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FOREWORD

After having the privilege to serve in the Air Force JAG Corps for 34 years, I retired this past February. As I reflect on my service, some of the highlights include the opportunities I had to write. Seven of your colleagues have taken that opportunity in this edition of the Air Force Law Review; I commend their articles to you. I also encourage all of you reading this edition of the Law Review to take the time to write, especially concerning an issue about which you are passionate. I am sure that there are lots of topics in that category, so just pick one that will be most helpful for the JAG Corps to have elucidated.

As you review these articles, I encourage you to note that while some of the authors began their articles in an LL.M. program, others began the endeavor in a more *sua sponte* setting. In addition, though most of the authors are field grade officers, a young second lieutenant who is not yet an official member of our Corps authored the leading piece.

It will be obvious to you that the articles in this edition took considerable time and research. But I promise you the reward is worth the effort. One benefit of writing is to be able to see others rely on your thoughts and writings—and it brings me joy to see my works cited in some of the articles in this edition of the Law Review. I believe my writing opened many doors during my career. While thought-provoking pieces such as the leading article regarding civilian casualties may engender some critical comment, our Corps will benefit from the effort and thought that goes into scholarly writing. Be bold.

I congratulate the authors of Volume 65 of the Air Force Law Review and I trust you will appreciate their scholarship. I have long advocated the benefits of writing and I urge you to consider how you can contribute to the dialogue of the Corps in the near future.

A handwritten signature in black ink that reads "Charles J. Dunlap, Jr." in a cursive, flowing script.

Charles J. Dunlap, Jr.
Major General (ret.), USAF

CIVIL-MILITARY COOPERATION IN CIVILIAN CASUALTY
INVESTIGATIONS: LESSONS LEARNED FROM THE AZIZABAD
ATTACK

SECOND LIEUTENANT BRENDAN GROVES

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*See that we suffer / and we suffer and we learn.*¹

I. INTRODUCTION

The grainy images depict a grotesque scene. Women and men wail over blanket-covered bodies of the dead. Tiny blankets cover ashen-faced children, their mothers weeping at their sides.² Though the video appears blurry, the deep despair of the gathered Afghan villagers is perfectly clear. Hours earlier, American and Afghan troops came under heavy fire in Azizabad, Afghanistan, during a mission to capture or kill Taliban commander Mullah Sadiq. Pinned down during the early morning of 23 August 2008, American troops called in an airstrike to attack militants firing from a cluster of homes. The airstrike wrought its intended destruction—and, regrettably, so much more. Unbeknownst to the Americans, dozens of civilians were in the houses along with the combatants.³ Shaken villagers collected many of the bodies in the Azizabad mosque. A mourner filmed the scene on a camera phone.

After the dust settled, allegations flew. The United Nations and the Government of Afghanistan released separate investigation reports, each claiming that approximately 90 civilians lost their lives.⁴ A respected Afghan non-governmental organization (NGO), after conducting its own investigation, concluded that 78 people died.⁵ A short while later, the organization appeared to change course and agreed that 90 people perished.⁶ A confident U.S. military countered these estimates, asserting that its initial investigations revealed 30 combatants killed with only five to seven civilian deaths.⁷ This confidence soon

¹ AESCHYLUS, *THE ORESTEIA* ¶ 250-52 (Robert Fagles, trans. Penguin Classics 1984).

² See Carlotta Gall, *Evidence Points to Civilian Toll in Afghan Raid*, N.Y. TIMES, Sept. 7, 2008, at A1, available at <http://tinyurl.com/CivilianToll> (offering a hyperlink to the cell-phone footage and explaining the events before and after the airstrike in Azizabad).

³ See Brigadier General Michael Callan, *Executive Summary of AR 15-6 Investigation Into New Information Relative to Civilian Casualties From Engagement by U.S. and Afghan Forces on 21-22 Aug 2008 in Azizabad, Shindand District, Heart Province, Afghanistan*, United States Central Command, Oct. 1, 2008, available at <http://media.washingtonpost.com/wp-srv/investigative/documents/centcom-shindand-100108.pdf>; see also Carlotta Gall, *U.S. Killed 90, Including 60 Children, in Afghan Village, U.N. Finds*, N.Y. TIMES, Aug. 26, 2008, at A6, available at <http://tinyurl.com/Gallarticle>.

⁴ See Gall, *supra* note 2.

⁵ See Jason Straziuso & Rahim Faiez, *Rights Group: 78 Afghans Killed, US to Investigate*, USA TODAY, Aug. 24, 2008, available at http://www.usatoday.com/news/world/2008-08-23-1051356149_x.htm.

⁶ Nader Nadery & Haseeb Humayoon, Op-ed., *Peace Under Friendly Fire*, N.Y. TIMES, Oct. 4, 2008, at WK11, available at <http://www.nytimes.com/2008/10/05/opinion/05nadery.html?pagewanted=1>.

⁷ Press Release, U.S. Central Command, Coalition: Aug. 22 Actions in Afghanistan Justified (Sept. 2, 2008), available at <http://www.centcom.mil/en/press-releases/coalition-aug-22-actions-in-afghanistan-justified.html>.

buckled, as media outlets worldwide broadcasted camera-phone footage revealing that at least twice as many women and children had died than the United States initially believed. Shortly after the video's release, the ranking American commander in Afghanistan ordered a new and more thorough investigation.⁸ The results would prove troubling: at least 33 civilians had perished in Azizabad, along with approximately 22 militants.⁹

In the aftermath of the Azizabad attack, American-Afghan relations plunged to a new low.¹⁰ President Hamid Karzai strongly condemned the attack and ordered his government to consider banning coalition airstrikes in urban settings.¹¹ He then called for negotiations to craft a more formal Status of Forces Agreement between the United States and Afghanistan to curb the ability of American soldiers to call in airstrikes.¹² President Karzai's reaction reflected that of the Afghan public. The attack jeopardized the already fragile Afghan support for the war effort. As stated by an Afghan official responsible for the Azizabad area, the coalition would "lose the people's confidence in the government and the coalition forces" if civilian casualties continued on that scale.¹³

The coalition arguably cannot afford to lose much more support. A "resurgent insurgency" threatens to undo Afghanistan's tenuous advances in security and stability, as admitted by the Chairman of the Joint Chiefs of Staff.¹⁴ President Obama called the situation in Afghanistan "increasingly perilous."¹⁵ Many metrics underscore the reasons fueling the President's concern. To begin, the country's level of violence has only risen in recent years.¹⁶ Violence in Afghanistan was

⁸ See Associated Press, *Karzai: 90 Civilians Died in Azizabad*, MIL.COM, Sept. 15, 2008, available at <http://www.military.com/news/article/karzai-90-civilians-died-in-azizabad.html>; see also Jim Garamone, *McKiernan Charts Course Forward in Afghanistan*, AM. FORCES PRESS SERV., Sept. 16, 2008, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=51202>.

⁹ See Callan, *supra* note 3.

¹⁰ See Laura King & Mubashir Zaidi, *Karzai is a Guest at Pakistani Fete*, L.A. TIMES, Sept. 10, 2008, at 8, available at <http://articles.latimes.com/2008/sep/10/world/fg-pakistan10>.

¹¹ HUMAN RIGHTS WATCH, *TROOPS IN CONTACT: AIRSTRIKES AND CIVILIAN DEATHS IN AFGHANISTAN* 3 (2008) [hereinafter *TROOPS IN CONTACT*], available at <http://tinyurl.com/TroopsinContact>.

¹² See Karen DeYoung, *Only a Two-Page 'Note' Governs U.S. Military in Afghanistan*, WASH. POST, Aug. 28, 2008, at A07, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/27/AR2008082703628.html?referrer=emailarticle>.

¹³ See Gall, *supra* note 2.

¹⁴ Admiral Mike Mullen, Chairman, Joint Chiefs of Staff, Remarks at the Naval Postgraduate School (Aug. 11, 2009), available at <http://www.jcs.mil/speech.aspx?ID=1233>.

¹⁵ See generally President Barack Obama, Remarks on a New Strategy for Afghanistan and Pakistan (Mar. 27, 2009).

¹⁶ See generally *id.*

thirty percent higher in 2008, for instance, than in 2007.¹⁷ The violence is not limited to a few, unfortunate villages. Nearly one-third of the country, according to the United Nations, is “directly affected by insurgent activities with different intensity.”¹⁸ More U.S. troops perished in Afghanistan in 2008 than in any previous year.¹⁹ The negative trends continued in 2009. In fact, by late August 2009, 259 coalition soldiers had already perished that year—“making 2009 the deadliest year for coalition troops since operations began.”²⁰

The commander of U.S. and NATO forces in Afghanistan, General Stanley A. McChrystal, sought to salvage the situation by requesting some 40,000 additional troops on top of the 17,000 that President Obama had already sent to the region.²¹ General McChrystal presented the consequences that might follow a rejection of his request in stark terms. The “[f]ailure to provide adequate resources,” he wrote, would be “likely to result in mission failure.”²² The General’s request came at a time when fewer Americans supported the war effort than ever before.²³

As the level of violence increased, so too did the number of civilian casualties. The United Nations estimates that some 1013 civilians died in the first six months of 2009, “compared with 818 for the same period in 2008, and 684” in the same period in 2007.²⁴ Though anti-government militants caused the majority of these deaths—59 percent in 2009—the number of civilians killed by coalition forces in Afghanistan increased every year from 2005 to 2009.²⁵ These civilian casualties further drive a wedge between ordinary Afghans and their fledgling government. This wedge grows wider when U.S. forces, as occurred after the Azizabad strike, fail to quickly and thoroughly investigate alleged civilian casualty incidents. Too often, U.S. military

¹⁷ See Garamone, *supra* note 8.

¹⁸ UNITED NATIONS ASSISTANCE MISSION TO AFGHANISTAN, AFGHANISTAN: MID YEAR BULLETIN ON PROTECTION OF CIVILIANS IN ARMED CONFLICT 1 (2009) [hereinafter UNAMA REPORT], available at <http://unama.unmissions.org/Portals/UNAMA/human%20rights/09july31-UNAMA-HUMAN-RIGHTS-CIVILIAN-CASUALTIES-Mid-Year-2009-Bulletin.pdf>.

¹⁹ See *id.*

²⁰ Alexandra Topping, *Four US Soldiers Killed, Making 2009 the Deadliest Year for NATO in Afghanistan*, GUARDIAN, Aug. 25, 2009, available at <http://www.guardian.co.uk/world/2009/aug/25/us-soldiers-killed-afghanistan>.

²¹ Dexter Filkins, *Stanley McChrystal’s Long War*, N.Y. TIMES, Oct. 14, 2009, at MM1.

²² GENERAL STANLEY A. MCCHRISTAL, COMISAF’S INITIAL ASSESSMENT 2-21 (30 Aug. 2009), available at <http://tinyurl.com/GenMcChrystalReport>.

²³ See Paul Steinhauer, *Poll: Support for Afghan War at All-Time Low*, CNN.COM, Sept. 15, 2009, <http://www.cnn.com/2009/POLITICS/09/15/afghan.war.poll/index.html> (finding that 58 percent of Americans opposed the war in Afghanistan in September, compared to only 39% favoring the war).

²⁴ UNAMA REPORT, *supra* note 18, at 1.

²⁵ See TROOPS IN CONTACT, *supra* note 11, at 12-13; UNAMA REPORT, *supra* note 18, at 1-2.

investigations are secretive affairs that seem to outside observers to depend on “denials and partial truths.”²⁶ Afghans appear to derive little comfort from, and harbor much resentment against, these inquiries.²⁷

With civilian casualties rising²⁸ and support for the war diminishing,²⁹ the conflict has reached an inflection point. How the United States and its allies handle the issue of civilian casualties may well determine whether the war is won or lost. Should an ineffective response cause the war effort to fail, the United States may “be remembered [in Afghanistan] for killing children.”³⁰

Such a sad legacy must not and need not be left. Here, the ancient Greek phrase *pathei mathos*, which means to suffer into truth or learning, proves prescient. America’s strategic goals in Afghanistan have suffered mightily as a result of civilian casualties, many of which were caused by airstrikes.³¹ To its credit, the military has attempted to learn from its mistakes. For instance, commanders instituted rigid rules of engagement to constrain air-launched attacks.³² General David McKiernan, the commander of NATO and American forces at the time of the Azizabad attack, stiffened these rules even further after the footage of dead civilians appeared on televisions worldwide.³³ The commander who assumed General McKiernan’s position in June 2009,

²⁶ See Nadery & Humavoon, *supra* note 6.

²⁷ *See id.*

²⁸ See UNAMA REPORT, *supra* note 18, at 1-2.

²⁹ See Steinhäuser, *supra* note 23.

³⁰ See *A Disastorous American Airstrike in Afghanistan*, ECONOMIST, Aug. 28, 2008, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=12009906.

³¹ See UNAMA REPORT, *supra* note 18, at 1-2.

³² See Richard Norton-Taylor & Julian Borger, *NATO Tightens Rules of Engagement to Limit Further Civilian Casualties in Afghanistan*, GUARDIAN, Sept. 9, 2008, available at <http://www.guardian.co.uk/world/2008/sep/09/nato.afghanistan>; see also Garamone, *supra* note 8. In addition to complying with the rules of engagement, air-launched strikes must undergo an estimation of civilian casualties before launch. See TROOPS IN CONTACT, *supra* note 11, at 29-32. This process necessarily differs according to whether the strike is pre-planned or a spontaneous attack necessary to assist troops engaged in combat. See *id.* Pre-planned strikes require a meticulous analysis to ensure that any expected collateral damage (euphemistic language for dead civilians) is proportional to the value of the target sought, in accordance with the Law of Armed Conflict (LOAC). In practice, pre-planned strikes rarely kill civilians. See *id.* In 2008, for example, Human Rights Watch did not identify a single pre-planned strike that caused the death of innocents. See *id.* at 29. Unplanned strikes, however, do not allow the military sufficient time to thoroughly estimate collateral damage. Commanders usually direct troops requesting unplanned strikes to withdraw from the area, if possible, in order to avoid the strike. See *id.* at 30. If withdrawal is not an option, forces on the ground will quickly estimate any collateral damage based on all known information. The inherent imperfections in these speedy estimates are a major factor behind many civilian casualty incidents. Yet unplanned strikes that will assuredly harm civilians are usually canceled. See *id.* at 29-31.

³³ See Norton-Taylor & Borger, *supra* note 32.

General Stanley McChrystal, issued even more rigorous restrictions on airstrikes in a July 2009 Tactical Directive.³⁴

Tightening procedures, alone, however, is unlikely to achieve significant change. Coalition forces have restricted procedures before, with only slightly positive results.³⁵ After an April 2007 airstrike allegedly killed 25 noncombatants, NATO and U.S. forces mandated the use of smaller munitions and a preference for house searches as means of reducing civilian casualties.³⁶ In an unfortunate turn of events, the attack that led to those changes occurred in Herat province—the very province in which the Azizabad attack would happen one year later.³⁷ Beyond instituting stricter procedures, another option would be to ban airstrikes in which civilians might be killed, but this is unlikely to be either militarily or politically palpable.³⁸ As long as insurgents commingle civilians and combatants, innocents will continue to perish.³⁹ Recent events prove the point. Only one month after the most recent and rigorous restrictions on airstrikes were issued, in the early morning of 4 September 2009, a NATO airstrike destroyed two recently stolen fuel trucks thought to be surrounded by scores of Taliban militants.⁴⁰ The strike did kill tens of militants, but apparently killed many civilians as well. Despite this large loss of civilian life, the attack may well have adhered to the dictates of the Tactical Directive.⁴¹ This bloodshed only amplified the anger many Afghans already felt toward coalition forces.⁴²

³⁴ See Memorandum from Headquarters International Security Assistance Force, subject: Revised Tactical Directive (6 July 2009), available at <http://tinyurl.com/TacticalDirective>; Rajiv Chandrasekaran, *Sole Informant Guided Decision on Afghan Strike*, WASH. POST., Sept. 6, 2009, available at <http://tinyurl.com/Kunduzattack>; see Filkins, *supra* note 21 (noting that the new restrictions essentially “bann[ed the use of] bombs and missiles in populated areas unless [soldiers] were in danger of being overrun”).

³⁵ See TROOPS IN CONTACT, *supra* note 11, at 6. Human Rights Watch believes that the “changes may have had some impact,” noting that a civilian casualties decreased after the changes were implemented. See *id.*

³⁶ See *id.*

³⁷ See *id.* at 17.

³⁸ Yet another option would be to temporarily cease or curtail the types of ground operations that risk creating significant collateral damage, such as certain special forces activities. Allegedly, the U.S. Special Operations Command did just this in February of 2009, as it ordered a two-week moratorium on many special operations’ missions. See Mark Mazzetti & Eric Schmitt, *U.S. Halted Some Raids in Afghanistan*, N.Y. TIMES, Mar. 9, 2009, at A6. Obviously, moratoriums of this sort are only stop-gap solutions. The long-term use of such measures would cripple the war effort.

³⁹ See generally Anthony Cordesman, *Qana and the Lessons for Modern War*, Center for Strategic and International Studies, July 31, 2006, http://www.csis.org/media/csis/pubs/060731_qana_commentary.pdf (last visited Feb. 1, 2010).

⁴⁰ See Chandrasekaran, *supra* note 34.

⁴¹ See *id.*; see also Stephen Farrell & Richard A. Opiel, Jr., *NATO Strike Magnifies Divide on Afghan War*, N.Y. TIMES, Sept. 4, 2009, at A1.

⁴² See *id.*

This episode demonstrates that altering the rules of engagement is necessary but not sufficient to ensure meaningful change.

Given that civilian casualties will not vanish entirely, what can the military do to prevent otherwise unavoidable civilian losses from dooming its strategic goals? The answer appears in the aftermath of Azizabad. As the bodies of the dead began to fill the local mosque, the Afghan Government, the United Nations and the Afghan Independent Human Rights Commission had each conducted separate investigations of the incident and announced a high—and apparently incorrect—casualty figure. These investigations were conducted with extreme haste and may well have been “tainted” by the political and financial interests of the villagers interviewed.⁴³ The first two American investigations represented only slight improvements. Indeed, the initial American inquiries were insufficiently thorough and rendered conclusions every bit as flawed as those drawn by the others. The most thorough inquiry, the third and final American investigation, simply arrived too late to pacify the anger of the Afghans.

The United States must transform the way in which it conducts civilian casualty investigations. This is the reality into which the United States has suffered: “A climate of denials and partial truths, such as occurred in the wake of the [Azizabad] massacre, breeds anxiety and mistrust.”⁴⁴

This article recommends that the President create a Task Force on Civilian Protection (Task Force) through an executive order. The Task Force would work with NGOs, the United Nations and the Government of Afghanistan to investigate alleged civilian casualty incidents. Vesting this responsibility in a single entity would solve a variety of problems. The military units that executed an attack would not be primarily responsible for any subsequent investigation, reducing the appearance of bias. Lessons learned from casualty investigations could also be shared among the services more easily, instead of being “stovepiped” within particularly military units or commands. Specially trained public relations and legal officers would respond to alleged civilian casualties incidents forthrightly and compassionately, minimizing the risk that ineffectual responses would inflame Afghan opinion against the coalition.⁴⁵

⁴³ See Callan, *supra* note 3.

⁴⁴ See Nadery & Humayoon, *supra* note 6.

⁴⁵ A press release issued by the U.S. Army Special Operations Command on 9 May 2007 after airstrikes allegedly killed 21 civilians exemplifies a non-effective response. The press release failed to mention any civilian casualties, even though military commanders may have known that civilians had died in the attack. See TROOPS IN CONTACT, *supra* note 11, at 18-21. Indeed, the NATO Commander told reporters a few days later that an investigation would uncover the cause of the deaths. See *id.* at 18-19. The press release omitted entirely any mention of civilian casualties. See *id.* Instead, it should have seized the strategic and moral high-ground by preemptively apologizing for

A number of other benefits would flow from utilizing the task force model. First, creating a task force would signal to Afghans and the world the importance that America places on protecting vulnerable civilians in wartime. Since the Task Force could be established by executive order, the President could take much of the credit for sending this signal, making this course politically advantageous.⁴⁶ Second, the task force model is tried and true. A presidentially-created Criminal Investigation Task Force (CITF), for instance, has excelled at investigating alleged war crimes against U.S. forces and funneling this information to prosecutors.⁴⁷ The task force model provides the ideal platform from which to synthesize the work of different military commands, intelligence agencies, criminal investigation agencies, NGOs and foreign governments.

A hallmark of the Task Force on Civilian Protection would be its inclusion of NGOs. Military and humanitarian actors traditionally operate in separate spheres of a conflict. This time-honored dichotomy, however, is rapidly evaporating. In fact, the military and humanitarians⁴⁸ have come to speak the same language: the language of

any collateral damage, even if none had yet been uncovered. The Task Force proposed here would have issued a statement apologizing for any killed or wounded civilians while promising an investigation. Recent events show that this practice is not currently followed. The NATO Press Release which followed the strike on the two fuel trucks, while commendable for its mention of possible civilian casualties, did not issue any sort of preemptive apology or offer assistance to affected Afghans. See Press Release, International Security Assistance Force, ISAF Air Strike in Kunduz Province (Sept. 5, 2009), available at <http://tinyurl.com/NATOrelease>. Worse, in a violation of the governing tactical directive, the local coalition contingent (led by a German unit) did not enter the area to investigate the incident until many hours later—reducing the chance that injured civilians received prompt medical attention and leaving more than enough time for the Taliban to manipulate the evidence, if they chose to do so. See Chandrasekaran, *supra* note 34.

⁴⁶ The Task Force could certainly be established by other means, including by order of the commander in Afghanistan, General McChrystal. This method would have the advantage of making the military—and General McChrystal specifically—responsible for the Task Force while still allowing the President to take credit for its successes and potentially avoid some of the blame for its failures. However, an executive order may be more beneficial because it would signal the President’s direct support for the operation, and so increase the likelihood that the Task Force lives up to its mission while attracting coalition partners to contribute to its proper functioning.

⁴⁷ See Morris Davis, *In Defense of Guantanamo Bay*, 117 YALE L.J. POCKET PART 21, 25-6 (2007), available at <http://www.yalelawjournal.org/images/pdfs/579.pdf>.

⁴⁸ As used in this article, the term “humanitarian” generally denotes non-governmental actors who labor to “alleviate human suffering,” namely by providing relief to victims of wars or disasters. See U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, MARINE CORPS WARFIGHTING PUBLICATION 3-33.5, COUNTERINSURGENCY 2-29 (15 Dec. 2006) [hereinafter COIN FIELD MANUAL], available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>. But the terms “military” and “humanitarian” should not be considered mutually exclusive. Indeed, this article attempts to show that the traditional barriers separating the two professions have substantially eroded. “Humanitarian,” in sum, is used only as a convenient method for describing the vast array of non-

law. Sharing a lexicon builds bridges between the two professions and enables them to interact more closely. Another paradigm shift may also invite closer military-humanitarian cooperation. This shift in thinking is titled “lawfare.”⁴⁹ Lawfare denotes the weaponization of law and the myriad ways in which the law can be used to achieve tactical and strategic objectives in modern conflicts.⁵⁰ Waging effective lawfare in certain contexts, such as in civilian casualty investigations, calls for the participation of humanitarian organizations.

Involving neutral players in civilian casualty investigations, so long as these organizations are not used simply to whitewash the proceedings, could enhance the credibility of the outcomes. Additionally, reducing the number of investigations would reduce hardship on Afghans involved in casualty incidents, who would no longer have to be interviewed by multiple organizations or be misled by the results of cursory investigations. NGOs would also benefit from this arrangement. By having a seat on the proposed task force, they could directly influence military policy while ensuring that the military more accurately performed casualty investigations. Despite their frequent disagreements, NGOs and the military share much common ground. A Task Force on Civilian Protection would provide them with a common platform for cooperation.

Section II of this article discusses in detail the Azizabad strike and its aftermath. Section III begins by exploring the growing nexus between humanitarians and the military. It then advances the concept of lawfare as a potential reason to alter the civilian casualty investigation process and to include NGOs in this work. Section IV makes the case for the Task Force on Civilian Protection. The argument proceeds from the premise that protecting civilians is “part of the counterinsurgent’s mission, in fact, the most important part.”⁵¹ Current casualty investigation procedures fail to achieve this mission. By working with host governments and humanitarians, the Task Force departs from the go-it-alone unilateralism that too often results in popular distrust of the military by Afghans. New procedures would usher in a new era of openness in a traditionally secretive arena. These procedures would also comply with emerging international standards for civilian casualty

governmental organizations at work in today’s war zones. As used here, the term by no means implies that the military does not fulfill humanitarian objectives.

⁴⁹ See Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 6 (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Workshop), available at <http://www.hks.harvard.edu> (search for “Dunlap intervention”) (Charles Dunlap was later promoted to the rank of Major General and retired from the Air Force as the Deputy Judge Advocate General in 2010).

⁵⁰ See DAVID KENNEDY, *OF WAR AND LAW* 125-127 (2006).

⁵¹ Sarah Sewell, *Introduction* to THE U.S. ARMY—MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL xxv (Univ. of Chic. Press 2007).

investigations.⁵² Although the United States is unlikely to regard these standards as binding, complying with them will improve the accuracy of investigations while showcasing a commitment to follow international law.

Once implemented, the Task Force's significance would be more than symbolic. Winning counterinsurgencies requires winning the support of the people. Most Afghans likely understand the tragic truth that some innocents will die in war. But, they are unlikely to understand why the world's superpower must launch multiple investigations into a single incident of civilian casualties. They are just as unlikely to believe the results of these inquiries when their own government, the United Nations, and human rights organizations reach divergent conclusions.

The Azizabad attack sounds a warning call. No longer can the United States appear indifferent to the needs of the people whose support it needs most. A Task Force on Civilian Protection, like any institution, cannot promise perfection—but it would markedly improve on the flawed infrastructure for casualty investigations in place today.

II. A STORY OF SUFFERING: THE ATTACK ON AZIZABAD

It was a deadly *déjà vu*. When U.S. military commanders first saw the camera-phone video of those killed at Azizabad, their minds must have flashed back to a similar scene one year earlier. A strike in the same province allegedly took the lives of over 20 civilians in April of 2007.⁵³ But this attack was worse. Televisions worldwide showed the carnage as newspapers described the plight of relatives whose loved ones lay beneath the rubble. The newspaper headlines alone were sufficient to give headaches to American military commanders and politicians alike. A headline from the *New York Times* is representative: “U.S. Killed 90, Including 60 Children, in Afghan Village, U.N. Finds.”⁵⁴

The military reacted swiftly. Even before the video surfaced, the American commander in Afghanistan at the time, General McKiernan, had promulgated restrictions on the use of force.⁵⁵ After the video made waves, General McKiernan immediately ordered another investigation of the incident.⁵⁶ U.S. Central Command, which has overall responsibility for the wars in Iraq and Afghanistan, dispatched

⁵² See *infra* Section IV.C.

⁵³ See TROOPS IN CONTACT, *supra* note 11, at 17-18.

⁵⁴ See Gall, *supra* note 2.

⁵⁵ See Eric Schmitt, *30 Civilians Died in Afghan Raid, U.S. Inquiry Finds*, N.Y. TIMES, Oct. 7, 2008, at A1, available at <http://www.nytimes.com/2008/10/08/washington/08inquiry.html>.

⁵⁶ See Press Release, U.S. Central Command, CENTCOM Commander Directs Review of Investigation (Sept. 7, 2008), available at <http://www.centcom.mil/en/press-releases/centcom-commander-directs-review-of-investigation-2.html>.

Brigadier General Michael W. Callan from the United States to conduct the third American investigation into the Azizabad strike.⁵⁷ Sending a general officer clearly indicated the military's interest in obtaining the truth about the civilian deaths and calming the growing angst over the incident.

Yet it was too little, too late. Before the new investigating officer ever set foot in Afghanistan, it appeared the facts had already gelled in the public consciousness. The Afghanistan Government had completed two of its own investigations and stood firmly by its conclusion that 90 civilians perished.⁵⁸ The United Nations reached the same conclusion in a separate investigation.⁵⁹ United Nations investigators supposedly found "convincing evidence, based on the testimony of eyewitnesses, and others, that some 90 civilians were killed."⁶⁰ Piling on the other conclusions, the respected Afghan Independent Human Rights Commission (AIHRC) released its own inquiry into the strike, concluding that 78 civilians perished.⁶¹ AIHRC eventually appeared to agree that 90 civilians died.⁶²

The final American investigation did not release its results until October first, over four weeks after the attacks.⁶³ Until then, the United States had conducted two, potentially related investigations asserting that "only 5 to 7 civilians, and 30 to 35 militants, were killed."⁶⁴ Military members first investigated the strike while assessing the battle damage immediately after the attack. Special forces soldiers searched the destroyed houses, but their limited efforts did not disclose the full extent of the civilian toll.⁶⁵ Days after the strike but before the video of

⁵⁷ See Press Release, U.S. Central Command, USCENTCOM Names Investigating Officer (Sept. 9, 2008), available at <http://www.centcom.mil/en/press-releases/uscentcom-names-investigating-officer.html>.

⁵⁸ Associated Press, *Karzai: 90 Civilians Died in Azizabad*, Sept. 15, 2008, MIL.COM, <http://www.military.com/news/article/karzai-90-civilians-died-in-azizabad.html>.

⁵⁹ Press Release, United Nations Assistance Mission in Afghanistan, Special Representative Kai Eide on Civilian Casualties Caused by Military Operations in Shindand (Aug. 26, 2008), available at <http://unama.unmissions.org/Default.aspx?tabid=1762&ctl=Details&mid=1920&ItemID=3108>.

⁶⁰ See *id.*

⁶¹ See Straziuso & Faiez, *supra* note 5.

⁶² See Nadery & Humayoon, *supra* note 6.

⁶³ See Callan, *supra* note 3, at 1.

⁶⁴ See Gall, *supra* note 2. I describe the investigations as "potentially related" because the results of the first investigation—a hasty search of houses by American soldiers after the strike—likely supplemented the results of the second. The first investigation was likely conducted in accordance with routine Battle Damage Assessment procedures which call for examining whether executed attacks achieved their objectives.

⁶⁵ See *id.* It appears that the special forces soldiers who executed the strike and the subsequent building-by-building search had to vacate the village for fear of reprisal or further attack from insurgents. See *id.*

civilian casualties appeared, a special forces Army Major visited local graveyards to assess the damage, but did not speak to any villagers.⁶⁶

General Callan's subsequent investigation stood on far more thorough fact-finding, including visits to other grave sites, extensive villager testimony, and on-site analysis.⁶⁷ The final report strongly criticized the evidentiary basis underpinning the investigations done by other entities.⁶⁸ General Callan decried their failure to perform any forensic analysis, their reliance on "inconsistent villager statements," and their willingness to trust witnesses who were "tainted" by personal agendas.⁶⁹ Individual compensation payments of \$2,000 given by the Afghan Government, he mentioned, may have inspired villagers to make false claims.⁷⁰ In the past, such payments were rendered to non-existent people.⁷¹ Documents allegedly listing the names of deceased civilians were likewise "invalid due to investigate shortfalls, and Afghan cultural realities such as no recent census, birth/death certificates and inconsistent burial evidence."⁷² Working around these pitfalls, General Callan concluded that approximately 33 civilians perished, along with 22 "anti-coalition militants."⁷³

The mission that led to these civilian deaths began as a routine affair. Intelligence sources suggested that militants were meeting in Azizabad on the evening of 21 August 2008.⁷⁴ U.S. and Afghan forces raided the town on that evening in an attempt to apprehend or kill Mullah Sadiq, an insurgent leader slated to attend the gathering.⁷⁵ Unfortunately, the meeting coincided with a memorial for a beloved tribal figure, Taimoor Shah, who had died months earlier.⁷⁶ Villagers from across the area had journeyed to Azizabad for the ceremony.⁷⁷

⁶⁶ *See id.*

⁶⁷ *See Callan, supra* note 3, at 1-4.

⁶⁸ *See id.* at 2.

⁶⁹ *See id.*; *see also* Alastair Leithead, *Afghan Bombing Drives Allies Apart*, BBC NEWS, Aug. 27, 2008, available at http://news.bbc.co.uk/2/hi/south_asia/7584464.stm. It is far from inconceivable that local villagers would purposely mislead investigators in an attempt to inflate the number of civilian casualties. Such conduct is perhaps especially likely in Azizabad and the surrounding area. *See id.* As reported by the BBC, "Shindand is a fiercely tribal area and there have been claims by local people of a large number of civilian casualties in the past which have turned out to be exaggerated." *Id.*

⁷⁰ Associated Press, *Afghan Leader: Deadly Raid Strained U.S. Relations*, USA TODAY, Sept. 4, 2008, available at http://www.usatoday.com/news/world/2008-09-04-Afghan-raid_N.htm.

⁷¹ *See id.*

⁷² *See id.* at 3.

⁷³ *See id.* at 1.

⁷⁴ *See id.*

⁷⁵ *See id.*; *see also* Gall, *supra* note 2 (mentioning that "Taliban Commander, Mullah Sadiq" was the object of the raid).

⁷⁶ *See* Gall, *supra* note 2.

⁷⁷ *See* Associated Press, *supra* note 58 ("Villagers said families had traveled to Azizabad for the ceremony, one of the reasons so many children were killed.").

Upon entering the village, U.S. and Afghan soldiers came under fire. Both sides exchanged small-arms fire for some time and U.S. forces eventually called for air support. An Air Force AC-130H gunship responded.⁷⁸ The ground commander positively identified militants before clearing the gunship to open fire. The soldiers on the ground, however, apparently did not know that the militants, in General Callan's words, had selected "fighting positions in close proximity to civilians."⁷⁹ The gunship's heavy cannons obliterated the target area. After the guns fell silent, U.S. forces found evidence indicating that Mullah Sadiq lay among the dead.⁸⁰ U.S. medics also treated two injured civilians while other soldiers detained five suspected Taliban members.⁸¹

General Callan did not find any violations of the Law of Armed Conflict (LOAC).⁸² The publicly available summary of his report states only that the force used was "necessary and proportional" to meet the threat.⁸³ Since civilians were not purposely targeted, only an attack which "may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated" would have violated LOAC.⁸⁴ Applying this "macabre calculus,"⁸⁵ General Callan determined that the airstrike did not transgress international law.

