries in Europe, the 19th Century saw a sharp decline in mercenary activity, especially in warfare within Europe.[66] During the 19th Century, the consolidation of power in centralized national governments led these governments to increasingly rely on standing armies, comprised mostly of citizens of their state.[67] At the same time as the nation state concentrated power and increasingly relied on standing armies of citizen soldiers, the rise of Nationalism caused Nation states to increasingly view foreign mercenaries as unreliable with questionable loyalty.[68] The use of mercenaries continued to decline during this period, and they were mainly employed by European nations in their colonies.

The trend toward the elimination of mercenaries from European militaries carried on from the middle of the 19th century until the mid 20th Century. Throughout this period, mercenaries were not commonly used, except to a limited extent in colonial areas. However, following the end of the Second World War mercenary activity surged. This surge in activity was especially strong in Africa where rapid decolonization left many African governments vulnerable to insurgents who were quick

---

[60] *Id.* at 44.
[61] MOCKLER, *supra* note 59, at 45.
[62] *See id.* at 50.
[63] *Id.* at 74.
[64] *See id.* at 74-104.
[65] British forces employed German mercenaries, most famously Hessians, against American forces. *See* MOCKLER at 128-29.
[66] SINGER, *supra* note 43, at 29-30.
[67] *Id.*
[68] *Id.* at 31.

to employ skilled mercenaries. One of the most notorious examples of mercenary involvement occurred in the Congo. Only a short time after declaring independence from Belgium, the resource rich province Katanga attempted to secede from Congo.[69] This secessionist movement was supported by roughly 200 foreign mercenaries, mostly Belgian and South Africans.[70] The insurgency was put down by a combined force of Congolese and United Nations (UN) troops, but the mercenaries gained notoriety battling the UN and Congolese forces because, despite the defeat, they had demonstrated their skill and usefulness.[71]

The majority of mercenaries in the cold war period were individuals or loosely organized bands of mercenaries who fought in civil wars or localized conflicts.[72] Some of these individuals rose to great notoriety, such as Bob Denard. Denard, a former French Marine, participated in numerous coup attempts: in the Congo in 1967,[73] Benin in 1977,[74] two consecutive coup attempts in the Comoro Islands in 1978,[75] and again in the Comoro Islands in 1989 and 1995 when he was arrested by French forces.[76] Other mercenaries also gained notoriety due not only to their involvement in undermining sovereign governments, but also for their involvement in atrocities and humanitarian crimes. One such mercenary was Costas Giorgiou who called himself "Callan."[77] Callan gained notoriety fighting in Angola where he was eventually tried and executed for his activities.[78] Callan possessed a notorious habit of executing individuals of his mercenary unit and of the forces of his employers for perceived incompetence or disloyalty.[79] Callan and other mercenaries like him embodied some of the most negative elements of the mercenary trade. The pervasive use of violence, lack of compliance with humanitarian laws, disloyalty, and disorganization of mercenaries during this period increased an already negative public perception of mercenaries and their activities.

---

[69] GUY ARNOLD, MERCENARIES: SCOURGE OF THE THIRD WORLD 1 (1999).
[70] MERCENARIES: AN AFRICAN SECURITY DILEMMA 35 (Abdel-Fatau Musah and J. Kayode Fayemi eds., 2000) [hereinafter MERCENARIES].
[71] *See* MOCKLER, *supra* note 59, at 194-95.
[72] Kevin A. O'Brien, *Private Military Companies and African Security 1990-98*, MERCENARIES: AN AFRICAN SECURITY DILEMMA 43, 46 (Abdel-Fatau Musah and J. Kayode Fayemi eds., 2000).
[73] MERCENARIES, *supra* note 70, at 266.
[74] *Id.*
[75] ARNOLD, *supra* note 69, at 67-68.
[76] Khareen Pech, *The Hand of War: Mercenaries in the Former Zaire 1996-97*, MERCENARIES: AN AFRICAN SECURITY DILEMMA 117, 134 (Abdel-Fatau Musah and J. Kayode Fayemi eds., 2000).
[77] PETER TICKLER, THE MODERN MERCENARY 64 (1987).
[78] *Id.* at 94-96.
[79] *Id.* at 75, 85-86.

The activity of Mercenaries in the cold war era was, at the time, increasingly viewed as a remnant of colonial rule. This perception, likely correct, was based on several factors. One factor was the fact that most of the mercenaries involved in the trade were Europeans. Another major factor in this perception was the extensive use of mercenaries by racist regimes such as the government in Rhodesia.[80] Finally, many suspicions, often correct, arose that the insurgencies supported by mercenaries were funded or encouraged by European nations or racist African governments.

The perception of mercenary activity, especially in Africa, as a holdover of colonial rule combined with the continued threat which mercenary activity posed to the security of African nations, led the UN and the Organization of African Unity (OAU) to take steps in an attempt to limit mercenary activity. The OAU issued several resolutions against the mercenary trade, and in 1977 adopted the Convention for the Elimination of Mercenarism in Africa.[81] The UN General Assembly passed several resolutions in an attempt to curb mercenary activity. However, these resolutions were limited in their scope, addressing only the use of mercenaries against national liberation movements, struggles against racist regimes, and in ways that would violate principles of neutrality.[82] The UN Security Council also passed several resolutions

---

[80] MERCENARIES, *supra* note 70, at 266.

[81] The Convention was designed to make mercenarism a crime for both individuals and for the states or entities that hire, organize, train, assist, or shelter mercenaries with the aim of "opposing by armed violence a process of self determination, stability or the territorial integrity of another State." The Convention requires states to refrain from allowing or utilizing mercenaries for the aforementioned purpose and also calls on them to make mercenarism a criminal offense and aid in the extradition of mercenaries to other countries for trial. The Convention's definition of mercenaries is nearly identical to the definition found in Article 47 of Additional Protocol I, Protocol Additional to the Geneva Convention of 12 August 1949, and Relation to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 47, 1125 U.N.T.S. 3. [hereinafter Additional Protocol I]. *See* Convention for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/817 (XXIX), Annex II (3d rev. 1977) *reprinted in* THE LAWS OF ARMED CONFLICTS, 1237 (Dietrich Schindler ed.).

[82] *See* Milliard, *supra* note 42, at 7-8. General Assembly Resolution 2645 is limited to, "[t]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act." *Id.* at 7. General Assembly Resolution 2625 states "Every State has the duty to refraining from organizing or encouraging the organization of irregular forces of armed bands, including mercenaries, for incursion into the territory of another State." a*vailable at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement. General Assembly Resolution 3103 states that "[t]he use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination and racist regimes is considered to be a criminal act and the mercenaries should accordingly be punished as criminals," a*vailable at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/281/75/IMG/NR028175.pdf?OpenElement. *See also* General Assembly Resolution 2548 (reiterating the language of General Assembly Resolution 2465), *available at*

condemning mercenary activities in specific conflicts and more generally condemning the tolerance of mercenaries who are attempting to undermine the sovereignty of another state.[83] In addition to resolutions passed by the General Assembly and Security Counsel, the UN also responded by drafting and promulgating the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries.[84] Although the convention was adopted by General Assembly Resolution 44/34 in 1989, it only entered into force in 2001 because, until that point, it had lacked the 22 ratifications necessary for it to come into effect.[85] Finally, the international community took some steps against mercenaries during the drafting of the Additional Protocol I, when the drafters created an article which specifically denied mercenaries the right to be combatants or to be given prisoner of war status.[86]

These responses by the UN were timid at best, and are illustrative of the international community's lack of consensus on forming norms against the employment of mercenaries. Instead of reflecting a norm against the employment of mercenaries, these resolutions were mostly focused on reinforcing existing norms against state aggression. They were primarily focused on condemning states who allow mercenaries to use their territory to further operations against other states because these actions constituted, at a minimum, tacit support of an attack on that nation and hence a potential act of aggression.

---

http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/256/82/IMG/NR025682.pdf ?OpenElement; General Assembly Resolution 2708 (reiterating language substantially similar to that of GA Resolution 2465), *available at* http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/349/73/IMG/NR034973.pdf ?OpenElement.

[83] S. C. Res. 226 (urging Portugal to not allow mercenaries to use Angola as a base of Operations in the Democratic Republic of Congo [hereinafter DRC]), *reprinted in* Dusan Djonovich, UNITED NATIONS RESOLUTION, VOL. VI, 21 [hereinafter Djonovich]; S.C. Res. 239 ("Condemns any State which persists in permitting . . . the recruitment of mercenaries . . . with the objective of overthrowing the governments of States Members of the United Nations." The resolution also calls on states to ensure that mercenaries do not use their territory to plan such actions.), *reprinted in* Djonovich at 47; S. C. Res. 241 (condemning Portugal for allowing mercenaries to use Angola as a staging ground for attacks on the DRC and calls upon all countries receiving mercenaries from DRC to prevent them from renewing their attacks on the DRC.), *reprinted in* Djonovich at 48; S.C. Res. 289 (demanding the withdrawal of all mercenaries and other forces used in the armed attack on the Republic of Guinea), *reprinted in* Djonovich at Vol. VII, 61; S.C. Res. 405 (renewing calls on states to not tolerate recruitment or training of mercenaries for the purpose of overthrowing government and further calling on governments consider taking necessary measures to prohibit the training or transit of mercenaries through domestic law), *reprinted in* Djonovich at Vol. X, 54.

[84] *Reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 81, at 1243-50.

[85] Milliard, *supra* note 42, at 19.

[86] Additional Protocol I, art. 47.

The international community's lack of consensus for forming a new norm against mercenaries and their resulting reluctance to go beyond a reinforcement of existing norms against aggression can be seen in the voting patterns of General Assembly motions on restricting mercenaries. General Assembly Resolution 2625, which was limited to condemning use of mercenaries in a way which violated norms of neutrality and state sovereignty, passed by consensus vote[87] whereas GA RES 2465 which more generally condemned the use of mercenaries against national liberation and independence movements received only fifty-three votes in favor, eight votes against, and forty three abstentions.[88] Such lukewarm support for regulation is echoed in the dichotomy between the General Assembly Resolutions and Security Counsel Resolutions. These Security Counsel Resolutions were much less restricting than their counterparts in the General Assembly. Where the international community was willing to take a stance against mercenaries, in the Additional Protocol I, that position focused the restrictions on individual mercenaries while allowing states to continue to employ these mercenaries without breaching international agreements and without incurring liability. Thus, despite the rise in notoriety of mercenaries throughout the Cold War era, the international community did not take concrete action to limit mercenary activities in any significant way, leaving open the possibility for the development the PMF industry.

Although the Cold War era mercenary economy was dominated by individual mercenaries and loosely organized mercenary units, this period saw the emergence of the first modern PMFs. One of the first and most famous of these PMFs was WatchGuard International, a company formed by Colonel Sir David Sterling, which recruited heavily from former British SAS members and which was formed to train the military forces of Persian Gulf States.[89] Like WatchGuard, most of the PMFs during this period were based in Britain and had the majority of their contracts for operations in the Middle East.[90] These companies represented a small part of the mercenary industry during the cold war. However, following the end of the cold war, PMFs increasingly became a large and prominent sector in the mercenary trade.

Following the end of the cold war, the number of PMFs increased and at the same time these PMFs became increasingly prominent in international affairs. The rise in the number and

---

[87] Milliard, *supra* note 42, at 7.
[88] *Id.* at 8. Although General Assembly Resolution 3103 would later receive more votes (83 for, 13 against, 19 abstaining) then General Assembly Resolution 2465, Resolution 3103 was less specific then Resolution 2465, only dealing with colonial and racist regimes, not with all independence movements as Resolution 2465 had done.
[89] O'Brien, *supra* note 72, at 46.
[90] *Id.*

prominence of PMFs can be attributed to changes in both supply and demand for military skills, equipment, and personnel. The end of the Cold War, and the rapid disarmament that followed, led to a massive expansion of the available supply of military personnel with skills and knowledge that were in demand.[91] As the end of the Cold War increased the supply of available manpower and knowledge, the retreat of the superpowers from the third-world also created an increase in demand for these same services. Client states, who previously had relied on the super powers to supply them with military training and personnel, now had to look to the private sector to fulfill these needs.[92] This increased demand was not only felt in third world client states, but also to some extent in the U.S. and other western nations whose rapidly downsized militaries increasingly needed to rely on private corporations to supply them with certain services.[93] This simultaneous increase in both supply and demand led to rapid growth of PMFs.

One of the first of the PMFs to gain major international attention was the South African firm Executive Outcomes (EO). EO was founded in 1989, and was primarily made up of soldiers who formerly fought for the South African Defense Force (SADF).[94] EO's first major operation was in Angola in 1993. EO was hired by the Angolan government to aid them in a civil war. EO's activities included supply of materials and training, and it is suspected they also became involved in several battles.[95] EO introduced night fighting and several other advanced tactics to the Angolan forces and were also able to supply government forces with helicopters and jet aircraft.[96] With EO's assistance, the Angolan government was able to conclude a favorable peace agreement with rebel forces in 1994.[97] Many observers believe that, although EO's presence was small, their aid was a critical element in the Angolan government's victory.[98] EO continued to be involved in operations throughout the 1990's. EO is just one of many of the new PMFs that were created following the end of the cold war.

Modern PMFs like EO have differentiated themselves from the mercenaries of the past in many ways that make them more acceptable to governments and the public. Unlike the individual mercenaries that dominated the cold war era, these post-cold war PMFs are highly organized, regularly registered corporations.[99] Another major difference between the Cold War-era mercenaries and the modern PMFs is their

---

[91] BRITISH GREEN PAPER, *supra* note 42, at 12.
[92] *Id.* at 13.
[93] *Id.* at 12-13.
[94] SINGER, *supra* note 43, at 103.
[95] BRITISH GREEN PAPER, *supra* note 42, at 11.
[96] SINGER, *supra* note 43, at 106.
[97] BRITISH GREEN PAPER, *supra* note 42, at 11.
[98] *Id.*
[99] SINGER, *supra* note 43, at 8-9.

clientele. While previous mercenaries had been undiscerning about their employers, working for both insurgents and governments, many modern PMFs have self imposed policies which allow them only to work for legitimate governments.[100] In addition to self imposed limitations on their clientele, many modern PMFs also limit the activities for which they are employed. Many PMFs provide military training and classroom instruction only, and do not become directly involved in fighting. These differences between PMFs and mercenaries of the past have allowed PMFs to largely avoid the negative public opinion which previously had attached to mercenaries and to operate with the tacit approval of the governments in their home countries.

This acceptability has opened the door for PMFs to become an increasingly utilized tool by both developing nations, who traditionally employed mercenaries throughout the cold war years, and western states like the United States. Within this context, the advent of the war in Iraq brought about a massive influx of civilian contractors into the zone of conflict to facilitate reconstruction. These contractors need security, and, to fill this need, PMFs are increasingly being called on to protect these individuals and fulfill numerous other roles.

IV. PMFS IN IRAQ

PMFs in Iraq fulfill a myriad of roles, from guarding dignitaries to training Iraqi military and police forces.[101] Some of these PMF personnel are not armed, and thus will not be considered under this analysis. Those that are armed are primarily employed as guards, and they are sometimes referred to as military providers.[102] These PMF personnel are primarily involved in guarding three types of resources: fixed facilities, individuals, and convoys.[103] Amongst their most prominent duties, PMF personnel were responsible for guarding Paul Bremer, the head of the Coalition Provisional Authority.[104] After the handover of sovereignty, PMFs continued the high profile role as bodyguards for State Department officials in Iraq.[105]

Although PMFs are primarily employed as guards, they have little resemblance to the private security guards that are common in the United States. Instead, PMFs in Iraq operate and are equipped much like military units. PMFs in Iraq use sophisticated military

---

[100] Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J INT'L L. 75, 92 (1998).
[101] Singer, *supra* note 1.
[102] *Id.*
[103] *Id.*
[104] Barstow, *supra* note 2, at A1.
[105] Broder, *supra* note 22.

equipment[106]. Some even employ armored vehicles and helicopters in support of their operations.[107] PMFs are not only equipped like military units, but have also use sophisticated military tactics and organizational tools to conduct their operations. One example of this is that some PMFs have developed their own "quick reaction forces" to reinforce defensive positions in case of attack.[108] Another is the presence in some PMFs of intelligence units who gather and disseminate daily intelligence reports on possible threats.[109]

Not only are PMFs in Iraq equipped and operating like military units, but they are also staffed mainly by former members of the military. Many of the personnel who fill the ranks of PMFs in Iraq, especially the most elite of those PMFs, are former members of special forces units.[110] These highly skilled individuals are able to employ the equipment and tactics provided by PMFs to maximize their potential. However, because of their qualifications and the risks that PMF personnel are exposed to, the pay for many of these individuals is significantly higher than in the regular military.[111] Some individuals make up to ten times what they would have made in their former military positions.[112] For example, former members of British and American special forces units have been known to make up to $1000 a day in Iraq.[113] While the most elite PMFs in Iraq are highly paid, the pay which they receive depends on the level of skill which the individual possesses. Thus while a former member of the Navy Seals or SAS might earn $1000 a day, an Indian Ghurka will earn closer to $1000 a month.[114]

Performing their roles as guards in Iraq, PMFs inevitably come into conflict with insurgents and the remnants of Saddam's regime. These engagements raise serious questions about the status of PMFs under the laws of war, especially about their status as legal or illegal combatants. Keeping in mind the historical background of these PMFs and the international legal framework that arose out of this background, it is important to examine the Geneva Convention status of those PMF personnel operating in Iraq.

---

[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *See* Singer, *supra* note 1.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*

V. PMFS UNDER THE GENEVA CONVENTIONS

The Geneva Conventions draw a sharp distinction between combatants and non-combatants and between military personnel and civilians. This sharp distinction creates a framework in which PMF personnel are not easily classified. Although the Conventions do contain some recognition of the possible presence of personnel employed by private companies being present on the battlefield, they give this class of individuals little consideration.[115] Thus any consideration of the status of these PMF personnel under the convention requires an analysis of the different provisions under which these personnel might fall.

The consequences of the PMFs status are critical, not only for the PMF personnel themselves, but also for the government employing them. If PMFs cannot qualify under any of the categories of legal combatants, their activities may force them into the status of being illegal combatants. As illegal combatants PMFs, if captured, could be tried as criminals for their activities. Further, if PMF personnel were not considered civilians accompanying the armed forces, they would not qualify for prisoner of war status. Also, if PMFs are considered illegal combatants they could be lawfully targeted by enemy forces. Finally, the consequences of their illegal combatant status could also raise issues for the United States who may be responsible for the PMFs' illegal activities, including the actions which led them to be considered illegal combatants.

A. Article 4(A)(2)

Article 4(A) of the Geneva Convention enumerates six categories of individuals who should be treated as prisoners of war if they are captured. These categories lay the basic framework for the convention, providing both a list of categories protected and definitions for determining who falls into these categories. While all of the classifications under 4(A) receive prisoner of war status if they are captured, not all are combatants. The provision grants prisoner of war status to civilians accompanying the armed forces, which include civilian members of air crews, war correspondents, supply contractors, and other accompanying individuals.[116] It also grants the same protection to merchant marines and crews of civil aircraft.[117]

The other four categories enumerated in 4(A) are combatants. These include members of the armed forces,[118] members of militias or

[115] *See* Geneva Convention, art. 4(A)(4).
[116] Geneva Convention, art. 4A(4).
[117] Geneva Convention, art. 4A(5).
[118] Geneva Convention, art. 4A(1).

volunteer corps,[119] members of armed forces who profess allegiance to a government not recognized by the detaining party,[120] and inhabitants who spontaneously take up arms against invaders.[121] Comparing these four categories to PMF personnel, it is clear that they could only conceivably qualify under one category: Article 4(A)(2), members of militias or volunteer corps.

The armed PMF personnel in Iraq might be considered "militias and members of other volunteer corps" under Article 4(A)(2) of the Geneva Convention. Under this provision, if PMF personnel met the four sub-conditions of the article, they would qualify as legal combatants and be given prisoner of war status if captured. Whether or not PMFs can meet these sub-conditions, or can even be considered under Article 4(A)(2) will depend heavily on their individual contracts and policies.[122] While PMF personnel treatment under the convention will vary depending on the practices of these individuals and the PMFs they work for, generally these personnel will not qualify as combatants or qualify for prisoner of war status under Article 4(A)(2).

Article 4(A)(2) covers members of militias and volunteer corps, including organized resistance movements, other than those that are effectively part of the armed forces of a state.[123] Neither the Convention nor the Commentary defines what constitutes either a "militia" or a "volunteer corps."[124] While this lack of definition might be problematic for any argument that PMFs fall into either of these categories, it contains no clear bar to them being considered as such.

Though the Convention and Commentary give no definition for what constitutes a militia or volunteer corps, the Commentary suggests two requirements which militias or volunteer corps must meet to qualify under Article 4(A)(2). The first is that the group must be independent of the regular armed forces,[125] and the second is that the group must be fighting on behalf of a party to the conflict.[126]

---

[119] Geneva Convention, art. 4A(2).
[120] Geneva Convention, art. 4A(3).
[121] Geneva Convention, art. 4A(6).
[122] The extent to which these criteria apply to individual members of a group, or to the group as a whole, has been debated by scholars. However, addressing the issues involved in this debate exceeds the scope of this article's inquiry.
[123] *See* Geneva Convention, arts. 4(A)(1), 4(A)(2).
[124] *See* Geneva Convention, art. 4(A)(2); COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 52-59 (Jean S. Pictet et al. eds., 1960) [hereinafter COMMENTARY].
[125] The requirement that the group be independent from the armed forces is derived both from language in the article itself and from the Commentary. Article 4(A)(2) refers to "other militias" and "other volunteer corps" in an attempt to contrast these militias and volunteer corps from those that would fall under 4(A)(1)("militias or volunteer corps forming part of such armed forces."). This requirement is also derived from the Commentary, which indicates that the Convention's language was to match the language of the 1907 Hague Regulations "which made a distinction between militias and

For a militia or volunteer corps to be considered under 4(A)(2), it must be independent from the armed forces of the party on whose behalf it fights. The degree of independence required is not expressly enumerated in either the Convention or the Commentary. Instead, it appears that the independence requirement simply distinguishes between militias and volunteer groups that would be considered as part of the armed forces under 4(A)(1) and those which are not part of the armed forces. It is likely that PMFs in Iraq would be considered independent from the armed forces. The PMFs operating in Iraq differ in important ways from militias or volunteer corps that might be considered part of the armed forces. These PMFs are separate and distinct entities from the armed forces, and have no affiliation, aside from a contract employing them for a specific operation or service, with the government of any State. Unlike a militia or volunteer group which would be formed under the State's power and legitimacy, PMFs are, with the exception of their employment contract, entirely independent of the state.[127] Further, many of the PMFs in Iraq today do not even have contracts with the government but instead are sub-contractors to other companies who have contracts with the government or who are themselves sub-contractors of another contractor.[128] This double and, in some cases, triple layer of private companies between the PMF and the government minimizes any direct ties that the PMFs have to the government and increases their independence.

Although these factors suggest that PMFs possess the requisite degree of independence to qualify as militias or volunteer corps under

---

volunteer corps forming part of the army and those which are independent." COMMENTARY, *supra* note 124, at 57.