The Callan investigation concluded by proposing three forward-thinking recommendations to the U.S. Government.⁸⁶ First, troops should "attempt to comprehensively document casualties" after executing an operation, and relate any relevant "facts and evidence" to

⁷⁸ See *Callan*, *supra* note 3, at 1. For a description of an AC-130 see AC-130H/U GUNSHIP, United States Air Force, Air Force Link, <http://www.af.mil/information/factsheets/factsheet.asp?fsID=71> (last visited Feb. 1, 2010).

⁷⁹ See *Callan*, *supra* note 3, at 1.

⁸⁰ Press Release, U.S. Central Command, Coalition: Aug. 22 Actions in Afghanistan Justified (Sept. 2, 2008) [hereinafter *Actions Justified*], *available at* <http://www.centcom.mil/en/press-releases/coalition-aug.-22-actions-in-afghanistan-justified.html>. Other evidence suggested that Mullah Sadiq might still be alive. In particular, someone "claiming to be Mullah Sadiq called Radio Liberty" after the attack asserting that he was unharmed. See *Gall*, *supra* note 2, at 3. U.S. commanders called the caller an "imposter," and reaffirmed their belief that Sadiq met his end at Azizabad. See *id.*

⁸¹ See *Actions Justified*, *supra* note 82.

⁸² See *Callan*, *supra* note 3, at 1.

⁸³ See *id.* at 5.

⁸⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Additional Protocol I*].

⁸⁵ See Mark Benjamin, *When is an Accidental Civilian Death Not an Accident?* SALON.COM, July 30, 2007, http://www.salon.com/news/feature/2007/07/30/collateral_damage/ (last visited Feb. 1, 2010).

⁸⁶ See *Callan*, *supra* note 3, at 5-6.

the Government of Afghanistan, the United Nations and NGOs.⁸⁷ U.S. troops should also “coordinate immediate humanitarian assistance” and make “solatia” payments⁸⁸—discretionary gifts given in sympathy to innocent victims of conflict⁸⁹—where appropriate. Second, civilian casualty investigations should be conducted jointly with the Afghan Government.⁹⁰ As it turned out, Secretary of Defense Robert Gates preempted this recommendation by agreeing on 17 September—some two weeks before General Callan released his report—to establish a “permanent joint investigative group” with Afghanistan to handle civilian casualty incidents.⁹¹ General Callan’s final recommendation encouraged military investigators to work with international governmental organizations and NGOs to acquire relevant information.⁹²

These recommendations, however, were released long after the Azizabad attack had done its damage. U.S. efforts to control the fallout began weeks earlier. President Bush, for instance, apologized for the incident to Afghanistan’s President Karzai⁹³ and promised closer military cooperation to better protect innocent Afghans.⁹⁴ Secretary Gates also participated in these efforts. Beyond announcing the new joint commission with Afghanistan mentioned above, Gates promised that U.S. forces would apologize for civilian casualty incidents and compensate victims “even before all the facts were known.”⁹⁵

President Karzai, in contrast, reacted to the Azizabad strike by going on the offensive.⁹⁶ He condemned the attack and called for drastic measures to prevent future incidents of this sort. To explore all of his options, he directed Afghan officials to examine the possibility of

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See* JONATHAN TRACY, COMPENSATING CIVILIAN CASUALTIES: ‘I AM SORRY FOR YOUR LOSS, AND I WISH YOU WELL IN A FREE IRAQ’ (2007), *available at* <http://www.hks.harvard.edu/cchp/Tracy%20Report%20Nov%203%202008.pdf>.

⁹⁰ *See Callan, supra* note 3, at 6.

⁹¹ *See* Thom Shanker, *Gates Tries to Ease Tension in Afghan Civilian Deaths*, N.Y. TIMES, Sept. 17, 2008, at A16, *available at* http://www.nytimes.com/2008/09/18/world/asia/18gates.html?_r=1&hp.

⁹² *See Callan, supra* note 3, at 6.

⁹³ *See* Gall, *supra* note 2 (noting that President Bush apologized to President Karzai by phone on Wednesday, 3 September 2008).

⁹⁴ *See* President George W. Bush, Address at the National Defense University’s Distinguished Lecture Program, Sept. 9, 2008, *available at* <http://www.globalsecurity.org> (search for “Bush NDU lecture”).

⁹⁵ *See* Shanker, *supra* note 91.

⁹⁶ *See* Kirk Semple, *Official Calls for Sensitivity to Afghan Demands*, N.Y. TIMES, Dec. 7, 2008, at A12, *available at* http://www.nytimes.com/2008/12/08/world/asia/08afghan.html?_r=1&ref=world (reporting the remarks of Kai Eide, the UN’s Special Representative for Afghanistan, who stated that the Azizabad attack “‘shook’ Mr. Karzai and helped to focus his concerns more acutely on the problem of civilian casualties and other problems of the foreign military engagement”).

banning NATO and U.S. airstrikes in populated areas.⁹⁷ He also suggested that the two countries update the Status of Forces Agreement between them.⁹⁸ Karzai traveled to Azizabad, telling the villagers that he strove “day and night to prevent these incidents from happening.”⁹⁹ According to Karzai, “relation[s] with the foreigners” grew far worse in the aftermath of the Azizabad attack.¹⁰⁰

In a globalized world, the effects of Azizabad extended well outside of Afghanistan. One notable world reaction occurred in a draft press statement submitted to the Security Council by Russia.¹⁰¹ The draft was not published because it could not have secured the unanimous approval of all fifteen Security Council members, a prerequisite of publication.¹⁰² The draft conveyed dismay at the number of civilians killed in Azizabad and stated that member nations “strongly deplore[d] the fact that this is not the first incident of this kind.”¹⁰³ It further declared “that killing and maiming . . . civilians” flagrantly violates international law.¹⁰⁴

The Azizabad strike carried grave political consequences.¹⁰⁵ To many observers, the strike’s aftermath called to mind Israel’s attack on Qana, Lebanon in July of 2006 which took the lives of some 28 civilians.¹⁰⁶ As mentioned above, the Azizabad strike shared unwanted similarities with a similar civilian casualty incident in Afghanistan one year earlier. An association with the Qana attack, however, would inspire an even more unfortunate *déjà vu*. The Qana strike seemed to catalyze opposition to the Israeli war effort.¹⁰⁷ Azizabad, quite fortunately, did not wreak this level of havoc on U.S. operations in Afghanistan. Unless the United States enhances its casualty prevention and investigation procedures, future tragedies like the one in Azizabad

⁹⁷ Associated Press, *Afghan Leader: Deadly Raid Strained U.S. Relations*, USA TODAY, Sept. 4, 2008, available at http://www.usatoday.com/news/world/2008-09-04-Afghan-raid_N.htm.

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See* Fisnik Abrashi, *U.N. Accuses U.S.-led Troops in Afghan Deaths*, TIMES ARGUS, Aug. 27, 2008, available at <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20080827/NEWS01/808270308/1002/NEWS01>.

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See, e.g.,* Shanker, *supra* note 91 (noting that “While [the Azizabad attack] is not the first case of such civilian casualties, it has been the focus of Afghan and global outrage”).

¹⁰⁶ For commentary on the Qana incident, see Press Release, Human Rights Watch, Lebanon/Israel: IDF Fails to Explain Qana Bombing (Aug. 2, 2006), available at <http://www.hrw.org> (search for “Qana bombing”).

¹⁰⁷ *See* David Schenker, Op-ed., *Laying Out the Qana Calculation: Disarming Hezbollah Presents More Crises*, CHI. TRIB., Aug. 2, 2006 (predicting that the Qana incident would “prove a pivotal moment in the Hezbollah-Israel war”).

could threaten even greater harm. It will take bold changes to avoid this possibility, and bold leaders to implement these changes. Before discussing the substance of the changes proposed herein, two background developments must first be explored.

III. THE DEATH OF THE DICHOTOMY? THE INCREASING HARMONY BETWEEN MILITARY AND HUMANITARIAN ACTORS

Once regarded as enemies, military personnel and humanitarians are increasingly finding common ground. The increasing interaction between the two organizations promises tremendous benefits. Specifically, warming civil-military relations enable the creation of the Task Force on Civilian Protection proposed in this article.

A. The Traditional Dichotomy Between the Military and Humanitarians

Customarily, humanitarians and the military have maintained a somewhat chilly relationship. Fundamentally different goals separated the two professions. Humanitarians made peace, it was thought, while the military made war.¹⁰⁸ The very definition of humanitarian work discloses the differences that separate it from the military. The military's new *Counterinsurgency Field Manual*, for instance, defines humanitarian organizations as those that exist to alleviate human suffering and to achieve a host of other goods, including education and economic development.¹⁰⁹ Others define these organizations by what they refrain from doing. In this view, NGOs "are private, non-profit organizations *which attempt to dissociate themselves from governments wherever possible.*"¹¹⁰

If humanitarian NGOs dislike associating with the government, they tend to especially detest associating with the military.¹¹¹ These organizations typically adhere to a code of neutrality as a means of

¹⁰⁸ See generally KENNEDY, *supra* note 50, at 29-33 (discussing the differences between humanitarians and military actors).

¹⁰⁹ See COIN FIELD MANUAL, *supra* note 48, at 2-29.

¹¹⁰ See Roy L. Allgauer, *The U.S. Military and NGO Relationship During Post-Conflict Humanitarian Emergency Operations: How Can the U.S. Military Improve It?* (May 16, 2006) (unpublished thesis, Naval War College), available at <http://www.dtic.mil> (search for "Allgauer").

¹¹¹ See Major Kimberly Fields, *Civil-Military Relations: A Military Civil Affairs Perspective* (relaying the reluctance of some NGOs in Afghanistan to cooperate with the U.S. military), available at <http://www.hks.harvard.edu> (search for "Kimberly Fields"); see also Edward Walsh, *Aid Groups Fear Civilian, Military Lines May Blur*, WASH. POST, Apr. 3, 2002, at A14 (describing the fear of some in the humanitarian community that military members working on humanitarian projects while wearing civilian clothes endangered the safety of humanitarian organizations, whose safety depends on their separation from governments).

securing the “impartiality they need to perform humanitarian work.”¹¹² Neutrality, for them, is a type of life insurance policy. In order to serve the suffering in areas of conflict, humanitarians seek to be considered apolitical actors.¹¹³ They care for people, not politics.

Consequently, many NGOs scrupulously avoid even the appearance of cooperation with the military. Military missions, after all, are executed in support of political goals. As Clausewitz instructed, war is simply “the continuation of politics by other means.”¹¹⁴ Cooperating too closely with the military might tarnish the impartiality of NGOs, which in turn could lead to a loss of “inviolability”—the ability of humanitarians to administer aid to all without being vulnerable to attack.¹¹⁵

The military has long accepted, and even appreciated, these bifurcated roles. Military members were content to fight the wars and leave it to NGOs to meet humanitarian needs.¹¹⁶ The belief that the two professions had incompatible purposes prevented close cooperation, even though both organizations commonly work “in the same remote and dangerous locations.”¹¹⁷ Cooperating requires convincing often skeptical NGOs that their needs will be best met by working with the military.¹¹⁸ NGOs may interpret the current security environment as counseling against such cooperation. Attacks in Afghanistan against humanitarian organizations in the summer months of 2008 reached their highest point since 2002.¹¹⁹ All told, at least 72 aid workers were abducted and 28 others were killed in Afghanistan in the first nine months of 2008 alone.¹²⁰

Two reasons might suggest that working with the military could decrease NGO security even further. First, working with military forces places aid workers in close proximity to any attacks against those military units. Second, associating with the military risks signaling to the population that an NGO is an agent of foreign military forces, which may dampen the willingness of locals to trust NGOs and encourage attacks by militants.

¹¹² See Allgauer, *supra* note 110, at 2.

¹¹³ Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003-2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41, 41 (2004).

¹¹⁴ CARL VON CLAUSEWITZ, ON WAR 119 (J.J. Graham, trans., Anatol Rapoport ed., 1968).

¹¹⁵ See Anderson, *supra* note 113, at 41-42.

¹¹⁶ See Allgauer, *supra* note 110, at 2.

¹¹⁷ See *id.* at ii.

¹¹⁸ See, e.g., Fields, *supra* note 111.

¹¹⁹ See Press Release, Integrated Regional Information Networks, Afghanistan: Attacks Force Aid Agencies to Scale Down Operations (Oct. 16, 2008), available at <http://tinyurl.com/Aidattacks>.

¹²⁰ See *id.*

Humanitarians also tend to believe that they see the world through different eyes than do military members. A recent Human Rights Watch report explains these divergent perspectives in the context of evaluating the lawfulness of a military attack.¹²¹ “While the military conducts [battle damage] assessments to determine the military success of an operation, Human Rights Watch reviews the same incidents from a humanitarian law perspective.”¹²² Human Rights Watch’s description suggests a clear delineation in perspective between the military and humanitarians. Recent developments, however, give ample reason to doubt that such a fine distinction exists.

B. Bridging the Military-Humanitarian Divide

The harsh dichotomy between the military and humanitarians may be dying. Increasingly, a striking coalescence of concerns has begun to unite the military with its humanitarian colleagues. Two developments have been particularly important. First, international law has become what can be called the “new English”: a shared language that has the potential to foster closer civil-military cooperation. Second, in order to deal with militants that do not distinguish between military members and humanitarians, and a military that is increasingly involved in humanitarian-type projects, NGOs simply *must* work more closely with the military. After discussing these changes, two case studies will show that the divide separating the two professions is decreasing as a practical, and not only a theoretical, matter.

1. *Law as a Link Between the Military and Humanitarians*

No longer do the laws fall silent when the guns sound.¹²³ The hand of law now reaches the very levers of war. Those opposed to a proposed war denounce it as an illegal transgression of the *jus ad bellum*—the laws governing the recourse to force.¹²⁴ Those sickened by the effects of a particular attack condemn it as violating the *jus in*

¹²¹ See TROOPS IN CONTACT, *supra* note 11, at 9.

¹²² See *id.*

¹²³ See, e.g., YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 1 (2004). Cicero’s maxim, that “‘during war [the] law is silent,’” can no longer be called a maxim. See Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-war Cases*, 80 N.Y.U. L. Rev. 1, 3-4 (2005). Instead, his words encourage us to consider the relative novelty of law’s infusion into the world of war.

¹²⁴ See generally KENNEDY, *supra* note 50, at 7-8. Once a war clears these initial legal hurdles, the military will not fire a shot before “‘legally condition[ing] the battlefield’ by informing civilians that [it is] entitled to kill civilians” *Id.* at 8.

bello—the laws governing the use of force in war.¹²⁵ The law reaches further still, infiltrating even the military’s internal decision mechanisms. Before striking a target, ever-present military lawyers ensure that the proposed attack accords with the applicable LOAC principle.

The infusion of law into war has been a long time in the making. Individuals like Henri Dunant campaigned valiantly to humanize war.¹²⁶ The organization that he left behind, the International Committee of the Red Cross (ICRC), now symbolizes the collective movement to protect innocents from the horrors of war.¹²⁷ The ICRC played a decisive role in the effort to craft a body of law whose name reveals its purpose: International Humanitarian Law (IHL). Countless other organizations now walk in the trail blazed by the ICRC. In addition to IHL treaties, NGOs have succeeded in implementing new legal standards and mechanisms of enforcement, such as the Landmines Convention and the International Criminal Court, respectively.¹²⁸

The attempt to leash the dogs of war with law has, in many ways, been successful.¹²⁹ As a result of this success, law has “become a vocabulary for judgment, for action, [and] for communication.”¹³⁰ The enterprise of war, in other words, is now open to influence from those outside of the military and political spheres. Law serves as the lexicon that allows communication with the military on an unprecedented level.¹³¹ “Expert outsiders” like human rights organizations and journalists,¹³² have “gradually [become] accustomed to using the language of the jurisprudence of war” to achieve their desired aims.¹³³

¹²⁵ See, e.g., TROOPS IN CONTACT, *supra* note 11 (asserting that a U.S. airstrike in the Kipisa Province of Afghanistan may have violated the *jus in bello* by failing to meet the proportionality requirement imposed by that set of laws).

¹²⁶ See Francois Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT’L L. 191, 191-93 (2004); see also Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT’L L. 223, 225-26 (2006). Yet it was not always humanitarians who led the charge towards greater respect for civilians in war. One of the most notable attempts to balance humanitarian and military aims in war, for example, was promulgated by President Lincoln. See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (April 24, 1863), available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

¹²⁷ See KENNEDY, *supra* note 50 at 6.

¹²⁸ See Dinah PoKempner, Marc Garlasco & Bonnie Docherty, *Off Target: A Response to Professor Schmitt*, 6 Y.B. INT’L HUM. L. 111, 111 (2003).

¹²⁹ See KENNEDY, *supra* note 50, at 45.

¹³⁰ *Id.*

¹³¹ See *id.* at 10 (“Military and civilian professionals are speaking in the same legal vocabulary.”).

¹³² See PoKempner et al., *supra* note 128, at 112.

¹³³ Francoise Bouchet-Saulnier, *Introduction to International Humanitarian Law, in CRIMES OF WAR 2.0: WHAT THE PUBLIC SHOULD KNOW* (Francis Hodgson trans. 2007),

Just as the spread of the English language eases the burdens of communicating across continents, the spread of the legal lexicon enables heightened interaction between co-linguists. This extending mantle of law offers humanitarians and the military numerous opportunities to cooperate without requiring them always to agree. Indeed, “[m]ilitary and humanitarian professionals will rarely evaluate the strategic usefulness of sharp and fuzzy distinctions in a given case the same way.”¹³⁴ At the tactical level of war, civilians may also disagree with the military’s *jus in bello* calculations in specific attacks.¹³⁵ As a result of globalization, civilians are more likely than ever to learn about the facts behind individual strikes in once-distant battlefields. As epitomized by the work of Human Rights Watch,¹³⁶ civilians now routinely engage in “real-time battle-field reporting and post-battle analysis.”¹³⁷ The omnipresence of civilians second-guessing wartime acts forces, for better or worse, the military to justify its actions more frequently. Few aspects of the military’s operation are not on display. As happened in Azizabad, civilian experts can swarm the scene of an attack soon after the bombs fall. Video of the attack can appear instantly on televisions worldwide. Civilians who investigate and comment on military actions often speak in the language of law.¹³⁸ In fact, ordinary civilians who live within the combat zone can, intentionally or not, use words with strong legal implications that influence the government’s subsequent actions.¹³⁹

Humanitarians may underestimate the extent to which war is now colored by law. Consider the attempt of Human Rights Watch to explain the differences separating its work from the military’s. As described above, Human Rights Watch wrote that it reviews a military

available at <http://www.crimesofwar.org/thebook/intro-ihl.html> (discussing specifically the increasing use in the language of war among those observing the conflict in Bosnia).

¹³⁴ See KENNEDY, *supra* note 50, at 128.

¹³⁵ See *id.* (“As the military assure us the dead civilians were unavoidable collateral damage humanitarians will insist that the death of every civilian is an outrageous violation.”).

¹³⁶ See, e.g., Human Rights Watch, *Our Work*, <http://www.hrw.org/en/our-work> (last visited Mar. 1, 2010).

¹³⁷ See PoKempner et al., *supra* note 128, at 112.

¹³⁸ See TROOPS IN CONTACT, *supra* note 11.

¹³⁹ A regional official in Afghanistan responsible for the Azizabad area used the language of law in an interview with the New York Times following the disastrous strike on Azizabad. He declared that, “This is not fair to kill 90 people for one Mullah Sadiq.” Gall, *supra* note 2. Whether he knew it or not, he implied that the attack may have been illegal. Attacks “which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated” transgress the principle of proportionality. See Additional Protocol I, *supra* note 84, art. 51(5)(b); see also DINSTEIN, *supra* note 123, at 120. Thus, civilians like this individual may use layman’s language to describe an attack as unfair or unjust, while that same language will register in legal tones to the humanitarians, military and political professionals who listen.

operation “from a humanitarian perspective” while the military evaluates the same operation to determine whether it was successful as a military matter.¹⁴⁰ Human Rights Watch implicitly assumes that one can nicely separate the “military success” of an operation from the humanitarian considerations involved.

This dichotomy is fast becoming false. In fact, humanitarian considerations—whether expressed in IHL or in terms of the security and development of a population—often serve as the *sine qua non* of overall success in modern conflicts. Now retired Major General Charles Dunlap, Jr., former Deputy Judge Advocate General of the U.S. Air Force, reinforces this assertion by stating that he “found that most senior U.S. military leaders . . . accept that the fact or perception of [International Humanitarian Law] violations can frustrate mission accomplishment.”¹⁴¹

Violations of IHL, real or perceived,¹⁴² can impede mission accomplishment in two ways. First, neglecting humanitarian considerations can risk losing the support of the American public.¹⁴³ Michael Reisman characterizes this change as follows.

In modern popular democracies, even a limited armed conflict requires a substantial base of public support. That support can erode or even reverse itself rapidly, no matter how worthy the political objective, if people believe that the war is being conducted in an unfair, inhumane, or iniquitous way.¹⁴⁴

Evidence confirms this phenomenon. One recent study found that “[p]residential approval drops when the public thinks the [United States] should do more to protect civilians and when the public thinks the [United States] has not been successful at limiting civilian casualties.”¹⁴⁵

¹⁴⁰ See TROOPS IN CONTACT, *supra* note 11, at 9.

¹⁴¹ Dunlap, *supra* note 49, at 13.

¹⁴² See *id.*; see also Sewell, *supra* note 51, at xxv (“The fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition. Civilian deaths create an extended family of enemies—new insurgent recruits or informants—and erode support for the host nation.”) (emphasis added).

¹⁴³ See Colonel Charles J. Dunlap, Jr., *A Virtuous Warrior in a Savage World*, 8 U.S.A.F.A. J. LEG. STUD. 71, 78 (1997) (offering as an example of this phenomenon “[t]he rapid end to the Gulf War following televised pictures of the so-called ‘Highway of Death’” and asserting that a military can lose domestic support “even where the enemy losses are inflicted without violating legal or moral norms”).

¹⁴⁴ W. MICHAEL REISMAN & CHRIS T. ANTONIOU, *THE LAWS OF WAR* XXIV (1994).

¹⁴⁵ Kathryn McNabb Cochran, Public Opinion and Civilian Casualties in the Iraq War, presented at the International Studies Association Annual Meeting, Mar. 27, 2008, at 38, available at <http://www.allacademic.com> (search “author” for “Kathryn Cochran”).

The apprehension of losing domestic support operates in conjunction with a related fear: endangering the support of the local population. The U.S. military's vaunted Counterinsurgency Field Manual testifies to this fear. "[S]ecuring the civilian, rather than destroying the enemy, [is the] top priority" when waging counterinsurgency warfare of the sort currently fought in Iraq and Afghanistan.¹⁴⁶ Winning a counterinsurgency campaign requires earning the trust and support of the locals.¹⁴⁷ Even the U.S. Marine Corps's *Small Wars Manual*, released in 1940, advised commanders in counterinsurgencies to utilize only limited military muscle in order to earn "the lasting friendship of the inhabitants."¹⁴⁸ The modern manual makes a similar case. "The real battle," one of its advisers writes, "is for civilian support for, or acquiescence to, the counterinsurgents and host nation government."¹⁴⁹ Failing to honor humanitarian concerns, exemplified by the killing of civilians, simply enhances the likelihood that counterinsurgents will fail to gain civilian support.¹⁵⁰ Clearly, incidents like the Azizabad attack jeopardize the support of the civilian population.¹⁵¹ General Stanley A. McChrystal clearly embraces this reality. In a report to President Obama, he declared that "Civilian casualties . . . and damage to public and private property (collateral damage), no matter how they are caused, undermine support" for the war effort "in the eyes of the Afghan population."¹⁵² The tactical directive he promulgated "stresses the necessity to avoid winning tactical victories" by destroying the Taliban everywhere they appear "while suffering strategic defeats" caused by civilian deaths.¹⁵³

¹⁴⁶ See Sewell, *supra* note 51, at xxv.

¹⁴⁷ See *id.*; see also Dunlap, *supra* note 49, at 4-9 ("Shaped by raw news footage, public perceptions of how conflicts are fought significantly affect military interventions.").

¹⁴⁸ JOHN A. NAGL, COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM: LEARNING TO EAT SOUP WITH A KNIFE 47 (2002) (quoting U.S. MARINE CORPS, SMALL WARS MANUAL vii (1940)).

¹⁴⁹ See Sewell, *supra* note 51, at xxv.

¹⁵⁰ See *id.*; see also James Dobbins, *Iraq: Winning the Unwinnable War*, vol. 84, no. 1 FOREIGN AFF., Jan-Feb 2005, at 16. Dobbins declared:

[T]he success or failure of an offensive such as the November assault on Falluja must be measured not according to body counts or footage of liberated territory, but according to Iraqi public opinion. If the Iraqi public emerges less supportive of its government, and more supportive of the insurgents, then the battle, perhaps even the war, will have been lost.

Id. Of course, earning the support of the locals "is determined by factors beyond simple adherence to the law of war . . ." TROOPS IN CONTACT, *supra* note 11, at 5.

¹⁵¹ See Gall, *supra* note 2.

¹⁵² MCCHRISTAL, *supra* note 22, at E-1.

¹⁵³ *Id.* at E-2.

The spectacular convergence of humanitarian and military aims enables the two professions to work together. Military and humanitarian actors are simply “playing the same cards in different ways.”¹⁵⁴ It is high time for these professions to harmonize at least certain components of their efforts.

2. *The Growing Need for Civil-Military Cooperation*

While the first factor allowing for civil-military cooperation is the global growth of the language of law, the second is sheer necessity. More than ever, the military simply must work with humanitarians and vice versa. Each profession has reached this conclusion independently. For humanitarians, various reasons fuel the need to cooperate in conflict zones. The United Nations guide on civil-military cooperation in Iraq traces this necessity to two developments: the often dangerous security conditions under which humanitarians must work, and the military’s fairly new role in performing traditionally humanitarian tasks, “including [the] provision of relief and services to the population.”¹⁵⁵ These developments have eroded “the separation between humanitarian and military spaces, and may threaten to blur the fundamental distinction between these two domains.”¹⁵⁶ Such changes do not, in the eyes of the United Nations, encourage further separation. Instead, the United Nations concludes that these shifts in operational “realities . . . have gradually *necessitated* various forms of civil-military coordination for humanitarian operations.”¹⁵⁷ Conceding that some humanitarians may lament the encroachment of the military on “humanitarian space,” the United Nations defends the military’s new role by stating that civil-military coordination can be a “tool[] for conflict resolution” and that the military “has assumed a number of responsibilities due to [a] lack of other organizations [who are] willing or able to do so”¹⁵⁸

¹⁵⁴ See KENNEDY, *supra* note 50, at 129.

¹⁵⁵ United Nations Office of the Humanitarian Coordinator for Iraq, The Guidelines for Humanitarian Organizations on Interacting with Military and Other Security Actors in Iraq, Oct. 20, 2004, *available at* <http://www.reliefweb.int/rw/RWB.NSF/db900SID/HMYT-66BQU7?OpenDocument> [hereinafter Guidelines]. The United Nations is not the only organization, of course, to produce and promote guidelines on this topic. See, e.g., Press Release, U.S. Institute of Peace, Guidelines for Relations Between U.S. Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments (Mar. 8, 2005), *available at* [http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-75LJCQ/\\$file/Interaction-July2007.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/AMMF-75LJCQ/$file/Interaction-July2007.pdf). This set of guidelines is particularly fascinating, as it was produced by a joint team of personnel from InterAction (an umbrella organization of NGOs), the Department of Defense and the U.S. Institute of Peace. See *id.*

¹⁵⁶ See Guidelines, *supra* note 155.

¹⁵⁷ See *id.* (emphasis added).

¹⁵⁸ See *id.*

The American military increasingly appears to agree.¹⁵⁹ The Counterinsurgency Field Manual states unequivocally that “[b]uilding a complementary, trust-based relationship [with NGOs] is *vital*.”¹⁶⁰ NGOs can be instrumental in “resolving insurgencies.”¹⁶¹ They often enter a country “before military forces and remain afterwards,” allowing them to “support lasting stability.”¹⁶² Commanders are specifically encouraged to “complement and not to override [NGO] capabilities.”¹⁶³ These acknowledgements are a welcome development in a military that traditionally sought separation from humanitarians and their work.¹⁶⁴

Certainly, recognizing the need to work together does not eliminate the problems posed by actually doing so. Chief among these potential problems is a loss of neutrality by humanitarian actors. Humanitarians may not carry swords, but they do have a shield: neutrality. Without this neutrality, humanitarians will feel that they lack not only a source of protection but a lodestar of sorts. Commentators such as Kenneth Anderson may respond that true neutrality is but a figment of humanitarian imagination.¹⁶⁵ Most NGOs cannot be fully neutral, so the argument goes, because they seek to assert a set of values.¹⁶⁶ Anderson argues that NGOs cannot be completely “apolitical” when engaging in reconstruction efforts, such as those in Iraq and Afghanistan.¹⁶⁷ This article describes Anderson’s attack on neutrality not necessarily to adopt it, but to suggest that neutrality need not be the paramount humanitarian value. No doubt many will forcefully disagree with any attempt to chip away at the doctrine of neutrality.¹⁶⁸ This article suggests only that the bulwark of neutrality is unlikely to withstand the tide of emerging necessity of civil-military

¹⁵⁹ See generally COIN FIELD MANUAL, *supra* note 48 (praising the potential of civil-military cooperation).

¹⁶⁰ See *id.* (emphasis added).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Allgauer, *supra* note 110, at 2.

¹⁶⁵ See Anderson, *supra* note 113, at 72. Other works also suggest a rethinking of traditional humanitarian philosophies. See, e.g., GEORGE FRERKS, BART KLEM, STEFAN VAN LAAR & MARLEEN VAN KLINGEREN, PRINCIPLES AND PRAGMATISM: CIVIL-MILITARY ACTION IN AFGHANISTAN AND LIBERIA 10 (2006), available at <http://www.cordaid.nl/Upload/publicatie/RAPPORT%20CMR.pdf> (concluding that “in view of the integration of humanitarian, political, development and state-building interventions, policymakers and practitioners need to rethink classical humanitarian principles: whether to apply them in today’s contexts and how?”).

¹⁶⁶ See Anderson, *supra* note 113, at 72.

¹⁶⁷ See *id.*

¹⁶⁸ See, e.g., Scott Malcomson, *When to Intervene*, N.Y. TIMES, Dec. 12, 2008, at BR12, available at <http://www.nytimes.com/2008/12/14/books/review/Malcomson-t.html> (noting the opinion of humanitarian Conor Foley that NGOs should reclaim neutrality and resist undue cooperation with expressly political actors like the military).

cooperation and the enhanced ability for these actors to cooperate through the language of law.

C. Two Case Studies on Civil-Military Relations

Two examples illustrate the potential promises and pitfalls of civil-military cooperation. The first case study is the path-breaking collaboration between the U.S. military and Harvard's Carr Center for Human Rights Policy to revise the military's counterinsurgency doctrine. This unlikely and "unprecedented"¹⁶⁹ pairing produced a text that attained instant celebrity. Within the first two months of release on the internet, the new Counterinsurgency Field Manual garnered more than two million downloads.¹⁷⁰ The University of Chicago Press published it in book form shortly thereafter.¹⁷¹

In February of 2006, Harvard's Carr Center co-sponsored a "doctrine revision workshop" with the U.S. Army Combined Arms Center that brought together humanitarians and other outsiders to participate in the revision process.¹⁷² According to one prominent attendee, now retired U.S. Army Lieutenant Colonel John A. Nagl, many military members were skeptical of including individuals from the media and humanitarian communities.¹⁷³ These worries likely subsided when non-military attendees "proved to be the most insightful of commentators."¹⁷⁴ Attendees from the humanitarian community also appeared to appreciate the free exchange of ideas. Indeed, many were surprised at the level of openness. Nagl mentions that a well-known journalist in attendance stated "he had never seen such an open transfer of ideas in any institution."¹⁷⁵ In a clear example of healthy civil-military cooperation, it appears that no subject was off the table at the conference.¹⁷⁶ NGO delegates even "raised sensitive issues about detainee treatment and escalation of force."¹⁷⁷

¹⁶⁹ See SEWELL, *supra* note 51, at xxxiii.

¹⁷⁰ See Tom Hayden, *The New Counterinsurgency*, THE NATION, Sept. 6, 2007, available at <http://www.thenation.com/doc/20070924/hayden>.

¹⁷¹ See *id.*

¹⁷² See Sewell, *supra* note 51, at xxxiii. The agenda of the revision conference is available online. See *COIN FM Workshop Agenda*, Carr Center for Human Rights Policy, Harvard University, John F. Kennedy School of Government, Feb 23-24, 2006, available at <http://www.hks.harvard.edu> (search for "COIN FM agenda").

¹⁷³ See Sewell, *supra* note 51, at xvi.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ One commentator noted, for instance, that the revision conference "was unprecedented in its openness." Colin H. Kahl, *COIN of the Realm: Is there a Future for Counterinsurgency?*, vol. 86, no. 6 FOREIGN AFF., Nov/Dec 2007, at 169, available at <http://www.foreignaffairs.com/articles/63035/colin-h-kahl/coin-of-the-realm>.

¹⁷⁷ See Sewell, *supra* note 51, at xxxiii.

The revision conference exemplifies the myriad benefits of close collaboration between the military and humanitarians.¹⁷⁸ Involving Harvard's Carr Center and other non-military actors in the project enabled the military to accommodate numerous humanitarian critiques in the final document. Just because the military allows humanitarians to participate at conferences on doctrinal matters within the United States, however, does not necessarily indicate that the military could or would work with NGOs to investigate civilian casualties in warzones. But, this critique proves too much. The fact that the highest echelons of the military allowed humanitarians to help write sensitive and significant military doctrine speaks volumes about the willingness of the military to involve those outside of its ranks, even in combat zones. Indeed, to write the military's doctrine is to directly influence its actions on distant battlefields. If the military trusts humanitarians to influence the principles that guide its forces, there is good reason to think that it would allow humanitarians to ensure that it actually complies with these guidelines in practice.¹⁷⁹

In fact, the Army's Command and General Staff College recently invited CIVIC, a respected NGO,¹⁸⁰ to fully participate in a high level, week-long war game.¹⁸¹ Throughout the exercise, CIVIC advised the high-ranking participants on "refugee issues," avoiding civilian casualties "and what line—thin or thick—is appropriate to separate humanitarian and military efforts."¹⁸² This vignette illustrates the military's increasing willingness to partner with humanitarians. The Task Force would provide the ideal forum for this participation to take place.