[126] This limitation is derived from the Commentary which explicitly requires the groups to be fighting on behalf of a party. The Commentary makes clear that this requirement arises from the need of the group, militia or volunteer corps, to fulfill the implementing requirements of Article 2. *Id.*

[127] Several recent efforts have been made to increase the control of the United States over contractors operating in Iraq, including proposals to amend the National Defense Authorization Act. One of these efforts was memorialized in a Memorandum of Agreement between the Department of Defense and the Department of State. The agreement calls for standardized training, oversight, and standards for PMFs operating in Iraq. While these changes may affect the degree of independence that PMFs have from the government, it is unlikely that they will cause PMFs to be disqualified as militias or volunteer corps under 4(A)(2). Even with these proposed changes the fundamental relationship between the government and PMFs remains contractual, and therefore PMFs will retain a much higher degree of independence then elements of the state's military forces or state controlled militias. *See* Memorandum of Agreement (MOA) Between the Department of Defense and the Department of State on USG Private Security Contractors, Annex A (Dec. 5, 2007) (on file with author).

[128] Many PMFs are employed either by companies who have contracted with the USAID directly to deliver services or a subcontractor who is contracted to USAID. Further, some of the contracts with USAID are actually engaged in by a private company created by USAID to create and administer contracts. *See* Barstow, *supra* note 2, at A1.

Article 4(A)(2), their ability to meet this requirement has been questioned. In his article, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, Michael N. Schmitt looks generally at the place of armed contractors under humanitarian law, while using the situation in Iraq as a lens to focus this analysis.[129] Schmitt concludes that PMFs would not be able to qualify under Article 4(A)(2), largely because they are not sufficiently independent from the armed forces.[130] Evaluating Schmitt's interpretation of this requirement requires an in-depth look at the sources of the requirement.

The requirement that militias and volunteer corps under Article 4(A)(2) be independent from armed forces under Article 4(A)(1), is found in the Commentary,[131] and it is also suggested by the distinction between militias and volunteer corps that are part of the armed forces included under Article 4(A)(1) and other militias and volunteer corps which fall under 4(A)(2).[132] Schmitt states that "Many contractors and subcontractors would run afoul of this provision in that they provide services specified by the armed forces; thus, they are not meaningfully independent."[133] Although he recognizes that independence of the contractor increases as one moves from contractor to subcontractor, he concludes that it is improbable that the contractor would be considered to be sufficiently independent. Thus, it appears Schmitt bases his conclusion on contractor independence on the idea that the contractors are (1) affiliated and controlled by the armed forces of the party to such an extent they are not meaningfully independent[134] and (2) that they are financially dependent on the armed forces.[135]

This analysis of the independence of contractors in Iraq overstates the degree of independence necessary to qualify under Article 4(A)(2). The requirement that a volunteer corps or militia be independent from the armed forces of a party to the conflict is derived from two sources. The first source of this distinction is an inference based on the differentiation between militias and volunteer groups under

---

[129] Michael N. Schmitt, *Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005).

[130] Schmitt, *supra* note 129, at 531 ("Taken together, the aforementioned criteria make it highly unlikely that private contractors could qualify for Article 4(A)(2) combatant status…private contractors, by contrast, are typically dependent on the armed forces, if only for fiscal survival.").

[131] *See* COMMENTARY, *supra* note 124, at 57.

[132] *See* Geneva Convention, art. 4(A)(1) ("Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."). *Cf.* Geneva Convention, art. 4(A)(2) ("members of other militias and members of other volunteer corps").

[133] Schmitt, *supra* note 129, at 529.

[134] *See id.*

[135] *See id.* at 531.

4(A)(1), who are part of the armed forces, and those which fall under 4(A)(2) described by the convention simply as "other" militias and volunteer corps. The second source is the language of the Commentary, which in several places refers to the volunteer corps and militias under 4(A)(2) as independent from the armed forces of a party to the conflict.[136] However, neither the Convention nor the Commentary enumerates the degree of independence necessary for a group to qualify under 4(A)(2). Indeed, though the Commentary mentions in its discussion that the volunteer groups under this provision would be independent, it never addresses such independence as a separate requirement for qualification under 4(A)(2).[137] Instead, it appears that the authors of the Commentary simply assumed that independence would exist in any group which might qualify under 4(A)(2).[138] This suggests that independence is not itself a requirement intended to bar groups from falling under 4(A)(2), but simply the condition for which groups would be considered under 4(A)(2) rather than as part of the armed forces under 4(A)(1). This reading is supported by the Commentary's assertion that the inclusion of article 4(A)(2) was intended to revert back to the definition used in the Hague Convention.[139] The definition included in the Hague Convention fails to include any requirement of independence when defining qualified belligerents but instead simply discusses armed forces and militias and volunteer corps who meet certain requirements.[140] Based on this reading of the Commentary and the Convention, it is unlikely that the authors of the Convention and the Commentary intended to use the independence requirement to exclude groups from being considered under 4(A)(2) except to the extent that they qualify under Article 4(A)(1) as being part of the armed forces.

This reading of the independence requirement under 4(A)(2) appears to directly conflict with that applied by Schmitt. Schmitt seems to construe the independence requirement as having two jointly necessary elements: autonomy of action and ability to exist separately. While these elements might be part of the meaning commonly

---

[136] *See* COMMENTARY, *supra* note 124, at 56-59.
[137] *Id.*
[138] *Id.* at 57. "[T]he delegates to the 1949 Conference reverted…to the principle stated in Article 1 of the 1907 Hague Regulations, which made a distinction between militias and volunteer corps forming part of the army and those which are independent." *Id.* "[T]he stipulation that organized resistance movements and members of other militias and members of other volunteer corps which are independent of the regular armed forces must belong to a Party to the conflict." *Id.*
[139] *Id.* at 57.
[140] Convention Respecting the Laws and Customs of War on Land, annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), art. 1 states "The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions."

associated with the word independence, they have no basis as requirements in the Commentary or the Convention. Instead, they appear to be attempts by Schmitt to elaborate the independence requirement which is only implied in the language of the Convention and briefly mentioned by the Commentary. However, as the above reading suggests, such an attempt at elaboration likely expands the degree of independence considerably beyond the scope of what was intended by the authors of the Convention and the Commentary.

Schmitt's construction of the 4(A)(1) and 4(A)(2) is problematic not only because it appears to expand the degree of independence beyond what was intended by the authors of the Convention, but also because it would have the absurd effect of creating three categories of individuals: (1) those who are part of the armed forces under 4A(1); (2) those who are independent and meet the requirements of 4(A)(2)(a-d); and (3) those who meet the requirements of 4(A)(2)(a-d), but lack sufficient independence and therefore do not qualify under 4(A)(2). Those who fell in the third category would be placed there not because they had violated some norm of international law, but instead because they were organizationally separate from the armed forces of a nation but not independent enough to be classified under 4(A)(2). It is unlikely that such an arbitrary distinction was intended by the Convention, especially where the distinction carries such critical consequences. The absence of a normative value which could explain the distinction indicates that this construction of the rule would not create an incentive structure rationally related to the ends which the Convention seeks to accomplish.

The shortcomings which arise out of Schmitt's construction, which creates three categories, make it unlikely that this is the correct interpretation of the Convention. Instead, a reading which created only two categories would not create an arbitrary distinction and would not disincentivize behavior which does not violate any norms of international law. If one interprets the independence requirement as merely the line of demarcation between those militias and volunteer corps which are part of the armed forces under 4(A)(1) and those that are not under 4(A)(2) instead of as a separate requirement, then this would create such a system of dual categories. Because this reading not only solves the problems created by Schmitt's construction, which creates a tri-partite system, but also because it conforms more closely to the intentions of the authors of the Convention as expressed in the Commentary, this interpretation of the 4(A)(2)'s independence requirement should be controlling. Under this interpretation, PMFs operating in Iraq would meet the first requirement for qualifying under Article 4(A)(2).

In addition to being independent from the armed forces, PMFs must also be fighting on behalf of a party to the conflict to qualify under

Article 4(A)(2).[141] For this requirement to be met the militia or volunteer corps need only have a "tacit agreement" with the party on whose behalf they are fighting.[142] This requires nothing more than that the operations of the militia or volunteer corps make it evident which side the group is fighting for.[143] The majority of PMFs operating in Iraq easily meet this requirement. Their operations are almost exclusively geared towards the protection of infrastructure, individuals, or some other objective from the insurgent forces. Thus, the PMFs are clearly operating to the detriment of the insurgents and for the benefit of Coalition forces. This tacit agreement is also coupled with an explicit agreement in the form of the employment contracts for the PMFs. These contracts, even if filtered through several layers of other private actors, show that the PMFs are working toward the same strategic objectives as the Coalition.

Although it is not entirely clear if PMFs could properly be considered either militias or volunteer corps, if they do qualify as either of these groups then the majority of the PMFs operating in Iraq would also meet the two additional Article 4(A)(2) requirements: that they be independent from the armed forces and that they fight on behalf of a party to the conflict. Having met these requirements the PMF personnel operating in Iraq would then be considered legal combatants and qualify for prisoner of war status so long as they also met the four requirements enumerated under Article 4(A)(2)(a)-(d). The failure of these personnel to meet any of these requirements would cause them to forfeit their combatant status and to possibly not qualify as prisoners of war.[144]

1. *Article 4(A)(2)(a)—That of Being Commanded by a Person Responsible for His Subordinates*

The Commentary elaborates this requirement saying that although the commander need not be a military officer, the commander's competence "must be considered in the same way as that of a military commander."[145] The commander must be someone who is responsible for the actions of his subordinates, both those he directed and those taken without orders or against his orders.[146] PMFs arguably meet this requirement because they have structures similar to military organizations, and as an employer the PMFs are responsible for the actions of their employees. However, the nature of the relationship

[141] COMMENTARY, *supra* note 124, at 57.
[142] *Id.*
[143] *Id.*
[144] Individuals who fail to meet this criteria could still receive POW status under Article 4(A)(4).
[145] COMMENTARY, *supra* note 124, at 59.
[146] *Id.*

between the PMF and its personnel—employer/employee—may be problematic in that it does not create the same authority of command that a military commander has. Unlike a subordinate in a military organization, the employee of a PMF is only bound to his employer through contract. Thus the PMF employee, unlike a soldier, is capable of ending the employment relationship with little to no consequence.[147] Further, the ability of the PMF to regulate the activity and behavior of an employee is far less than that associated with a military organization that typically can use criminal sanctions to ensure subordinates comply with its directives. Despite these problems, the PMFs would still likely fulfill this requirement because the focus of this condition is on the responsibility of the commander for his subordinate's actions rather than a concentration on his ability to control the actions of his subordinates.[148]

2. *Article 4(A)(2)(b)—That of Having a Fixed Distinctive Sign Recognizable at a Distance*

The Commentary makes it clear that the distinctive sign could be as little as an armband, cap, or shirt so long as it is the same for all members of the organization and is limited to use in that organization.[149] Despite the ease with which this requirement might be met, it is likely that many PMFs in Iraq fail to fulfill this requirement. Compliance with this condition clearly would differ depending on the policies of individual PMFs. However, information regarding PMFs in Iraq indicates that PMF personnel wear a hodge-podge of different types of clothing, and although some do wear military type uniforms or clothing, many of them wear civilian clothing.[150] Even those that do wear military uniforms or clothing would have to do so in a sufficiently standardized way so as to distinguish themselves as a coherent group separate from the military forces of the coalition governments, including the U.S. While meeting this condition will vary depending on which PMF the individual works for, it is likely that many PMF personnel will fail to fulfill this condition.

3. *Article 4(A)(2)(c)—That of Carrying Arms Openly*

This condition requires that the enemy be able to recognize the members of the militia or volunteer corps as combatants rather than

---

[147] *See* P.W. Singer, *Outsourcing War*, FOREIGN AFF. Vol. 84 No. 2, 124 (2005).
[148] *See* Geneva Convention, art. 4(A)(2)(A); *cf.* COMMENTARY, *supra* note 124, at 59.
[149] COMMENTARY, *supra* note 124, at 60.
[150] *See* British American Security Information Council, *A Fistful of Contractor: The case for a Pragmatic Assessment of Private Military Companies in Iraq* at 45, *available at* http://www.basicint.org/pubs/Research/2004PMC.pdf [hereinafter Contractor Assessment].

prescribing any particular method of carrying firearms.[151] Most PMFs operating in Iraq would meet this requirement as they regularly carry arms openly.[152] While most PMFs carry arms openly, and thus would meet this criteria, if some contractors did not carry arms openly they would fail to qualify as combatants under 4(A)(2).