¹⁷⁸ Of course, some individuals vehemently oppose the idea of such close-collaboration between a prestigious Human Rights Center, the military and a host of influential journalists and humanitarians. See, e.g., Tom Hayden, *Harvard's Collaboration with Counter-Insurgency in Iraq*, HUFFINGTON POST, July 14, 2007, http://www.huffingtonpost.com/tom-hayden/harvards-collaboration-w_b_56243.html (attacking the collaboration as "justify[ing] a permanent engagement in counter-terrorism wars"). Sarah Sewall, the Director of Harvard's Carr Center and the co-convenor of the revision conference, ably identifies the likely reasons behind such resistance. See Sewall, *supra* note 51, at xxvi. "Humanitarians," she says, "often avoid wading into the conduct of war for fear of becoming complicit in its purpose." See *id.*

¹⁷⁹ Sarah Sewall notes that "critical outsiders . . . must monitor military actions in the field, insist that the precepts [of the manual] be followed, and support the associated institutional changes to make it possible for the military to fulfill the manual's promise." See Sewall, *supra* note 51, at xxxvi. This article suggests one way in which such outsiders could ensure that the military keeps the promises it made in the manual, namely the obligation to make civilian protection its overriding priority. See *id.* at xxv.

¹⁸⁰ To learn more about CIVIC, visit <http://www.civicworldwide.org/>.

¹⁸¹ See Marla Bertagnolli-Keenan, Posting, CIVIC From the Field, <http://civicfieldreports.wordpress.com/2009/03/17/ft-leavenworth-civic-participating-in-military-training-exercise/> (Mar. 17, 2009) (last visited Feb. 17, 2010).

¹⁸² *Id.*

The second case study provides an example of civil-military cooperation in practice: the Coalition Joint Civil-Military Operations Task Force (CJCMOTF) and the Provincial Reconstruction Teams that it spawned throughout Afghanistan. Before the U.S. invasion of Afghanistan in 2001, General Tommy Franks realized that military force alone would be insufficient to secure victory;¹⁸³ winning the hearts and minds of Afghans would require the provision of basic services.¹⁸⁴ General Franks created the CJCMOTF to meet this need.¹⁸⁵ In the beginning, military commanders did not intend for the CJCMOTF to provide these basic services itself.¹⁸⁶ Rather, it was to coordinate the efforts of civilian aid agencies.¹⁸⁷ Influential agencies, including Interaction and the World Food Program, worked with the CJCMOTF at its Tampa, Florida location to assist with strategic planning before it began operations in Afghanistan. Once the CJCMOTF moved its efforts from Tampa to Kabul, however, these interactions quieted.¹⁸⁸ In fact, the CJCMOTF proved unable to coordinate its operations with major NGOs.¹⁸⁹ A “fundamental disconnect” developed between the military and civilian agencies.¹⁹⁰

Instead of repairing the linkages between the military and aid workers, the CJCMOTF forged ahead, deciding that it would direct and perform its own aid work.¹⁹¹ It would be unfair, however, to blame CJCMOTF alone. Aid agencies, fearing the military’s interference on their turf, refused to attend CJCMOTF meetings and ignored its repeated requests for closer cooperation.¹⁹² CJCMOTF had weakened its early outreach efforts by not wearing uniforms in the field, worrying aid agencies that Afghans would believe purely humanitarian workers to be soldiers in disguise.¹⁹³ CJCMOTF leadership eventually directed its members to don the uniform.¹⁹⁴

¹⁸³ See Fields, *supra* note 111.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.*

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.* At its inception, the CJCMOTF was intended to receive much of its ‘orders’ from humanitarian agencies. *See id.* As it turned out, the aid agencies largely refused to give them. *See id.*

¹⁹⁰ See HY S. ROTHSTEIN, *AFGHANISTAN & THE TROUBLED FUTURE OF UNCONVENTIONAL WARFARE* 115 (2006).

¹⁹¹ See Fields, *supra* note 111.

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

The CJCMOTF would recover somewhat from these initial stumbles.¹⁹⁵ Perhaps the brightest point in the CJCMOTF saga was its role in helping to create the Provincial Reconstruction Teams (PRTs) that now operate throughout Afghanistan. PRTs are localized cells composed of both military and civilian elements that coordinate and conduct humanitarian relief and political stability efforts within a defined geographic area.¹⁹⁶ Ideally, PRTs work in concert with local NGOs. Lines of communication between the PRT and humanitarians run through the individual PRT commander and civilian staff, including representatives of the U.S. Agency for International Development.¹⁹⁷ When PRTs first appeared, they were met with a maelstrom of criticism from NGOs who feared military encroachment on their humanitarian missions.¹⁹⁸ Gradually, however, “NGOs came to regard PRTs as a fact of life and adjusted to their presence.”¹⁹⁹ PRTs often implement projects through NGOs and appear to include them in some aspects of the project selection process.²⁰⁰

Though the PRTs—like the CJCMOTF from which they came—are far from perfect,²⁰¹ they nevertheless showcase the possible benefits of joint military and humanitarian action. In a war that cannot be won by force alone, instruments like the PRTs act as tendons: flexible linkages that allow civilian and military actors to work together to meet the needs of the local people.

D. Lawfare as an Impetus for Closer Civil-Military Cooperation

Among the more controversial theories of modern warfare is the idea of lawfare. The term describes a “strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”²⁰² General Dunlap developed the current understanding of the term in the late 1990s.²⁰³ Since then, this buzzword has blossomed. Lawfare even appeared *sub rosa* in the 2005 National Defense Strategy

¹⁹⁵ Among other successes, the CJCMOTF met needs that civilian agencies were not meeting throughout Afghanistan. See GlobalSecurity.org, Coalition Joint Civil-Military Task Force, http://www.globalsecurity.org/military/facility/camp_cjcmotf.htm (last visited Feb. 1, 2010).

¹⁹⁶ See ROBERT M. PERITO, THE U.S. EXPERIENCE WITH PROVINCIAL RECONSTRUCTION TEAMS IN AFGHANISTAN: LESSONS IDENTIFIED 1-3 (2005), available at <http://www.usip.org/pubs/specialreports/sr152.pdf>.

¹⁹⁷ See *id.* at 5-6.

¹⁹⁸ See *id.* at 9-10.

¹⁹⁹ See *id.* at 10.

²⁰⁰ See *id.*

²⁰¹ See *id.* at 11-12 (describing the flaws in the PRTs).

²⁰² See COUNCIL ON FOREIGN RELATIONS, LAWFARE, THE LATEST IN ASYMMETRIES (2003), available at http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html.

²⁰³ See Major General Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFFAIRS 146, 146 (2008).

of the United States. “Our strength as a nation state,” the document declares, “will continue to be challenged by those who employ *a strategy of the weak* using international fora, judicial processes, and terrorism.”²⁰⁴ The National Defense Strategy identifies the essence of lawfare. At its heart, lawfare is a type of asymmetric warfare: a means through which actors seek to exploit their opponents’ weaknesses.²⁰⁵

As an asymmetric tactic, lawfare is relevant to the present analysis of civil-military relations in two senses. First, lawfare describes reality. When enemy militants launch not rockets but “allegations of unlawful actions [as a means to] weaken domestic and/or international support for U.S. operations,” they engage in lawfare.²⁰⁶ Such behavior is nothing new. Enemy forces in Vietnam and in the First Gulf War also sought to slash the Achilles’ heel of the American military—its domestic support—by creating civilian casualty incidents.²⁰⁷ Modern militants follow in these footsteps. Since they “cannot match the United States militarily,” they “instead criticize it for purported legal violations, especially violations of human rights or the laws of war.”²⁰⁸

Enemy forces are not alone in their use of lawfare. The United States also wages lawfare. When the U.S. Government purchased commercially-available satellite photos of Afghanistan in order to deny this resource to its enemies, it engaged in lawfare.²⁰⁹ Embedding journalists with combat teams may also be seen as a means of lawfare, because it provides the military with a neutral set of eyes—and video-cameras—to counter any enemy assertions of wrongdoing.²¹⁰

Though helpful as a descriptive concept, the ultimate value of

²⁰⁴ U.S. DEP’T OF DEF., THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005) (emphasis added). An intelligence report prepared in the Clinton Administration predicted the rise of lawfare in the coming decades. See NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2015: A DIALOGUE ABOUT THE FUTURE WITH NONGOVERNMENT EXPERTS (2000), available at <http://infowar.net/cia/publications/globaltrends2015/>.

²⁰⁵ For a superb discussion of asymmetric warfare, see STEVEN METZ, ARMED CONFLICT IN THE 21ST CENTURY: THE INFORMATION REVOLUTION AND POST-MODERN WARFARE 22-23 (2000).

²⁰⁶ See Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. Rev. 1407, 1433 (2008). As these authors note, militants often “intentionally seek to create an incident in which such allegations might be leveled.” See *id.*

²⁰⁷ See Cochran, *supra* note 145.

²⁰⁸ See JACK L. GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 58 (2007).

²⁰⁹ See Dunlap, *supra* note 203, at 147.

²¹⁰ See COUNCIL ON FOREIGN RELATIONS, *supra* note 202. All of these actions can be considered forms of “high” asymmetric warfare, as opposed to the “low” asymmetric warfare waged by its opponents. See STEVEN METZ, ARMED CONFLICT IN THE 21ST CENTURY: THE INFORMATION REVOLUTION AND POST-MODERN WARFARE 22-23 (2000) (discussing the concepts of “high” and “low” asymmetry).

lawfare flows from its prescriptive uses. In this vein, lawfare guides the strategic advice that government attorneys, and particularly those in the military, give to their client, the U.S. Government.²¹¹ The normative implications of lawfare are profound. In particular, a government-sponsored lawfare campaign would encourage a new era of “openness and honesty” in responding to lawfare attacks by enemy actors.²¹² The reason why lawfare succeeds in harming U.S. interests, after all, is partly because “our society so respects the rule of law that it demands compliance with it”²¹³ Thus, the most effective response to these allegations will likely be one that emphasizes the military’s compliance with legal and moral norms.²¹⁴

Others advance alternative recommendations, many building on the suspicion that militants are not the only antagonists that utilize lawfare to harm U.S. interests. Some see certain NGOs as engaging in lawfare along with the military and its foes.²¹⁵ NGOs, these commentators suggest, wage lawfare when they seek to constrain U.S. political and military might by “complaining about possible collateral damage” and, more generally, by vociferously decrying U.S. violations of human rights.²¹⁶ One such commentator, John Fonte, proposes that the U.S. Government respond by denying these organizations any support, including permission “to roam battlefields” at will, or to interview government officials.²¹⁷

A better way to deal with these organizations would be to understand the common ground between their view and the government’s view. For instance, both entities presumably wish to preserve and protect the rights of individuals, though they may disagree about how best to achieve this goal.²¹⁸ The government has much more to gain by embracing these organizations than by excluding them. Had

²¹¹ See Kelly D. Wheaton, *Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 7.

²¹² See COUNCIL ON FOREIGN RELATIONS, *supra* note 202.

²¹³ See William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT’L L. 431, 441 (2003).

²¹⁴ If the military did violate such norms, then violators should be punished after a thorough and impartial investigation.

²¹⁵ See, e.g., John Fonte, *Democracy’s Trojan Horse*, NAT’L INT., Summer 2004, available at http://findarticles.com/p/articles/mi_m2751/is_76/ai_n6127318/. One non-profit suggests that other non-profits are engaging in a concerted lawfare campaign to delegitimize the Israeli state. See ANNE HERZBERG, NGO MONITOR, NGO ‘LAWFARE’: EXPLOITATION OF COURTS IN THE ARAB-ISRAELI CONFLICT (2008), available at <http://www.ngo-monitor.org/data/images/File/lawfare-monograph.pdf>.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See, e.g., Anne Marie-Slaughter, *Beware the Trumpets of War: A Response to Kenneth Anderson*, 25 HARV. J. L. & PUB. POL’Y 965, 967-68 (asserting that NGOs do “champion universal human rights, but find that position, which is also the position of all recent U.S. administrations, liberal and conservative, to be entirely consistent with a pluralist world in which national governments retain principal power”).

the U.S. military refused to partner with Harvard's Carr Center in revising its counterinsurgency doctrine, it would have been poorer for it. Perceptive suggestions by those outside of the military would have gone unheard. The military cannot afford to be deaf to the concerns of others, particularly when they offer advice on how to win the support of the crucial constituency in a counterinsurgency: the local people. Therefore, the possibility of civil-military partnerships, when appropriate, should be vigorously explored. Establishing mutually-beneficial relationships will do more in the long term to advance the position of both entities than will a consistent strategy of disengagement and estrangement.²¹⁹

IV. TOWARD A TASK FORCE ON CIVILIAN PROTECTION

To win a war in which ultimate victory hinges on the ability to secure local support, the U.S. military must earn the people's trust. Few actions do more to damage this trust than killing innocent civilians.²²⁰ Failing to respond adequately and openly when civilians are killed only rubs salt in the wound. The military needs a new course of action. The President should embark on this new course by creating a Task Force on Civilian Protection by executive order. By ushering in a new era of "openness and honesty,"²²¹ the Task Force could be a catalyst through which to gain the trust and support of local citizens.

A. Considering Alternative Options

Before discussing the proposed Task Force, alternative options must be briefly analyzed. Two other options present themselves, each

²¹⁹ Outcomes produced by actors who approached the problem from multiple perspectives often have more legitimacy than outcomes reached by those with similar methodologies or perspectives. This truth explains why governmental and non-governmental commissions that seek to solve pressing problems nearly always include people of varying backgrounds and approaches. The National Commission on War Powers, for instance, boasted as its co-chairs two distinguished individuals who were members of different political parties (James Baker and Warren Christopher). See Miller Center of Public Affairs, University of Virginia, National War Powers Commission at a Glance, <http://millercenter.org/policy/commissions/warpowers/glance> (last visited Feb. 1, 2010).

²²⁰ Unintended civilian deaths do "seem to be a key factor in the marked erosion of support by Afghans for the American presence in their country." Peter Berger & Katherine Tiedemann, Op-ed, *Does Killing Afghan Civilians Keep us Safe? Western Airstrikes Kill Terrorists, But Innocents are Caught in the Crossfire*, L.A. TIMES, Sept. 12, 2008, at 21, available at <http://articles.latimes.com/2008/sep/12/news/OE-BERGEN12>. "In 2005, 68% of Afghans rated U.S. efforts in Afghanistan positively, but that number dropped abruptly to 57% in 2006 and to 42% in 2007." *Id.*

²²¹ COUNCIL ON FOREIGN RELATIONS, LAWFARE, THE LATEST IN ASYMMETRIES: PART TWO (2003), available at http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html.

of them flawed. First, the United States could change nothing, keeping in place the policies that led to the multiple and mistaken investigations after the Azizabad attack. Roughly three procedures currently govern investigations in civilian casualty incidents. On the whole, these procedures are inadequate.

Suspected war crimes committed by U.S. forces or against them are reported and investigated by the relevant criminal investigation office of the military branch involved in the incident.²²² If the incident is considered minor, the involved military unit might conduct the investigation itself.²²³ Overall, the fact that suspected war crimes can be investigated by an independent criminal investigative unit is laudable. Having an outside unit conduct the investigation dispels the appearance of partiality that surrounds investigations performed by military units into their own actions. Yet the military's general procedure of having a criminal investigative unit conduct the investigation only when a war crime is suspected leaves much to be desired. Many incidents involving civilian casualties, for instance, will not involve suspected war crimes. Indeed, the strike on Azizabad itself likely did not involve any legal violations.²²⁴ Thus, these types of incidents could still be investigated by the unit that executed the strike and the ensuing investigation marred by the perception of possible bias.

The second avenue in which collateral damage information is collected occurs in the battle damage assessment process. Military doctrine requires the preparation of reports estimating the "damage resulting from the application of lethal or nonlethal military force."²²⁵ Estimating any collateral damage caused by a strike is, in theory, an aspect of these reports.²²⁶ A high-level cell at the command level retains responsibility for inquiring into alleged incidents of civilian casualties.²²⁷ But these requirements may be dead letters. According to one former military officer, "The U.S. does not have any formal

²²² See CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 5810.01C, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM, para. 6.5.3 (31 Jan. 2007); see also INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 36 (2008) [hereinafter OPERATIONAL LAW HANDBOOK].

²²³ See *id.*

²²⁴ See Callan, *supra* note 3, at 5.

²²⁵ See JOINT CHIEFS OF STAFF, JOINT PUB 3-60, JOINT TARGETING (13 Apr. 2007), available at http://www.dtic.mil/doctrine/jel/new_pubs/jp3_60.pdf.

²²⁶ See, e.g., JOINT CHIEFS OF STAFF, JOINT PUB 2-01.1, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR INTELLIGENCE SUPPORT TO TARGETING E-8 (9 Jan. 2003), available at http://www.fas.org/irp/doddir/dod/jp2_01_1.pdf (mandating the reporting of "possible unintended consequences due to weapon employment," including "civilian casualties" and "collateral damage").

²²⁷ See *id.* at E-10.

requirement to investigate collateral damage incidents”²²⁸ It does appear, however, that the recent Tactical Directive promulgated by General McChrystal in Afghanistan may include a requirement to visit the scene of an alleged incident immediately after it happens in order to begin the investigation quickly.²²⁹ Yet the NATO troops who bombed the fuel trucks allegedly surrounded by civilians did not visit the scene of the incident until much later, suggesting that at least some forces either cannot or will not follow this portion of the Tactical Directive.²³⁰ Other knowledgeable individuals decry the fact that, despite the dictates of doctrine, “thorough postmortems [of civilian casualty incidents] are rare.”²³¹ The military invests tremendous energy in preventing civilian deaths, but it does not always exert similar energy in responding to them when they occur.²³²

Though the procedures in place to prevent civilian casualties have improved markedly in recent years, the procedures governing the response to civilian deaths do not appear to have evolved dramatically. The same incongruity dogged commanders in the 1991 Persian Gulf War, where the “military encountered a vast discrepancy on the amount of knowledge available of the *input*—for example, the number of sorties and bomb tonnage—compared with the *output*—the bomb damage”²³³ More resources must be devoted to ensuring that the procedures in place to prevent civilian casualties actually succeeded in specific incidents.

The final way in which civilian deaths or injuries are investigated is through compensation claims submitted to U.S. forces. The military employs an elaborate scheme to compensate those injured by its actions.²³⁴ Claims officers investigate all potential claims against the government, immediately investigating any civilian death claim, and sometimes coordinate their actions with military criminal investigation agencies.²³⁵ Though the procedures followed by claims investigators are fairly robust—they include, for example, independent verification of the

²²⁸ See Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 44 (2005) (Mr. Reynolds was a Major in the Air Force Reserve at the time he authored this article).

²²⁹ See Chandrasekaran, *supra* note 34.

²³⁰ See *id.*

²³¹ See Benjamin, *supra* note 85.

²³² See *id.* The military often has difficulty in going back to the scene of a strike. See *id.* Everything from hostile locals to insufficient combat troops in an area can make these *ex post facto* visits hard to accomplish.

²³³ See Thomas Keaney, *Collateral Damage in the Gulf War: Experience and Lessons* (unpublished paper prepared for the Understanding Collateral Damage Workshop, Harvard University’s Carr Center for Human Rights Policy, June 4-5, 2002), available at <http://www.hks.harvard.edu> (search for “collateral damage”).

²³⁴ See, e.g., OPERATIONAL LAW HANDBOOK, *supra* note 222, at 164.

²³⁵ See *id.*

evidence and visits to the scene of the incident²³⁶—the claims process is not free of flaws. Most notably, the process is shrouded in secrecy. Only recently has the government released completed claims to the public, and only then after the ACLU filed a Freedom of Information Act request.²³⁷ This lack of transparency makes the process appear untrustworthy.

The claims process is not alone in emphasizing secrecy at the cost of believability. Both the war crimes investigations and battle damage assessments also occur behind closed doors. These secretive measures ignore the reality that “legitimacy has become the currency of power.”²³⁸ Thus, it is no surprise that such closed procedures have damaged the legitimacy of the United States. Even the United Nations and the Government of Afghanistan do not trust U.S. efforts to investigate civilian casualties. If they did, they would not expend their own time and resources in conducting separate investigations into attacks such as the one in Azizabad.

The secrecy in the casualty investigation process presents only one instance of the military’s overall tendency toward secrecy and other examples abound. Indeed, a lack of transparency only increased the damage wrought by early practices at the detention facility at Guantanamo Bay.²³⁹ Simply stated, secrecy tends to undermine the trust-based relationships that must be fostered to achieve long term success.

The problem of secrecy exists alongside another damaging aspect of U.S. casualty investigation procedures. Namely, even when the United States thoroughly investigates a single incident, it does not appear to have an effective process to aggregate the lessons learned in each investigation. The apparent failure to “systematically measure its efforts or effects with regard to preventing civilian deaths” injures the military’s attempts to proclaim that it places enormous emphasis on civilian casualty prevention.²⁴⁰ Therefore, the claims process, the battle damage assessment process, and the war crimes investigation system do not present—individually or collectively—sufficiently effective means of securing the support of the local population.

Another possible solution to the civilian casualty problem merits brief mention. The U.S. and Afghan Governments could agree to have the International Fact Finding Commission investigate all serious

²³⁶ *See id.*

²³⁷ *See* TRACY, *supra* note 89, at 4.

²³⁸ *See* KENNEDY, *supra* note 50, at 45.

²³⁹ *See, e.g.*, Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES, Oct. 21, 2007, at 678, available at <http://www.nytimes.com> (search “all results since 1851” for “golden gitmo”).

²⁴⁰ *See* CARR CENTER FOR HUMAN RIGHTS POLICY, HARVARD UNIVERSITY, REPORT ON THE UNDERSTANDING COLLATERAL DAMAGE WORKSHOP, JUNE 4-5, 2002, at 5-6 (2002), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/WebJuneReport.pdf>.

incidents of civilian casualties in which war crimes are suspected. The Fact Finding Commission is a treaty-based organism created by Article 90 of the First Additional Protocol to the Geneva Conventions. Though the Commission exists, it barely functions, as it “has only a limited mandate and no real powers.”²⁴¹ Even if the United States were willing to entrust the responsibility of investigating alleged war crimes to an international entity, it should not award this responsibility to the Commission for at least two reasons. The United States will certainly desire more control over these investigations than it would have in the case of Commission participation. Additionally, Commission-led investigations may harm U.S. and Afghan efforts to procure valuable intelligence. After all, even claims investigations often yield productive intelligence,²⁴² and the United States would not want to tie its hands in retrieving this evidence for fear of interfering in the Commission’s neutral inquiry. The Commission, then, is simply not a viable option.

B. The Task Force on Civilian Protection: Form and Functions

Since neither accepting the jurisdiction of the Fact Finding Commission nor remaining with the status quo appears to be advantageous, the U.S. Government should adopt a more intrepid solution. The President should act decisively and create a Task Force on Civilian Protection (Task Force) through an executive order. Using an executive order would allow the President to gain immediate political capital, as he could signal at the highest level his commitment to better handle civilian casualties in war. An outline of the form and functions of the Task Force follows, including an exploration of international standards that may bear on the issue.

The task force model constitutes the ideal platform on which to synthesize the efforts of diverse actors. The Department of Defense Criminal Investigation Task Force (CITF), for example, spearheads the government’s attempts to marshal evidence against those “suspected of illegal activities in conjunction with their affiliation to al Qaida and other enemies of the state.”²⁴³ Created by executive order,²⁴⁴ CITF includes civilian personnel from the federal intelligence and law

²⁴¹ Nout van Woudenberg, *The Long and Winding Road Towards an Instrument on Cluster Munitions*, 12 J. CONF. & SEC. L. 447, 464 (2008). Perhaps the most fitting description of the Commission comes from Christopher Greenwood, who called it “an almost toothless tiger.” See Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETH. Y.B. INT’L L. 35, 37 (1989).

²⁴² See OPERATIONAL LAW HANDBOOK, *supra* note 222, at 173 (asserting that “claims offices can become very fertile ground for intelligence gathering”).

²⁴³ See Brigadier General Eric Patterson, *CITF: Criminal Investigation Task Force—OSI*, TIG BRIEF: THE INSPECTOR GENERAL (Nov.-Dec. 2003), available at http://findarticles.com/p/articles/mi_m0PAJ/is_6_55/ai_112482127/print.

²⁴⁴ See *id.*

enforcement agencies and military members from every branch of the armed services.²⁴⁵ CITF members gather evidence and intelligence in locations spanning the globe.²⁴⁶ The task force organizational model on which CITF stands should receive some of the credit for its success. Few other fora could have fostered such robust coordination among such a wide span of agencies and individuals.

The task force model would prove similarly beneficial in the context of civilian casualty investigations. In seeking to forge cooperation among the United Nations, the Government of Afghanistan, the American military, and a collection of NGOs, the United States will need a platform that allows easy and efficient interaction. As demonstrated by CITF's success, the task force model provides just that.

Several entities and organizations would have seats on the proposed Task Force. The U.S. military would serve as its Chair, guiding its meetings and exercising administrative control. Ideally, the host government and the United Nations would also participate. These partner members would participate in the investigations to the extent they desire. Humanitarian NGOs would also be encouraged to join the Task Force, on which they would likely share a single seat so as to not outweigh the governmental members.

Built on the strong foundation of the task force model, the Task Force would fulfill numerous functions. First among these would be to conduct thorough investigations of alleged civilian casualty incidents by engaging various military commands, NGOs, inter-governmental organizations and the host government. After a while, other entities would hopefully stop conducting separate investigations into incidents to which the Task Force was assigned.

As demonstrated from the aftermath of the Azizabad attack, the production of various and conflicting investigations and results can disserve the local people. Though the Task Force would strive to reach unanimous conclusions in its investigations, this will not always be possible. When members disagree with the conclusion reached by the Task Force in particular investigations, they should be allowed to dissent.²⁴⁷ A scenario where one or more partner members dissent from the results is still more palatable than the chaotic circumstance in which separate entities conduct fully independent inquiries that reach divergent conclusions. Multiple inquiries not only prevent the locals from

²⁴⁵ See Davis, *supra* note 47, at 25-6.

²⁴⁶ See *id.*

²⁴⁷ Given that the United States would run the Task Force, it probably could not be in the position of writing a dissenting opinion itself. Instead, in case of strong disagreement, the U.S. representatives would revisit the evidence and facts to determine if their conclusion was mistaken. If they stood by their conclusion even after this further research, then they would issue a lead conclusion with the dissenting opinions of the partner organizations attached.

knowing which result is correct, but can turn into harassment. In the Azizabad case, for instance, some of the same villagers were interviewed multiple times by multiple organizations—a practice that amounted to an unfortunate intrusion on their privacy in a time of stark suffering. In order to gain the trust of the locals, the United States must devise a system that reaches the right result quickly without irritating the very individuals whose allegiance it needs most.

Reaching the right result, however, will prove of little value without proper communication of it. During and after an investigation, specially trained public affairs officers in the Task Force would respond compassionately and quickly to alleged civilian casualty incidents.²⁴⁸ Military attorneys schooled in the lessons of lawfare would vet all statements that concerned the law, especially those statements that responded to lawfare tactics by insurgent forces—that is, where insurgents sought to create, and did create, civilian casualties. Naturally, many of the public affairs officials serving as the face of the Task Force should be Afghans, who will more easily relate to their fellow citizens than foreigners.

Furthermore, all public affairs personnel would be trained to apologize first and defend later when faced with possible civilian deaths. Secretary of Defense Gates instituted this practice as a means of shoring up the support of locals.²⁴⁹ The Task Force would turn this practice into a policy. After all, and as noted by General McChrystal, “Civilian casualties . . . and damage to public and private property (collateral damage), *no matter how they are caused*, undermine support” for the war effort “in the eyes of the Afghan population.”²⁵⁰ The United States and its coalition partners should seize every opportunity to act more like caring partners than “a military that makes indiscriminate decisions in which people are acceptable losses.”²⁵¹

The Task Force would also coordinate efforts to engage local leaders on ways in which the United States could both prevent civilian casualties and repair the harm caused when such incidents do occur. The Task Force should explore every option necessary to win over the local people, to include more effective ways of distributing aid and making compensation payments. The Task Force should take into

²⁴⁸ Colonel Kelly Wheaton penned an insightful article to which I am indebted on this point. He argues that senior military attorneys should advance the strategic objectives of the force, which requires, *inter alia*, effective and clear communication. See Wheaton, *supra* note 211, at 7.

²⁴⁹ See Thom Shanker, *Gates Apologizes for Afghan Deaths*, N.Y. TIMES, Sept. 17, 2008, available at <http://www.ihf.com/articles/2008/09/17/asia/afghan.php>.

²⁵⁰ MCCRYSTAL, *supra* note 22, at E-1 (emphasis added).

²⁵¹ See RAJA G. HUSSAIN, BADAL: A CULTURE OF REVENGE 38 (Mar. 2008) (unpublished thesis, Naval Postgraduate School), available at <http://www.dtic.mil> (search for “culture of revenge”).

account thoughtful proposals to improve the system,²⁵² and should survey claims officers to garner their ideas for possible improvements.

The Task Force should also seek to prevent civilian casualty incidents from occurring by systematically measuring the efficacy of the military's efforts to avert civilian casualty incidents. NGO members may be particularly interested in assisting with this role, as some of them have lobbied the military to pay greater attention to this overlooked area.²⁵³ The Task Force and its NGO partners could compile sophisticated studies detailing how civilian casualties are caused. Implementing the lessons learned from these studies could help coalition forces to avoid such incidents in the future. Moreover, producing open studies on the issue of civilian casualties would empower the United States and its allies to more forcefully claim that they exert tremendous energy in preventing civilian deaths. The current Civilian Casualty Tracking Cells established by General McChrystal for NATO and American forces in Afghanistan, which appear to operate mainly in secret, do not live up to this ideal.²⁵⁴

Distilling lessons learned from civilian casualty incidents would also shatter any myth that the military has not learned from its mistakes in this arena. Of course, those in the Azizabad area are unlikely to believe that the military learned its lesson as their province suffered two major civilian casualty incidents within a single year.²⁵⁵ The Task Force may still be able to convince others, however, that coalition forces truly seek to safeguard every innocent life.

In general, history suggests that coalition troops do learn from their mistakes. An airstrike in Iraq on 11 April 2004 showcases the point. On that day, a U.S. airstrike in Iraq inadvertently "killed Malik al-Kharbit, a tribal leader who, since the mid-1990s, had actually worked with the CIA and Jordanian intelligence trying to overthrow Saddam Hussein."²⁵⁶ Kharbit's influential clan instantly turned against the coalition, which inspired a well-connected tribe to do likewise.²⁵⁷ That tribe, the Dulaimi, exercises a measure of authority over the area now "known as the Sunni Triangle."²⁵⁸ U.S. forces learned their lesson.

²⁵² Jonathan Tracy presents one such thoughtful proposal. See TRACY, *supra* note 89.

²⁵³ Two organizations that may be extremely interested in this work are CIVIC and Human Rights Watch. A recent article quoted officials from each of these organizations, Sarah Holewinski and Marc Garlasco, respectively, as they expressed their frustration at America's failure to systematically track its work in preventing civilian deaths. See Benjamin, *supra* note 85.

²⁵⁴ See, e.g., UNAMA REPORT, *supra* note 18, at 2 (discussing the tracking cells).

²⁵⁵ See TROOPS IN CONTACT, *supra* note 11, at 3, 17.

²⁵⁶ See Rod Nordland, Tom Masland & Christopher Dickey, *Iraq: Unmasking the Insurgents*, NEWSWEEK, Feb. 7, 2005, available at <http://www.msnbc.msn.com/id/6885867/site/newsweek/print/1/displaymode/1098/>.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

In the ensuing battle for Fallujah, the American forces limited civilian casualties by evacuating noncombatants before entering the city.²⁵⁹ The Task Force proposed here would work to ensure that stories like this remain the rule and not the exception.

C. Incorporating Lessons From International Law

In conducting its investigations, the Task Force should integrate relevant lessons from international law. As law has “become a mark of legitimacy—and legitimacy has become the currency of power,” complying with international legal standards, even non-binding ones, is increasingly important.²⁶⁰ International law provides a duty to investigate that should guide the efforts of the Task Force. Specifically, two principles from international jurisprudence on the duty to investigate should guide the Task Force’s operations: that all investigations be independent and sufficiently transparent. Before discussing these two principles, this article will first explain the ways in which the jurisprudence on the duty to investigate might apply to the United States.

1. *Avenues Through Which the Duty to Investigate Might Apply*

The duty to investigate appears to flow from three different reservoirs of law. First, the duty stems from the obligation of states party to international human rights treaties to guarantee the rights contained in those treaties.²⁶¹ The International Covenant on Civil and Political Rights (ICCPR), to which the United States is party, obligates parties to “respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights enumerated therein.²⁶² An earlier treaty, the European Convention on Human Rights, to which the United States is not party, obligates parties to “secure to everyone within their jurisdiction the rights and freedoms defined” by the Convention.²⁶³ These broad mandates are commonly interpreted as implying a duty to take positive measures to enforce the rights guaranteed in a given

²⁵⁹ See RICHARD H. SCHULTZ, JR. & ANDREA J. DEW, *INSURGENTS, TERRORISTS, AND MILITIAS: THE WARRIORS OF CONTEMPORARY COMBAT* 235 (2006).

²⁶⁰ See KENNEDY, *supra* note 50, at 45.

²⁶¹ See Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT’L REV. RED CROSS 881, 887 (2006). Article 2(1) of the ICCPR articulates the duty to “respect and ensure respect to all individuals” International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

²⁶² See ICCPR, *supra* note 261, art. 2(1).