4. *Article 4(A)(2)(d)—That of Conducting Their Operations in Accordance with the Laws and Customs of War*

This fourth and final condition is extremely broad, attempting to capture a wide range of requirements that the militia or volunteer corps must meet. These include a number of obligations that arise from customary law and from other international agreements.[153] Although it is likely that PMFs fulfill most of the requirements under 4(A)(2)(d), it is difficult to discern if they entirely fulfill this condition. Meeting the requirements would depend on the behavior and policies of the PMF and its personnel. Most of the requirements, which include giving quarter to enemy soldiers, only targeting combatants, and conforming attacks with principles of proportionality, would likely be met by the PMFs so long as their rules of engagement were not flagrantly illegal and so long as their personnel act with restraint. PMFs may also fail to meet these requirements because of other policies and practices which they observe. Article 4(A)(2)(d) requires that PMFs "conform to international agreements such as those which prohibit the use of certain weapons."[154] PMFs would be in violation of this provision if their personnel make use of any bullets that do not have a full metal jacket, such as "hollow point" bullets.[155]

5. *Summary—Article 4(A)(2)*

Most PMFs personnel in Iraq would likely not under fit the classification of a volunteer or militia as defined by 4(A)(2). While qualifying as a volunteer corps or militia may prove problematic, Article

---

[151] COMMENTARY, *supra* note 124, at 61.
[152] *See* Contractor Assessment, *supra* note 150, at 45.
[153] These requirements include conformity with international agreements which prohibit the use of certain weapons, applying principles of proportionality, distinguishing between combatants and non combatants, and generally conforming with a broad range of principles considered customary law. *See* COMMENTARY, *supra* note 124, 61.
[154] COMMENTARY, *supra* note 124, at 61.
[155] *See* Declaration on the Use of Bullets Which Expand or Flatten Easily in the Human Body (Jul. 29, 1899), *available at* http://www.yale.edu/lawweb/avalon/lawofwar/dec99-03.htm. *See also* Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations, No. IV, Annex Section II, Chapter I, art. 23(e), *reprinted in* LORI FISLER DAMROSCH, ET. AL., BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW (2001).

4(A)(2) contains no explicit definition preventing PMFs from being considered as one of these groups. However, even if PMFs were to be considered "militias" or "volunteer corps" under 4(A)(2), it is clear that many of the PMFs operating in Iraq would fail to meet the requirement that they wear a distinctive symbol as laid out in 4(A)(2)(b). This defect, however, would easily be curable. The requirement of a 4(A)(2)(a), that the unit be commanded by a person responsible for his subordinates, may prove problematic for the PMFs, but would likely be met. Thus, although the status of PMF personnel under the Article 4(A)(2) is questionable due to both their command structure and the difficulties in construing them as a "volunteer corps" or a "militia," the primary obstacle for PMFs being considered a "militia or volunteer corps" under 4(A)(2) is their failure to wear a distinctive emblem or symbol to differentiate themselves from the civilian population.

B. Article 4(A)(4)

If PMF personnel do not qualify as volunteers or members of militias under Article 4(A)(2) they may nonetheless qualify as civilian's accompanying the armed forces under Article 4(A)(4). Although this category of individuals are not combatants, and thus may not legally directly participate in hostilities, they are afforded prisoner of war status if captured by the enemy. Thus, if PMFs qualify as civilians accompanying the armed forces they would be entitled to POW status but would not receive combatant immunity and could therefore be held criminally liable for directly participating in hostilities. Article 4(A)(4) defines civilian's accompanying the armed forces as:

> Persons who accompany the armed forces without actually being members thereof, such as…supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.[156]

Under this definition, individuals may qualify if they have received express authorization from the armed forces to accompany them. Although possessing an identity card is not required, it is presumptive proof the individual is authorized.[157] In the case of PMFs in Iraq, relevant Department of Defense contractors and subcontractors are

[156] Geneva Convention, art. 4(A)(4).
[157] COMMENTARY, *supra* note 124, at 65.

issued identification cards.[158] This means the roughly 6000 contractors who have contracts with the Department of Defense are issued identification cards and would be considered civilians accompanying the armed forces.[159] However, other contractors who are under contract by other government agencies and their sub-contractors would likely not qualify. These contractors are not accompanying any elements of the armed forces, but are instead providing security for other contractors or other government agencies. Furthermore, it is unlikely that these individuals have been issued identification cards by the Department of Defense. Thus, while the roughly 6000 of the estimated twenty to thirty thousand armed contractors operating in Iraq could qualify under this provision, the majority of contractors would not.

C. Article 47

Even if PMFs were able to qualify as lawful combatants and receive prisoner of war status under any other provision of the convention, they might be disallowed this status if they fell under Article 47 of the Additional Protocol I.[160] Article 47(1) states that "A mercenary shall not have the right to be a combatant or a prisoner of war." Article 47(2) then gives a six-part test for determining if an individual is a mercenary. Although many of the PMF personnel in Iraq may come close to qualifying as mercenaries under 47(2)'s definition, it is likely that they would evade consideration under this category due to important difference between PMFs and traditional mercenaries. Examining the six elements of 47(2) illustrates these important differences that allow the PMF personnel in Iraq to avoid being considered mercenaries.

1. *Article 47(2)(a)—Is Specially Recruited Locally or Abroad in Order to Fight in an Armed Conflict*

It is likely that PMF personnel in Iraq would not meet this element of the definition of mercenary because they were not recruited to fight in an armed conflict. The armed PMF's in Iraq are primarily employed to guard or defend individuals or locations. While these duties entail a high risk that they will become engaged with enemy units

[158] *See* DODI 3020.41, *supra* note 20, at ¶6.2.7.3.
[159] ELSEA, s*upra* Note 13.
[160] Additional Protocol, *supra* note 81. Although the United States and several other major nations are not signatories to the Additional Protocol I, many of its provisions have been recognized as customary international law. However, the U.S. has explicitly rejected Article 47 being a part of customary international law. Milliard, *supra* note 42, at 37. Despite the questionable status of this provision, this article will still consider the effect that Article 47 may or may not have on the status of PMF personnel.

as part of a continuing armed conflict, these personnel were not specifically hired to "fight."[161] Because of this difference, it is likely that PMFs could successfully argue that they are employed to guard and that they only engage in hostilities when doing so in self-defense.[162] This distinction becomes even more important if one considers the fact that PMFs are hired to not only to guard against enemy forces, but also to guard against looters and other criminals. The Commentary on the Additional Protocol does not elaborate on what is meant by the term "fight in an armed conflict," and thus, in the absence of specific provision or language preventing a differentiation between being recruited to fight in an armed conflict and being recruited to guard facilities or individuals, the PMFs would likely not qualify under this element of the definition.

2. *Article 47(2)(b)—He Does, in Fact, Take a Direct Part in the Hostilities*

It is likely that most PMF personnel will be considered to have taken a direct part in hostilities. The standard for determining if an individual has taken direct part in hostilities under this provision is the same as that under provisions for civilians,[163] and will be discussed later in this article.

3. *Article 47(2)(c)—He Is Motivated to Take Part in the Hostilities Essentially by the Desire for Private Gain and, in Fact, is Promised Material Compensation Substantially in Excess of That Promised or Paid to Combatants of Similar Ranks and Functions in the Armed Forces*

It is possible, though unlikely, that PMF personnel could escape qualifying under this condition. The Commentary indicates that, although the drafters attempted to create an objective standard for motivation based on the amount of money the individual was paid, that such a standard was abandoned. Thus, the final draft included the current subjective standard: "motivated to take part… essentially by the desire for private gain."[164] Because of this subjective standard and the difficulty of proving someone's subjective motivations, PMF personnel might escape this element of the definition. For example PMF

---

[161] Singer, *supra* note 1.
[162] Several commentators on Article 47(2)(a) have noted the ability of PMFs to utilize this loophole. *See*, *e.g.*, Zarate, *supra* note 100, 124.
[163] *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 ¶ 1806 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOL].
[164] COMMENTARY ON THE ADDITIONAL PROTOCOL, *supra* note 163, ¶ 1807-10.

personnel could claim that they are motivated to serve the cause of Iraqi freedom or to help the Iraqi people and that compensation is just a side benefit. Indeed, several commentators have noted the weakness of this subjective standard and other similar standards used in several treaties regarding mercenaries.[165]

Although arguments maintaining that the subjective motivation of the individual was not greed are possible, it is unlikely that such an argument would be convincing. The fact that many PMF personnel are paid substantially more then their counterparts in the regular military would make any claim of a motivation other than material compensation highly suspect.[166] Further, although the provision does state that the individual must be motivated "essentially by the desire for private gain," it does not state that to qualify the only motivation must be for material gain. Thus, even if an individual were able to proffer a credible motivation aside from material gain for being a PMF, such a motivation would not necessarily mean that the individual was not motivated "essentially by the desire for private gain."

4. *Article 47(2)(d)—He Is Neither a National of a Party to the Conflict Nor a Resident of a Territory Controlled by a Party to the Conflict*

Whether or not an individual working for a PMF would qualify under this provision would depend on their nationality. Any individual who was a citizen of Iraq or any of the nations who are a part of the coalition would not fulfill this requirement. Some of the individuals serving in PMFs are citizens of coalition states or Iraq, but others have been drawn from all over the world. These individuals would meet this element of the definition.[167]

5. *47(2)(e)—He Is Not a Member of the Armed Forces of a Party to the Conflict; and 47(2)(f)—He Has Not Been Sent by a State Which is Not a Party to the Conflict on Official Duty as a Member of Its Armed Forces*

It is likely that all PMF personnel currently serving in Iraq would meet these requirements. Although a handful of individuals may

---

[165] The definition provided under Article 47 is substantially similar to the definitions provided in other treaties and conventions. Many commentators have noted that this subjective valuation of motivation would allow mercenaries to escape falling under these provisions simply by inventing motivations other then personal gain. *See* Singer, *supra* note 42, at 529. *See also* Milliard, *supra* note 42, at 42, 59-60; BRITISH GREEN PAPER, *supra* note 42, at 7.

[166] PMF personnel are often paid up to ten times what they would make in the regular army. *See* Singer, *supra* note 1.

[167] *See* Barstow, *supra* note 2, at A1.

escape these provisions for various reasons,[168] the vast majority of PMF personnel will qualify under these two elements of the definition.

6. *Summary—Article 47(2)*

To qualify as a mercenary and lose both combatant status and prisoner of war status, an individual must meet the six elements of the definition of a mercenary under Article 47(2). PMF personnel would likely escape being considered mercenaries under this definition. Although the PMF personnel in Iraq would meet several of the elements, they would likely be successful in claiming that they were recruited to guard rather than to fight. As such, they would not qualify as mercenaries under 47(2)(a). Further, it is possible (though the argument is tenuous) that PMF personnel could claim they had a primary motivation other then private gain. Finally, because many PMF personnel are citizens of a coalition state or Iraq, they would not meet the requirement laid out by 47(2)(d). By not qualifying under each of these six elements, PMF personnel could avoid being considered mercenaries under Article 47.

D. PMFs as Civilians

Article 50(1) of the Additional Protocol defines a civilian as "anyone who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." [169] PMFs could not qualify under 4(A)(1) (members of the armed forces), 4(A)(3) (members of the regular armed forces who profess allegiance to an authority not recognized by the Detaining Power), 4(A)(6) (Inhabitants of non-occupied territory who rise up to repel invaders), or Article 43 (members of the armed forces). This leaves Article 4(A)(2), the provision for volunteer corps or militias discussed previously, as the only opportunity for PMFs to be considered non-civilians. Because PMFs are unlikely to qualify under 4(A)(2), PMF personnel would be considered civilians under the Geneva Conventions. If PMF personnel are considered civilians, they would also be non-combatants. As non-combatants, PMF personnel would be protected and enemy forces would be prohibited from

[168] For example, it is possible, though unlikely, that a security contractor from the U.S. might at the same time be a reservist in the U.S. military (though not actively serving at the time). Such anomalies, although possible, are not the norm for the personnel involved.

[169] As noted previously, although Additional Protocol I has not been adopted by the United States and several other nations, many of its provisions are considered customary international law.

attacking them.[170] This protection would expire if the PMF personnel took a "direct part in hostilities" [171] or took an "active part in hostilities."[172] If PMF personnel took part in hostilities, they would not only lose their protection and become viable targets, but they also would become illegal combatants. The critical question, then, is if the activities which armed PMF personnel carry out in Iraq constitute "direct participation in hostilities."[173]

1. *Direct Participation in Hostilities*

The range of actions which constitute direct participation in hostilities under Article 51 is a heavily debated question by legal scholars.[174] The standard set forth in the Commentary for direct participation: "means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[175] The Commentary also explains that "the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time he is carrying it."[176] Applying these two provisions to the context of PMFs in Iraq, it will be

---

[170] Additional Protocol I, art. 51(2).
[171] Additional Protocol I, art. 51(3).
[172] Although the term "active participation" is used in the Geneva Convention's common Article 3 only in the context of conflicts of a non international character, it is applicable here by analogy. Geneva Convention, art. 3 (1).
[173] For the purposes of this article, "direct participation in hostilities" will be considered the applicable standard. Both the Commentary on the Additional Protocol I and the jurisprudence of the International Criminal Tribunal for Rawanda consider "active" and "direct" participation as synonymous. However, other commentators and sources, including the Preparatory Committee for the Establishment of an International Criminal Court, have taken the position that the two terms are different. *See* International Committee of the Red Cross, *Direct Participation in Hostilities under International Humanitarian Law* 3 (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5TALL8/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf. If there is a dichotomy between the terms it is apparent that "direct" participation would indicate more involvement then "active" thus if the "direct participation" standard is met then, presumably, so would the "active" standard.
[174] *See Id.* at 3-5 (debating if actions qualify as direct participation in several scenarios)
[175] COMMENTARY ON THE ADDITIONAL PROTOCOL, *supra* note 163, ¶1944. Though the Commentary twice uses the word "armed forces," it is unlikely that this was intended to be a limiting factor on what constitutes direct participation. Under such an interpretation a civilian who attacked non-military targets like power plants or even other civilians, would not be considered to have directly participated in hostilities. Since these type of actions are clearly those which are in the realm of taking part in hostilities it is unlikely that the authors of the Commentary intended to exclude them from the range of actions that would constitute direct participation. Instead, it is likely the phrase "armed forces" was inserted because the Commentary authors were focused on resistance groups who would be fighting with guerilla warfare tactics against a occupying force.
[176] *Id.* at ¶ 1943

critical to determine if the activities which these PMFs carry out—guarding individuals, locations, and other resources—qualify as direct participation in hostilities.

The activities which the armed PMFs in Iraq carry out, though defensive in nature, lead to engagements with elements of the insurgency. When these engagements occur, whether initiated by the insurgents or by the PMF personnel, PMF personnel discharge firearms and take a number of tactical actions which are clearly designed to, and likely will, harm enemy personnel. At the time PMF personnel engage enemy forces with the intent to kill them, this clearly constitutes actions which are likely to harm enemy personnel and thus would be considered direct participation.

While engagements between PMF personnel and enemy forces in Iraq clearly constitute direct participation, the PMF's actions of guarding itself might also be considered direct participation. The activity of posting armed guards in Iraq will likely lead to a confrontation with enemy forces, and in this confrontation, personnel would likely harm, or attempt to harm, enemy personnel. Although the causal link between guarding and the harm to the enemy personnel might be attenuated, some scholars have interpreted other even less direct acts, such as gathering intelligence for military purposes in some instances, as direct participation.[177] Like many areas of the debate surrounding what constitutes "direct participation," there is no scholarly consensus on the question of whether guarding itself constitutes direct participation. Some scholars suggest that a guard would not be participating directly until he had used force against the enemy,[178] while others argue the definition should include guards and other civilians who work in a position that would normally be filled by military personnel.[179] No consensus yet exists on whether or not acting as an armed guard itself constitutes direct participation, but it appears that a trend is beginning that bases the determination of direct participation on intent rather than on whether or not the individual actually engaged enemy forces.

If intent rather than actions is controlling, then being an armed guard would be considered direct participation so long as that guard intended to directly participate in hostilities. Arguments for a standard based on intent have appeared explicitly in the scholarly debate over direct participation and implicitly in legal actions of the United States against former members of Al-Qaeda. In the scholarly field, several experts in humanitarian law have argued that having the intent to

---

[177] ICRC, *supra* note 173, at 3.
[178] A.P.V ROGERS, LAW ON THE BATTLEFIELD 12 (2004)
[179] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990)

directly participate should constitute direct participation in hostilities.[180] Though some scholars have argued against this position, especially on the grounds that intent would be difficult to judge on the battlefield,[181] this position also is supported implicitly by recent charges made against suspected Al-Qaeda members by the United States. These charges consider the suspects to be illegal combatants based on their participation in a conspiracy to directly participate against civilian targets, even though they themselves never engaged the enemy.[182] Implicit in the notion that joining a conspiracy can constitute direct participation is the idea that the participation occurs not only when you discharge a weapon at the enemy, but also when you are taking steps so that you or others can directly participate in hostilities in the future. Although the theory of direct participation through conspiracy is a much wider interpretation of what constitutes direct participation than is suggested by the scholar's arguments about intent, these two arguments are pushing the definition in the same direction. The conjunction of scholarly opinion and state practice is a strong indicator that the definition of direct participation may have expanded to include situations where an individual intends to directly participate in hostilities but has not yet done so. If this is the case, then PMFs could be considered to have directly participated in hostilities based on their intent to directly participate in hostilities to protect the assets or individuals they are assigned to guard. While the current state of the law is not yet clear, it is possible that being an armed guard with intent to directly participate could cause PMF personnel to be considered illegal combatants.

Some scholars have suggested that intent can constitute direct participation, but others have argued that membership in an organized armed group alone constitutes continual direct participation in hostilities.[183] If this were the case, then PMF personnel would clearly considered to be continually participating and could be targeted at any time, even when they were not carrying arms.[184] This concept of direct

---

[180] International Committee of the Red Cross, *Second Expert Meeting: Direct Participation in Hostilities under International Law* I.1, VI.1 (2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf [hereinafter ICRC Second Conference]; *see also* Jean-Francois Queguiner, *Working Paper on Direct Participation in Hostilities Under International Humanitarian Law, available at* http://www.ihlresearch.org/ihl/pdfs/briefing3297.pdf.

[181] *See* ICRC Second Conference, *supra* note 180, at I.1.

[182] *See* Charge sheets for *United States v. Ali Hamza Ahmad Sulayman Al Bahilul*, *available at* http://www.defenselink.mil/news/Jun2004/d20040629ABCO.pdf; Charge sheet for *United States v. Ibrahim Ahmed Mahmoud Al Qosi, available at* http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf

[183] ICRC Second Conference, *supra* note 180, at 21.

[184] *Id.* at 20.

participation is also in line with the United State's recent legal actions against former Al-Qaeda members. Indeed, the notion of participation through membership in a group is much closer to the conspiracy approach adopted by the United States than the intent approach which, although included in the United States' approach, is considerably less broad. Despite the congruence between these scholars' arguments and current United States legal actions, the theory that membership in an armed group constitutes direct participation has failed to attract broad support.[185] The theory of direct participation through group membership may eventually become the accepted standard, but it far more likely that the laws of war in their current state include the intent approach to direct participation rather than the more extreme participation through group membership.

2. *Loss of Protection Before and After Engagements*

Whether or not the action of guarding constitutes direct participation or not, the engagements which occur between PMF personnel and enemy forces clearly constitute direct participation in hostilities by those personnel. Though this direct participation is limited in duration and in frequency, the fact that they do occur would likely make the PMF personnel illegal combatants during the entire time which they carry arms openly. The Commentary indicates that civilians lose their protection, and are thus considered illegal combatants, not just during the time in which they take actions likely to harm enemy forces, but at the time before and after the engagement when the individual is carrying arms openly.[186] Based on this provision, if the PMF personnel in the past or in the future would (or are likely to) directly participate in hostilities, their loss of protection and status as illegal combatants would extend to all points while they are openly carrying weapons, not just during or in the wake of an engagement. This means that PMF personnel qualify as illegal combatants during the entire time they are conducting armed operations.[187]

---

[185] *See Id*. at 20-21; Ryan Goodman and Derek Jinks, *Replies: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 Harv. L. Rev. 2653, 2657 (2005).

[186] The Commentary on the Additional Protocol states that: "It seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it." COMMENTARY ON THE ADDITIONAL PROTOCOL, *supra* note 163, at ¶1943.

[187] If a civilian is not carrying a weapon she can still be captured and face the consequences of her direct participation (i.e. trial). Such an individual is still an illegal combatant; however, they may not be targeted by enemy forces because they are no longer directly participating. *See* COMMENTARY ON THE ADDITIONAL PROTOCOL, *supra* note 163, ¶1944.

3. *Self-Defense*

While the actions of PMF personnel would be considered "direct participation," the defensive nature of PMF personnel's involvement in these engagements raises the issue of whether or not these individuals are acting in self-defense. Even if PMF personnel directly participated in hostilities that participation might be excluded from being considered illegal if the individuals were acting in self-defense.[188] If a particular act of direct participation is excluded from being considered illegal because of self-defense, that act of direct participation would no longer cause PMF personnel to be illegal combatants. Thus, self-defense may contain the potential for many PMF personnel to escape being considered illegal combatants. To analyze what effect self-defense has on PMF personnel's overall status under the conventions, it is important to consider in what situations self-defense could excuse direct participation. With that analysis in mind, it will then be possible to determine if PMF personnel are indeed illegal combatants or if the doctrine of self-defense has excused all of their direct participation in hostilities. It will also be possible to determine if those PMF personnel intended to directly participate in hostilities only in self-defense. If this is the case, then PMF personnel could also avoid the danger of being considered illegal combatants because they are acting as armed guards with the intent to directly participate in hostilities.

The doctrine of self-defense, as it applies to individuals, is neither outlined nor explained by the Geneva Conventions, though it is mentioned.[189] However, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has ruled that the doctrine of self-defense is considered to be customary international law.[190] In ruling that self-defense was part of customary international law, the ICTY employed the definition of self-defense used in the Rome Statute of the International Criminal Court:

---

[188] While it is easy to see how a doctrine of self-defense might excuse PMFs whose direct participation in hostilities arose from a direct engagement with the enemy, it is less obvious how the doctrine would apply in the case of guarding itself being considered direct participation. This question will be revisited following the analysis of the three situations in which the doctrine of self-defense might be applicable.

[189] References in the Conventions to self-defense predominantly concern the rights of nations to act in self-defense rather then individuals. However, self-defense is mentioned in several sections in passing, but never comprehensively defined. For example, Additional Protocol I, art. 65.3 mentions that civil defense workers would be able to carry side arms for self-defense without loosing immunity from attack. However, the article never explains in what situations those personnel would be able to employ the weapons without directly participating in hostilities. *See* Additional Protocol I, art. 65.3.

[190] Prosecutor v. Kordic, Case No. IT-95-14/2-T, PP 451 (Apr. 6, 2001).