²⁶³ See Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

treaty.²⁶⁴ The duty to investigate suspected violations of rights is one such positive obligation.²⁶⁵ Thus, alleged violations of the right to life, for instance, trigger a state's responsibility to launch an effective investigation into the matter and to prosecute anyone found responsible.²⁶⁶ A rich jurisprudence defines the contours of the duty to investigate. Perhaps nowhere else is this doctrine more developed than in the precedent of the European Court of Human Rights, which has articulated numerous requirements for a given investigation to pass scrutiny.²⁶⁷ The Inter-American Court of Human Rights also enforces a duty to investigate²⁶⁸ and others in the international system, including the United Nations General Assembly, have recognized the principle as well.²⁶⁹

Because this manifestation of the duty to investigate is tied to treaty law, it only applies when and where the relevant treaty applies. This apparent limitation, however, may not be very limiting. As the U.S. military admits in its Operational Law Handbook, "Increasingly, States consider their human rights treaty obligations binding in all cases of State action."²⁷⁰ Indeed, even skeptical observers now agree that "international human rights law continues to apply in all armed conflicts alongside international humanitarian law."²⁷¹ The presence of armed conflict, then, does "not discharge the State's duty to investigate and prosecute human rights abuses," particularly because "the right to life [in the ICCPR] is non-derogable regardless of circumstances."²⁷²

For present purposes, the ICCPR is the relevant treaty that must apply extraterritorially if the duty to investigate is to be triggered by

²⁶⁴ See Doswald-Beck, *supra* note 261, at 887; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 147, A/RES/60/147 (Mar. 21, 2006), available at <http://www2.ohchr.org/english/law/remedy.htm> [hereinafter G.A.Res. 147]. The concept that states must take positive steps to secure international human rights is sometimes referred to as the "duty to guarantee." See FEDERICO ANDREU-GUZMÁN, 1 MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS 21-23 (2004).

²⁶⁵ See Doswald-Beck, *supra* note 261, at 887.

²⁶⁶ See *id.*

²⁶⁷ For an overview of the specifications given to the duty to investigate by the European Court of Human Rights, see *id.* at 887-88. See generally R. (on the application of Al-Skeini) v. Secretary of State for Defence, [2005] EWCA Civ 1609, [2007] Q.B. 140 ¶ 318-25 (Court of Appeal (Civil Division)).

²⁶⁸ See, e.g., ANDREU-GUZMÁN, *supra* note 264, at 22-24.

²⁶⁹ See G.A. Res. 147, *supra* note 264.

²⁷⁰ See OPERATIONAL LAW HANDBOOK, *supra* note 222, at 48.

²⁷¹ See Doswald-Beck, *supra* note 261, at 881.

²⁷² See U.N. Comm'n on Human Rights, *Report of the Special Rapporteur to the Commission on Human Rights on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, ¶ 36, E/CN.4/2006/53 (Mar. 8, 2006) [hereinafter *Report of the Special Rapporteur*].

U.S. actions outside of its borders. The second article of the ICCPR provides that each state party to the “Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant”²⁷³ Substantial authority supports a disjunctive reading of this provision, such that the ICCPR applies both within and without a state’s territory so long as an individual is “subject to its jurisdiction.”²⁷⁴ Most notably, the International Court of Justice concluded that the ICCPR’s object and purpose, the drafting history of Article Two, and the consistent extraterritorial interpretation adopted by the treaty-based Human Rights Commission supported the extraterritorial application of the ICCPR.²⁷⁵ The United States disagrees, arguing that the ICCPR was not intended to apply extraterritorially.²⁷⁶ Therefore, unless and until future administrations reverse course, the U.S. Government will not view itself as obliged to effectuate any ICCPR-based obligations—including the duty to investigate—when acting abroad.

The second possible avenue through which the duty to investigate might apply is found in LOAC. As in the case of international human rights law, LOAC does not provide a general duty mandating the investigation of possible breaches.²⁷⁷ Article 146 of the Fourth Geneva Convention does, however, obligate parties to implement legislation allowing for the prosecution of any person who commits grave breaches of the Convention, as defined in Article 147.²⁷⁸ The enumerated grave breaches include “willful killing, [and] torture or inhuman treatment,” among others.²⁷⁹ But this list leaves out other LOAC breaches, to include violations of the laws of targeting, breaches of which can lead to hundreds of civilian deaths. In order to discharge the obligation to prosecute those who commit grave breaches, a state must *ipso facto* conduct credible investigations that could, if warranted, lead to prosecutions. Anything less would appear to violate Article

²⁷³ ICCPR, *supra* note 261, art. 2(1).

²⁷⁴ For an overview of the argument for a disjunctive reading, see Theodor Meron, *Agora: The 1994 U.S. Action in Haiti: Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78 (1995). See also Thomas Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Delegations*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981).

²⁷⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

²⁷⁶ See, e.g., Press Release, U.S. Dep’t of State, Statement by U.S. Mission to the United Nations on Behalf of the U.S. Delegation to the U.N. Human Rights Committee (July 28, 2006), available at <http://geneva.usmission.gov/Press2006/0728ICCPR.html>. President Obama’s administration does not appear to have taken a position on whether the ICCPR applies extraterritorially.

²⁷⁷ See Doswald-Beck, *supra* note 261, at 881.

²⁷⁸ Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

²⁷⁹ See *id.* art. 147.

146's obligation to provide "effective penal sanctions" against offenders.²⁸⁰ Suspected violations of the laws of targeting, however, would not trigger the duty to investigate as a means of adhering to Article 146 because only grave breaches, as defined in Article 147, demand prosecution.

Despite the lack of textual support for a broader duty to investigate in LOAC, some commentators advance a more general duty akin to that developed in international human rights law.²⁸¹ Presumably, this argument rests on the theory that any violation of LOAC—and not only those labeled "grave breaches" in Article 147 of the Fourth Geneva Convention—merits scrutiny. The growing "convergence" of LOAC and international human rights law also lends support to this argument.²⁸² Many of the provisions in the Geneva Conventions of 1949, for instance, "reflect the unmistakable influence of the Universal Declaration of Human Rights."²⁸³ As the influence of human rights law expands, LOAC is "being 'humanized' to accord with a more modern conception of individual human dignity that is thought to prevail in all circumstances."²⁸⁴ Thus, it seems less surprising that rights and obligations derived from international human rights law would apply to LOAC. Even if the United States did recognize a general LOAC-based duty to investigate, this recognition would be meaningless unless it also recognized and implemented the standards accompanying the duty to investigate, discussed below.

The third avenue of application is customary international humanitarian law. Fascinatingly, the ICRC's recent study on customary international humanitarian law found an overarching duty to investigate "war crimes allegedly committed by [a state's] nationals, or armed forces, or on [its] territory and, if appropriate, [to] prosecute the suspects."²⁸⁵ A corollary duty obligates states to "investigate other war crimes over which they have jurisdiction" and, if warranted, to prosecute suspected offenders.²⁸⁶ Moreover, the ICRC found that customary international law requires states "to make every effort to

²⁸⁰ See *id.* art. 147.

²⁸¹ See Doswald-Beck, *supra* note 264, at 889.

²⁸² See P.G. Danchin, *Transitional Justice in Afghanistan*, 4 Y.B. INT'L L. 3, 18 (2001).

²⁸³ See *id.* at 19.

²⁸⁴ See *id.* As Danchin relates, even "the classic distinctions in thresholds of applicability between international and 'non-international' armed conflicts has begun to break down with increasing calls for the formulation of fundamental standards of humanity that protect an 'irreducible core of non-derogable norms.'" See *id.* (quoting Theodor Meron & Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AM. J. INT'L L. 375, 375 (1991)).

²⁸⁵ 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 INT'L REV. RED CROSS 175, 212 (2005) (listing, among others, Rule 158, which obligates states to conduct investigations into suspected war crimes).

²⁸⁶ See *id.*

cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.”²⁸⁷ Adhering to these rules would generally make intelligent policy, even if it were not required by customary international law. The U.S. Government, however, has already expressed its unwillingness to accept much of the study’s findings.²⁸⁸ Indeed, the United States clearly and compellingly articulated its concerns about the study’s methodology.²⁸⁹ As such, it appears especially unlikely to adopt many of the study’s specific findings.

2. *Specific Standards*

The United States should consider accepting the duty to investigate as an obligation binding on its operations abroad. As demonstrated above, the U.S. Government is somewhat unlikely to do so. Regardless of whether it accepts the duty to investigate as a binding obligation, though, military and political leaders should nevertheless adopt certain standards that accompany the jurisprudence on the responsibility to investigate. In particular, two specific standards should inform the military’s efforts in investigating both suspected war crimes and suspected civilian casualty incidents, even where a war crime has not occurred.²⁹⁰

First, the U.S. military should adopt the requirement that investigations be independent as a means of securing impartiality. When the same military unit that allegedly violated the law investigates the violation, the result it reaches automatically lacks a measure of credibility. The United Kingdom discovered this first hand during their efforts to institute a proper system of investigating civilian deaths allegedly caused by its forces in Iraq. When the United Kingdom first arrived in Iraq, the Royal Military Police, a special criminal investigative unit separate from other commands, investigated every incident.²⁹¹ A short time later, the military changed its policy and allowed commanders to forego a formal investigation if they believed that their subordinates did not transgress the law.²⁹² After the new

²⁸⁷ See *id.* (discussing Rule 161).

²⁸⁸ See John B. Bellinger, III & William J. Haynes, II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 445-45 (2007), available at <http://www.icrc.org> (search for “Bellinger Haynes”).

²⁸⁹ See *id.*

²⁹⁰ For a broad introduction to the standards applied to the duty to investigate, see Peter Rowe, *Do Soldiers Really Have to Apply Human Rights Law in Military Operations?*, 17-18 n.45, The 4th Ruth Steinkraus-Cohen International Law Lecture (May 16, 2006), available at http://www.unawestminster.org.uk/pdf/peter_rowe_lecture_2006.pdf.

²⁹¹ See *Report of the Special Rapporteur*, *supra* note 272, at 25 n.31.

²⁹² See *id.*

policy entered operation, certain incidents in which Iraqi civilians had allegedly perished stoked the curiosity of both the media and Parliament. In the face of this pressure, the United Kingdom enacted a policy in which “all shooting incidents involving U.K. forces which result in a civilian being killed or injured” receive an independent investigation by the Royal Military Police.²⁹³ As evidenced by this example, no longer is it sufficient in all cases for military commanders to conduct proprietary investigations of incidents allegedly committed by their troops. The requirement of independence in the duty to investigate has long reflected recognition of this truth.²⁹⁴

Beyond independence, the U.S. Government should adopt the requirement of sufficient transparency garnered from the duty to investigate. The European Court of Human Rights holds that “there must be a sufficient element of public scrutiny of [an] investigation for its results to secure accountability in practice as well as in theory.”²⁹⁵ Of course, investigations need not be absolutely transparent, particularly where classified information is concerned. The “degree of public scrutiny required” by the European Court of Human Rights, for instance, can “vary from case to case.”²⁹⁶ Yet some elements remain constant. Specifically, the European Court of Human Rights requires victims to participate in the investigation “to the extent necessary to safeguard” their interests.²⁹⁷ Including victims makes for sound policy, as it enables them to understand the proceedings and to offer their side of the story. Ultimately, this practice could engender public support for coalition forces by proving to the locals that outside forces can run open and trustworthy operations even after they make a mistake.

D. Giving NGOs a Seat at the Task Force Table

If the military successfully adopts the lessons of independence and transparency, much good will follow. But the military should not

²⁹³ *See id.*

²⁹⁴ The requirement of independence has been enunciated and extolled by numerous courts and commentators alike. *See* HCJ 769/02 *The Public Committee against Torture in Israel v. Israel* [Dec. 13, 2006] IsrSC ¶ 40 (requiring an independent investigation of targeted killings against civilians taking a “direct part” in hostilities), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf; *see also id.* at ¶ 15; *see also* *Özkan v. Turkey*, App. No. 21689/93, Eur. Ct. H.R. ¶ 311 (Apr. 6, 2004) (asserting that the requirement for investigators to “be independent from those implicated in the events” implicitly requires “not only a lack of hierarchical or institutional connection but also . . . practical independence”), *available at* <http://cmiskp.echr.coe.int> (search for “21689/93”).

²⁹⁵ *See* *Özkan v. Turkey*, App. No. 21689/93, Eur. Ct. H.R. ¶ 314.

²⁹⁶ *See id.* Interestingly, the *Özkan* case itself concerns a situation of military conflict—alleged civilian deaths that resulted from a Turkish military raid of a village while hunting for PKK militants. *See id.*

²⁹⁷ *Id.*

stop there. It should take the bold move of involving NGOs in the new Task Force on Civilian Protection. This maneuver would usher in a host of benefits while signaling the willingness of the United States to work even with those with whom it disagrees.

Practically speaking, it might not take long to teach NGOs the mechanics of casualty investigations. Some organizations, like Human Rights Watch, already engage in somewhat sophisticated battlefield investigations the world over.²⁹⁸ Moreover, some humanitarian organizations may want to partner with the military in this way.²⁹⁹ NGOs that engage in civilian casualty investigations presumably conduct their work in order to protect innocents affected by war and its ravages. Partnering with the military and the host nation government would give NGOs a chance to influence the actors whose actions largely determine the condition of civilians in war. Human Rights Watch, for one, has previously expressed an interest in certain forms of cooperation with military actors. In a report analyzing the conflict between Israel and Hezbollah in 2006, Human Rights Watch lamented that Israeli forces did not allow them to interview soldiers when conducting their investigations.³⁰⁰ Participation on the Task Force would abate, if not eliminate, hurdles of this nature with the American military.

As is implied by Human Rights Watch's inability to secure interviews with Israeli soldiers, NGOs often conduct investigations without access to crucial facts.³⁰¹ "It is one of the peculiarities of international humanitarian law that many of the interesting facts are classified or unavailable to those outside the military."³⁰² Without all of the facts, NGOs must evaluate the legality of military operations in the dark. Legal calculations that require knowledge of "alternative" actions or classified information, for example, are out of the question.³⁰³ Yet NGOs do evaluate the legality of strikes for which they do not have all of the information. Given this knowledge deficit, these organizations may often reach incorrect conclusions, to their detriment and to the detriment of the military whose reputation is on the line.

NGOs may also lack sufficient security or resources to conduct proper investigations. Human Rights Watch, for instance, only spent

²⁹⁸ Of course, Human Rights Watch has far from a flawless record for accuracy in civilian casualty investigations. *See infra* note 318 and accompanying text.

²⁹⁹ For an example, consider CIVIC's close cooperation with high-level military actors. *See* Marla Bertagnolli-Keenan, Posting, CIVIC From the Field, <http://civicfieldreports.wordpress.com/2009/03/17/ft-leavenworth-civic-participating-in-military-training-exercise/> (Mar. 17, 2009) (last visited Feb. 17, 2010).

³⁰⁰ *See* HUMAN RIGHTS WATCH, FATAL STRIKES: ISRAEL'S INDISCRIMINATE ATTACKS AGAINST CIVILIANS IN LEBANON 10 (2006) [hereinafter FATAL STRIKES], *available at* <http://www.hrw.org/en/reports/2006/08/02/fatal-strikes>.

³⁰¹ *See* PoKempner et al., *supra* note 128.

³⁰² *See id.*

³⁰³ *See id.*

two days researching the effects of Israeli airstrikes in southern Lebanon before writing their reports.³⁰⁴ These researchers likely could only spend a short time on the ground due to shortfalls in resources, security, or both. Whatever their reasons, two days is unlikely to provide enough time to acquire the sort of strong evidence necessary to adjudge the legality of attacks. It almost certainly takes more than forty-eight hours of on-the-ground research to lift the fog of war, particularly when the investigators lack any of the military's targeting information that precipitated the attacks. Actions like these can stoke the scorn of observers, who lambast the conclusions these organizations reach based on such limited evidence.³⁰⁵

Humanitarian organizations, however, are more discerning and capable than these criticisms allow. Most of these groups do not automatically denounce every wartime military action as illegal and unethical. When a U.S. unmanned aerial vehicle fired a missile that killed an Al Qaeda officer in Yemen, Human Rights Watch did not condemn the attack, for instance, even though five others perished along with the targeted terrorist.³⁰⁶ Instead, Human Rights Watch thoughtfully articulated the factors that legitimized his killing in the eyes of IHL, before noting that the U.S. Government lamentably did not attempt to “justify this use of military force.”³⁰⁷ As this example illustrates, NGOs can be more objective than some believe.

Involving NGOs in the Task Force would enhance their own investigations as well as the military's. By awarding these organizations access to sensitive information, including classified information in certain cases, the military would allow these select organizations to see the inside calculations—often gray and grainy—that lead to attacks which sometimes cause civilian casualties.³⁰⁸

³⁰⁴ See FATAL STRIKES, *supra* note 300, at 9.

³⁰⁵ Some allegations against NGOs are more serious, like Alan Dershowitz's claim that Human Rights Watch sometimes deliberately disregards key facts to suit its ideological whims. Alan Dershowitz, *The 'Human Rights Watch' Watch, Installment 1*, HUFFINGTON POST, Aug. 21, 2006, http://www.huffingtonpost.com/alan-dershowitz/the-human-rights-watch-_b_27701.html (last visited Feb. 3, 2010). Still others lament the “pacifist and leftist leanings of a lot of NGOs” which can, according to some, make them difficult to trust. See Dunlap, *supra* note 49, at 3.

³⁰⁶ See James Ross, *Jurisdictional Aspects of International Human Rights and Humanitarian Law in the War on Terror*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 15 (Fons Coomans & Menno T. Kamminga, eds., 2004) (James Ross is currently the Legal and Policy Director for Human Rights Watch).

³⁰⁷ See *id.*

³⁰⁸ When dealing with classified information, the Task Force proposed here would obviously need to tread carefully. But the Task Force would hardly be the first governmental entity to confront the difficulties of sharing sensitive information with foreign partners. Thus, the Task Force could glean the best practices in this area by engaging other agencies that seem to do this regularly, to include the Central Intelligence Agency and certain facets of the Department of Defense. Some information regarding civilian casualty incidents would likely be too sensitive to share with partner

Allowing humanitarians inside the military's mind may have benefits beyond simply improving after-action reports. Professor David Kennedy has previously chastised humanitarians for fearing involvement in projects of governance.³⁰⁹ Too often, humanitarians view themselves as immune from the costs and consequences of public decision making.³¹⁰ Humanitarians leave it to others to lead while they stand on the sidelines, attempting to speak truth to power.³¹¹ Kennedy invites humanitarians to step off of the sidelines and enter the places of power. He envisions:

[H]umanitarianism which embraced the act of decision—allocating stakes, distributing resources, making politics, governing, ruling. Which was comfortable intervening because it knew itself always already as a participant in governance. Which exercised power not as humanitarian knowledge imprinting itself on the real, but with all the ambivalence and ignorance and uncertainty we know as human.³¹²

A Task Force on Civilian Protection would move Kennedy's bold vision closer to reality.

Beyond urging NGOs to consider the full panoply of considerations in difficult military decisions, involving NGOs would immerse the Task Force, and the broader military apparatus, in a web of beneficial transnational networks. Some, like John Fonte, would likely fear these networks and accordingly resist any affiliation with them.³¹³ Fonte's fear is understandable. The United States should certainly be wary of awarding NGOs influence out of proportion with their standing as unelected, "idiosyncratic *interest groups*,"³¹⁴ but this truth only

members and NGOs. In such cases, the Task Force would attempt to prepare a report based only on information that the government could disclose to Task Force members. In cases where information essential to comprehending an incident could not be disclosed, the United States would simply conduct its investigation apart from the partner members and NGOs. This probably will not happen frequently. The local people and the host government will push the United States to publicize the facts and results of investigations into any incident, for instance, that allegedly involved a high number of civilian deaths. In such cases, it is likely that the United States would go public with most of the critical facts and circumstances of sensitive attacks rather than risk alienating the support of the local people.

³⁰⁹ See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* xix (2005).

³¹⁰ See *id.* at 332.

³¹¹ See *id.*

³¹² See *id.* at 354.

³¹³ See Fonte, *supra* note 215 (advocating an isolationist stance towards networks of NGOs that may damage U.S. interests).

³¹⁴ See Dunlap, *supra* note 49, at 8 (emphasis added).

sounds a note of caution—not a trumpet of retreat. Anne-Marie Slaughter is right to suggest that “a world of government networks,” far from being frightening, “should be particularly attractive to the United States.”³¹⁵ Government networks acting “as global governance mechanisms can help mobilize a whole set of transnational actors around them—to interact with them, *monitor their activities, provide input into their decision making, and receive information from them.*”³¹⁶ In short, NGO networks could augment the efficacy of the Task Force. NGOs would not only provide the Task Force with a ready set of experts, but a different set of perspectives by which to test the Task Force’s assumptions. Indeed, the very reason global networks form is to accomplish together “what none can achieve on its own.”³¹⁷ The Task Force should join these transnational networks in order to achieve goals unreachable on its own accord.

Some will argue that engaging these networks risks harming America’s interest by undermining its sovereignty. But this concern only reaches so far. Surely most observers would agree that governments are no longer the sole fount of power, political or otherwise. “Even in the most powerful and well-integrated states . . . power today lies in the capillaries of social and economic life.”³¹⁸ Governments do not enjoy boundless freedom of action. Instead, interlocking systems of associations and interests “determine much of what any government, or any president, is able to say or do.”³¹⁹ In this environment, there is more to be gained from working closely with powerful NGOs—and thereby exercising some level of influence over their actions—than by keeping one’s distance. Moreover, attempts to act unilaterally by overriding these transnational networks will sometimes reduce the standing of the United States and, perversely, diminish the “soft power” that the country needs to encourage transnational actors to support U.S. demands.³²⁰

Thus, U.S. leaders should approach the quandary of civilian casualties in war in a way open to the assistance and perspectives of others. “[F]or reasons of legitimacy, burden sharing, and effectiveness,”³²¹ the U.S. Government should create a Task Force that

³¹⁵ See ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 4 (2004).

³¹⁶ See *id.* at 240 (emphasis added).

³¹⁷ See *id.* (quoting Wolfgang H. Reinicke, *The Other World Wide Web: Global Public Policy Networks*, FOR. POL’Y 44 (1999-2000), available at <http://www.foreignpolicy.com/Ning/archive/archive/117/globalpublicpolicynet.pdf>).

³¹⁸ See KENNEDY, *supra* note 50, at 14.

³¹⁹ See *id.* at 14.

³²⁰ See, e.g., JOSEPH S. NYE, SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS 129 (2004). Nye defines “soft power” as the “ability to get what you want through attraction rather than coercion or payments. It arises from the attractiveness of a country’s culture, political ideals, and policies.” *Id.* at x.

³²¹ See SLAUGHTER, *supra* note 315, at 4.

tackles the civilian casualty problem with the assistance of humanitarian actors, whose extended networks may lend credence to a process that presently operates without the trust of the most important network—the local people.

V. CONCLUSION

In the wails of the mourners at Azizabad, if one listens closely enough, a clarion call sounds. Two of its notes ring loudest. First, the U.S. military should continue to make every effort to ensure that innocents do not die in war. The military has heard this call and largely heeded its teaching. But the second note has yet to engender such wide scale change. This second note urges parties to a conflict to quickly and effectively investigate all incidents in which civilians perish. Those who lost loved ones, as well as society at large, deserve to promptly learn the truth. They deserve better than to be misled by multiple investigations, some of which may present incorrect conclusions.

The U.S. military must heed this second call. Every civilian killed makes those who live less likely to support the host government. Failing to conduct open and effective investigations into civilian casualties only enhances this reluctance. Thus, the U.S. Government should act boldly and swiftly to earn back the trust of the local populace. Towards this end, a Task Force on Civilian Protection should be established and invested with the responsibility of investigating all serious civilian casualty incidents. Investigating civilian casualties in an effective and open manner requires an “all hands on deck” approach. Therefore, the Task Force should not only involve the United Nations and the host government, but representative NGOs as well.

Involving NGOs promises immense benefits while presenting far fewer problems than some may suppose. In particular, two developments have enabled the military and humanitarians to interact more closely. The remarkable rise of law enables those who speak its language to work together. That some speakers—namely military and humanitarian professionals—have slightly different dialects will not prevent co-linguists from communicating and cooperating. Alongside the spread of the legal language are changes that simply necessitate closer civil-militarily cooperation. Together, these developments have eroded the once-high bulwark that separated humanitarian and military actors. Additionally, the concept of lawfare, which urges governments to use the law to their strategic advantage, provides an impetus to capitalize on the increasing commonalities between the military and humanitarians. As a result of these developments, the Task Force may be able to harness the collective capacities of NGOs and the transnational networks of which they are a part.

In conducting its operations, the Task Force should implement certain lessons acquired from international jurisprudence. Specifically, international tribunals and commentators have asserted a duty to investigate. Effective investigations, in the eyes of this jurisprudence, must be both independently conducted and sufficiently transparent. Regardless of whether the United States considers these requirements obligatory, it should adopt them as a matter of political expediency. Independent and transparent investigations would do much to improve the current process and to instill trust in local civilians.

The story of the Azizabad attack is a story of suffering. Yet, as preserved in the ancient Greek phrase *pathei mathos*, suffering can and should lead to learning. Here, the lesson is clear: the U.S. military must more ably respond to civilian casualties in war, particularly in a counterinsurgency where success ultimately pivots on local support. In this way, the songs of the mourners at Azizabad will become the anthem of change.

THIS LAND IS MY LAND: THE TENSION BETWEEN FEDERAL
USE OF PUBLIC LANDS AND THE RELIGIOUS FREEDOM
RESTORATION ACT

LIEUTENANT COLONEL JAMES E. KEY

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I. INTRODUCTION

Perceiving a crisis of constitutional proportions, Congress enacted the Religious Freedom Restoration Act¹ (RFRA) in 1993 to legislatively “reverse” the 1990 U.S. Supreme Court decision in *Employment Division v. Smith*.² Congress felt the Court had “virtually eliminated” strict scrutiny analysis of generally applicable, religion-neutral laws that happened to burden religious exercise.³ Congress intended the Act to apply “in all cases where free exercise of religion is substantially burdened” and would require a compelling interest to justify any such burden.⁴ Rather than explain what it meant by “compelling interest,” Congress obliquely noted it was trying to “restore the compelling interest test” found in the 1963 case of *Sherbert v. Verner*⁵ and the 1972 case of *Wisconsin v. Yoder*.⁶ As for the “substantial burden” prong, RFRA fails to even hint as to how that term should be defined.

By requiring the government to justify any law that happens to infringe upon someone’s exercise of their religion—regardless of the law’s intended purpose—with proof of a state interest of the highest order, and by crafting a statute in such vague terms, Congress set the stage for a flood of litigation. Since RFRA’s passage, the law and its cousin, the Religious Land Use and Institutionalized Persons Act of 2000⁷ (RLUIPA), have been used as weapons to attack virtually every aspect of governmental regulation; including prison hair-length regulations, community zoning rules and national drug laws.

Recently, however, plaintiffs invoked RFRA to challenge federal land use decisions with respect to public lands. While litigants have so far found only a modicum of success with this tactic, they could employ RFRA to force the government to bend to the will of private religious practitioners with the right mix of facts, argument and sympathetic judges. In a recent case, religious litigants succeeded in blocking a military construction project on federal land and are now trying to prohibit any future development thereupon.⁸ The significance of this result cannot be overstated, and it reveals that RFRA is far more powerful than the more typical environmental avenue of attack, the

¹ Religious Freedom Restoration Act § 2, 42 U.S.C. § 2000bb(a)(4) (2006).

² 494 U.S. 872 (1990); see 42 U.S.C. § 2000bb(a)(4) (2006).

³ 42 U.S.C. § 2000bb(a)(4) (2006).

⁴ *Id.* §§ 2000bb(b)(1), 2000bb-1(b).

⁵ 374 U.S. 398 (1963).

⁶ 406 U.S. 205 (1972); see 42 U.S.C. § 2000bb(b)(1) (2006).

⁷ 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

⁸ *Comanche Nation v. United States*, No. Civ-08-849-D, 2008 WL 4426621, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 23, 2008) (order granting preliminary injunction); First Amended Complaint at 8-10, *Comanche Nation v. United States*, No. Civ-08-849-D (W.D. Okla. Nov. 14, 2008).

National Environmental Policy Act⁹ (NEPA). Where NEPA only requires federal agencies to follow a particular process in reaching conclusions, RFRA can dictate the conclusion itself. As environmental interest groups have come to understand the power of RFRA, they have joined forces with religious practitioners to make land use arguments that sound less in environmental and natural resource law and more in the free exercise of religion.

This article posits that despite its sweeping language, Congress never intended for RFRA to control government land use decisions with respect to public lands. Two legislative options to remove RFRA from these types of decisions are to either (1) amend RFRA to explicitly exclude public land use or (2) repeal RFRA in its entirety. Without legislative action, government agencies must prepare to meet RFRA challenges by relying on existing legal precedent.

II. THE EVOLUTION OF FREE EXERCISE JURISPRUDENCE AND PRE-RFRA CONFLICTS BETWEEN RELIGION AND PUBLIC LANDS

Prior to RFRA's enactment, religion was used sporadically to challenge public land use decisions with virtually no success. Those challenges must be viewed in the context of the development of free exercise law that led to RFRA.

A. The Rise of Religious Exceptions to Neutral Laws

With little fanfare, early Supreme Court decisions refused to find violations of the Free Exercise Clause in laws neutral toward religion, even if such laws burdened the exercise of individual religious practitioners. In 1879, the Supreme Court squarely addressed the issue when the ban on polygamy was challenged and found "there cannot be a doubt that . . . it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion."¹⁰ The Court warned that finding a religious exemption to generally applicable laws in the Free Exercise Clause would "make the professed doctrines of religious belief superior to the law of the land, and in effect . . . permit every citizen to become a law unto himself."¹¹ The Court endorsed this view over the years, only finding violations of the Free Exercise Clause when laws particularly targeted religious practitioners or violated some other constitutional right.¹²

⁹ 42 U.S.C. §§ 4321-4347 (2006).

¹⁰ *Reynolds v. United States*, 98 U.S. 145, 166 (1879).

¹¹ *Id.* at 167.

¹² *See Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance

Departing sharply from its precedent, the Supreme Court rejected the notion that laws of neutral applicability were immune from challenge under the Free Exercise Clause in 1963. In *Sherbert v. Verner*, the South Carolina Employment Security Commission refused to pay unemployment compensation to a Seventh-day Adventist who had been fired for refusing to work on her Sabbath.¹³ Rejecting the Commission's position, the Court held states could not maintain unemployment provisions requiring applicants to abandon religious convictions in order to be eligible for payment.¹⁴ In reaching this conclusion, the Court determined that "any incidental burden" on religious exercise must be justified by a "compelling state interest" to survive,¹⁵ if either the purpose *or* the effect of the law burdened religious exercise.¹⁶

The second seminal case for this proposition, *Wisconsin v. Yoder*, involved the criminal conviction of Amish parents who—for religious reasons—refused to send their children to public school after the eighth grade in violation of state law.¹⁷ In striking down their convictions in 1972, the Court cited *Sherbert* for the proposition that a facially neutral regulation may violate the First Amendment if it "unduly burdens the free exercise of religion" in the absence of a compelling state interest.¹⁸

Over the course of the two decades following *Yoder*, the only free exercise challenges to neutral laws successful at the Supreme Court were in the field of unemployment programs. In the 1981 case of *Thomas v. Review Board of the Indiana Employment Security Division*,

the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."); *Prince v. Mass.*, 321 U.S. 158, 170-71 (1944) ("However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 654 (1943) ("But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation."); *Cantwell v. Conn.*, 310 U.S. 296, 305 (1940) ("The general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose.").

¹³ *Sherbert v. Verner*, 374 U.S. 398, 400-01 (1963).

¹⁴ *Id.* at 410.

¹⁵ *Id.* at 403.

¹⁶ *Id.* at 404 (citing *Braunfeld*, 366 U.S. at 607).

¹⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

¹⁸ *Id.* at 220-29. *Sherbert*, however, never invoked the "unduly" qualifier for "burden." Instead, *Sherbert* only referred to "any incidental burden" and "any burden." *Sherbert*, 374 U.S. at 403. By requiring a threshold of an *undue* burden, the *Yoder* Court arguably limited *Sherbert*'s holding by concluding that an imposition on religious exercise not amounting to an "undue" burden does not merit strict-scrutiny analysis.

a Jehovah's Witness quit his job when he was transferred to a department involved in producing military tank turrets, asserting that his religion prohibited work on weapons.¹⁹ The state agency denied his application for unemployment benefits after determining he had quit for personal reasons.²⁰ The Court found an indirect, but substantial, infringement on the former employee's religious exercise and concluded Indiana failed to advance a compelling interest in denying his unemployment benefits.²¹ Justice Rehnquist dissented, arguing the Court had read the Free Exercise Clause too broadly both in *Thomas* and in *Sherbert*.²²

Six years later, the Court decided *Hobbie v. Unemployment Appeals Commission of Florida*, a case involving a jewelry store's assistant manager baptized into the Seventh-day Adventist Church.²³ The appellant's new religion prohibited working on Friday evenings through Saturday evenings.²⁴ After accommodating this schedule for a few months, the employer eventually told the appellant she would be required to work during that timeframe.²⁵ The appellant refused and the employer subsequently fired her.²⁶ The state denied her claim for unemployment based on the premise that her refusal to work constituted "misconduct."²⁷ Following *Sherbert* and *Thomas*, the Court found the denial of unemployment benefits amounted to an "infringement" of her religious exercise and applied strict scrutiny.²⁸ As in *Thomas*, Justice Rehnquist dissented.²⁹

B. Early Attempts to Use Religion in Public Land Use Cases

In the late 1970s, cases with litigants employing religion as a weapon in the fight against the development of public lands began to emerge. While *Sherbert* and *Yoder* involved granting relatively small-scale exceptions to generally applicable laws, the attacks in the federal land use cases threatened to derail large federal projects. Unlike the unemployment-benefit litigation, the introduction of geography-as-religious-exercise was not well received by courts, which rebuffed

¹⁹ *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 709-10 (1981).

²⁰ *Id.* at 711-12.

²¹ *Id.* at 717-20.

²² *Id.* at 722 (Rehnquist, J., dissenting).

²³ *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 138 (1987).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 138-39.