> 1. In addition to other grounds for excluding criminal responsibility provided in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct
>
> . . .
>
> (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.[191]

In analyzing how this doctrine applies to PMF personnel, it is helpful to divide the situations in which the direct participation of PMFs in hostilities might be considered self-defense into three categories: (1) PMF personnel engage in fighting in response to an attack on themselves; (2) PMF personnel engage in fighting response to a use of force against property they are guarding; or (3) PMF personnel engage in fighting to defend a third party.[192]

The first situation to consider is where PMF personnel directly participate in hostilities as a result of attacks on themselves. PMF personnel reacting defensively to attacks on themselves can only be justified under the doctrine of self-defense if the use of force to which they are responding is unlawful. Attacks against PMF personnel could be unlawful either because those attacking were illegal combatants or because the PMF personnel are considered civilians and hence are "protected persons."[193] If the attacks are considered unlawful because those attackers are illegal combatants, PMF personnel might be considered to be acting in self-defense. A civilian shooting an illegal combatant who is attacking him or her with a firearm is a paradigmatic

---

[191] *Kordic*, *supra* note 190, ¶450 (citing Rome Statute of the International Criminal Court, art. 31.1(c)).

[192] While the separation into these categories is problematic, it is a helpful tool for identifying situations in which self-defense might apply. The author is aware that in many situations it will be difficult to discern if an attack is targeting a particular individual or piece of property or those guarding it because the attacker will likely first engage those guarding that target.

[193] The term "protected persons" as used herein is referring to PMF's status as civilians and the protections commensurate with that status. It is not intended as a reference to the term "protected persons" as used in Article 4 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 287.

example of self-defense. However, the nature of PMFs makes classifying this type of defensive action as "self-defense" highly problematic. After all, PMF personnel are not regular citizens in the war zone who are defending their lives from a spontaneous attack. Instead, these are heavily armed individuals in an area in which their sole purpose is to enter into defensive engagements. While nothing in the ICTY's formulation of self-defense would cause them to be disqualified because of this, it does raise several problems.[194] For instance, if PMF personnel fired on insurgents who were not imminently attacking but instead merely moving in the area, then not only would the PMF personnel not be acting in self-defense,[195] but the insurgents could actually be considered to be acting in self-defense if they respond with force.[196] Thus the doctrine laid out by the ICTY makes the determination of self-defense rest on who initiated the engagement. Although hinging liability on who initiates violence makes sense in a domestic law situation, in a situation like Iraq, where two groups of heavily armed paramilitary groups who have a history of antagonism are operating, the doctrine appears largely inadequate. In a domestic situation the norm is for there to not be violence, and hence assigning responsibility to the person who is imminently initiating violence is a sound legal principle. But in a situation like Iraq, where violence is the norm and both groups would likely fire on each other immediately, the distinction based on who initiates the violence is inadequate. In that situation, the distinction turns on the vagaries of fortune, such as which group saw the other first, and not on any sense of moral culpability. Despite the apparent inadequacy of the doctrine to cope with this complexity, it is apparent that under the existing doctrine, PMF personnel would be acting in self-defense if attacked by illegal combatants so long as the illegal combatants initiated the engagement and as long as their response was proportionate.

The problems that arise when considering attacks that are unlawful because the attackers are not lawful belligerents are compounded when one analyzes the possibility that the force used might be unlawful because PMF personnel are "protected persons." In this situation, the attackers would be lawful belligerents, but the force they

---

[194] *See Kordic*, *supra* note 190, ¶448-52.

[195] It is important to note that the Rome Statute's standard of imminence of the use of force employs an objective standard, and so the subjective belief that insurgents might use force imminently would be insufficient to trigger the doctrine of self-defense. Kai Ambos, *Other Reasons for Excluding Criminal Responsibility* 1003,1032, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. 1 (2002)

[196] Although the insurgents would not be considered "protected persons" because their direct participation in hostilities attaches to them throughout the time they are carrying arms, the use of force against them would still be unlawful because the PMF personnel are civilians who may not directly participate in hostilities.

use would be unlawful because it targets PMF personnel who are civilians. However, it is important to note that if PMF personnel are found to be illegal combatants, because their direct participation cannot be excused by the doctrine of self-defense, then this would not be an issue. If they are illegal combatants then they have lost their protected status and thus targeting them would not be unlawful. For the purpose of this section, we will operate under the assumption that PMF personnel are protected individuals even though this is not certain at this stage in the analysis.

The right of a civilian to respond defensively to a soldier who is illegally targeting him or her is another paradigmatic example of where the doctrine of self-defense should operate. However, in a case where the "civilian" is openly carrying military weapons, employing military tactics, and has entered the area with the intent to fight defensively, several major issues arise. A soldier approaching a group of heavily armed PMF personnel might not know the intentions of those individuals and whether or not they will attack or only act if provoked. That soldier might also mistake those individuals for enemy soldiers rather than civilians. The confusion which is created when non-combatants carry military weapons has been recognized by Additional Protocol I, which contains several provisions that attempt to preserve the distinction between combatants and non-combatants, while allowing for self-defense.[197] Although none of these provisions directly apply to PMFs, they present analogous situations where the conventions have stressed the need to preserve distinction even while allowing for self-defense. The principles of distinction which these provisions seek to protect would be seriously undermined if civilians were given the protection of the doctrine of self-defense while at the same time being allowed to carry military weapons. However, it would also be contrary to the fundamental principles of law if civilians could be targeted by soldiers but would be held criminally liable if they responded with force. One solution that would balance these two considerations would

---

[197] *See* Additional Protocol I, art. 65.3:

> It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

See also Additional Protocol I, art. 13.2(a), art. 67.1(d).

be to require that, in order for a civilian to be able to benefit from the doctrine of self-defense, he or she would have to show why it was necessary for them to be in the area of conflict and show why it was objectively reasonable to be carrying arms openly. This rule could be viewed as a preemptive duty to retreat, which would create incentives for civilians to not carry military weapons and to avoid areas of conflict.

Though such a rule would ideally balance the two normative goals of allowing civilians to exercise self-defense while preserving the principles of distinction, the law as it stands contains no such balance. Within the framework of the law of self-defense, as laid out by the ICTY, PMF personnel who responded proportionately to an attack by lawful combatant that targeted them would be acting in self-defense so long as they are considered civilians.

It is important to note that this conclusion is limited to situations where the lawful combatants target PMFs and does not apply where lawful combatants are targeting other assets and PMF personnel are harmed or killed in that attack. For example, if PMF personnel are in a building and the building itself is attacked and destroyed, this would not be considered targeting the PMF personnel, but instead the harm that came to them would be considered collateral damage (assuming the building was a viable target).[198] However, if the PMF personnel in the building are shot prior to the attack on the building by a sniper, for example, then this would be specifically targeting them and the above analysis would apply.

A situation in which PMF personnel are not directly targeted but react in defense to attacks on property is the second category of self-defense that may be applicable. For the actions of PMFs to constitute self-defense in this situation, two requirements must be met: (1) the imminent use of force against the property must be unlawful; and, (2) the property must be essential to the survival of another person or the PMF personnel or essential to the accomplishment of a military mission.

The first requirement for PMFs defending property to be self-defense is that the force used against that property must be unlawful. One way in which the force used might be illegal, and probably the most likely for the situation in Iraq, is if the attackers are not lawful combatants. Another possibility is if the property being defended is protected. For example, if PMFs react to an attack on a hospital, the force would be considered unlawful.[199] Although other possibilities exist that could make the force used against property unlawful,[200] the most likely is that those attacking the property are not legal combatants.

---

[198] *See* ROGERS, *supra* note 178, at 10-12.

[199] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 18, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[200] For example, the attack against the building could employ chemical weapons.

The second requirement that must be met is that the property must be essential to the survival of another person, the PMF personnel, or essential to the accomplishment of the military mission. Even if the first requirement that the force be unlawful is met, this second requirement must also be satisfied for the actions of the PMFs to be considered self-defense.[201] While it is possible that PMF personnel would at times be in the position of defending property that is essential to the survival of themselves or another person, it would likely be far more common for them to be defending property that serves a military purpose. In these situations, PMF personnel may only defend the property if the property is "essential for accomplishing a military mission."[202] While this requirement initially seems quite restrictive in that the items must be "essential" to the mission, it fails to set any limitation on what constitutes "a military mission." Depending on the definition of "a military mission," this doctrine could be either quite expansive or rarely applicable. For example, a broad definition of what a military mission is, such as the overall war effort, would greatly restrict the scope of this provision because only a few key resources would be essential to the accomplishment of the overall war effort. Conversely, a very narrow definition of the mission, such as moving a squad of soldiers, could greatly enlarge the number of items that are essential to the mission, allowing for a very wide application of the doctrine.

Although the ICTY opinion provides no further elaboration,[203] a broader definition of "a military mission" would be consistent with the intentions of the drafters of the Rome Statute and would conform to the norms of international law. In stating that the Rome Statute's definition of self-defense constituted customary international law, the ICTY presumably not only referred to the actual provision, but also to the intentions of the drafters who crafted the language. While the evidence of the drafter's intentions is not authoritative, it does provide persuasive evidence as to the correct interpretation of the provision. Looking to the intent of the drafters it is clear that they intended to limit the applicability of self-defense as it relates to defense of property. The inclusion of a provision allowing self-defense to apply to the defense of property was highly controversial, and after initial proposals a great deal of negotiations were devoted to setting satisfactory limits on its applicability.[204] These limitations include both a requirement that the

---

[201] *See Kordic*, *supra* note 190, ¶450.
[202] *Kordic*, *supra* note 190, ¶450 (citing ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 31.1(c))
[203] *See Kordic*, *supra* note 190, ¶448-52.
[204] Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 207-08 (1999); *See also* Ambos, *supra* note 195, at 1033.

property be "essential to a military mission" and a limitation that the doctrine only apply "in the case of war crimes,"[205] These requirements are strong evidence that the drafters intended this doctrine to be narrowly applicable, and thus that they should not be construed to allow the doctrine to be expansive.[206] While the extreme of interpreting "a military mission" as the whole war effort is almost certainly too broad, the limitation must be closer to this extreme than to the other.

Requiring a broader definition of "a military mission," and thus limiting the scope of what constitutes self-defense, would not only be consistent with the intent of the drafters of the Rome Statute but would also be consistent with the norms of humanitarian law. Any attack on military equipment would almost certainly constitute direct participation in hostilities,[207] and the attacker, if not a combatant, would be considered an unlawful combatant. Thus, any individual attacking military equipment would be a lawful target, and any combatants could respond with force to repel such an attack. Combatants responding to such an attack could not be held criminally liable for their actions because they would be protected by combatant immunity and therefore have no need of a doctrine of self-defense to negate criminal responsibility. Thus, the doctrine of self-defense is only necessary in a rare class of cases where the law seeks to allow non-combatants to engage in direct participation in hostilities without incurring criminal liability. These cases clearly deviate from the predominate norms of the laws of war which call for creating clear distinctions between combatants and non-combatants and imposing sanctions on non-combatant participation in hostilities. Because self-defense is an exception to the standard position of non-combatants, the exception should be drawn as narrowly as possible while still preserving the core goals of a doctrine of self-defense. Consistent with this, "a military mission" should be interpreted broadly to limit the scope of the doctrine to prevent the exception from extensively undermining the rule that non-combatants should not directly participate in hostilities.

Construing what constitutes "a military mission" broadly, and thus limiting the scope of self-defense, is consistent with both the intent of the drafters of the Rome Statute and the norms of the laws of war. Although this analysis yields no exact formulation of what constitutes "a

---

[205] *Id.*

[206] *See* Ambos, *supra* note 195, at 1033.

[207] The commentary states that direct participation, "means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces." COMMENTARY ON THE ADDITIONAL PROTOCOL I, *supra* note 163, ¶1944. Attacking military equipment clearly falls into this category. However, some scholars have been reluctant to apply this in every situation. For example, though Rogers suggests that, while soldiers who were being attacked by children throwing petrol bombs could act in self defense, that the children may not be directly participating in hostilities depending on the circumstances. *See* ROGERS, *supra* note 178, at 11-12.

military mission," it gives strong indications of a range of possible definitions that restrict the use of the doctrine. Comparing this possible range to the activities of PMFs in Iraq is difficult, considering the wide array of activities which they carry out. Certainly some of the installations that PMFs guard are critical to the success of the long term military mission, such as the Baghdad airport. However, many others, such as an individual convoy, would not rise to the level of property that is essential for "a military mission" even if they are important assets. As such, while PMF's direct participation in hostilities in defense of property might be excused in some instances where PMF personnel are defending particularly important assets, much of the time such participation would not be justified by the doctrine of self-defense.

The third and final situation in which PMF personnel could qualify under the doctrine of self-defense is in the event that PMF personnel are defending a third party from unlawful force. The Rome Statute excludes criminal responsibility if "[t]he person acts reasonably to defend . . . another person . . . against an imminent and unlawful use of force."[208] PMF personnel would qualify under the doctrine of self-defense if they responded to a use of unlawful force against a third person, so long as that response was proportionate.[209] As in the analysis of PMF personnel responding to attacks on themselves, there are two predominant reasons why a force targeting third parties might be considered unlawful. The first is if the individual using the force is an illegal combatant, and the second is if the individuals targeted are "protected persons."

The imminent use of force against a third person would be considered unlawful if the attacker is an illegal combatant. In that case, the PMF personnel would be free to respond with proportionate force to protect the third person. However, some of the same issues which arose in the area of PMF responding to attacks on themselves would apply here. As in the earlier analysis, if PMF personnel initiate the engagement instead of responding to an imminent threat of force, then the illegal combatants would benefit from the doctrine of self-defense instead of the PMF personnel.

Another way in which the force used against a third party might be considered unlawful is if the third party targeted is a protected person, such as a civilian. In this situation, as where PMF personnel might react to defend themselves, the attack must specifically target the protected individual. If instead the attack incidentally harms the protected person, the harm is collateral damage and the force used is not

---

[208] Rome Statute of the International Criminal Court, art. 31.1(c) (Jul. 1, 2002), 2187 U.N.T.S. 90.

[209] For the purposes of this discussion we will assume that the attack is an attempt to kill the individuals with military weapons or explosives, and hence the response would be proportionate.

unlawful. It is also important to note that the individual who they are defending must be a "protected" person. This category of people includes State Department personnel and contractors who are not armed, such as construction workers or truck drivers. However, this does not include military personnel who are combatants and therefore may be specifically targeted by enemy forces, such as generals or other high ranking officers.[210] In instances where these protected persons come under attack, either by lawful combatants or unprivileged belligerents, PMF personnel responding defensively would fall under the doctrine of self-defense.

Whether the force is considered unlawful because the attackers are illegal combatants or those targeted are protected persons, PMF personnel responding in a proportionate manner to defend a third party who was attacked would have their direct participation excused under the doctrine of self-defense. When the three situations (response to attacks on themselves, property, or third persons) in which self-defense might excuse PMF personnel's direct participation in hostilities are considered together, it is clear that the doctrine has a substantial effect on the status of PMF personnel. In some situations where PMF personnel respond to attacks made by illegal combatants, their direct participation in hostilities would be excused by self-defense and they would retain their non-combatant status. Thus in a number of situations in which PMF personnel would previously have been considered to be illegal combatants because of their direct participation, those personnel would retain their status as non-combatants as a result of the doctrine of self-defense. PMF personnel would not be acting in self-defense in three main scenarios: (1) where PMF personnel initiated force instead of responding defensively to an imminent use of force; (2) where the individuals attacking were lawful combatants who were not targeting protected persons or property; and (3) where the attackers were targeting only property that was not essential for a military mission.

It is difficult to determine with any certainty what number of engagements fall into the three scenarios in which PMF personnel would not benefit from the doctrine of self-defense. It is clear that the majority, if not all, of Iraqi insurgents are illegal combatants, but it is significantly less certain how often PMFs initiate the use of force against insurgents or suspected insurgents. Although PMFs predominantly operate defensively, the line between defense and offense has become increasingly blurred as the overall security situation in Iraq has deteriorated.[211] Confusion and tension have resulted in friendly fire incidents between coalition forces and contractors, and the situation has

[210] *See* ROGERS, *supra* note 178, at 44-46.
[211] Barstow, *supra* note 2, at A1.

spurred creation of rules regulating the use of force by contractors.[212] Despite these regulations, an increasing number of accusations have involved contractors firing on civilians.[213] Indeed, some evidence suggests that incidents of PMF personnel firing at civilians are commonplace in Iraq.[214] If contractors accidentally fire on civilians because they believe those individuals are insurgents, then it is almost certain that PMF personnel are also initiating attacks on insurgents who are not imminently using force against them. Whether PMF personnel engage civilians because they believe they are insurgents or they engage insurgents who are not imminently attacking them, the actions of PMF personnel in these situations clearly constitute direct participation in hostilities, which would not be covered by self-defense. As noted previously, the consequences of these incidents, however sporadic, would continue to attach to the PMF personnel involved for the entire time before and after they were carrying arms (i.e., during all times in which they were conducting armed operations).

It is also important to evaluate how the doctrine of self-defense affects the possibility that PMF personnel might be considered illegal combatants because they are acting as armed guards who intend to directly participate in hostilities. If PMF personnel only intend to directly participate in ways that would be excused by self-defense, they would not be considered illegal combatants. However, if PMF personnel intend to directly participate in any of the three situations in which self-defense does not excuse participation, they would be considered illegal combatants so long as having the intent to participate is considered participation. Answering this question is difficult because the controlling factor is the subjective intent of the individual. Some of the scholars who support the theory that intent to use force constitutes direct participation have called for the doctrine not to consider intent alone, but instead to look at a nexus of behavior and intent.[215] While this elaboration of intent is also consistent with the United States' push

---

[212] *Id.*; Coalition Provisional Authority Memorandum Number 17, Appendix A *available at* http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/cpamemo.pdf.

[213] Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, WASH. POST, September 10, 2005, at A1; Fainaru, *supra* note 15, at A1; Zielbauer, *supra* note 26, at A1.

[214] Fainaru, *supra* note 15, at A1;

> 'These guys run loose in this country and do stupid stuff. There's no authority over them, so you can't come down on them hard when they escalate force,' said Brig. Gen. Karl R. Horst, deputy commander of the 3rd Infantry Division, which is responsible for security in and around Baghdad. 'They shoot people, and someone else has to deal with the aftermath. It happens all over the place.'

Finer, *supra* note 213, at A1.

[215] ICRC Second Conference, *supra* note 180, at I.1.

toward direct participation through conspiracy, which presumably requires overt acts to further the conspiracy that might be similar to the nexus of behavior and intent, it is unhelpful where the difference between intent to only use force in self-defense and intent to use force in other situations is small and difficult to assess through observation of behavior. To determine if PMF personnel intend to directly participate in hostilities where self-defense does not apply, we must ask if PMF personnel would directly participate in hostilities if the situation occurred. The first situation where the actions of PMF personnel would not be excused by self-defense is if they initiated an attack rather then responding defensively to an imminent use of force. Available evidence suggests that, while PMFs may be initiating violence in situations where they are mistaken about the imminent use of force, they only intend to act defensively.[216] If they intend to initiate use of force defensively, they would not intend to directly participate in hostilities in the first scenario, where self-defense would not protect their actions.

The second scenario in which PMF personnel would not be covered by self-defense is where the attackers are lawful combatants who are not specifically targeting protected persons. It is almost certain that PMF personnel intend to defend assets to which they are assigned regardless of who the attackers are. It is extremely unlikely that PMF personnel make any attempt to determine the status of those attacking them before they respond. Although it is likely that all insurgents in Iraq are unlawful combatants, it is possible that some insurgents may be lawful combatants.[217] If PMF personnel realized that the convoy or building they were defending was being attacked by lawful combatants, it is not realistic to presume that they would not defend it. Although PMF personnel may hope that all attackers are unlawful combatants, their actions indicate that their intent is to defend the assets without regard to the identity of the attackers. The intent to participate in this second scenario where self-defense would not apply indicates that, if the intent is sufficient to constitute direct participation in hostilities, then PMF personnel would be considered illegal combatants.

The third and final situation where self-defense does not protect PMF personnel is where personnel respond to defend property that is not essential to a military mission. Again, as in the last situation, it is nearly certain that PMF personnel will defend the assets they are assigned to protect, even if they (or a third party) have not yet been harmed. Even if these situations rarely (or never) occur, it is the intent of PMF personnel to directly participate in hostilities in two of the three situations where their actions would not be excused by the doctrine of

---

[216] Barstow, *supra* note 2, at A1.

[217] It is possible that some of the militias operating in Iraq may meet the requirements of Geneva Convention Article 4A(2)(a-d) and thus be lawful combatants.

self-defense. Thus, if being an armed guard with the requisite intent constitutes participation in hostilities, PMF personnel would be considered illegal combatants.

4. Summary—PMFs as Civilians

If armed PMFs in Iraq are classified as civilians under the Geneva Convention, some would be considered illegal combatants. The doctrine of self-defense will excuse some PMF personnel that directly participate in hostilities, but PMF personnel who initiate the use of force against individuals who are not threatening an imminent use of unlawful force would not be excused. The status of illegal combatant attaches to PMF personnel, not just at the point where they initiated the use of force, but during the entire time they conduct armed operations. Even after armed operations are over, personnel may still be considered liable under the Conventions for their actions as illegal combatants. Further, PMF personnel serving as guards who intend to directly participate in hostilities may be considered illegal combatants. Although self-defense could prevent PMF personnel from being considered illegal combatants if they intend to fight only in self-defense, several scenarios indicating intent to directly participate in hostilities are likely not covered by self-defense. Where PMF personnel serve as guards who intend to directly participate in hostilities, no action short of ceasing armed operations would conform PMF personnel's actions to the requirements of the Convention and avoid classification as illegal combatants.

E. Conclusion: PMFs under the Geneva Convention

Armed PMFs occupy a grey area in the Geneva Conventions, not clearly falling into any single category. The Geneva Conventions were written with a heavy influence from the historical period in which they originate. The focus of the authors was clearly the events of the Second World War, where large national armies fought each other supported in some instances by partisans. However, the original Conventions appear to give little consideration to the issue of civilian contractors who in recent years have become an increasingly integral part of many major militaries throughout the world. While the Additional Protocol gives more attention to the issues involved, specifically decrying the use of mercenaries, it was also a product of its time, with a focus on national armies and colonial struggles for liberation. Within the context of these treaties, it is difficult to place where armed PMFs fall.