²⁸ *Id.* at 141. After finding strict scrutiny had been triggered, the Court virtually abandoned any pretense of engaging in actual strict scrutiny analysis. The Court merely stated that "[t]he Appeals Commission does not seriously contend that its denial of benefits can withstand strict scrutiny" and then said nothing more about the matter. *Id.*

²⁹ *Id.* at 148 (Rehnquist, C.J., dissenting).

litigants under three principal theories.³⁰

Under the first approach, courts would typically say they were employing the *Sherbert* test but narrowly construe the type of burden that would trigger strict scrutiny.³¹ By making it extremely difficult for litigants to meet the burden threshold in the first place, the courts would not need to engage in the strict scrutiny analysis. For example, in *Block v. Wilson*, the Court of Appeals for the District of Columbia Circuit allowed private entities to develop the government-owned Snowbowl ski area in Arizona.³² The area is sacred to Native American tribes who felt development would be “a profane act[,]” “an affront to the deities” and would cause the mountains to “lose their healing power and otherwise cease to benefit the tribes.”³³ The tribes further argued the development “would seriously impair their ability to pray and conduct ceremonies”³⁴ In its decision, the court adopted a narrow notion of what amounted to a burden on religious exercise by holding government actions only burdened religion when such actions affirmatively “penalize[d] faith.”³⁵ Applying its “penalty” interpretation of *Sherbert*, the court found the “spiritual disquiet” caused by the construction did not burden the Native Americans’ “freedom to believe.”³⁶

In further raising the bar, the court held that religious litigants attempting to restrict government land-use must show that it “would impair a religious practice *that could not be performed at any other site.*”³⁷ Because the plaintiffs could not prove they could perform their religious exercises “nowhere else,” the court held the burden on their exercise did not trigger strict scrutiny analysis.³⁸ In sum, the *Wilson* court’s test for proving a sufficient burden required establishing that a religious exercise (1) was penalized and (2) could not be conducted at any other location. The Sixth Circuit crafted a similarly demanding standard and required plaintiffs to show religious exercise at a site was “inseparable from the way of life, the cornerstone of their religious observance . . . or play[ed] the central role in their religious ceremonies

³⁰ See, e.g., *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983); *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), 452 U.S. 954 (1981); *Crow v. Gullet*, 541 F. Supp. 785 (D. S.D. 1982), *aff’d*, 706 F.2d 856 (8th Cir. 1983); *Inupiat Cmty. of Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff’d*, 746 F.2d 570 (9th Cir. 1984); *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 552 F. Supp. 951 (N.D. Cal. 1982), *rev’d on other grounds*, *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 484 U.S. 941 (1987).

³¹ E.g., *Crow*, 541 F. Supp. 785.

³² *Wilson*, 708 F.2d 735.

³³ *Id.* at 740.

³⁴ *Id.*

³⁵ *Id.* at 741.

³⁶ *Id.* at 742.

³⁷ *Id.* at 744 (emphasis added).

³⁸ *Id.*

and practices”³⁹

In determining whether governmental action burdened religious exercise to a constitutional degree, the courts typically found neither mere interference with nor diminishment in quality of religious exercise should trigger strict-scrutiny.⁴⁰ Thus, for example, permitting tourists to take pictures of religious practitioners, disrupt religious practices with noise and take religious offerings did not amount to a Free Exercise violation.⁴¹

Courts have also used the second approach of finding a compelling and overriding government interest, which avoids determining whether or not plaintiffs showed a sufficient burden at all. In *Badoni v. Higginson*, Native American plaintiffs complained that by operating a dam and reservoir, the government flooded sacred sites, prayer spots and even gods.⁴² Without deciding whether the government’s actions burdened the plaintiffs’ religious exercise, the Court of Appeals for the Tenth Circuit found the water-management plan to be of “sufficient” magnitude to override the Native Americans’ religious interests.⁴³ In another case giving short shrift to whether the religious plaintiffs showed a sufficient burden, a court found a compelling interest in the nation’s “economic stake in the development of energy resources” as well as compliance with foreign treaty obligations.⁴⁴

The third line of reasoning used by courts for ruling against plaintiffs in public land cases was that the Free Exercise Clause could never dictate federal ownership and control of public lands, because that land had to be managed for the public at large versus for a particular segment of the public. In *Crow v. Gullet*, the District Court for the District of South Dakota held that construction in sacred areas and interference with religious rituals by tourists did not merit relief under the Free Exercise Clause because that clause does not require the government to provide either the means or the environment for religious exercise.⁴⁵ The District Court for the Northern District of California reached a similar result in *Northwest Indian Cemetery Protective Association v. Peterson*, refusing to enjoin either construction of a

³⁹ *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980). Nonetheless, the court refused to enjoin the flooding of a sacred site in the face of testimony that the flooding would, *inter alia*, “destroy the spiritual strength of the Cherokee people.” *Id.* at 1162.

⁴⁰ *Crow v. Gullet*, 541 F. Supp. 785, 792 (D. S.D. 1982), *aff’d*, 706 F.2d 856 (8th Cir. 1983).

⁴¹ *Id.* at 791.

⁴² *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980).

⁴³ *Id.* at 177 n.4.

⁴⁴ *Inupiat Cmty. of the Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982), *aff’d*, 746 F.2d 570 (9th Cir. 1984).

⁴⁵ *Crow*, 541 F. Supp. at 791.

logging road through a sacred site or logging operations in its vicinity.⁴⁶ That court pointed to the government's obligation to manage public lands "for the benefit of the public at large."⁴⁷ The Court of Appeals for the Tenth Circuit came to the same conclusion when it refused to exclude tourists from, or require tourists to behave in "a respectful and appreciative manner," in a sacred area near Rainbow Bridge National Monument during religious ceremonies.⁴⁸ The District Court for the District of Alaska warned that setting aside public land on free exercise grounds could result "in the creation of a vast religious sanctuary."⁴⁹ Regarding the Rainbow Bridge National Monument, the Tenth Circuit suggested the plaintiffs' view would turn the monument into "a government-managed religious shrine."⁵⁰

Native American religious practitioners were not the only parties challenging federal land use decisions on religious grounds as environmental activists joined forces with them in several cases. Indeed, such interest groups as The Sierra Club, The Wilderness Society, California Trout, Siskiyou Mountains Resource Council, Redwood Region Audubon Society and Northcoast Environmental Center were among the plaintiffs in *Northwest Indian Cemetery Protective Association*.⁵¹

C. Supreme Court Rejection of Religion as Means for Controlling Government's Internal Affairs and Public Land Use

Despite the expansive-sounding grants of personal religious rights in *Sherbert* and *Yoder* and religious plaintiffs' ensuing success in the unemployment-benefits realm, the Supreme Court pared back those rights in 1986 by refusing to require the government to modify its "internal affairs" in order to avoid burdening religious exercise.⁵² In *Bowen v. Roy*, the Court rejected the claim that the First Amendment compelled the government to waive a social security number prerequisite for receiving welfare benefits.⁵³ Despite the welfare applicant's religious objection to obtaining a social security number, the Supreme Court held the First Amendment does not require the government "to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."⁵⁴ The Court further

⁴⁶ *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 552 F. Supp. 951, 954 (N.D. Cal. 1982).

⁴⁷ *Id.*

⁴⁸ *Badoni*, 638 F.2d at 179.

⁴⁹ *Inupiat Cmty. of the Arctic Slope*, 548 F. Supp. at 189.

⁵⁰ *Badoni*, 638 F.2d at 179.

⁵¹ *Nw. Indian Cemetery Protective Ass'n*, 552 F. Supp. 951.

⁵² *Bowen v. Roy*, 476 U.S. 693 (1986).

⁵³ *Id.* at 695.

⁵⁴ *Id.* at 696, 699.

held the Free Exercise Clause “is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.”⁵⁵ Noting that the social security requirement was “wholly neutral,” the Court found the requirement did not “affirmatively compel [the applicant], by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons.”⁵⁶

Rejecting the *Yoder* test in the case of “a facially neutral and uniformly applicable requirement for the administration of welfare programs,” the Court refused to require a strict-scrutiny analysis.⁵⁷ Instead, the Court held, “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.”⁵⁸ The Court also refused to apply *Sherbert*, limiting that case to situations where the government maintains a standard for individualized exemptions to a neutral law but refuses to grant such an exemption for religious practitioners.⁵⁹ Thus, the *Bowen* court adopted a rational-basis test, at least insofar as government “internal affairs” are at issue, and employed the pre-*Sherbert* analysis of neutral laws that have an indirect impact on religious exercise.

Agreeing with the ultimate outcome, but dissenting from the majority’s analysis, Justice O’Connor argued that a “long line of precedents” required the government to accommodate religious exercise “unless pursuing an especially important interest by narrowly tailored means.”⁶⁰ This “long line,” however, consisted only of *Thomas*, *Yoder*, *Sherbert*, and *United States v. Lee*, a 1982 case finding the collection of social security payments (without making exceptions for religious practitioners) was a compelling state interest and therefore valid.⁶¹ The

⁵⁵ *Id.* at 700 (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

⁵⁶ *Id.* at 703.

⁵⁷ *Id.* at 707.

⁵⁸ *Id.* at 707-08.

⁵⁹ *Id.* at 708. The Court further distinguished *Sherbert*, concluding “that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action of legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.” *Id.* at 706.

⁶⁰ *Id.* at 727 (O’Connor, J., dissenting). Justice O’Connor found the government had established a compelling interest in preventing welfare fraud, but had failed to show why it could not accomplish that goal while providing an exemption to religious practitioners. *Id.* at 732.

⁶¹ *United States v. Lee*, 455 U.S. 252 (1982).

majority characterized Justice O'Connor's history as "revisionist."⁶²

Two years after *Roy*, in *Lyng v. Northwest Indian Cemetery Protective Association*, the Court held that the Free Exercise Clause did not prohibit road-building and timber-harvesting activities in government-owned areas sacred to Native Americans.⁶³ There, the Court determined neither the road-building nor the timber-harvesting would coerce the Native Americans to either violate their religious beliefs or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."⁶⁴ Despite acknowledging the project could have potentially "devastating effects on traditional Indian religious practices," the Court held the First Amendment cannot be used to challenge public programs that do not prohibit the free exercise of religion.⁶⁵ The Court further held this proposition is true even if the project would "virtually destroy the Indians' ability to practice their religion."⁶⁶

The *Lyng* court rejected the assertion that the government was required to show a compelling reason for "otherwise lawful" government programs, even if the "incidental effect" of those programs makes it more difficult to practice religion, so long as the programs do not coerce violation of beliefs or deny rights, benefits and privileges.⁶⁷ Citing *Roy*, the Court held: "The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."⁶⁸

Writing for the Court, Justice O'Connor said the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires," and that a contrary ruling could result in "de facto beneficial ownership of some rather spacious tracts of public property."⁶⁹ Even though she argued for strict-scrutiny analysis of indirect burdens brought on by internal government affairs in *Roy*, Justice O'Connor wrote in *Lyng* that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious belief" do not trigger strict-scrutiny.⁷⁰ She further noted that *Roy* provided a "sound reading" of the Constitution.⁷¹ The Court ultimately held, "Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use

⁶² *Roy*, 476 U.S. at 706 n.16.

⁶³ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁶⁴ *Id.* at 449.

⁶⁵ *Id.* at 452.

⁶⁶ *Id.* at 452.

⁶⁷ *Id.* at 451-52.

⁶⁸ *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986)).

⁶⁹ *Id.* at 452-53.

⁷⁰ *Id.* at 450.

⁷¹ *Id.* at 452.

what is, after all, its land.”⁷²

The dissent, however, argued that upon a showing of a “substantial and realistic threat of frustrating . . . religious practices,” the Court should require the government to advance a compelling justification for the land use in question.⁷³ The holding of *Lyng* amounted to a declaration that federal actions on federal lands are essentially free from strict-scrutiny analysis, regardless of the impact those actions have on religious exercise. By explaining that the outcome would be the same even if the government “virtually destroy[ed]” the practitioners’ ability to engage in religious exercise, the Supreme Court held that public land use decisions causing even the most egregious infringements on personal religious exercise would not demand strict-scrutiny analysis.

The practical effect of *Lyng* is that, except for the most extreme land use decisions made for the sole purpose of frustrating religious exercise, litigants will be unable to show a strict-scrutiny triggering burden. In the same year the Supreme Court decided *Lyng*, the Eighth Circuit Court of Appeals cited the case favorably while bluntly noting, “[c]ourts consistently have refused to disturb governmental land management decisions that have been challenged by Native Americans on free exercise grounds.”⁷⁴ The Supreme Court declined to hear the appeal from the Eighth Circuit case.⁷⁵

D. The Supreme Court Attempts to Scale Back Free Exercise Rights in the Unemployment-Benefit Context

By 1990, the Supreme Court’s willingness to overturn general laws of neutral applicability under the Free Exercise Clause seemed limited to unemployment benefits cases and *Yoder*’s mandatory-school exemption for Amish teenagers. Despite the Court’s rejection of Free Exercise challenges to government actions as severe as those that could “virtually destroy” religious exercise, Congress had not felt the need to intervene. Congress’s pre-1990 reticence was quickly abandoned when the Court reversed course in an unemployment case pitting religious drug use against state anti-drug laws.⁷⁶

When two substance abuse counselors were fired because of their sacramental use of peyote, a Schedule I controlled substance, the state of Oregon refused to pay them unemployment compensation because they lost their jobs for misconduct.⁷⁷ A five-Justice majority in

⁷² *Lyng*, 485 U.S. at 453.

⁷³ *Id.* at 474-75 (Brennan, J., dissenting).

⁷⁴ *United States v. Means*, 858 F.2d 404, 407 (8th Cir. 1988).

⁷⁵ *Means v. United States*, 492 U.S. 910 (1989) (petition for certiorari denied).

⁷⁶ *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

⁷⁷ *Id.* at 874.

Employment Division, Department of Human Resources of Oregon v. Smith refused to grant relief.⁷⁸ The Court held generally applicable laws that incidentally impact religious practice did not require the government to prove a “compelling governmental interest.”⁷⁹ The majority distinguished the cases of *Sherbert, Thomas* and *Hobbie* as standing for the proposition that government may not impose laws permitting individual exemptions in such a way as to burden religious exercise without a compelling reason.⁸⁰ Thus, under *Smith*, generally applicable laws without a system of individual exemptions that are neutral with respect to religion are not subject to strict-scrutiny analysis.

Writing for the Court, Justice Scalia pointed to the admonition in an 1879 polygamy case that a contrary holding would result in religious practitioners being able to skirt any law they deemed necessary or expedient.⁸¹ The majority presciently argued that requiring all governmental burdens on religion to be supported by a compelling state interest would “open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind,” including, *inter alia*, drug laws and environmental protection laws.⁸²

Though concurring in the holding, Justice O’Connor disagreed sharply from the majority’s assessment. She argued the Court had “dramatically depart[ed] from well-settled First Amendment jurisprudence,” and that even neutral, generally applicable laws were subject to strict-scrutiny analysis.⁸³ Justice O’Connor argued the First Amendment required “the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to that interest.”⁸⁴ Ultimately, Justice O’Connor determined Oregon had a compelling state interest in “uniform application” of drug laws that justified the outcome in this case.⁸⁵ The dissent agreed with Justice O’Connor’s formulation of the applicable test, but believed the “compelling interest” analysis should focus on the particular religious practitioners who are harmed, not general societal justifications for the law.⁸⁶ The dissent found no compelling interest in refusing to grant an exemption for Native

⁷⁸ *Smith*, 494 U.S. at 890.

⁷⁹ *Id.* at 877-80.

⁸⁰ *Id.* at 884.

⁸¹ *Id.* at 879 (citing *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)).

⁸² *Id.* at 888-89.

⁸³ *Id.* at 891 (O’Connor, J., concurring).

⁸⁴ *Id.* at 894 (O’Connor, J., concurring). Among the cases she cited for this proposition were *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (neutral, generally applicable regulations that unduly burden the free exercise of religion can run afoul of the Free Exercise clause) and *Sherbert v. Verner*, 374 U.S. 398 (1963) (only compelling state interests permit substantial infringement of Free Exercise rights).

⁸⁵ *Smith*, 494 U.S. at 905 (O’Connor, J., concurring).

⁸⁶ *Id.* at 909-10 (Blackmun, J., dissenting).

American sacramental peyote use and would have required the disbursement of unemployment checks.⁸⁷

Justice O'Connor noted, however, the Free Exercise Clause did *not* require such analysis with respect to the government's own internal affairs, and cited *Lyng* and *Roy* for this proposition.⁸⁸ In *Roy*, however, Justice O'Connor had argued that *Sherbert* did compel strict-scrutiny analysis once a plaintiff showed a burden on the free exercise of religion, even in a case involving only the government's internal affairs.⁸⁹ Perhaps sensing the tension between her position in *Roy* and the essentially insurmountable hurdle adopted in *Lyng*, Justice O'Connor acknowledged that some types of governmental actions are ineligible for strict-scrutiny review despite their burdens on religious exercise. Nonetheless, she determined Oregon's drug laws were not the sort of internal affairs exempt from *Sherbert* and strict-scrutiny applied.⁹⁰ The majority, however, rejected her distinction, finding it difficult to understand why the government would be required to modify health and safety laws to satisfy religious practitioners but not the management of public lands or administration of welfare programs.⁹¹

III. THE RELIGIOUS FREEDOM RESTORATION ACT

The *Smith* decision ignited a firestorm on Capitol Hill, yielding a swift, forceful and nearly unanimous rejection of the Court's ruling. The outcry over *Smith* provided the impetus for the Religious Freedom Restoration Act (RFRA), a statute that specifically cites the *Smith* decision as a judicial problem requiring a legislative fix.⁹²

A. The Enactment of RFRA

As *Smith* was an unemployment-benefits case decided against the fired employees, one might presume Congress's limited goal in enacting RFRA was simply to reinstate the *Sherbert* test in unemployment cases impacting religious exercise.⁹³ Instead, Congress used *Smith* as a catalyst to address a wide variety of perceived religion-based inequities.

The Congressional debates leading up to the passage of RFRA reveal both the types of religious burdens RFRA would relieve and the

⁸⁷ *Id.* at 921 (Blackmun, J., dissenting).

⁸⁸ *Id.* at 900 (O'Connor, J., concurring). The majority also cited approvingly of both *Lyng* and *Roy*. *Id.* at 883-84.

⁸⁹ *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., concurring).

⁹⁰ *Smith*, 494 U.S. at 900 (O'Connor, J., concurring).

⁹¹ *Id.* at 885 n.2.

⁹² Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

⁹³ In fact, the *Smith* majority expressly pointed out the *Sherbert* test had never been used for any type of case other than unemployment cases. *Smith*, 494 U.S. at 884.

perceived severity of *Smith*'s impact. One representative argued that RFRA was "very, very important" due to post-*Smith* incidents such as autopsies being performed on deceased Hmong and Jewish people despite their religious opposition to the procedure, Amish people being required to mount safety lights on their buggies, and an investigator being fired for refusing to investigate a particular pacifist group.⁹⁴ Another warned that without RFRA religious practitioners would be denied the right to "keep the Sabbath, to use wine in religious ceremonies, to observe religious dietary laws, to be free from unnecessary autopsies, [and] to worship as their consciences dictate."⁹⁵ A third representative, describing the "parade of horrors" since the *Smith* decision, reiterated the autopsy concern and argued "evangelical store-front churches have been zoned out of commercial areas."⁹⁶ Other anecdotal wrongs included Amish farmers being required to display "garish warning signs" rather than "more modest silver reflective tape,"⁹⁷ a Christian being denied the right to erect a cross "on her own front lawn,"⁹⁸ the attempted removal of children from home-school due to their religion-based refusal to take a standardized test,⁹⁹ Jewish military members being prohibited from wearing yarmulkes while in uniform,¹⁰⁰ prisoners being denied wine for communion¹⁰¹ and prisoners being prohibited from keeping rosary beads and scapulars in their cells.¹⁰² The Senate overwhelmingly approved RFRA by a vote of 97-3,

⁹⁴ 139 CONG. REC. H2356, 2357 (May 11, 1993) (statement of Rep. Brooks).

⁹⁵ *Id.* at 2359-60 (statement of Rep. Nadler).

⁹⁶ *Id.* at 2360 (statement of Rep. Schumer). Rep. Schumer's "parade" was confined to these two examples.

⁹⁷ *Id.* at 2361 (statement of Rep. Hoyer).

⁹⁸ *Id.* at 2362 (statement of Rep. Lowrey).

⁹⁹ 139 CONG. REC. S14350, 14353 (Oct. 26, 1993) (statement of Sen. Hatch).

¹⁰⁰ *Id.* at 14366 (statement of Sen. Hatch).

¹⁰¹ 139 CONG. REC. S14461, 14462 (Oct. 27, 1993) (statement of Sen. Lieberman).

¹⁰² *Id.* at 14467 (statement of Sen. Danforth). Interestingly, in the 103rd Congress' debate over RFRA, the only discussion about sacramental peyote use—in which RFRA found its genesis—came from one senator attempting to limit the scope of RFRA due to his concern the law would be misused to justify access to controlled substances by prisoners. 139 Cong. Rec. S14350, 14357, 14363 (Oct. 26, 1993) (statements of Sen. Simpson). Despite RFRA's origins being in the use of controlled substances, the law has not persuaded courts to require accommodation of sacramental marijuana use, highlighting the disconnect between the impetus for RFRA, the law's stated purposes, and its ultimate applicability. See *Nesbeth v. United States*, 870 A.2d 1193, 1198 (D.C. 2005) (religious exemption to criminal prohibition of marijuana possession is not a viable "less-restrictive means" of enforcing drug laws); *United States v. Israel*, 317 F.3d 768, 772 (7th Cir. 2003) (religious exemption to drug laws would result in "a weed-like proliferation of claims for religious exemptions"); *State v. Balzer*, 954 P.2d 931, 941 (Wash. Ct. App. 1998) (refusing to permit sacramental marijuana use, court argued such would result in people joining religions for "the wrong reasons"); cf. *United States v. Valrey*, No. CR96-549Z, 2000 WL 692647, 2000 U.S. Dist. LEXIS 22390 (W.D. Wash. Feb. 22, 2000) (Rastafarian defendant on supervised release permitted to use sacramental marijuana). The sacramental use of the Schedule I hallucinogen ayahuasca

the House approved it on a voice vote and the President signed it into law on 16 November 1993.¹⁰³

B. The Act Itself

The Act is broken down into seven sections and the second, 42 U.S.C. § 2000bb, sets out Congressional findings and the Act's purposes.¹⁰⁴ Therein, Congress finds that "governments should not substantially burden religious exercise without compelling justification," and that in *Smith* the Supreme Court "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."¹⁰⁵ Congress also found "the compelling interest test as set forth in prior federal court rulings [was] a workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹⁰⁶ The purposes of the Act include "restor[ing] the compelling interest test as set forth in *Sherbert* and *Yoder* and [guaranteeing] its application in all cases where free exercise of religion is substantially burdened" ¹⁰⁷

The Act states the government shall not "substantially burden a person's exercise of religion" unless it can show the burden is "in furtherance of a compelling governmental interest" and the "least restrictive means of furthering" that interest.¹⁰⁸ The Act does not define the phrase "substantially burden" or "compelling interest." The 102nd Congress offered an amendment that would have defined "compelling state interest" to include specific instances such as "the protection of national security," but the amendment failed.¹⁰⁹

C. Judicial Attempts at Defining the "Substantially Burden" Trigger

In order to trigger the applicability of RFRA, a litigant must establish government conduct of some sort that "substantially burdens"

has, however, been permitted. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (outright prohibition of importation and use of this particular drug not a compelling interest); *Church of the Holy Light of the Queen v. Mukasey*, No. CV 08-3095-PA, 615 F. Supp. 2d (D. Or. 2009) (same).

¹⁰³ CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS NO. 97-795-A, THE RELIGIOUS FREEDOM RESTORATION ACT: ITS RISE, FALL, AND CURRENT STATUS (June 25, 1998), available at <https://www.policyarchive.org/handle/10207/454>.

¹⁰⁴ Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993); Religious Freedom Restoration Act § 2, 42 U.S.C. § 2000bb (2006).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citations omitted).

¹⁰⁸ *Id.* § 2000bb-1. Thus, RFRA's statutory test is substantially the same as Justice O'Connor's formulation in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 894 (1990).

¹⁰⁹ H.R. REP. NO. 103-88 (1993) (additional views of Rep. Hyde et al.).

religious exercise. Apparently, Congress intended for the term “substantially burden” to merely incorporate pre-*Smith* case law.¹¹⁰ One immediate problem with this approach was that “substantially burden” had little history, appearing in only three Supreme Court cases involving First Amendment religious rights prior to *Smith*. Of those three, only *Jimmy Swaggart Ministries v. Board of Equalization* provided any insight into the Court’s definition of a substantial burden.¹¹¹

In *Jimmy Swaggart Ministries*, the Supreme Court determined that any burden posed by the imposition of sales and use taxes on religious publications was “not constitutionally significant.”¹¹² The Court did not elaborate on what *would* be constitutionally significant, but it did point to *Hernandez v. Commissioner* for the proposition that a “substantial burden on the observation of a central religious belief or practice” would trigger the inquiry into whether the government could advance a compelling state interest for the burden.¹¹³ In *Hernandez*, the Court declined to determine whether taxation of the Church of Scientology was a substantial burden because the government had shown a compelling interest in a sound tax system; it essentially ignored the burden trigger and jumped straight to the compelling interest analysis.¹¹⁴

Hernandez does, however, cite three cases after restating the strict-scrutiny rule: *Yoder*, *Thomas* and *Hobbie*. Presumably, the Court saw these three cases as establishing the parameters of burdens on religion that give rise to strict-scrutiny analysis. Nonetheless, none of these cases actually use the phrase “substantial burden.”

¹¹⁰ The 1993 House Report confusingly explains:

In order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person’s exercise of religion. It is the Committee’s expectation that the courts will look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened

Id. The House Report addressed H.R. 1308, which pertained to “burdens” on religious exercise. The Senate later added the modifier “substantial,” but the accompanying Senate Report merely stated “the committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened” S. REP. NO. 103-111 (1993).

¹¹¹ *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 (1990). The Court made passing reference in a footnote to “substantial burdens” on nonbeneficiaries of religious exemptions in *Texas Monthly v. Bullock*, 489 U.S. 1, 18 n.8 (1989).

¹¹² *Jimmy Swaggart Ministries*, 493 U.S. at 391.

¹¹³ *Id.* at 384-85 (quoting *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)).

¹¹⁴ *Hernandez*, 490 U.S. at 699-700.

The Court in *Yoder* cited *Sherbert* for the proposition that a compelling state interest was required when a facially neutral regulation “unduly burdens” religious exercise.¹¹⁵ The *Yoder* court determined that the school attendance requirement, at least as applied to the Amish, “would gravely endanger if not destroy the free exercise of respondents’ religious beliefs,” and that Wisconsin’s interest in educating its youth was not compelling with respect to Amish children.¹¹⁶ The Court also found the impact of the law “severe” and “inescapable” due to the appellants being compelled to act at odds with their religious beliefs under threat of criminal sanction.¹¹⁷ Still, the Court went to great lengths to limit its holding to the facts of the case.¹¹⁸

In the 1981 *Thomas* unemployment case, the Court pointed to *Sherbert* and *Yoder*.

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement is nonetheless substantial.¹¹⁹

Employing this test, the *Thomas* court concluded the state failed to advance a compelling interest for denying unemployment benefits to the plaintiff who had been fired for refusing to build military weaponry.¹²⁰

¹¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 220-29 (1972). *Sherbert*, however, only referred to “any incidental burden” and “any burden.” *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

¹¹⁶ *Yoder*, 406 U.S. at 219, 235-36.

¹¹⁷ *Id.* at 218.

¹¹⁸ The Court explained the appellants had made a “convincing showing, one that probably few other religious groups or sects could make.” *Id.* at 235-36.

¹¹⁹ *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). The *Sherbert* Court held the denial of employment benefits forced the appellant

to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship . . . [and that] . . . to condition the availability of benefits upon this appellant’s willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Sherbert, 374 U.S. at 404, 406.

¹²⁰ *Thomas*, 450 U.S. at 719-20.

Six years later, the Court decided *Hobbie* by applying the *Thomas* test and concluded denial of unemployment benefits amounted to an “infringement” of the type that triggered strict-scrutiny. The appellant’s free exercise rights had been violated.¹²¹ Stating the *Thomas* test in the negative, *Jimmy Swaggart Ministries* found no substantial burden where the government did not “condition[] receipt of an important benefit upon conduct proscribed by a religious faith, or . . . [deny] such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.”¹²² Thus, pre-*Smith* jurisprudence reveals that a substantial burden exists when a government puts substantial pressure on a person to violate his beliefs either by conditioning the receipt of an important benefit on religiously objectionable conduct (*Sherbert* and *Thomas*) or compelling a person to act at odds with her religion by threat of criminal sanction (*Yoder*).

D. Congress’s View of RFRA’s Applicability to Government Use of Public Lands

During the Congressional debates over RFRA, the issue of public land management came up briefly. Addressing the issue, one senator argued RFRA would have no impact on the *Lyng* ruling, noting “the Court ruled that the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise. Thus, the construction of mining or timber roads over Government land, land sacred to Native American religion, did not burden their free exercise rights.”¹²³ The Senate report accompanying its bill explained the intent of RFRA was “to restore the compelling interest test previously applicable to free exercise cases”¹²⁴ It further explained that the Senate Judiciary Committee “expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest.”¹²⁵ Without approving or disapproving of pre-*Smith* cases, the Committee said those holdings “make[] it clear that strict scrutiny does not apply to government actions involving only management of internal government affairs or the use of the government’s own property or resources.”¹²⁶ To

¹²¹ *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987).

¹²² *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391-92 (1990). (citing *Hobbie*, 480 U.S. at 141); see also *Thomas*, 450 U.S. at 717-18.

¹²³ 139 CONG. REC. S14350, 14362 (Oct. 26, 1993) (statement of Sen. Hatch).

¹²⁴ S. REP. NO. 103-111, at 9 (1993).

¹²⁵ *Id.* at 8-9.

¹²⁶ *Id.* at 9 (emphasis added).

support this conclusion, the report pointed to *Bowen* and *Lyng*, two cases which explicitly did not employ strict-scrutiny analysis.¹²⁷

During the last minutes of the debate on the bill, Senator Grassley announced that he had previously held “some reservations” about RFRA, but that Senator Hatch had alleviated his concerns during a Judicial Committee colloquy.¹²⁸ A transcript of that colloquy was attached as an exhibit to the Congressional Record.¹²⁹ Therein, Senator Grassley asked how RFRA would apply to “internal affairs” of the government in light of *Roy* and *Lyng*.¹³⁰ Senator Hatch replied that RFRA would have “no effect” on cases like *Roy*, and RFRA likewise “does not [a]ffect” *Lyng* due to the Court’s ruling “that the way in which government manages its affairs and uses its own property does not impose a burden on religious exercise.”¹³¹ Without a burden, he reasoned, RFRA would be inapplicable.¹³²

E. The Supreme Court’s Partial Invalidation of RFRA

The first RFRA case to make it to the Supreme Court was the 1997 case of *City of Boerne v. Flores*.¹³³ The Court dealt a near-fatal blow to the Act, when a six-Justice majority held RFRA was unconstitutional—at least as far as it applied to the states—because Congress had exceeded its authority under the Fourteenth Amendment.¹³⁴ The case revolved around a church located in a historic Texas district.¹³⁵ The church’s congregation had grown to the point where 40 to 60 congregants were excluded from some Sunday masses, and the church sought a building permit to expand.¹³⁶ The city denied the permit, and the church sued under RFRA.¹³⁷

The majority was unimpressed with the stated purposes for RFRA and took the opportunity to point out that the Congressional hearings failed to address a single episode of religious persecution occurring in the preceding four decades.¹³⁸ The majority noted, “Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs and on zoning regulations and historic

¹²⁷ *Id.* at n.19.

¹²⁸ 139 CONG. REC. S14350, 14469 (Oct. 26, 1993) (statement of Sen. Grassley).

¹²⁹ *Id.* at 14470, Exhibit 1.

¹³⁰ *Id.* (statement of Sen. Grassley).

¹³¹ *Id.* (statement of Sen. Hatch).

¹³² *Id.*

¹³³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³⁴ *Id.* at 536.

¹³⁵ *Id.* at 511.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 530.

preservation laws . . . which as an incident of their normal operation, have adverse effects on churches and synagogues.”¹³⁹ The Court concluded that RFRA was “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹⁴⁰

Justice O’Connor dissented, arguing *Smith* was wrongly decided and should be revisited.¹⁴¹ She suggested the Court “return” to a rule requiring strict-scrutiny analysis whenever any government action imposed a substantial burden on religious exercise.¹⁴²

The *Flores* court did not explicitly address the issue of whether or not RFRA was invalid as to the federal government or simply with respect to the states. Without directly addressing the issue, the Court applied RFRA in 2006 to an attempt by the federal government to block importation of a Schedule I controlled hallucinogen by religious practitioners in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.¹⁴³ In that case, the government conceded its prohibition on importation would substantially burden the practitioners’ religious exercise, and the Court found the government failed to prove a blanket ban on the drug was the least restrictive means of control.¹⁴⁴ The

¹³⁹ *Id.* at 531 (citations omitted).

¹⁴⁰ *Id.* at 532.

¹⁴¹ *Id.* at 544 (O’Connor, J., dissenting). In her dissent, Justice O’Connor engaged in a lengthy review of pre-Constitution protections enacted by the states to support her contention that religious exercise can only be burdened by government action upon a showing of a compelling state interest. Incongruously, she cited state constitutions that evidenced a much more permissive stance toward government intrusion. For example, New York’s right to free exercise only extended to practices not “inconsistent with the peace or safety of [the] state.” New Hampshire did not permit religious exercise that “disturb[ed] others”; Georgia allowed religious exercise as long as practitioners acted “in a peaceable and orderly manner.” *Id.* at 553-54. Justice O’Connor’s historical review actually undercuts her argument the Framers of the Constitution understood “free exercise” to prohibit infringement unless the government could meet the high burden of showing a “compelling” interest, and then, only so far as that interest was carried out in the least restrictive means. In his concurring opinion, Justice Scalia argues the historical review, if anything, supports *Smith* due to the states’ “provisos” to their free exercise clauses, which he interprets to allow religious exercise so long as such does not run afoul of any existing law. *Id.* at 539-40 (Scalia, J., concurring). Most damaging to Justice O’Connor’s argument, however, is Justice Scalia’s citation of a Pennsylvania case decided two years after the Bill of Rights was ratified, holding it permissible to fine a witness who “refused to be sworn, because it was his Sabbath.” *Id.* at 543 (citing *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213 (Pa. 1793)).

¹⁴² *Flores*, 521 U.S. at 548 (O’Connor, J., dissenting). Justice Scalia wrote a concurring opinion to respond to Justice O’Connor, recognizing the “great popular attraction” of requiring a compelling interest for any and every governmental intrusion into the exercise of religion. “Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice?” *Id.* at 544 (Scalia, J., concurring).

¹⁴³ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

¹⁴⁴ *Id.* at 439. The unanimous Court also took the opportunity to point to *Smith* and note the difficulties caused by the *O Centro* ruling were of the very sort “cited by [the] Court

Court's reliance on RFRA effectively verified the law's applicability to the federal government.

IV. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Unsurprisingly, *Flores* set off a new round of legislation as Congress set about to assert its dominance over the uncooperative Supreme Court.¹⁴⁵ Proponents of a new statute, however, found some members of Congress less enthusiastic about granting broad exemptions from the law. The final result in 2000 was the Religious Land Use and Institutionalized Persons Act (RLUIPA), which specifically targeted prisoners and zoning decisions, while making minor modifications to RFRA.¹⁴⁶ Although RLUIPA itself is inapplicable to land use decisions with respect to public lands,¹⁴⁷ the Act's language mirrors RFRA's in all important aspects. As such, precedent developed under RLUIPA is often employed in RFRA cases, and *vice versa*.¹⁴⁸

A. The Enactment of RLUIPA

As originally proposed, RLUIPA was named the Religious Liberty Protection Act of 1999 and prohibited the government from substantially burdening any person's religious exercise where an effect on interstate commerce could be shown.¹⁴⁹ Designed to overcome *Flores*, the Religious Liberty Protection Act was written to reach as far as the Commerce Clause would allow.¹⁵⁰ The following year, due to concerns that the Religious Liberty Protection Act would encroach upon civil rights laws by permitting discrimination under the color of

in deciding that the approach later mandated by Congress under RFRA was not required as a matter of constitutional law under the Free Exercise Clause." *Id.*

¹⁴⁵ H.R. REP. NO. 106-219 n.22 (1999).

¹⁴⁶ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

¹⁴⁷ See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1077 (2008).

RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a 'substantial burden' on the exercise of religion . . . and even for state and local governments, RLUIPA applies only to government land use regulations of private land—such as zoning laws—not to the government's management of its own land.

Id.

¹⁴⁸ See e.g., *Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1585 (2009).

¹⁴⁹ H.R. 1691, 106th Cong. (1st Sess.1999). The Act defined "government" to include, *inter alia*, the United States, states, counties, municipalities, any entities created under the authority of a state, and any person acting under color of federal or state law.

¹⁵⁰ 145 CONG. REC. H5580, 5587 (July 15, 1999) (statement of Rep. Canady).

religious exercise, Congress substantially modified the bill to cover only land use decisions and institutionalized persons, and it passed as RLUIPA.¹⁵¹

Even though RLUIPA is fairly limited in scope, its original formulation as the Religious Liberty Protection Act aimed to reinstate RFRA to the greatest extent possible. As such, the Congressional debate over the Religious Liberty Protection Act provides insight into the types of religious burdens the bill's proponents sought to address.

The issues raised as justifying the need for the Religious Liberty Protection Act fall into the categories of private land-use issues (zoning), hiring and employment issues (religious organizations being required to hire non-practitioners) and purely personal religious behavior (wear of religious jewelry and facial hair). What is notably absent from the debate, however, is any notion that the law would provide a religious practitioner a means of stopping a federal construction project on federal lands.¹⁵² Despite the burdens on religious exercise permitted in *Lyng* and the rejection of strict-scrutiny analysis in *Roy*, neither case makes more than a cursory appearance in the Act's legislative history.

The debate suggests the federal government would be required to not infringe upon what a practitioner does with his or her private property; the examples raised with respect to churches, for instance, all dealt with zoning issues related to private property. In the other categories, governments would be required to lift restrictions on personal religious behavior and not condition employment upon abandoning religious practices. Congress intended for the Act to force governments to provide exceptions from otherwise generally applicable laws whenever those laws interfered with the exercise of religion. Nothing at all indicates Congress contemplated "religious liberty protection" as a driver for federal land use decisions.

B. The Act Itself

The Act employs two parallel sections, one for land use issues (§ 2000cc) and one for institutionalized persons (§ 2000cc-1).¹⁵³ Section 2000cc prohibits the imposition or implementation of land use regulations that place a substantial burden on the exercise of religion unless that burden furthers a compelling governmental interest using the

¹⁵¹ 146 CONG. REC. H7190, 7191 (July 27, 2000) (statement of Rep. Nadler).

¹⁵² The only indication of a concern about larger federal land management issues came in Rep. Conyers' dissent to House Report 106-219 wherein he raised the problem of "challenges to historic preservation ordinances, environmental protection laws and child welfare laws." H.R. REP. NO. 106-219 (1999) (statement of Rep. Conyers, et. al.).

¹⁵³ 42 U.S.C. §§ 2000cc, 2000cc-1 (2006).

least restrictive means.¹⁵⁴ Section 2000cc-1 does the same with respect to institutionalized persons.¹⁵⁵

The two Acts, RFRA and RLUIPA, employ the same substantial burden trigger and the same compelling interest exception as well as the same requirement of least restrictive means. Like RFRA, RLUIPA does not define “substantial burden.” But unlike RFRA, RLUIPA includes no Congressional findings or purposes nor any reference to case law. The joint statement of Senators Orrin Hatch and Edward Kennedy does, however, explain that a definition for “substantial burden” was purposely omitted; the intent of the Act was not to create a “new standard,” but rather let the phrase “be interpreted by reference to Supreme Court jurisprudence.”¹⁵⁶ RLUIPA also includes a “rule of construction” that the Act is to be “construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.”¹⁵⁷

Moreover, RLUIPA made minor modifications to RFRA. As originally enacted, RFRA defined “exercise of religion” to mean “the exercise of religion under the First Amendment to the Constitution.”¹⁵⁸ This definition was deleted in 2000, and a statement that the RFRA term “exercise of religion” would share the same meaning as RLUIPA’s “religious exercise” was added.¹⁵⁹ The new definition includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” extending RFRA’s reach beyond the scope of traditional First Amendment analysis.¹⁶⁰

C. The Supreme Court’s (Partial) Affirmation of RLUIPA

When a group of jailed “non-mainstream” religious practitioners¹⁶¹ alleged their jailors had imposed various restrictions on their religious exercise, the Court of Appeals for the Sixth Circuit found RLUIPA unconstitutionally violated the First Amendment’s Establishment Clause in *Cutter v. Wilkinson*.¹⁶² The Supreme Court unanimously reversed, finding the portion of RLUIPA pertaining to

¹⁵⁴ *Id.* § 2000cc (2006).

¹⁵⁵ *Id.* § 2000cc-1 (2006).

¹⁵⁶ 145 CONG. REC. S7774, 7776 (July 27, 2000) (Exhibit 1).

¹⁵⁷ 42 U.S.C. § 2000cc-3(g) (2006).

¹⁵⁸ Pub. L. No. 103-141, § 5, 107 Stat. 1488 (1993).

¹⁵⁹ Pub. L. No. 106-274, § 7(a), 114 Stat. 806 (2000).

¹⁶⁰ Religious Land Use and Institutionalized Persons Act of 2000, § 8, 42 U.S.C. § 2000cc-5 (2006).

¹⁶¹ The plaintiffs included adherents to Asatru (based on Norse mythology) and the Church of Jesus Christ Christian (advocates white supremacy) as well as Satanists and Wiccans. *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005); *see also* Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 833 (S.D. Ohio 2001).

¹⁶² *Cutter v. Wilkinson*, 349 F.3d 257, 268-69 (6th Cir. 2003).

institutionalized persons “a permissible legislative accommodation of religion” that fits within the “room for play in the joints” of the Free Exercise and Establishment clauses.¹⁶³ The Court specifically noted it passed no judgment with respect to § 2000cc of RLUIPA, which addresses land use issues.¹⁶⁴ Because the case was a facial challenge of RLUIPA, the Court did not determine whether the jail’s alleged restrictions amounted to a substantial burden, or whether the jail’s compelling interest in safety and security outweighed those burdens.¹⁶⁵

V. USE OF RFRA TO CHALLENGE GOVERNMENT USE OF PUBLIC LANDS

In the wake of *Flores*, *O Centro* and *Cutter*, a substantial burden will trigger strict-scrutiny analysis in federal government actions under RFRA, and state or federal actions with respect to institutionalized persons and possibly land use decisions under RLUIPA. With that backdrop, litigation involving RFRA-based challenges to public land use decisions started to surface in appellate courts.

¹⁶³ *Cutter*, 544 U.S. at 719-20.

¹⁶⁴ *Id.* at 716 n.3.

¹⁶⁵ *Id.* at 725. The case was an interlocutory appeal brought by defendant prison officials who argued RLUIPA was unconstitutional based on Commerce Clause, Establishment Clause and Tenth Amendment states’ rights theories. As such, the case was decided on the facial constitutional challenge without analyzing the underlying facts of the individual cases. The Court strongly hinted, however, that it might find RLUIPA’s compelling interest test to be less stringent than Congress contemplated – at least in the prison context. In suggesting courts should employ a “particular sensitivity” to the issue of jail security, the Court wrote: “[w]hile the Act adopts a compelling governmental interest standard[,] context matters in the application of that standard.” *Id.* at 722-23 (quotation marks, citations omitted). The Court then curiously pointed to the congressional debate over RFRA for the following prospect.

Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act’s standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.

Id. (quotation marks, citations omitted). The Court did not explain why this sentiment in generally applicable RFRA was equally applicable to RLUIPA—a statute that specifically targets the religious exercise of institutionalized persons. By injecting concerns such as costs and “limited resources,” and by calling for deference to the experience and expertise of jail administrators, it appears the Court may be contemplating a sort of “strict-scrutiny lite” analysis for RLUIPA’s jailhouse cases. This could suggest a similar treatment for other unique government interests, such as national security, military preparedness or public land use decisions.

A. *Navajo Nation v. U.S. Forest Service*

One of the most significant attempts at using RFRA to block a federal land use program came in *Navajo Nation v. U.S. Forest Service*.¹⁶⁶ The Forest Service approved a plan to expand the Snowbowl ski-resort in a mountainous area of public land viewed as sacred by a number of Native American tribes.¹⁶⁷ The tribes opposed the plan, in part, because the resort would use treated sewage water in its snow-making system, thereby desecrating the sacred mountain range.¹⁶⁸

The Sierra Club, the Center for Biological Diversity and the Flagstaff Activist Network joined the Native American plaintiffs in bringing the suit.¹⁶⁹ Development of Snowbowl had long been a contentious matter between Native American tribes and the federal government, and the courts decided earlier litigation in favor of developing the area in *Wilson v. Block*.¹⁷⁰

Noting the absence of a definition for substantial burden in RFRA, the district court turned to the pre-*Smith* land-management cases of *Lyng* and *Wilson* as “instructive” and followed the Ninth Circuit’s definition from *Guam v. Guerrero*: “an action burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and violate his beliefs, including when . . . it results in the choice of an individual of either abandoning his religious principle or facing criminal prosecution.”¹⁷¹ Relying heavily on *Lyng*, the district court concluded the tribes’ “subjective views and beliefs” that use of the reclaimed water would have “negative, irreversible, and devastating effects to their religious, traditional and cultural practices” failed to constitute a substantial burden under RFRA.¹⁷²

A panel of the Court of Appeals for the Ninth Circuit reversed; finding “the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated—physically, spiritually, or

¹⁶⁶ *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006), *aff’d*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

¹⁶⁷ *Id.* at 883.

¹⁶⁸ *Id.* at 886-88.

¹⁶⁹ *Id.* The Flagstaff Activist Network describes itself as “a network of groups and individuals who demonstrate their commitment to the earth by defending cultural diversity, ecological health and natural beauty. . . . [The network] supports sustainable communities and provides opportunities for concerned people to resist the destruction of their cultures and the natural world.” Flagstaff Activist Network, <http://www.wiserearth.org/organization/view/e93dfa2360f690102aac12eb07a9f109> (last visited Feb. 24, 2010).

¹⁷⁰ *Wilson v. Block*, 708 F.2d 735 (1983); *see supra* Section II.B.

¹⁷¹ *Navajo Nation*, 408 F. Supp. 2d at 903-04 (citing *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002)).

¹⁷² *Id.* at 882, 905.

both—for sacramental use” constituted a substantial burden.¹⁷³ The panel held *Lyng* did not control based on two notions. First, that RFRA’s substantial burden prerequisite was met by less intrusive government actions than required to offend the Free Exercise Clause.¹⁷⁴ Second, the court found *Lyng*’s facts to be “materially different” because a ruling for the plaintiffs there “would have required the wholesale exclusion of non-Indians from the land in question,” while the *Navajo Nation* plaintiffs did not want to exclude others or even interfere with existing ski-resort operations.¹⁷⁵ Without explicitly rejecting the definition of substantial burden employed by the district court, the panel defined the term as something “more than an inconvenience” that “prevent[s] the plaintiff from engaging in religious conduct or having a religious experience.”¹⁷⁶

In December of 2007, the Ninth Circuit, sitting *en banc*, heard argument in *Navajo Nation*.¹⁷⁷ The court reversed the panel decision, determining that the plaintiffs failed to establish a RFRA violation because “the presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a substantial burden.”¹⁷⁸

The Forest Service did not dispute the district court’s holding that the plaintiffs’ religious beliefs were sincere and that their activities on the mountains amounted to an “exercise of religion.”¹⁷⁹ Thus, the question became whether or not the use of recycled wastewater on Snowbowl constituted a substantial burden on their religious exercise.¹⁸⁰ Noting that Congress had explicitly relied upon the *Sherbert* and *Yoder* decisions, the Ninth Circuit held that a substantial burden is “imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).”¹⁸¹ Using this standard, the court concluded there was no substantial burden on the plaintiffs’ exercise of religion

¹⁷³ *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1039, 1043 (9th Cir. 2007), *rev’d*, 535 F.3d 1058 (9th Cir. 2008) (en banc). The court also held the Forest Service failed to establish a compelling governmental interest in the expansion project. *Id.* at 1046.

¹⁷⁴ *Id.* at 1047. Note that the Free Exercise Clause is implicated only by government actions amounting to *prohibitions* on the exercise of religion.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1042, *citing*, *Guam v. Guerrero*, 290 F.3d 1210, 122 (9th Cir. 2002); *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1994).

¹⁷⁷ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

¹⁷⁸ *Id.* at 1067.

¹⁷⁹ *Id.* at 1068.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1069-70.

because the use of recycled wastewater “on a ski area that covers one percent of the Peaks” neither forces the plaintiffs to choose between following their religion and receiving a benefit, nor results in coercion with the threat of civil or criminal sanctions.¹⁸²

The court noted the religious practitioners would be given continued access to the mountains and found “the only effect of the proposed upgrades is on the [p]laintiffs’ subjective, emotional religious experience.”¹⁸³ It held “the diminishment of spiritual fulfillment—serious though it may be—is not a ‘substantial burden’ on the free exercise of religion.” It went on to describe the plaintiffs’ injuries in this case as merely “damaged spiritual feelings.”¹⁸⁴

The court differentiated between objective and subjective effects on religious exercise, holding that RFRA only prohibits objective effects.¹⁸⁵ For this proposition, the court argued that the *Yoder* court found an actionable violation not in the subjective interference with Amish religious “sensibilities” but, rather, in the objective penalty of criminal sanctions on parents refusing to enroll their children in school.¹⁸⁶ The court also pointed to *Sherbert*, arguing “the protected interest was the receipt of unemployment benefits and not . . . the right to take religious rest on Saturday” as the *Sherbert* court required the granting of monetary benefits, not mandatory days off.¹⁸⁷

The Ninth Circuit then turned to the Supreme Court’s decision in the free-exercise case of *Lyng*.¹⁸⁸ The Ninth Circuit relied on *Lyng*, a pre-RFRA case, because Congress directed courts to use pre-*Smith* case law to interpret RFRA.¹⁸⁹ The court admitted that “[e]ven were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will ‘virtually destroy the . . . Indian’s ability to practice their religion,’ there is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater on the Peaks.”¹⁹⁰ Relying on the objective test, the court found the use of recycled wastewater did “not compel the Plaintiffs to act contrary to their religious tenets” and, therefore, they failed to show a substantial burden on their religious exercise.¹⁹¹ Having found no substantial burden, the Ninth Circuit did

¹⁸² *Navajo Nation*, 535 F.3d at 1070.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1070 & n.9.

¹⁸⁵ *Id.* at 1070 n.9.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1071.

¹⁸⁹ *Id.* at 1071 n.13. The Ninth Circuit conceded *Lyng* did not use the words “substantial burden,” but argued that the *Lyng* court “squarely held the government plan did not impose a ‘burden heavy enough’ on religious exercise” despite “severe adverse effects on the practice of [the Plaintiffs’] religion.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1071 n.14 (9th Cir. 2008) (en banc).

¹⁹⁰ *Id.* at 1072.

¹⁹¹ *Id.* at 1079.

not reach the question of whether the Forest Service's actions either advanced a compelling interest or implemented its program using the least restrictive means.¹⁹²

In a spirited dissent, three judges argued that the plaintiffs had proven a substantial burden on the exercise of their religion and that the majority had manufactured an inaccurate definition of the standard.¹⁹³ That argument merits consideration insofar as it highlights the judicial difficulties in applying RFRA to the particular facts of public land use cases. Resorting to two dictionaries, the dissent fashioned its own definition of substantial burden: when a government action “hinders or oppresses the exercise of religion to a considerable degree.”¹⁹⁴ The dissent also cited a Ninth Circuit RLUIPA case requiring an action to be “oppressive to a significantly great extent” to impose a substantial burden.¹⁹⁵ The judges did not attempt to reconcile the difference between the “considerable degree” and “significantly great extent” tests it articulated. More problematic for the dissent, though, is that its cited case, which crafted the “oppressive to a significantly great extent” standard, ultimately held there was no substantial burden because the government actions at issue “[did] not render religious exercise *effectively impracticable*.”¹⁹⁶

Continuing its argument against the majority's definition of substantial burden, the dissent found the statutory purpose of RFRA to be to “restore the *compelling interest test* as set forth in [*Sherbert* and *Yoder*],” and not to restore those cases' substantial burden definition.¹⁹⁷ The dissent attempted to distinguish those precedents by noting that neither employed the term substantial burden, only the term burden.¹⁹⁸ If one is to assume a “substantial burden” is greater than a mere “burden,” then RFRA—by its terms—addresses burdens *greater* than those in *Sherbert* and *Yoder*. The dissent, however, argues the reverse: RFRA's “substantial burden” is triggered by infringements less onerous

¹⁹² *Navajo Nation*, 535 F.3d at 1076.

¹⁹³ *Id.* at 1085-90 (Fletcher, J., dissenting).

¹⁹⁴ *Id.* at 1086.

¹⁹⁵ *Id.* at 1087 (citing *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)).

¹⁹⁶ *San Jose Christian College*, 360 F.3d at 1035 (emphasis added). Without explicitly adopting the Seventh Circuit's “effectively impracticable” test for finding a substantial burden, the *San Jose Christian College* court held its decision was consistent with *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), because the regulations at issue (in *San Jose*) did not render religious exercise “effectively impracticable.” 360 F.3d at 1035. The court there arrived at its conclusion, in part, because the practitioners could exercise their religion at other locations. *San Jose Christian College*, 360 F.3d at 1035.

¹⁹⁷ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1087 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting) (citing 42 U.S.C. § 2000bb(b)).

¹⁹⁸ *Id.* at 1089 (Fletcher, J., dissenting).

than the prior cases' "burden."¹⁹⁹

The dissent also claimed the majority's "attempt to read *Lyng* into RFRA [was] not just flawed. It [was] perverse."²⁰⁰ Following the panel's rationale, the dissent found RFRA's substantial burden trigger to require less than the Free Exercise Clause's prohibition of religion requirement.²⁰¹ Due to the Supreme Court's reliance upon *Lyng* in *Smith*, the dissent also advanced the view that, in repudiating *Smith* and adopting RFRA, the act likewise repudiated *Lyng*.²⁰² The judges made no mention of the legislative history that squarely contradicts this reading.²⁰³

Despite aggressively attacking the majority's substantial burden definition, the dissent's analysis of whether the governmental action was a substantial burden under its own definition is fairly cursory, and seems to rely on a third definition of the phrase. After describing in detail the various Native American religious practices in the area, the dissent concluded "it is self-evident that the Snowbowl expansion prevents the Navajo and Hopi from engaging in [religious] conduct or having a religious experience and that this interference is more than an inconvenience."²⁰⁴ In June of 2009, the Supreme Court denied the *Navajo Nation* plaintiffs' petition for certiorari, declining the opportunity to either define substantial burden or explain RFRA's reach in the context of public land use.²⁰⁵

The Ninth Circuit has continued to use the restrictive substantial burden standard set out in *Navajo Nation*.²⁰⁶ Shortly after deciding that case, but prior to the denial of the petition for certiorari, the Court of Appeals rejected another attempt to block federal land use.²⁰⁷ As in

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1090 (Fletcher, J., dissenting).

²⁰¹ *Id.*

²⁰² *Id.* The dissent does not explain why this reasoning would not also result in the rejection of all precedent relied upon in *Smith* (which included *Sherbert*, *Thomas* and *Hobbie*).

²⁰³ *E.g.*, S. REP. NO. 103-111, n.19 (1993).

²⁰⁴ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1106 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting) (internal quotation marks omitted) (citing *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995)).

²⁰⁵ *Navajo Nation v. U.S. Forest Serv.*, 129 S. Ct. 2763, 174 L. Ed. 2d 270 (June 8, 2009). The United States opposed the petition, arguing that the differences in the circuit's definitions of substantial burden are merely "semantic differences" and "minor variations" (despite the fact courts have gone to some effort to reject other circuits' formulations) and that the pre-RFRA *Lyng* case is controlling precedent. Brief in Opposition, *Navajo Nation*, 129 S. Ct. 2763, 174 L. Ed. 2d 270 (May 8, 2009) (No. 08-846).

²⁰⁶ *See Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, 545 F.3d 1207, 1213-14 (9th Cir. 2008). Judge Fisher, who was one of the dissenting judges in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1106 (9th Cir. 2008) (en banc), was in the majority in *Snoqualmie Indian Tribe*.

²⁰⁷ *Snoqualmie Indian Tribe*, 545 F.3d at 1213-14.

Lyng and *Navajo Nation*, the Native American plaintiffs there asserted the area in question was a sacred site where tribe members would meet to conduct religious ceremonies and rituals.²⁰⁸ The tribe alleged the hydroelectric project deprived its members of access to the water falls for its rituals.²⁰⁹ Relying on *Navajo Nation*, the Ninth Circuit found the tribe failed to show any of its members would lose a government benefit or be subject to civil or criminal sanctions and rejected the petition.²¹⁰ The Ninth Circuit then took the opportunity to further limit RFRA's scope by finding the Act does not reach a government action that "merely diminishes the *quality* of an individual's religious experience."²¹¹

The Shoshone Tribe saw a similar result when, along with the Great Basin Resource Watch, it used RFRA to attack open-pit gold mining proposed for sacred sites within the territory of the Western Shoshone Nation.²¹² Finding that nothing forced the plaintiffs to violate their beliefs in order to obtain a benefit and no threat of civil or criminal sanctions, the district judge ruled against the plaintiffs.²¹³

B. *Comanche Nation v. United States*

A successful RFRA attack on a federal land project came in *Comanche Nation v. United States*.²¹⁴ The Army planned to construct a Training Support Center (TSC), a 43,000-square-foot warehouse designed to replace aging facilities, provide additional storage space and house various types of military training equipment.²¹⁵ The intended location for the TSC was Fort Sill, Oklahoma, south of Medicine Bluffs, a natural landform including a series of bluffs about one mile long.²¹⁶ Medicine Bluffs has been listed in the National Register of Historic Places since 1974 and is located on the Fort Sill military post, which is federal property.²¹⁷

The Army decided to build the TSC on a parcel of undeveloped property some 1,662 feet southwest of Medicine Bluffs' southern

²⁰⁸ *Id.* at 1211.

²⁰⁹ *Id.* at 1213.

²¹⁰ *Id.* at 1214.

²¹¹ *Id.* at 1215 n.3.

²¹² *South Fork Band v. U.S. Dep't of the Interior*, 643 F. Supp. 2d 1192 (D. Nev. Feb. 3, 2009).

²¹³ *Id.* at 1208.

²¹⁴ *Comanche Nation v. United States*, No. CIV-08-0849-D, 2008 WL 4426621, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 23, 2008).

²¹⁵ *Id.* at *7-8, 2008 U.S. Dist. LEXIS 73283, at *23-24.

²¹⁶ *Id.* at *6, 2008 U.S. Dist. LEXIS 73283, at *20.

²¹⁷ *Id.* at *6, 2008 U.S. Dist. LEXIS 73283, at *19; e-mail from Allison A. Polchek, Deputy Chief, U.S. Army Environmental Law Division (June 1, 2009) (on file with author).

boundary.²¹⁸ That rectangular parcel is bounded by roads on the southern and eastern edges and the Fort Sill Regional Confinement Facility on the western edge.²¹⁹ The parcel is bisected, west to east, by a gravel tank trail, such that the area north of the lower road and south of the tank trail is “a rectangular box approximately 55 acres in size.”²²⁰ Given that an acre is 43,560 square feet,²²¹ the TSC would occupy about one fifty-fifth of this section of the larger parcel.

The proposed site of the TSC lies in the “southern approach” to Medicine Bluffs, where the terrain “rises gradually to the top of the Bluffs.”²²² Sections of the approach terminate at the tops of the Bluffs which fall off as steep cliffs on the Bluffs’ north face.²²³

The site for the TSC was chosen by the Fort Sill master planner who was “generally aware” of the Bluffs’ significance to local Native Americans.²²⁴ The master planner, however, believed that the significant part of the Bluffs “was limited to the area north of the tank trail and up to the Bluffs themselves,” where no construction was planned.²²⁵ The Army hired a contractor to prepare the environmental assessment of the TSC project, and the contractor sent the Comanche Nation a copy of the draft environmental assessment and draft finding of no significant impact in September of 2006.²²⁶

During a pre-construction meeting on 26 October 2006, however, the meeting minutes included this statement: “Medicine Bluffs, which are located north of the proposed site beyond the tank trail, are sacred to the Indian Nation. Maintaining an acceptable viewscape *from* these hills will be critical from the point of view of cultural resources, since [the TSC] will be built in part of remaining open space south of the bluffs.”²²⁷ The district judge who heard this case, Judge DeGiusti, explained that “[f]rom the location of the TSC construction site . . . all four Bluffs are clearly visible. Approximately 750 feet north on the tank trail the view is significantly restricted, with none of the peaks clearly visible. Only with substantial clearing of native trees would the Bluffs be visible . . .”²²⁸ In that same month, representatives from the Comanche Nation raised concerns about the

²¹⁸ *Comanche Nation*, 2008 WL 4426621, at *9, 2008 U.S. Dist. LEXIS 73283, at *27.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ U.S. DEP’T OF COMMERCE, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, SPECIFICATIONS, TOLERANCES, AND OTHER TECHNICAL REQUIREMENTS FOR WEIGHING AND MEASURING DEVICES (NIST HANDBOOK 44) App’x C, Units of Area—Int’l Measure (2010), available at <http://ts.nist.gov/WeightsAndMeasures/Publications/appxc.cfm>.

²²² *Comanche Nation*, 2008 WL 4426621, at *6, 2008 U.S. Dist. LEXIS 73283, at *20.

²²³ *Id.*

²²⁴ *Id.* at *9, 2008 U.S. Dist. LEXIS 73283, at *26, 28.

²²⁵ *Id.* at *9, 2008 U.S. Dist. LEXIS 73283, at *28.

²²⁶ *Id.* at *10, 2008 U.S. Dist. LEXIS 73283, at *31.

²²⁷ *Id.* (emphasis added).

²²⁸ *Id.* at *9, 2008 U.S. Dist. LEXIS 73283, at *27-28.

possibility of disturbing unmarked graves and cultural artifacts, but otherwise indicated they had no objection to the proposed location of the TSC.²²⁹

In June of 2007, however, the director and curator of Fort Sill's museum raised concern that the TSC would "definitely have an adverse impact of the viewscape of the Medicine Bluffs," noting that the site has "long been regarded" as sacred by the Comanche Indians and other tribes.²³⁰ He pointed out that local tribes had purposefully located sweat lodges and camps so that they faced the Bluffs, and that "[t]ribal people continue to this day to collect cedar and sage from the immediate area of the Bluffs for use in sacred ceremonies."²³¹ He further highlighted that even though the TSC facility would not actually lie on the Medicine Bluffs historic site, the TSC would "still have an adverse impact on the 'viewscape' of the Bluffs."²³²

The environmental division chief at Fort Sill responded that, outside the curator's note, no negative comments had been received concerning the proposed TSC project.²³³ The division chief also noted that the TSC would not "dramatically affect the view to the south from the top of the bluffs" and would not be visible at all from the north side.²³⁴ The final environmental assessment did not discuss changing viewscales as a potential environmental impact.²³⁵

During August of 2007, the Army began fulfilling its consulting requirements under the National Historic Preservation Act (NHPA) by sending a Section 106 notice letter to various parties, including the Comanche Nation.²³⁶ Attached to the letter was a "35% Conceptual Design Analysis" which reflected that another facility, the Defense Reutilization Management Office (DRMO), was planned in the Bluffs' southern approach, immediately to the west of the TSC.²³⁷ This facility would cover approximately twenty acres of the fifty-five-acre parcel and require the widening of Randolph Road.²³⁸

In response to the Section 106 letter, a Comanche Nation representative contacted Fort Sill's environmental division, inquiring about the distance between the DRMO facility and Medicine Bluffs.²³⁹

²²⁹ *Id.* at *11, 2008 U.S. Dist. LEXIS 73283, at *33-34.

²³⁰ *Id.* at *13, 2008 U.S. Dist. LEXIS 73283, at *36 (emphasis added). Thus, it appears June 2007 was when concerns about the view of the bluffs were first raised, as opposed to the previous discussions of the view from the bluffs.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at *12, 2008 U.S. Dist. LEXIS 73283, at *38.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at *14, 2008 U.S. Dist. LEXIS 73283, at *41.

²³⁷ *Id.* at *14, 2008 U.S. Dist. LEXIS 73283, at *42, 44.

²³⁸ *Id.*

²³⁹ *Id.* at *14, 2008 U.S. Dist. LEXIS 73283, at *44.

Months later, the same representative wrote to the environmental division about a phone call she had received from the chairman of the tribe's Native American Graves Protection and Repatriation Act (NAGPRA) board, stating the chairman felt the DRMO site "is just to [sic] close to Medicine Bluff [sic]," without specifically referencing the viewscape issue.²⁴⁰

In 2008, opposition from the Comanche Nation became more intense as its NAGPRA chairman wrote a letter to the Fort Sill commander stating, "Medicine Bluff [sic], a well known unique geological feature of Fort Sill which is a place of immense spiritual and healing 'medicine' to the Comanche and other tribes alike has been placed in eminent danger by construction plans"²⁴¹ Despite efforts by both parties to resolve these issues, the Comanche Nation ultimately sued the United States over the proposed TSC project and filed a motion for a preliminary injunction to prevent construction.²⁴²

Suing in the Western District of Oklahoma, the Comanche Nation asserted two claims for relief: one under RFRA and the other under NHPA. Judge DeGiusti enjoined the TSC project, finding the Comanche Nation had shown a substantial likelihood of success on the RFRA claim.²⁴³ The judge ruled the southern approach to Medicine Bluffs was a site sacred to the Comanches, and that the traditional religious practices there constituted a sincere exercise of religion under RFRA.²⁴⁴ He further found that "an unobstructed view of all four Bluffs is central to the spiritual experience of the Comanche people," and that the TSC construction would impose a substantial burden on the Comanches' religious practices as the TSC warehouse would "occupy the area which represents the central sight-line to the Bluffs."²⁴⁵

Judge DeGiusti determined construction of the TSC warehouse would advance a compelling government interest, but that the chosen location was not the least restrictive means of achieving that interest.²⁴⁶ As a result, he concluded the Comanche Nation had shown a substantial likelihood of success, that it would suffer irreparable harm if the project went forward, that the United States' monetary damages "pale[d] in comparison to the prospect of irreparable harm to sacred lands and centuries-old religious traditions" and that an injunction would not adversely affect the public interest.²⁴⁷ He then enjoined construction of the TSC at its current planned location during the pendency of the case

²⁴⁰ *Id.*

²⁴¹ *Id.* at *16, 2008 U.S. Dist. LEXIS 73283, at *47.

²⁴² *Id.* at *16, 2008 U.S. Dist. LEXIS 73283, at *48-49.

²⁴³ *Id.* at *17, 2008 U.S. Dist. LEXIS 73283, at *53. Judge DeGiusti also determined that the NHPA claim provided an independent basis for enjoining the construction.

²⁴⁴ *Id.* at *17, 2008 U.S. Dist. LEXIS 73283, at *50.

²⁴⁵ *Id.* at *17, 2008 U.S. Dist. LEXIS 73283, at *50-51.

²⁴⁶ *Id.* at *18, 2008 U.S. Dist. LEXIS 73283, at *52-53.

²⁴⁷ *Id.* at *19-20, 2008 U.S. Dist. LEXIS 73283, at *53, 57-58.

on 23 September 2008.²⁴⁸

In finding that the view of Medicine Bluffs involved the exercise of religion, Judge DeGiusti focused on “testimony from several members of the Comanche Nation . . . that the Bluffs remain a sacred site for the Comanche people, and are still the situs of significant aspects of traditional Comanche religious practices for hundreds of Comanches.”²⁴⁹ To arrive at this conclusion, Judge DeGiusti pointed to the accounts of members of the Comanche Nation and expert testimony from the University of Oklahoma’s Director of Native American Studies.²⁵⁰ These witnesses testified that the Comanches’ traditional religious practice is “an intensely private spiritual experience that is inextricably intertwined with the natural environment” and that practitioners traditionally treat the location of sacred sites as confidential.²⁵¹

The Chairman of the Comanche Nation and a member of the tribe, Jimmy Arterberry, Jr., explained that “the southern approach is the traditional route to ascend the Bluffs for Comanches making the trek to the peaks for spiritual purposes” and “the unobstructed view of all four Bluffs is central to a spiritual experience of the Bluffs, as the number four has particular spiritual significance.”²⁵² Mr. Arterberry testified that his own personal practice involved a “physical and spiritual centering on the gap between Bluffs 2 and 3,” which meant he normally stood in the same place as the proposed TSC warehouse.²⁵³

Although Mr. Arterberry was the lone witness who testified that he “centered” himself at the TSC site, Judge DeGiusti nevertheless found it was “clear” that “the area of the Medicine Bluffs Historic Feature, *as well as* the southern approach that is particularly significant to this case, is considered sacred by the Comanche people and continues to be used for traditional religious purposes.”²⁵⁴ The judge’s determination that the Comanche people “clearly” considered the southern approach as sacred, though, is debatable. Mr. Arterberry could not identify any other person who exercised his or her religion at the TSC site, nor could he explain the religious significance of that particular place.²⁵⁵ Mr. Arterberry identified no religious tenet requiring

²⁴⁸ *Id.* at *20, 2008 U.S. Dist. LEXIS 73283, at *58-59.