Armed PMFs in Iraq might qualify as militias or volunteer groups under the Geneva Convention Article 4(A)(2), but the majority of PMFs operating in Iraq will fail to meet the qualifications laid out by

the Convention.[218] Specifically, from information available about their operating procedures, it is clear that many PMFs personnel fail to distinguish themselves as required by the Convention.[219] It is unclear to what extent prohibited items are used by the PMF organizations, but these personnel may also not meet Article 4(A)(2) criteria because of their use of certain munitions (i.e., hollow point bullets).[220] Additionally, because PMF personnel often fail to meet provisions under Article 4(A)(2) requiring the wear a distinctive emblem, the majority of personnel would not qualify as being part of a militia or volunteer group. Finally, it is possible (though unlikely) that the command structure of PMFs could disqualify them from being considered a militia or volunteer corps because the individual's association with the group as an employee instead of a soldier does not allow for the same capacity of command and accountability.[221]

If they are not volunteers or members of a militia under Article 4(A)(2), PMF personnel may be considered civilians accompanying the armed forces under Article 4(A)(4). This designation would not give them immunity from prosecution for directly participating in hostilities, but it would allow them to be classified as prisoners of war if captured. In the current conflict, roughly 6000 contractors working under Department of Defense contracts would qualify under this provision.[222] However, the remaining twenty to thirty thousand contractors currently operating in Iraq would likely not qualify.[223]

Even if PMFs were considered a militia or volunteer corps or civilians accompanying the armed forces, they could be considered mercenaries under Article 47 of the Additional Protocol. However, it is unlikely they will be considered under this provision for several reasons. First, although the argument appears tenuous, PMFs might not be considered mercenaries because they were not recruited to fight in the conflict, but simply to guard. Second, because the provisions of Article 47 make qualifying as a mercenary dependent on the subjective motivation of the individual (i.e., being motivated by monetary gain), many PMF personnel could avoid classification as mercenaries by claiming alternate motives. Third, many PMF personnel cannot be considered mercenaries because they are citizens of Coalition states or Iraq. Finally, even if PMF personnel qualified as mercenaries under Article 47, the article's uncertain status in international law calls into question its relevancy.

---

[218] Geneva Convention, art. 4(A)(2)(a)-(d).
[219] Geneva Convention, art. 4(A)(2)(b).
[220] Use of these munitions would violate international law and thus they would fail to qualify under 4(A)(2)(d).
[221] Geneva Convention, art. 4(A)(2)(a).
[222] Elsea, *supra* note 13.
[223] *Id.*

If the armed PMFs operating in Iraq are not considered either volunteer groups under Article 4(A)(2) or mercenaries under Article 47 of the Additional Protocol, they are best classified as civilians under the Geneva Convention. Under this classification, however, actions taken by armed PMF personnel in Iraq constitute direct participation in hostilities. Some of this direct participation would be excused by the doctrine of self-defense, but those PMF personnel whose actions do not constitute self-defense would be considered illegal combatants under the Conventions during and after armed operations. Further, PMF personnel serving as armed guards who intend to directly participate itself might be considered direct participation, which would cause PMFs to be classified as illegal combatants. It is not certain if being an armed guard with intent to use force constitutes direct participation, but existing trends in the law suggest that this may be the case. Thus, even though only the fraction of PMF personnel who have initiated violence can certainly be classified as illegal combatants, all PMF personnel risk such classification based on their role as armed guards who intend to directly participate in hostilities.

To avoid classification as illegal combatants, PMFs in Iraq must attempt to avoid classification as civilians or cease armed activities. Assuming the latter option is not acceptable, there are several steps that PMFs and coalition governments could take to avoid classification as civilians and ensure they are not illegal combatants. First, they could attempt to examine their operations and bring them into conformity with Article 4(A)(2). As the above analysis suggests, this may be as simple as ensuring personnel wear a distinctive symbol recognizable at a distance. PMFs must also examine their practices to ensure that they conform with customary laws of war. Taking these actions would likely allow them to qualify under Article 4(A)(2). However, qualification under this provision might still be problematic. The definition of what constitutes a "militia or volunteer corps" is left open by both the Convention and Commentary. There are strong arguments for why PMFs should fall into this category, but it is not clear this provision was intended to encompass groups like PMFs. In the absence of any definitive basis for being considered a volunteer corps or militia, there exists a danger that PMFs would not qualify.

The most certain way PMFs can ensure they will not be considered civilians and avoid being classified as illegal combatants would be to become officially integrated into the armed forces of a party to the conflict. Article 43(3) of the Additional Protocol states that this integration can be achieved by simple notification to other parties

involved in the conflict.[224] The possibility of such integration is also suggested by Article 4(A)(1) of the Geneva Convention.[225] Such integration would likely still require PMFs to ensure that they wear distinctive emblems and observe the laws of war,[226] but the integration would avoid any questions of whether PMFs could qualify under the rubric of "militias or volunteer corps" under Article 4(A)(2).[227] Integrating PMF personnel into the armed forces of a party to the conflict would relieve any doubt as to the position of those individuals under the Geneva Conventions.

VI. CONCLUSION

Because of their direct participation in hostilities, PMF personnel operating in Iraq risk being considered illegal combatants. This participation cannot be excused by the doctrine of self-defense, particularly where PMF personnel serve as guards with the intent to directly participate. Although the laws of war likely no longer apply to the situation in Iraq after handover of sovereignty, the status of PMFs under those laws is pertinent because those laws did apply prior to the handover.[228] More importantly, the role PMFs have played in the Iraq conflict is one which they will likely repeat in future armed conflicts. In

---

[224] "Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict." Additional Protocol I, art. 43(3).

[225] "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." Geneva Convention, art. 4(A)(1).

[226] Whether or not the requirements included in Article 4(A)(2)(a)-(d) (or some similar set of requirements) also attach to members of armed forces under Article 4(A)(1) is a heavily debated issue.

[227] Although the language in Article 4(A)(1) of the Geneva Convention still contains the phrase "militias or volunteer corps," the declaration of a party to the conflict that a PMF was part of its armed forces would be much more of an authoritative argument for qualifying a PMF under the provision then would the same PMF simply claiming that it was a militia or volunteer corps under Article 4(A)(2). Further, in the case of Article 4(A)(1) it is apparent that the authors of the Convention were aware of the dangers of placing any limitations on what could constitute a party's armed forces, and intended to leave the category open to definition by the party itself. *See* COMMENTARY, *supra* note 124, at 51.

[228] Oddly, the United States appears to have taken the position that the laws of war continue to apply to Iraq. Department of Defense Memorandum, *supra* note 30, at 2. As noted previously, this assertion is not authoritative and is likely incorrect. However, if it is correct then all of the consequences discussed below would apply to this conflict in addition to future conflicts. Furthermore, even though it is likely incorrect, it undermines the United States' own interests by conflicting with the Government's attempts to decry those who do not follow the laws of war. After all, if their assertion is correct, it is certain that some PMFs operating in Iraq, and thus employed by the United States or its allies through contracts or sub-contracts, are illegal combatants.

future conflicts, just as in the current conflict in Iraq, PMF personnel could potentially be considered illegal combatants.

The legal consequences of classifying PMF personnel as illegal combatants impacts not only the individual personnel, but also the countries that hired them and the PMFs they work for. If the United States employs PMF personnel in future conflicts, which seems likely given the growing trend of privatization in the military, then the United States must carefully consider these legal consequences. Under the doctrine of state responsibility, a nation can be held liable for actions of non-state actors. Through this doctrine, the United States might be held responsible for illegal activity of PMF personnel. Thus, if PMF personnel are considered illegal combatants because they have unlawfully participated in hostilities, the United States could be held liable for their illegal participation.

The legal ramifications of PMF personnel being considered illegal combatants could also extend to the PMFs, which could face potential criminal liability. In a recent case brought by the United States against a former Al-Qaeda member, the prosecution has alleged that the defendant directly participated in hostilities as part of a conspiracy. The overt acts that he took in furtherance of this conspiracy consisted almost exclusively of logistical support and financial management.[229] Under this theory, all individuals working for PMFs could potentially be held criminally liable for the illegal participation of PMF personnel in hostilities. Under this theory, a parent company that owns a PMF might also be criminally responsible, a disturbing thought considering some firms are owned by major corporations, such as MPRI which is owned by L-3, a Fortune 500 firm.[230]

In addition to legal liability, the United States' employment of PMF personnel in future conflicts has potential negative policy ramifications. Employing PMF personnel who are potentially viewed as illegal combatants may undermine the public image that the United States conducts its military operations in accordance with the laws of war. This would not only serve as a public relations problem for the United States, but it could also be used as justification for other nations or non-state actors to violate the laws of war, especially if those states or groups are engaged in a conflict against the United States. In the end, the employment of illegal combatants could reduce prisoner of war

---

[229] The only non logistical or financial activity which the charges allege is the defendant's involvement in fighting in Chechnya against the Russians. However, the charge sheet does not indicate that this combat activity was illegal, but instead merely lists this activity amongst a number of overt actions which constitute furtherance of the conspiracy to attack civilians, civilian objects, commit murder, destroy property and commit terrorism in violation of the law of war. *See* Charge sheet for *United States v. Ibrahim Ahmed Mahmoud Al Qosi*, *available at* http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf.

[230] Singer, *supra* note 1.

protections afforded to United States military personnel if they are captured.

Considering these negative consequences, the United States should carefully re-evaluate its policy toward armed PMFs. Prior to the Iraqi conflict, the United States recognized the danger of arming contractors on the battlefield. Except for rare occasions, Department of Defense regulations prohibited contractors from carrying weapons, and then only side-arms for self-defense.[231] Returning to this policy would clearly protect the United States from the negative repercussions of employing armed PMFs.

However, it is unrealistic to expect that the war in Iraq is an anomaly and that the United States will never again have to rely on armed PMFs to support operations. Instead, the United States should look at ways it can ensure that PMF personnel are less likely to be considered illegal combatants. It is possible that achieving lawful combatant status could be as simple as requiring PMF personnel to wear a distinctive symbol as part of their contract. The United States could also take other steps to ensure that PMF personnel constrain their operations within the laws of war in future conflicts. This might be achieved by requiring PMF personnel to attend briefings on the laws of war or by writing rules governing the use of force into PMF contracts.[232]

Whatever methods are adopted, the United States can draw valuable lessons from the experience in Iraq. PMFs will continue to operate in a gray area in international law. However, despite the challenges posed in applying the laws of war to armed PMFs, the United States and its allies can take measures to ensure that, in future conflicts, PMF personnel are far less likely to be considered illegal combatants.

---

[231] U.S. DEP'T OF ARMY, FIELD MANUAL 3-100.21(100-21), CONTRACTORS ON THE BATTLEFIELD (January 2003) at 2-33.

[232] Although some government contracts, including those issued by the State Department, do prescribe rules of engagement for the use of force, these provisions vary. *See* Fainaru, *supra* note 15, at A1.

INFORMATION FOR CONTRIBUTORS

The Air Force Law Review publishes articles, notes, comments, and book reviews. The Editorial Board encourages readers to submit manuscripts on any area of law or legal practice that may be of interest to judge advocates and military lawyers. Because the *Law Review* is a publication of The Judge Advocate General's Corps, USAF, Air Force judge advocates and civilian attorneys are particularly encouraged to contribute. Authors are invited to submit scholarly, timely, and well-written articles for consideration by the Editorial Board. The *Law Review* does not pay authors any compensation for items selected for publication.

Manuscript Review. Members of the Editorial Board review all manuscripts to determine suitability for publication in light of space and editorial limitations. Manuscripts selected for publication undergo an editorial and technical review, as well as a policy and security clearance as required. The Editor will make necessary revisions or deletions without prior permission of, or coordination with, the author. Authors are responsible for the accuracy of all material submitted, including citations and other references. The *Law Review* generally does not publish material committed for publication in other journals. In lieu of reprints, authors are provided four copies of the issue containing their work.

Manuscript Form. Manuscripts may be submitted by disc or electronic mail in Microsoft Word format. Please contact the Editor at the address on the inside front cover for further formatting requirements and submission information before submitting articles. Authors should retain backup copies of all submissions. Footnotes must follow the format prescribed by A UNIFORM SYSTEM OF CITATION (18th ed. 2005). Include appropriate biographical data concerning the author(s), such as rank, position, duty assignment, educational background, and bar affiliations. The Editorial Board will consider manuscripts of any length, but most articles selected for publication are generally 60 pages of text or less, and notes or comments are generally 20 pages of text or less. The *Law Review* does not return unpublished manuscripts.

Distribution. *The Air Force Law Review* is distributed to Air Force judge advocates. In addition, it reaches other military services, law schools, bar associations, international organizations, foreign governments, federal and state agencies, and civilian lawyers.


THE JUDGE ADVOCATE GENERAL'S SCHOOL
UNITED STATES AIR FORCE