²⁴⁹ *Id.* at *7, 2008 U.S. Dist. LEXIS 73283, at *21.

²⁵⁰ *Id.* at *7, 2008 U.S. Dist. LEXIS 73283, at *22.

²⁵¹ *Id.*

²⁵² *Id.* at *7, 2008 U.S. Dist. LEXIS 73283, at *21-22.

²⁵³ *Id.* at *7, 2008 U.S. Dist. LEXIS 73283, at *23.

²⁵⁴ *Id.* at *7, 2008 U.S. Dist. LEXIS 73283, at *22-23.

²⁵⁵ When asked whether the TSC could be built in another part of the 55-acre parcel, Mr. Arterberry testified:

It’s burdening us to ask us, first of all, to go to the back or go to the left So it’s not so much that, you know, I can’t do that same

him to use the proposed TSC site for his religious exercise, nor did he testify that he could not practice his religion in other places. He claimed he used the site “at the very least, annually” and that the TSC site was “part of the only remaining viewscape that allows [him] to center [him]self in relation to the Medicine Bluffs.”²⁵⁶

Another member of the tribe testified that although he did not “center” himself or otherwise use the TSC site, he would often stop on Fort Sill’s golf course and reflect on the Bluffs; if he was playing a good round of golf, though, he was generally “not paying attention” to them.²⁵⁷ The Comanche witness also testified the Bluffs’ spiritual significance held as long as the practitioners were within a two or three-mile range of the site.²⁵⁸ Another tribal elder echoed this sentiment, stating religious practitioners did not need to stand in a particular spot, and that they could exercise their religion anywhere in the vicinity of the Bluffs.²⁵⁹ One tribal elder who met with the Fort Sill garrison commander to negotiate a resolution of the TSC issue was unaware of the Bluffs’ location and appeared to believe the Bluffs consisted of a single rather than a series of hills.²⁶⁰

In finding a substantial burden, Judge DeGiusti employed the Tenth Circuit’s pre-RFRA definition of the term: “a governmental action which . . . must significantly inhibit or constrain conduct or expression or deny reasonable opportunities to engage in religious activities.”²⁶¹ He declined to adopt the Ninth Circuit’s *Navajo Nation* definition, noting only that the Tenth Circuit had not adopted that test.²⁶² He made no mention of *Lyng* or any other land-use case impacting religious exercise.

In determining whether the Army had chosen the least

thing, but what it does is it changes my traditional practice of stopping there and being able to offer prayers or gather, you know, medicine, or even, you know, make that decision to actually ascend the Bluffs, you know, through that barrier, which is—would be considered the tree line, that hedge, that protective barrier, you know, between that space and then, you know, the top of the hill.

Transcript of Record at 99-100, *Comanche Nation*, No. CR-08-0849-D (W.D. Okla. Sept. 10, 2008).

²⁵⁶ Declaration of Jimmy Arterberry, Jr. at 2-3, *Comanche Nation*, No. CR-08-0849-D (W.D. Okla. Aug. 15, 2008).

²⁵⁷ Transcript of Record at 231, *Comanche Nation*, No. CR-08-0849-D.

²⁵⁸ *Id.* at 250.

²⁵⁹ *Id.* at 342. This elder also took issue with the description of the practice as a “religion,” saying “it’s got nothing to do with any type of religion or anything.” She preferred to describe the practice as “spiritual.” *Id.*

²⁶⁰ *Id.* at 764.

²⁶¹ *Comanche Nation*, 2008 WL 4426621, at *3, 2008 U.S. Dist. LEXIS 73283, at *9 (W.D. Okla. Sept. 23, 2008) (internal quotation marks omitted) (citing *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996)).

²⁶² *Id.* at *3 n.5, 2008 U.S. Dist. LEXIS 73283, at *9-10 n.5.

restrictive means of burdening the Comanches' religious practices, Judge DeGiusti pointed to the failure of Fort Sill's master planner to "seriously consider" using the regional confinement facility as a warehouse once it became vacant.²⁶³ Ultimately, the judge concluded the Army failed to identify the least restrictive means because it "did not consider [the Comanches'] religious practices at all when selecting the site of the TSC."²⁶⁴

Not only was the testimony vague and confused with respect to Mr. Arterberry's purported need to use the TSC site for his religious exercise, the Comanche Nation never voiced this requirement prior to litigation.²⁶⁵ The trial team was unaware of the need for any religious practitioner to be centered in front of the Bluffs until Mr. Arterberry's declaration was filed in August of 2008, less than one month prior to the district court's hearing on the motion for a preliminary injunction.²⁶⁶ Mr. Arterberry himself met with the garrison commander two days before the date of his declaration to discuss the TSC project, yet made no mention of the need to center himself during that meeting.²⁶⁷ The timing of the claim, then, raises questions as to its importance and sincerity. If the practice was as central to the practitioners' religious exercise as Mr. Arterberry claimed, he would have likely voiced it early and often in the dispute over the TSC project. Instead, he hurriedly advanced the claim nearly two years after the Comanche Nation first raised concerns about the project.

A month after Judge DeGiusti enjoined the TSC construction, the National Congress of American Indians issued a resolution stating that Medicine Bluffs was "a place of great religious and cultural significance" and that the proposed TSC site was "directly on an area where traditional Comanche people carry out religious ceremonies in preparation for ascending the Bluffs."²⁶⁸ The National Congress further determined the TSC "would desecrate Medicine Bluffs and prevent traditional Comanche people from carrying out religious ceremonies."²⁶⁹

The Army eventually decided to build the TSC at an alternate site rather than extend litigation over the facility.²⁷⁰ Nevertheless, the

²⁶³ *Id.* at *10, 2008 U.S. Dist. LEXIS 73283, at *30.

²⁶⁴ *Id.* at *18, 2008 U.S. Dist. LEXIS 73283, at *53.

²⁶⁵ E-mail from Capt. Theresa Ford, Trial Attorney, U.S. Army Environmental Law Division (June 11, 2009) (on file with author).

²⁶⁶ *Id.*

²⁶⁷ Transcript of Record at 780-81, *Comanche Nation*, No. CR-08-0849-D (W.D. Okla. Sept. 10, 2008).

²⁶⁸ The National Congress of American Indians Resolution #PHX-08-048, Protection of Medicine Bluffs National Historic Feature at Fort Sill (2008), available at <http://www.ncai.org/ncai/resolutions/doc/PHX-08-048FINAL.pdf>.

²⁶⁹ *Id.*

²⁷⁰ Interview with Lt. Col. Mark Holycross, Chief, U.S. Army Environmental Law Division, in Arlington, Va. (June 12, 2009).

plaintiffs amended their complaint to seek a prohibition of any future development of the site.²⁷¹ Despite the September 2008 *Comanche Nation* ruling squarely at odds with both *Lyng* and *Navajo Nation* and Judge DeGiusti's rejection of the substantial-burden definition from the Ninth Circuit, the United States did not reference the case in its opposition to the *Navajo Nation* plaintiffs' petition for certiorari in May 2009.²⁷²

C. Does RFRA Even Apply to Government Management of Public Lands?

As discussed above, the legislative history of RFRA shows the Senate Judiciary Committee, at a minimum, did not believe RFRA had any applicability to public land use decisions when Congress enacted it.²⁷³ The Senate Report explained that RFRA was intended to require courts to rely on pre-*Smith* case law, and the Committee believed that case law made "it clear that strict-scrutiny does not apply to government actions involving only management of internal Government affairs *or the use of the Government's own property or resources*."²⁷⁴ Just before the Senate voted on RFRA, Senator Grassley attached a transcript of his colloquy with Senator Hatch plainly explaining that RFRA would have no impact on government management of its own land.²⁷⁵

However, only two reported decisions cite the language as relevant.²⁷⁶ Recently, the U.S. District Court for the District of Nevada in *South Fork Band v. Dep't of Interior* explicitly rejected the contention that RFRA was inapplicable to federal activities on federal property despite the act's legislative history.²⁷⁷ That court argued the Supreme Court reached its result in *Lyng* because the plaintiffs there failed to prove a "heavy enough burden" and that *Roy's* exemption of internal government affairs from strict-scrutiny had been overruled.²⁷⁸

The district court's suggestion that *Lyng* was decided on insufficient burden grounds is flatly inconsistent with the language of

²⁷¹ First Amended Complaint, *Comanche Nation*, No. 08-849-D (W.D. Okla. Nov. 14, 2008).

²⁷² Brief in Opposition, *Navajo Nation v. U.S. Forest Serv.*, No. 08-846, 129 S. Ct. 2763, 174 L. Ed. 2d 270 (May 8, 2009).

²⁷³ See *supra* Section III.D.

²⁷⁴ S. REP. NO. 103-111, at 9 (1993) (emphasis added).

²⁷⁵ 139 CONG. REC. S14350, 14470, Exhibit 1 (Oct. 26, 1993) (statement of Sen. Hatch).

²⁷⁶ A third case references the language in a footnote, but that court simply includes the language as part of a larger quote to show the compelling interest test is "workable . . . for striking sensible balances between religious liberty and competing prior governmental interests." *Abdur-Ra'oof v. Mich. Dep't of Corrections*, 562 N.W.2d 251, 252 n.2 (Mich. Ct. App. 1997), *appeal denied*, 584 N.W.2d 736 (Mich. 1998).

²⁷⁷ *South Fork Band v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-RAM, 643 F. Supp. 2d 1192, 1199 (D. Nev. Feb. 3, 2009).

²⁷⁸ *Id.* at 1198-99.

Lyng itself. In *Lyng*, the religious practitioners successfully argued “the burden on their religious practices [was] heavy enough to violate the Free Exercise Clause unless the Government [could] demonstrate a compelling need” for the project.²⁷⁹ The Supreme Court rejected this very challenge in *Roy* by holding the Free Exercise Clause “simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.”²⁸⁰ The *Lyng* decision held the government actions at issue, road building and timber harvesting, “cannot meaningfully be distinguished from the use of a Social Security number in *Roy*.”²⁸¹ The Court went on to characterize the government actions in both *Lyng* and *Roy* as significantly interfering with the practitioners’ religious exercise, but neither case involved the coercion of the practitioners to violate their beliefs or denial of benefits enjoyed by other citizens.²⁸² Later in the opinion, the Supreme Court pointedly held that Native Americans simply had no right to direct the government’s use of its own land.²⁸³ Thus, the *Lyng* holding followed *Roy* in removing the government’s internal affairs from the scope of the Free Exercise Clause, rather than engaging in a burden analysis as suggested by the *South Fork Band* court.

Still, the district court argued *Roy* “did not hold that the strict scrutiny analysis never applies to the government’s management of its own affairs;” rather, the decision made clear “denial of a government benefit on religious grounds was subject to strict scrutiny.”²⁸⁴ It should be noted the court merged, or at least failed to distinguish between, government internal affairs and government benefits. It stated that in *Roy*, five Justices rejected the Chief Justice’s use of a rational basis test for cases involving government benefits and *Hobbie* upheld that principle.²⁸⁵ While the court correctly observed that *Hobbie* stands for the proposition that a government benefit conditioned on religiously objectionable conduct is subject to strict-scrutiny, it failed to distinguish between the different sections of *Roy*.

The Court divided the *Roy* decision into three parts.²⁸⁶ In the third, the Chief Justice addressed a government benefit program and

²⁷⁹ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 447 (1988).

²⁸⁰ *Id.* at 448 (citing *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986)).

²⁸¹ *Id.* at 449.

²⁸² *Id.*

²⁸³ *Id.* at 453. “Whatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988).

²⁸⁴ *South Fork Band v. U.S. Dep’t of the Interior*, No. 3:08-CV-00616-LRH-RAM, 643 F. Supp. 2d 1192, 1199 (D. Nev. Feb. 3, 2009) (emphasis added).

²⁸⁵ *Id.*

²⁸⁶ *Bowen v. Roy*, 476 U.S. 693 (1986).

sought to employ a rational-basis type test in the government benefit context.²⁸⁷ Five Justices refused to join that part, which was again rejected in *Hobbie*'s finding that strict-scrutiny is the proper test for government benefits conditioned on religious conduct.²⁸⁸ The second part of *Roy*, however, held that the Free Exercise Clause could not be used to direct the conduct of the government's internal affairs, and the Court unanimously agreed with the proposition that strict-scrutiny analysis did not apply to internal affairs.²⁸⁹ The district court failed to distinguish between *Roy*'s internal affairs section and government benefit section, misleadingly suggesting post-*Roy* case law subjected government's internal affairs to strict-scrutiny analysis. Moreover, the court's attempt to reject *Roy*'s rationale by pointing to *Hobbie* is unconvincing in light of the Supreme Court's own reliance on *Roy* in *Lyng*, which it decided the year after the *Hobbie* decision. The Supreme Court's post-*Hobbie* reliance on *Roy* undercuts the suggestion it had repudiated the *Roy* holding, particularly with respect to the internal affairs issue. While the Nevada court took note of RFRA's legislative history which said strict-scrutiny did not apply to the use of government land, the court made no attempt to square the history with the case at hand.²⁹⁰

A Tenth Circuit case also cited to RFRA's legislative history, in a ruling dealing with non-Native Americans prosecuted for possessing eagle feathers without a permit.²⁹¹ That court remanded the case to determine whether the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act banning feather possession were the least restrictive means of protecting the birds.²⁹² A concurring judge wrote separately to emphasize the case only involved the question of whether the claimants were entitled to possess the feathers, and not the issue of "whether the procedures for distributing eagle parts from the National Eagle Repository are contrary to RFRA."²⁹³ That judge cited the "internal Government affairs" language from the Senate Report in arguing why RFRA could not be used as a vehicle to attack the Repository's operating policies.²⁹⁴ He noted "it would be ironic if the principle on which [the *Lyng*] decision is based were not available to the tribes in defending the present system of distributing eagle parts from the Repository."²⁹⁵ Inasmuch, the concurring judge argued for limiting

²⁸⁷ *Id.* at 701.

²⁸⁸ *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141-42 (1987).

²⁸⁹ *Roy*, 476 U.S. at 699-700.

²⁹⁰ *South Fork Band*, 643 F. Supp. 2d at 1198.

²⁹¹ *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002) (en banc).

²⁹² *Id.* at 1130.

²⁹³ *Id.* at 1140-41 (Hartz, J., concurring).

²⁹⁴ *Id.* at 1143 (Hartz, J., concurring).

²⁹⁵ *Id.* (the Native Americans plaintiffs were opposed to expanding the group of candidates eligible to withdraw eagle feathers from the repository under the theory it

the scope of the appeal to granting exceptions to the bird-protection acts while precluding inquiry into the government's internal affairs at the Repository. This logic mirrors the Supreme Court's approach in *Roy*.

On remand, however, the district court cited the intervening delisting of the bald eagle and held the ban on possession of eagle feathers by "non-Native American adherents to Native American religions" was not the least restrictive means to achieve the state interest of protecting the birds.²⁹⁶ The district court made no mention of either the Tenth Circuit's concurring opinion or RFRA's legislative history respecting internal government affairs.

In *Navajo Nation*, the Ninth Circuit did not squarely address the question of whether or not RFRA applies to federal use and management of public lands. The court assumed in a footnote that RFRA did apply for that case, but only because the Forest Service did not argue RFRA was inapplicable.²⁹⁷ That the court affirmatively raised this issue could be seen as it questioning the applicability of RFRA to the management of federal property. This notion is bolstered by the court's analogizing *Navajo Nation* to *Lyng*, and the statement that "the Plaintiffs here challenge a government-sanctioned project, conducted *on the government's own land*, on the basis that the project will diminish their spiritual fulfillment."²⁹⁸

The three-judge dissent took issue with this footnote, stating bluntly, "[i]t is hardly an open question whether RFRA applies to federal land. There is nothing in the text of RFRA that says, or even suggests, that such a carve-out from RFRA exists. No case has ever so held, or even suggested, that RFRA is inapplicable to federal land."²⁹⁹ The dissent supported its argument by highlighting an exchange during oral argument:

Question [by a member of the en banc panel]: Is it your position that the substantial burden test is simply never triggered when the government is using its own land? That it's simply outside the coverage of RFRA if the government is using its own land?

Answer [by the government's attorney]: No, your honor, that is not our position. . . .

would increase wait times for access to feathers as well as diminish the Native American religions).

²⁹⁶ *United States v. Hardman*, 622 F.Supp.2d 1129, 1154 (C.D. Utah Feb. 19, 2009).

²⁹⁷ *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 n.9 (9th Cir. 2008) (en banc).

²⁹⁸ *Id.* at 1072 (emphasis added).

²⁹⁹ *Id.* at 1095 (Fletcher, J., dissenting).

Question: So, the use of government land has the potential under RFRA to impose a substantial burden?

Answer: It is possible that certain activities on certain government land can still substantially burden religious activities.

Question: And would then violate RFRA if there were no compelling interest?

Answer: Yes.³⁰⁰

This exchange carries slight precedential weight, but it does highlight the ongoing confusion regarding the applicability of RFRA to federal actions on federal lands—that is, whether the *Lyng* rationale survives the adoption of RFRA. As explained above, the legislative history indicates RFRA was not intended to modify the *Lyng* holding nor to regulate the government’s use of its property, and nothing in the history of the statute suggests the contrary. The *Navajo Nation* dissent, however, makes no mention of this fact. Instead, it relies entirely on the exchange quoted above and the absence of a “carve-out” in RFRA to support its suggestion that RFRA applies to federal actions on federal lands.³⁰¹ Despite the lingering issue, the Ninth Circuit itself and the District Court for the District of Nevada have both decided RFRA federal land use cases without discussing the real possibility that RFRA does not apply.³⁰²

VI. RESPONDING TO RFRA’S THREAT TO FEDERAL PROJECTS AND LAND USE DECISIONS

In spite of Congressional intent that RFRA not apply to federal decisions with respect to public land use, two courts have decided that RFRA applies and that the government’s actions failed, or would likely fail, under the statute.³⁰³ Given this success, similar suits will likely be forthcoming.

³⁰⁰ *Id.* at 1096 (Fletcher, J., dissenting).

³⁰¹ *Id.* at 1095-96.

³⁰² *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207 (9th Cir. 2008); *South Fork Band v. U.S. Dep’t of the Interior*, 643 F. Supp. 2d 1192 (D. Nev. Feb. 3, 2009).

³⁰³ *Navajo Nation v. United States Forest Serv.*, 479 F.3d 1024 (2007), *rev’d*, 535 F.3d 1058 (2008) (en banc); *Comanche Nation v. United States*, No. CIV-08-0849-D, 2008 WL 4426621, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 23, 2008).

A. The Power of RFRA

What makes RFRA particularly appealing to potential plaintiffs is that a favorable ruling compels the government either to grant some sort of benefit or cease the challenged operation. The panel decision in *Navajo Nation*, for example, found the Forest Service's proposed expansion of the Snowbowl violated the law.³⁰⁴ As a result, the project could not go forward until the ruling was reversed.

This proposition stands in stark contrast to the typical environmental lawsuit brought under the National Environmental Policy Act (NEPA).³⁰⁵ NEPA requires federal agencies to take a "hard look" at the environmental impact of their proposed actions, but gives courts no authority to direct which of the proposed actions the government must take.³⁰⁶ As long as an agency follows the procedural requirements of NEPA, it ultimately decides what final action to take, regardless of the impact on the environment.³⁰⁷

The National Historical Preservation Act (NHPA)³⁰⁸ similarly sets out mandatory procedures governing the planning and decision-making process without directing any particular outcome.³⁰⁹ Other potentially relevant laws, such as the American Indian Religious Freedom Act,³¹⁰ provide no enforceable rights.³¹¹ An executive order requiring executive branch agencies to "avoid adversely affecting the physical integrity" of sacred sites explicitly states it does not create any rights or benefits.³¹²

At best, a successful suit under either NEPA or NHPA would result in the court requiring the relevant agency to start its planning process anew. Success under RFRA, on the other hand, can result in absolute prohibition of the proposed project.

Environmental interest groups seeking to make use of RFRA face the initial burden of establishing standing to sue under the statute. RFRA itself provides that Article III of the Constitution governs standing to assert a claim or defense.³¹³ With respect to associations and

³⁰⁴ *Navajo Nation*, 479 F.3d at 1060, *rev'd*, 535 F.3d 1058 (2008) (en banc).

³⁰⁵ 42 U.S.C. § 4332 (2006).

³⁰⁶ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

³⁰⁷ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) ("it would not have violated NEPA if the Forest Service, after complying with the Act's procedural prerequisites . . . [it proceeded] notwithstanding the loss of 15 percent, 50 percent, or even 100 percent of the mule deer herd").

³⁰⁸ 16 U.S.C. § 470 (2006).

³⁰⁹ *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006).

³¹⁰ 42 U.S.C. § 1996 (2006).

³¹¹ *See, e.g., Henderson v. Terhune*, 379 F.3d 709, 711 (9th Cir. 2004) ("is simply a policy statement and does not create a cause of action or any judicially enforceable individual rights").

³¹² Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

³¹³ 42 U.S.C. § 2000bb-1(c) (2006).

interest groups bringing suit on behalf of members, Article III requires a plaintiff to show: (1) an injury in fact; (2) that the defendant caused the injury; (3) that a favorable decision is likely to redress the injury; (4) that the organization's members would have the right to sue on their own behalf; (5) that the interests in the case are germane to the organization's purpose; and (6) that the participation of the individual members of the organization will not be needed for the proceedings.³¹⁴ Showing injury in fact under RFRA for a land use claim generally entails showing members of the organization use the site in question for religious exercise and the proposed land use would substantially burden their exercise.³¹⁵

While a Native American tribe or religious organization would likely meet the "organizational purpose" requirement in a RFRA case, it is less clear whether an environmental organization would. In *South Fork Band*, the defendants challenged the standing of all the plaintiffs, including the Great Basin Resource Watch, a "nonprofit conservation organization . . . concerned with protecting the Great Basin's land, air, water, wildlife and communities from the adverse impacts of hard rock mining."³¹⁶ That court expressed doubt as to whether the organization's purpose reached RFRA's religious focus, but determined that as long as one plaintiff established standing it was not required to assess the standing of the other plaintiffs.³¹⁷ The notion that all plaintiffs need not establish their own standing as long as at least one plaintiff can prove standing does have a basis in federal jurisprudence, though courts adopting the principle have not explained its legal grounding.³¹⁸ Secular environmental interest groups thus need only marry up with affected religious practitioners to join a RFRA case as plaintiffs and bring their resources to bear.

³¹⁴ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180 (2000); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

³¹⁵ *South Fork Band v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-RAM, 643 F. Supp. 2d 1192, 1204-1205 (D. Nev. Feb. 3, 2009).

³¹⁶ *Id.* at 1204.

³¹⁷ *Id.*

³¹⁸ See *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981) (not considering standing of consumer groups when state had shown standing in case revolving around oil and gas lease bidding); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977) (commenting without citing authority, "[b]ecause of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *Doe v. Bolton*, 410 U.S. 178, 188 (1973) (describing the question of whether other plaintiffs have standing as "perhaps a matter of no great consequence"); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992) ("Because some of the plaintiffs have standing, it is not necessary to determine whether the others do.").

B. Defending Federal Use of Public Lands Against RFRA Suits

Despite the broad language of RFRA and the inconsistent case law applying the Act, Native American religious land use litigants have generally seen little success. Whether that result is rooted in an aversion to placing land-based religious practices on the same level as “traditional” religious practices, a disinclination to compel the government to operate public land for the benefit of a small group of practitioners, or an unstated adherence to RFRA’s legislative history is unclear. Regardless, the government should be prepared to meet these cases in a reasoned and methodical manner.

1. *RFRA Is Inapplicable to Federal Use of Public Lands*

The first line of attack is the argument that RFRA has no bearing on how the government makes use of public land. Despite the District Court for the District of Nevada’s attempt to disregard the legislative history of RFRA in *South Fork Band*, that history suggests Congress did not intend the Act to have any effect on the pre-*Smith* decisions of *Lyng* and *Roy*.³¹⁹ According to the House Report, RFRA was designed to “return[] the law to the state as it existed prior to *Smith*.”³²⁰ Indeed, RFRA itself points to *Smith* and states “the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.”³²¹ Both *Lyng* and *Roy* were part of that prior case law.

So far, only the *South Fork Band* court has squarely addressed this legislative history, and it did so unconvincingly. The *Navajo Nation* dissent is similarly problematic in its reliance on an exchange during oral argument.³²² The judges in that case failed to probe what “certain activities” the government’s attorney felt could substantially burden religious activities on “certain” types of federal land. The attorney might have been imagining the case in which a religious practitioner is directed to perform some religiously objectionable act in order to gain a benefit available to the rest of the public—*e.g.*, access to a national park—which would run afoul of the rule of *Thomas*. One court, the District of Columbia Circuit Court of Appeals, has indicated government use of its own land involves “different considerations” than government actions with respect to privately owned religious

³¹⁹ See *supra* Section III.D.

³²⁰ H.R. REP. NO. 103-88 (1993) (statement of Rep. Hyde).

³²¹ 42 U.S.C. § 2000bb(4)-(5) (2006).

³²² *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1096 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting).

facilities.³²³ In the same case it held “government land uses can never burden the right to freedom of belief, and can burden the right to freedom of practice only if site-specific religious practices are significantly impaired”³²⁴ Unfortunately, the court did not expound on the language in later cases and no other court has adopted the rule.

The legislative history of RFRA also allows a negative inference: the absence of any discussion of public land use implies Congress did not intend RFRA to reach such cases. Hearings and debate over RFRA spanned three years and were silent on this matter.³²⁵ Instead, the topics considered included prisoners being denied communion, zoning issues and unnecessary autopsies.³²⁶ Indeed, RFRA was enacted with an eye toward exemptions for generally applicable rules when those rules burdened the exercise of religion rather than the construction of a governmental obligation to modify land use operations to accommodate religious preferences of a particular group of adherents. If Congress had intended RFRA to sweep so broadly, it could have said so in the Act itself. It did not, and instead focused on the issue faced in pre-*Smith* jurisprudence: whether to grant exemptions for religious practitioners from neutral regulatory schemes that impose substantial burdens on religious exercise.

2. *A Substantial Burden Cannot be Shown in Public Land Use Cases*

The Supreme Court’s jurisprudence with respect to what constitutes a substantial burden on religious exercise can be summed up by defining a substantial burden as one that would involve a choice-benefit burden³²⁷ or a pressure burden.³²⁸ The choice-benefit burden occurs when a follower must make a choice between religion and a benefit, while the pressure burden occurs when a government “puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.”³²⁹

In the case of public land use decisions, the choice-benefit burden is generally irrelevant absent the unlikely situation in which the government conditions a benefit, such as access or use of the public

³²³ *Wilson v. Block*, 708 F.2d 735, 742, n.3 (D.C. Cir. 1983). In making this comment, the court was distinguishing development in a sacred site on public land with a condemnation case involving a church, in which the Colorado Supreme Court had determined structures and parcels of land could be given First Amendment protection on account of religious exercise related to the structures and parcels. *Id.*

³²⁴ *Id.* at 744 n.5.

³²⁵ See *supra* notes 123-32 and accompanying text.

³²⁶ See *supra* notes 94-102 and accompanying text.

³²⁷ See *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (following *Sherbert v. Verner*, 374 U.S. 398, 404, 406 (1963)).

³²⁸ See *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

³²⁹ *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

land, on the exercise of religion. Importantly, the only Supreme Court cases in which plaintiffs have successfully claimed a choice-benefit burden have involved unemployment benefits. That is, a benefit in this context has been the type distributed through government programs available to the general public.

The typical public land use scenario involves either taking a religiously significant area for a government project or the use of public land in such a way as to interfere with the nature and quality of religious exercise in the vicinity. In the first scenario, the choice-benefit burden does not apply because there is no benefit to be obtained. Unlike the unemployment benefits cases of *Sherbert*, *Thomas* and *Hobbie*, when the government excludes the public in general from a piece of land there is no benefit of access or use for anyone. Religious practitioners are denied entry alongside non-practitioners; if the practitioners abandon their religion, nothing changes. Without a benefit, there is no difficult choice to be made and no constitutionally significant burden on the practitioner.³³⁰

In the second scenario, where the government use of public land impacts the nature or quality of religious exercise, there is neither a choice to be made nor an otherwise available benefit to be obtained from the religious practitioner's perspective. In *Navajo Nation*, the plaintiffs sought to prohibit the use of treated wastewater for snowmaking at the Snowbowl ski resort.³³¹ Precluding the government from using a particular snowmaking process is not a benefit generally available to the public.³³² Unlike the unemployment benefits program, the choice of what water to use for snowmaking is not the sort of program citizens apply for, nor is there a government system in place that considers such applications. The benefit sought in *Navajo Nation* was similar to that in *Lyng*: not having to tolerate the government activity. As with the first scenario, the practitioners' adherence to or abandonment of their religious precepts will have no impact on the government project.³³³ Once more, then, the land use scenario carries

³³⁰ Seeking a government-granted benefit based on religious grounds when such benefit is not available to the public at large moves beyond accommodation of religious exercise and into the impermissible realm of establishing religion. It is difficult, if not impossible, to conceive of a statute permitting religious exercise where non-religious activity is banned while still having a "secular purpose" (much less not having a principal effect of advancing religion). See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

³³¹ *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1062 (9th Cir. 2008) (en banc).

³³² If anything, the preclusion would be a detriment to the ski resort developers, its customers and those that would benefit economically from expanded resort operations.

³³³ Naturally, the government can always make the determination that the impact on the practitioners' religious exercise warrants abandonment or modification of the project based on notions of fair dealing, respect for indigenous peoples, social justice, and myriad other considerations falling outside the scope of First Amendment requirements.

no choice-benefit burden.

Whether the government action subjects religious practitioners to the pressure burden is the more relevant question. As discussed above, courts typically resolve this issue in favor of the government in public land use cases.³³⁴ Although a given government project may cause significant disruption of private religious practice, practitioners have generally been unable to establish how they have been coerced to act contrary to their religious beliefs. The logic behind the decisions arriving at this result, however, is uncertain.

Lyng held that government road building and logging operations did not coerce the practitioners to act contrary to the precepts of their religion, even though the Court assumed “the threat to the efficacy of at least some religious practices [was] extremely grave.” It further noted it would reach the same result even if the government action “virtually destroy[ed] the Indians’ ability to practice their religion.”³³⁵ But the Court ultimately decided *Lyng* on the theory that the First Amendment does not give religious adherents a “veto over public programs that do not prohibit the free exercise of religion.”³³⁶ The Court essentially sidestepped any pressure burden analysis by holding that “[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.”³³⁷ The Court then went on to decry the difficulty governments would face if forced to “satisfy every citizen’s religious needs and desires.”³³⁸

In *Navajo Nation*, the Ninth Circuit followed *Lyng* and reached the same result by concluding the plaintiffs were not coerced by civil or criminal sanctions to act contrary to their religion.³³⁹ The court noted its holding would be the same even if the government project virtually destroyed the Native Americans’ ability to practice their religion.³⁴⁰ The Ninth Circuit found the exclusion of religious practitioners from a

³³⁴ *E.g.*, *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207, 1214 (9th Cir. 2008); *South Fork Band v. U.S. Dep’t of the Interior*, 643 F. Supp. 2d 1192, 1207-08 (D. Nev. Feb. 3, 2009); *cf.* *Comanche Nation v. United States*, No. CIV-08-0849-D, 2008 WL 4426621, at *17, 2008 U.S. Dist. LEXIS 73283, at *51-52 (W.D. Okla. Sept. 23, 2008) (concluding the practitioners’ exercise would be substantially burdened, but failing to explain whether this was due to a government-pressure burden, a choice-benefit burden or the Tenth Circuit’s reasonable opportunity for religious exercise construct).

³³⁵ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988).

³³⁶ *Id.* at 452.

³³⁷ *Id.* at 451.

³³⁸ *Id.* at 452.

³³⁹ *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc).

³⁴⁰ *Id.* at 1072.

sacred site in another case, *Snoqualmie Indian Tribe*, “irrelevant” to the question of whether they were coerced into violating their beliefs by threat of civil or criminal sanctions.³⁴¹ Despite the use of sacred sites for religious rituals, the District Court for the District of Nevada found no evidence religious practitioners had been subjected to the pressure burden.³⁴²

It is difficult to tease a satisfactory explanation out of *Lyng* and its progeny as to how virtually destroying religious exercise is distinguishable from coercing the violation of religious tenets. The *Lyng* plaintiffs alleged that the proposed road would alter a sacred area, thereby precluding future religious exercise at that place.³⁴³ This begs the question of whether the weakness in the plaintiffs’ case was simply that the plaintiffs did not produce a religious tenet requiring a particular ritual to be performed at a particular place with a particular set of environmental factors, such as the absence of man-made sounds. The Court’s ultimate reliance on the “government’s own land” theory indicates the result would be the same, but it is hard to imagine how requiring Amish children to go to school amounts to an unconstitutional burden on Amish religious exercise while the virtual destruction of Native American practitioners’ religious exercise is constitutionally insignificant. The threat of criminal liability for Amish parents violating compulsory school laws would seem analogous to the threat of trespass liability for Native American adherents who exercise their religion at sacred sites they have been banned from.

This construction is also problematic because it implies rendering religious exercise impossible is legally defensible so long as the government subverts religious exercise by indirect means. Such a proposition directly contradicts the Supreme Court’s principle that a law that has either the purpose or effect of “imped[ing] the observance of one or all religions” is unconstitutional.³⁴⁴ The *Lyng* court pointed to *Sherbert* for the premise that “the crucial word” in the Free Exercise Clause is “prohibit.” The clause addresses “what the government cannot do to the individual, not . . . what the individual can extract from the government.”³⁴⁵ This premise can hardly be squared with the Court’s jurisprudence. In *Sherbert* and the other unemployment cases, the plaintiffs sought to extract unemployment benefits from the government. In the land use cases, the government engaged in activities

³⁴¹ *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207, 1214 (9th Cir. 2008).

³⁴² *South Fork Band v. U.S. Dep’t of the Interior*, 643 F. Supp. 2d 1192, 1208 (D. Nev. Feb. 3, 2009).

³⁴³ *Lyng*, 485 U.S. at 449.

³⁴⁴ *Gillette v. United States*, 401 U.S. 437, 462 (1971) (citing *Brained v. Brown*, 366 U.S. 599, 607 (1961)).

³⁴⁵ *Lyng*, 485 U.S. at 451 (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

impairing the religious exercise of individuals. But only plaintiffs in the former succeed.³⁴⁶ The fact that “virtually destroying” an adherent’s ability to practice her religion fails to amount to a prohibition of religious exercise but denial of an unemployment benefit does, is an extremely strange result. As the dissent in *Lyng* pointed out, denying unemployment benefits really just makes the offending religious exercise more expensive³⁴⁷ and the Court has already rejected the notion that making religious exercise more expensive triggers a strict-scrutiny analysis.³⁴⁸ Of course, the Court has also analogized the withholding of unemployment benefits to the imposition of a fine without explaining when a permissible expense becomes fine-like and, therefore, impermissible.³⁴⁹

The real distinction between the public land cases and those in which religious adherents have succeeded seems to rest upon the relative ease with which the government can grant exceptions to aggrieved practitioners. In the unemployment benefits cases, the government was directed to pay benefits to particular individuals. In *Yoder*, the Court directed an exemption for a relatively small and insular religious sect from compulsory education laws; in *O Centro*, another small sect was granted an exemption from the Controlled Substances Act. These decisions imposed some bureaucratic burden, but they fall far short of the disruption in shutting down a government program or directing a particular use of public lands. With the exception of *Comanche Nation* and the panel decision in *Navajo Nation*, courts have been unwilling to extend strict-scrutiny to situations that would have impacts on overall plans and policies. Although the courts resort to different tactics to decide against the religious practitioners in these cases, the outcome is generally the same.

Regardless of the difficulty in reconciling free exercise principles with past judicial results, the government’s strongest argument for defeating pressure burden claims in land use cases is that the government is not actually putting pressure on religious practitioners to violate their beliefs. Although the government action may make

³⁴⁶ In his dissent in *Lyng*, Justice Brennan accused the majority of arriving at the “astonishing” conclusion that the government “is simply not ‘doing’ anything to the [Native Americans]” *Lyng*, 485 U.S. at 458 (Brennan, J., dissenting).

³⁴⁷ *Id.* at 468 (Brennan, J., dissenting).

³⁴⁸ See *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (upholding Pennsylvania statute that proscribed “selling certain property on Sunday”); *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995); see also *Johnson v. Robison*, 415 U.S. 361 (1974) (withholding veterans educational benefits from conscientious objectors who perform alternative civilian service instead of military duty is “only an incidental burden,” not giving rise to strict scrutiny); cf. *Sherbert v. Verner*, 374 U.S. 398, 408 (1963) (holding that *Braunfeld*’s Sunday-closing law was “saved” by the “strong state interest in providing one uniform day of rest for all workers”); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

³⁴⁹ *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

religious exercise difficult or less fulfilling, it does not coerce an individual to violate a religious tenet. In circuits requiring a threat of criminal or civil sanction, the government land use decision should fail to amount to a substantial burden because such sanctions are rarely imposed. In circuits requiring only government pressure, the government must demand the religious practitioners identify the particular religious tenet that will be violated, and avoid the mistake of conceding the existence of a substantial burden.³⁵⁰

The more difficult scenario will occur when a plaintiff does establish a religious tenet requiring religious exercise at a particular place and under a particular set of conditions that will be rendered impossible by the government activity. Religious adherents in that situation would argue that by rendering the exercise impossible, the government action coerces the violation of the tenet mandating such exercise. Further, the adherents could point to criminal or civil sanctions imposable for trespassing on the place of exercise or for attempting to exclude others from the government land.

In such a situation, the government ought to rely on pre-RFRA cases requiring plaintiffs to show not just that the religious exercise is required at the particular place in question, but that it cannot be practiced anywhere else. The District of Columbia Circuit explicitly held this to be the case,³⁵¹ while the Sixth Circuit required a showing of centrality.³⁵² RLUIPA's modification of RFRA's definition of "exercise of religion" in 2000 would seem to foreclose this sort of requirement by extending the term to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."³⁵³ The Third Circuit, however, recently demonstrated that plaintiffs claiming a substantial burden on religious exercise based upon denial of access to a particular place must still explain "why the inability to occupy a particular location is significant to [their] belief."³⁵⁴

The government should expect to conduct a fact-intensive inquiry into both the significance of the physical place in question and the ability of the practitioners to exercise their religion elsewhere. The information gathered from the former inquiry would be used to argue that the practitioners are not being compelled to violate a religious tenet; while the information gathered from the latter would help to argue that

³⁵⁰ *E.g.*, *United States v. Hardman*, 622 F.Supp.2d 1129 (C.D. Utah Feb. 19, 2009); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 282 F.Supp.2d 1236, 1252 (D. N.M. 2002), *aff'd*, *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006);

³⁵¹ *Wilson v. Block*, 708 F.2d 735, 744 (D.C. Cir. 1983).

³⁵² *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980).

³⁵³ Religious Land Use and Institutionalized Persons Act of 2000, § 8, 42 U.S.C. § 2000cc-5 (2006).

³⁵⁴ *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 274 (3d Cir. 2007).

religious exercise has not been prohibited, but simply made more difficult or expensive.

Finally, the government must point to cases drawing a line between impermissible prohibition of religious exercise and negative impacts on the quality of the religious exercise. The Ninth Circuit refused to extend RFRA to government actions that “merely diminish[] the *quality* of an individual’s religious experience,” rejecting the notion that such an impact can amount to a substantial burden.³⁵⁵ Although expansion of the Snowbowl ski area would result in “spiritual disquiet,” the Court of Appeals for the District of Columbia Circuit has determined it would not amount to a free exercise claim at all.³⁵⁶ The court held that government actions which “offend religious believers” or “cast doubt upon the veracity of religious beliefs” do not amount to burdens on religious exercise unless such actions actually “penalize faith.”³⁵⁷ In finding no substantial burden on religious exercise, the decision in *South Fork Band* considered the environmental impact statement for the project which identified as “indirect effects to Native American Traditional values” the degradation of the viewscape.³⁵⁸

3. *The Government Should Be Prepared to Establish a Compelling Interest*

If the plaintiffs can show a substantial burden on religious exercise, the government must establish a compelling government interest carried out in the least restrictive means necessary. Courts have traditionally defined national security as a compelling state interest. The Supreme Court found it “‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”³⁵⁹ The concept has been extended to the military preparedness required for national defense,³⁶⁰ and this compelling interest has justified economic sanctions and travel restrictions during national emergencies,³⁶¹ random drug testing of civil employees holding security

³⁵⁵ *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm’n*, 545 F.3d 1207, 1215 n.3 (9th Cir. 2008).

³⁵⁶ *Wilson v. Block*, 708 F.2d 735, 742 (D.C. Cir. 1983).

³⁵⁷ *Id.* at 741 (D.C. Cir. 1983).

³⁵⁸ U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CORTEZ HILLS EXPANSION PROJECT, FINAL ENVIRONMENTAL IMPACT STATEMENT, NVN-067575, NV063-EIS06-011, at ES-15 (Sept. 2008), *available at* <http://tiny.cc/tu7D6>.

³⁵⁹ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citing *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

³⁶⁰ *Natural Res. Def. Council v. Gutierrez*, No. C-07-04771 EDL, 2008 WL 360852, at *31, 2008 U.S. Dist. LEXIS 8744, at *94-95 (N.D. Calif. Feb. 6, 2008).

³⁶¹ *Clancy v. Office of Foreign Assets Control of the U.S. Dep’t of Treasury*, No. 05-C-580, 2007 WL 1051767, at *12, 2007 U.S. Dist. LEXIS 29232, at *21 (E.D. Wis., Mar. 31, 2007), *aff’d*, *Clancy v. Geithner*, 559 F.3d 595, 597 (7th Cir. 2009) (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

clearances³⁶² and applying the military draft to conscientious objectors.³⁶³

Recently, the Supreme Court held the military's need to conduct realistic submarine training "plainly outweighed" the "[e]cological, scientific, and recreational interests in marine mammals."³⁶⁴ The Supreme Court went as far as to suggest that the courts should tread lightly when second-guessing military decisions, finding military decisions with respect to training, equipping and controlling forces are "essentially professional military judgments."³⁶⁵ In 1973, the Supreme Court said of military training that "it is difficult to conceive of an area of governmental activity in which the courts have less competence."³⁶⁶ With this backdrop, the *Comanche Nation* court noted the "somewhat conflicting" evidence with respect to the necessity of the TSC but ultimately concluded it was "essential" to the training mission and, therefore, amounted to a compelling governmental interest.³⁶⁷

Although national security and military preparedness are fairly well-established compelling governmental interests, cases involving non-military land-use do not establish broad categories of compelling interests. The difficulty in formulating consistent rules for what is or is not a compelling interest largely arises from the fact courts seem to take a fairly conclusory approach to the issue without much analysis—or simply decide the case on other grounds. One court found a compelling state interest in preserving particular parcels of land for industrial use in accordance with a city's development plan.³⁶⁸ Other courts, however, rejected arguments that comprehensive development plans are compelling state interests.³⁶⁹ One court found vehicular traffic concerns compelling,³⁷⁰ while another found the opposite.³⁷¹

Despite the inconsistent rulings, litigation in this area has

³⁶² AFGE Local 1533 v. Cheney, 944 F.2d 503, 508 (9th Cir. 1991).

³⁶³ Gillette v. United States, 401 U.S. 437, 460 (1971). The Court found mandatory military service by such objectors to be an "incidental" burden in the face of the government's interest in building military forces. *Id.* at 462.

³⁶⁴ Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 382, 172 L.Ed.2d 249, 269 (2008).

³⁶⁵ *Id.* at 377 (citing Gilligan v. Morgan, 413 U.S. 1 (1973)).

³⁶⁶ *Morgan*, 413 U.S. at 10 (1973).

³⁶⁷ *Comanche Nation v. United States*, No. Civ-08-849-D, 2008 WL 4426621, at *17, 2008 U.S. Dist. LEXIS 73283, at *52-53 (W.D. Okla. Sept. 23, 2008).

³⁶⁸ Int'l Church of the Foursquare Gospel v. City of San Leandro, 632 F. Supp. 2d 925, 943 (N.D. Cal. Dec. 22, 2008).

³⁶⁹ United Farmworkers of Fla. Housing Project, Inc. v. Delray Beach, 493 F.2d 799, 809 (5th Cir. 1974) (the court here found the master plan un compelling based upon the government's practice of granting exceptions as well as its application for federal funds); Rocky Mt. Christian Church v. Bd. of County Comm'rs, 612 F. Supp. 2d 1163, 1174 (D. Colo. Mar. 30, 2009).

³⁷⁰ Dimmitt v. City of Clearwater, 985 F.2d 1565, 1570 (11th Cir. 1993).

³⁷¹ Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

produced a small body of law the government can base its arguments on in establishing compelling government interests. Potentially, multi-state water storage and power generation projects can be compelling.³⁷² Development of energy resources and adherence to international treaty obligations have provided a compelling interest.³⁷³ In a case involving temporary exclusion of religious practitioners due to a construction project, one court found compelling state interests in environmental preservation, prevention of decay and erosion, protection of health and safety of visitors and improving public access.³⁷⁴ Protecting health and safety is generally a compelling interest,³⁷⁵ but the Supreme Court has indicated it is unlikely to find a compelling interest in uniform application of a particular law when exceptions have been granted to others.³⁷⁶

VII. CONCLUSION

An objective review of RFRA's history, the problems Congress was trying to address and the ensuing litigation indicate RFRA should not apply to government decisions with respect to the use of public lands. The most straightforward, but politically untenable, way to keep RFRA out of public land management would be to repeal the Act in its entirety. The Act has engendered a great deal of litigation, created a vague legal landscape, undermined public health and welfare laws such as the Controlled Substances Act and even interfered with military readiness. Successful RFRA suits result in discriminatory outcomes by granting religious practitioners privileges denied to non-practitioners and exemptions from laws non-practitioners must follow.

Based upon the intensity of Congress's outcry over the *Smith* decision and its enthusiasm for both RFRA and RLUIPA, it is unlikely either Act will be repealed in the near future. Congress could, however, easily amend RFRA to address the problems discussed in this article. A simple amendment to RFRA that would resolve public land use issues would be adding a "negative" definition of the term "substantial burden"

³⁷² *Badoni v. Higginson*, 638 F.2d 172, 177 (10th Cir. 1980). The court in this case did not specifically find an infringement on the plaintiffs' religious exercise. The court simply concluded the government had "shown an interest of magnitude sufficient to justify the alleged infringements." *Id.*

³⁷³ *Inupiat Cmty. of the Arctic Slope v. United States*, 548 F. Supp. 182, 189 (D. Alaska 1982).

³⁷⁴ *Crow v. Gullet*, 541 F. Supp. 785, 794 (D. S.D. 1982). The court does not indicate whether any of these interests individually were compelling, or if they were only compelling in the aggregate.

³⁷⁵ *E.g.*, *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996); *Am. Life League v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995).

³⁷⁶ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

in RFRA's definition section (42 U.S.C. § 2000bb-2). The definition could state that a government decision with respect to government-owned lands is not a substantial burden on the exercise of religion, even if the decision has an incidental effect on religious exercise. This would leave the remainder of substantial burden precedent intact while removing public lands from RFRA's ambit. A second, but less precise option, would be to amend the "purposes" section of RFRA (42 U.S.C. § 2000bb(b)) by adding a statement that RFRA has no impact on the substantial burden analysis in the *Lyng* case. As with the first proposed amendment, this recommendation would make RFRA inapplicable to public lands, while it could also usher in the holdings of post-*Lyng* cases that applied its rationale to internal government procedures.

The use of RFRA in public land use cases likely reflects perceived shortcomings in two other legal arenas: the inadequacy of current environmental laws in protecting non-economic uses of public lands and the absence of legislation favoring religious sites. RFRA is being used to fill these voids by creative litigants, thereby frustrating government land use decisions.

As long as RFRA remains enforceable in its current form, the risk identified by the Supreme Court in 1878—that religious exemptions from generally applicable laws “permit every citizen to become a law unto himself”—remains very much alive.³⁷⁷ The same is true of the prospect of continued legal challenges to government land use on RFRA grounds. When RFRA is employed as a means of litigating public land use decisions, the government's representatives must be prepared to counter those attacks by highlighting RFRA's legislative history and case law interpreting the statute.

³⁷⁷ Reynolds v. United States, 98 U.S. 145, 166-67 (1878).

THE INFLUENCE OF LAW ON COMMAND OF SPACE

MAJOR JOHN W. BELLFLOWER

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*You should know, then, that there are two means of contending: one by using laws, the other, force. The first is appropriate for men, the second for animals; but because the former is often ineffective, one must have recourse to the latter.*¹

I. INTRODUCTION

In 1890, Alfred Thayer Mahan cogently argued, that sea power is a dominant influence upon the wealth and security of nations.² Shortly before World War I, Sir Julian Corbett expanded Mahan's concept by including the interaction of the land and sea within a maritime strategy designed to achieve command of the sea.³ Using that maritime strategy as a strategic springboard, John Klein transposed Mahan and Corbett's early 20th century maritime strategy to the realm of outer space by viewing the concept of "command of space" more narrowly than command within other mediums.⁴ However, neither of these authors, owing mainly to the time in which they wrote but also to the limited scope of their subject, grasped the importance of international law in military operations nor understood how international law could be used within the rubric of the strategic defensive in an effort to achieve command of space. This article seeks to fill that void.

Until very recently, nations faced few constraints on uses of the space domain. Yet, despite the professed goal of cooperation in outer space and the denouncement of aggressive use of force within that realm by many countries, "all spacefaring states today have military missions, goals, and contingency space-operations plans."⁵ Thus, space is already a contested environment.⁶ It is therefore necessary to address the

¹ NICCOLÒ MACHIAVELLI, *THE PRINCE* (Quentin Skinner & Russell Price eds., Cambridge U. Press 1988) (1532).

² ALFRED THAYER MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY 1660-1783* (1890).

³ JULIAN S. CORBETT, *SOME PRINCIPLES OF MARITIME STRATEGY* (1911).

⁴ JOHN J. KLEIN, *SPACE WARFARE: STRATEGY, PRINCIPLES AND POLICY* (2006).

⁵ EVERETT C. DOLMAN, *ASTROPOLITIK: CLASSICAL GEOPOLITICS IN THE SPACE AGE 2* (2002).

⁶ China's 2007 test of an anti-satellite weapon announced to the world their belief that space is a potential theater of conflict. U.S. JOINT FORCES COMMAND, U.S. DEP'T OF DEFENSE, *THE JOINT OPERATING ENVIRONMENT: CHALLENGES AND IMPLICATIONS FOR THE FUTURE JOINT FORCE 23* (2008) [hereinafter JOE], available at <http://www.jfcom.mil/newslink/storyarchive/2008/JOE2008.pdf>. The United States has long understood the need to defend its access to space. See, e.g., NAT'L SCIENCE & TECH. COUNCIL, EXECUTIVE OFFICE OF THE PRESIDENT, *FACT SHEET: NATIONAL SPACE POLICY* (Sept. 19, 1996), available at <http://www.fas.org/spp/military/docops/national/nstc-8.htm>.

military implications of continued U.S. freedom of action in space.⁷ While that freedom is not yet actively threatened by the use of armed force, the United States has a narrow window of opportunity to identify and pursue alternate means of securing command of space.⁸ It is within this vein that international law is helpful. America's extensive use of space for commercial and military activities should translate to significant power to guide and shape international law regarding space. U.S. goals must seek to craft effective mechanisms for achieving putative command of space in the absence of the hostilities that truly determine which nation exercises that command.⁹

This article asserts that strategic defense is the best strategy for maintaining putative U.S. command of space¹⁰ and the foundation for such a defense must be constructed by utilizing the mechanisms of international law. A successful strategic defense does not require, however, that America forego research and development of potential offensive capabilities. On the contrary, offensive counter-space is a necessary component of the defense through the pursuit of negative command when necessary.¹¹ However, offensive counterspace capabilities must be viewed within the context of strategic defense since these capabilities may pose serious risks to America's own space assets. Thus, the United States must always first consider defense of its assets. To that end, law is a central element in any defensive strategy to achieve putative command of space.

Given the relative peace between nations, some may question the necessity of a warfare approach to law. However, war is in the nature of man and, if history is a teacher, the issue is not if, but when war will reach outer space. Nonetheless, looking solely to military science as a method of securing command of space disserves U.S. interests. Indeed, as military methods focus on actions taken subsequent to the initiation of hostilities, it is necessary to pursue a strategy that remains as applicable in peace as in war, for it is in peace that decisive victories might be gained which provide benefits that could not accrue

⁷ C. Robert Kehler, Commander, Air Force Space Command, The Next Space Age: Remarks to the National Space Symposium (Mar. 31, 2009), *available at* <http://www.af.mil/library/speeches/speech.asp?id=464>.

⁸ At its core, command of space is little more than the maintenance of freedom of action in outer space that is consistent with international law. *See infra* Section III.

⁹ KLEIN, *supra* note 4, at 60. Applying Corbett to the instant situation indicates that the object of warfare is to gain command of the medium in question (e.g. air, sea, space). CORBETT, *supra* note 3, at 87. Klein indicates that "command is normally thought of a being gained and exercised through the use of military might." KLEIN, *supra* note 4, at 60. Although military might is indeed the final arbiter, putative command of space can, as will be demonstrated, be secured via lawfare.

¹⁰ KLEIN, *supra* note 4, at 76.

¹¹ Compare CORBETT, *supra* note 3, at 33, with KLEIN, *supra* note 4, at 78-79 (for a description of negative command, see Chapter One, Section 2(b) of CORBETT).

through armed force.¹² The strategic legal vision offered herein attempts to satisfy that purpose.

II. LAW AS A METHOD OF WARFARE

The major driving force of globalization is a knowledge revolution enabled mainly through enhanced telecommunications and technology transfer,¹³ much of which is further enabled through the use of space-based assets. This revolution, characterized by an exponential increase in information sharing across borders, has fundamentally altered the geopolitical landscape such that it is malleable and “perpetually unfolding across land and sea—and now outer space and cyberspace as well.”¹⁴ What emerges is a true global order wherein economically emerging countries, and non-state actors, are creating an international system in which they are no longer mere objects but bona fide players.¹⁵ This creates a diversification and diffusion of power within the international system that leads to an increased need for legitimacy in international conduct.¹⁶ Indeed, one foreign policy advisor has opined that “the struggle to define and obtain international legitimacy . . . may prove to be among the most critical contests of our time. In some ways, it is as significant in determining the future of the U.S. role in the international system as any purely material measure of power and influence.”¹⁷ Therefore, the use of law as a method of warfare is the best means of achieving that legitimacy.

A. Seamless War

Sun Tzu recognized that war and diplomacy “comprise a continuous, seamless activity,”¹⁸ and viewed diplomacy as the best means of attaining victory without bloodshed.¹⁹ Diplomacy, “the art or practice of conducting international relations, as in negotiating alliances,

¹² MAHAN, *supra* note 2, at 22.

¹³ Ellen L. Frost, *Globalization and National Security: A Strategic Agenda*, in *THE GLOBAL CENTURY: GLOBALIZATION AND NATIONAL SECURITY* 43 (Richard L. Kugler & Ellen L. Frost eds., 2002).

¹⁴ PARAG KHANNA, *THE SECOND WORLD: HOW EMERGING POWERS ARE REDEFINING GLOBAL COMPETITION IN THE TWENTY-FIRST CENTURY*, at xx (2009).

¹⁵ FAREED ZAKARIA, *THE POST-AMERICAN WORLD* 4-5 (2008).

¹⁶ *Id.* at 39.

¹⁷ Robert Kagan, *America's Crisis of Legitimacy*, vol. 83, no. 2 *FOREIGN AFF.*, Mar./Apr. 2004, at 65.

¹⁸ MICHAEL I. HANDEL, *MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT* 31 (2d ed. 1996).

¹⁹ *Id.* Sun Tzu is famous for opining that “to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.” SUN TZU, *THE ART OF WAR* 77 (Samuel B. Griffith trans., Oxford University Press, 1963).

treaties, and agreements,”²⁰ includes, *inter alia*, international law since such law is composed of both treaty law and state practice—that is, customary international law. Determining how states can use law as a method of warfare to achieve military objectives requires an understanding of how the evolving temporal and structural dimensions of war have altered its very meaning.

War, as a means to accomplish political objectives,²¹ encompasses myriad elements in addition to armed force. It is not initiated solely when bullets start flying but, rather, at some point prior. War in its normative sense, restricted by temporal or structural constraints, does not exist; formal division between “war” and “peace” today is artificial.²² For example, the Cold War comprised armed conflict by proxies as well as an ideological battle waged in the court of public opinion, a space race, and legal maneuvering within international institutions. War has undergone a metamorphosis wherein it is no longer simply “using armed force to compel the enemy to submit to one’s will, but rather . . . using all means, including armed force or non-armed force, military and non-military, and lethal and non-lethal means to compel the enemy to accept one’s interests.”²³ Thus, war has become seamless, without shape, with no discernable beginning or end and encompassing countless means.

With the gradually vanishing structural distinctions of war, asymmetric means become paramount. While this may come as no shock to a public inundated with the use of asymmetry as a buzzword, a mistaken application of that term leads to a myopic view of war. Many strategists focus on asymmetry as the application of “qualitatively different weapons and forces of one’s own” against an adversary’s weapons and forces.²⁴ This, however, restricts its use to a traditional

²⁰ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004), available at <http://dictionary.reference.com/browse/diplomacy>. As international law is composed of both treaty law and state practice (customary international law) it fits within this construct for the purposes herein.

²¹ CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Pare eds. & trans., Princeton University Press, 1976) (1832).

²² It is this single dimension of war, i.e. armed force, with which the so-called law of war is concerned given its preference for the term “armed conflict.” See, e.g., Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (this article is common to all four Geneva Conventions); U.N. Charter art. 2, para. 4.

²³ QIAO LIANG & WANG XIANGSUI, UNRESTRICTED WARFARE 7 (People’s Liberation Army (P.R.C.) trans., 1999). War is currently much more than a clash of armed men upon the battlefield, it has become “widely dispersed and largely undefined; the distinction between war and peace is seamless. War [has become (once again?)] nonlinear and may have no definable battle space.” James Gardiner, Editorial, *Facing a New Form of War*, A.F. TIMES (Mar. 19, 2007) available at http://www.airforcetimes.com/community/opinion/marine_opinion_gardiner070319.

²⁴ Richard B. Gasparre, *Multi-Dimensionality in Chinese Strategy*, ARMY TECH. (May 22, 2008) available at <http://www.army-technology.com/features/feature1917/>.

military paradigm. Rather than rely solely on the use of armed force, states and non-state actors are increasingly using “all available networks—political, economic, social, and military” to achieve positive results.²⁵ It is for this reason that states may use law as a means of warfare to achieve the political ends sought.

B. Lawfare

An adaptation of the Clausewitzian principle of war as the continuation of politics, is the concept of “lawfare”—the continuation, or initiation, of war by political or legal means.²⁶ Lawfare has been defined as a variant of warfare whereby law is used “as a substitute for traditional military means to achieve military objectives.”²⁷ Even this definitional construct, though embracing law as a method of war, misses the mark because it is too constrictive vis-à-vis law and strategy. Those advocating this restrictive definition of lawfare, which adheres to traditional notions of warfare, hamstring its utility by restricting its use to the achievement of *military* objectives. Lawfare, however, must be viewed as a means of securing the *political* objective of command of space.

This short-sighted vision of lawfare as nothing more than another arrow in the military quiver leads to an artificial categorization

²⁵ THOMAS X. HAMMES, *THE SLING AND THE STONE: ON WAR IN THE 21ST CENTURY* 2 (2006). Hammes discusses modern war as an evolutionary process that has, to date, culminated in “fourth-generation warfare.” *Id.* Whether Hammes’s historical analysis and conclusions are factually accurate in no way diminishes his observations of the current state of warfare. For a critique of the fourth-generation warfare concept, see ANTULIO J. ECHEVARRIA II, *FOURTH GENERATION WAR AND OTHER MYTHS* (2005), available at <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub632.pdf>.

²⁶ See, e.g., Major General Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 *YALE J. INT’L AFFAIRS* 146, 146 (2008) (Major General Charles Dunlap retired from the Air Force as the Deputy Judge Advocate General in 2010); Council on Foreign Relations, *Lawfare, the Latest in Asymmetries*, summarized transcript of sixth session of the FY03 National Security Roundtable (Mar. 18, 2003), <http://www.cfr.org/publication.html?id=5772> (last visited Jan. 18, 2010); Phillip Carter, *Legal Combat: Are Enemies Waging War in Our Courts?*, *SLATE*, Apr. 4, 2005, <http://www.slate.com/id/2116169/pagenum/all/> (last visited Jan. 18, 2010).

²⁷ Council on Foreign Relations, *supra* note 26. It is interesting to note that Hugo Grotius, the “father of international law,” may be the first practitioner of lawfare with his publication of *Mare Liberum* in 1609 defending the concept of freedom of the high seas. At the time of its publication, European countries, including Grotius’s Holland, were in keen competition for commercial rights to trade routes over the high seas. Having lost out to Portuguese and Spanish domination, Grotius was commissioned to defend Holland’s right to navigate freely upon the seas. Thus, Grotius used law to accomplish an objective that Dutch military power could not and thereby solidified the concept of freedom of the seas in modern international law. See R.P. Anand, *Maritime Practice in South-East Asia until 1600 A.D. and the Modern Law of the Sea*, 30 *INT’L & COMP. L.Q.* 440 (1981), available at <http://journals.cambridge.org/action/search#>.

of lawfare into negative and positive attributes.²⁸ The legitimate use of law in pursuit of military objectives has been characterized as “positive” lawfare, while the “misuse” of law to achieve military objectives is referred to as “negative” lawfare.²⁹ However, the positive-negative dichotomy merely clouds the issue, because it is predicated on the use or abuse of law within an operational setting, as a barrier whereby American troops have little recourse but to adhere to international law despite the refusal of an adversary to do so.³⁰ Harnessing lawfare in support of U.S. “command” of space, however, requires not only an objective understanding of lawfare in its tactical context but also in its strategic context.

1. Tactical Lawfare

Tactical lawfare seeks to achieve a distinct military objective at the tactical or operational level of war.³¹ The opening phases of

²⁸ Thus, there is the somewhat dated example of the use of lawfare by the Iraqis, in Baghdad during Desert Storm, through manipulation of perceived law of war violations in the attack on the Al Firdos bunker. *See generally* Colonel Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 6 (Nov. 29, 2001) (unpublished paper presented at Harvard University, Carr Center, Humanitarian Challenges in Military Intervention Workshop), *available at* <http://www.hks.harvard.edu> (search for “Dunlap”).

²⁹ The American Non-Governmental Organizations Coalition for the International Criminal Court, *Lawfare and the International Criminal Court: Questions and Answers* (Harriette Hill, Jan. 14, 2008) [hereinafter American NGO Coalition], *available at* <http://www.amicc.org/docs/Lawfare.pdf>.

³⁰ General Dunlap states that in exploring the use of lawfare in warfare he “was trying to focus on the exploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting American military power.” Major General Charles J. Dunlap, Jr., Editorial, *Lawfare Amid Warfare*, WASH. TIMES, Aug. 3, 2007, at A19, *available at* <http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/>.

³¹ The tactical level of war is “[t]he level of war at which battles and engagements are planned and executed to achieve 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.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 534 (17 Mar. 2009) [hereinafter DOD DICTIONARY], *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf. The operational level of war is “[t]he level of war at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas. Activities at this level link tactics and strategy by establishing operational objectives needed to achieve the strategic objectives, sequencing events to achieve the operational objectives, initiating actions, and applying resources to bring about and sustain these events. *Id.* at 395. The term “tactical” is used as a modifier vis-à-vis lawfare since its use at this level is confined to distinct military operations. Of course, operational lawfare can also achieve strategic effects, but the difference is the immediate effect sought. General Dunlap’s examples illustrate their operational characterization in that

Operation Enduring Freedom provide an example of the use of tactical lawfare by the United States. Concerned about the commercial availability of satellite imagery that could be used by Taliban and Al Qaeda forces in Afghanistan, the United States used legal means, in this case contracts, to deny the enemy use of that information, thereby enhancing American operations.³²

The more common form of tactical lawfare is merely a values-based method of asymmetric warfare,³³ where the immediate objective is to constrain an adversary's military options. Tactical lawfare has been used quite extensively against the United States by exploiting adherence to the rule of law.³⁴ It typically takes the form of placing lawful targets—such as, enemy weapons or troops engaged in combat—near protected persons or property in the hopes of either protecting those lawful targets by placing them off limits, or provoking an attack that could be used in propaganda to portray American action as contrary to international law.³⁵ The inherent dilemma for American forces in these cases centers on the principle of proportionality in the international law of armed conflict, which permits engagement of lawful targets despite the presence of civilians or other protected persons or property so long as the damage inflicted is not out of proportion to the military advantage gained.³⁶ However, it becomes extremely difficult to advance cold legal arguments in the face of media attention focused on images of dead and maimed civilians.³⁷ While the tactical component of lawfare is generally most often thought of as representative of its dangers, lawfare

both instances of lawfare achieved the operational objectives of neutralizing American airpower. See American NGO Coalition, *supra* note 29.

³² Brigadier General Charles Dunlap, Jr., *Lawfare in Modern Conflicts*, THE REPORTER, KEYSTONE Ed. 2005, at 95. Perhaps this example best demonstrates the futility of bifurcating lawfare into positive and negative categories since this use would obviously be deemed positive from the American perspective, but negative from the enemy's viewpoint.

³³ See *id.* at 96.

³⁴ See *id.*

³⁵ See *id.*; 2 U.S. DEP'T OF DEFENSE, REPORT OF THE DEFENSE SCIENCE BOARD 2007 SUMMER STUDY: CHALLENGES TO MILITARY OPERATIONS IN SUPPORT OF U.S. INTERESTS 36 (Dec. 2008), available at <http://handle.dtic.mil/100.2/ADA491393>.

³⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 51, para. 5(b), 57, para 2(b), June 8, 1977, 1125 U.N.T.S. 3.

³⁷ An illustration of this difficulty is found in a comment from a coalition soldier in Afghanistan. Responding to a media inquiry regarding civilian casualties in light of military operations, a coalition soldier responded that "NATO would not fire on positions if it knew there were civilians nearby." In addition to being a misstatement of the law of armed conflict, such statement ostensibly yields a definite military objective to enemy forces by, in the least, generating the perception that any subsequent civilian casualties violate international law. Major General Charles Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. OF INT'L AFF. 146, 149 (2008), available at <http://www.nimj.org/documents/Lawfare%20Today.pdf>.

in its strategic context presents the most danger and the greatest potential support for American interests.

2. Strategic Lawfare

Strategic lawfare seeks to bind military power by exploiting a commitment to the rule of law to insulate one from the full effects of an adversary's military power.³⁸ In effect, strategic lawfare can fasten military power to international rules and institutions that channel or confine the ways in which that power can be used.³⁹ As with tactical lawfare, it is also used effectively to constrain American military power, but in contrast to tactical lawfare, it can also be used to achieve a political end without resort to military power. The familiar metaphor is the small and weak Lilliputians lashing the more powerful Gulliver to the ground as he lay sleeping.⁴⁰ Gulliver erred through inattentiveness. America cannot make the same mistake and, instead, must recognize that strategic lawfare can be used either for or against American interests.

The premise for binding the United States using strategic lawfare lies in the knowledge that America, perhaps more than others, assigns a more prominent role to law within our society.⁴¹ Indeed, rightly or wrongly, Americans envision their country as “a city upon a hill” for all to see, exemplifying and personifying the rule of law.⁴² Even in military matters we have recognized the primacy of law since

³⁸ See STEPHEN M. WALT, TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY 144 (2005).

³⁹ See G. JOHN IKENBERRY, STRATEGIC REACTIONS TO AMERICAN PREEMINENCE: GREAT POWER POLITICS IN THE AGE OF UNIPOLARITY (July 28, 2003), available at http://www.dni.gov/nic/confreports_stratreact.html. An early use of strategic lawfare occurred with the Brussels Act of 1890 in which European powers sought to maintain their edge in firepower vis-à-vis African tribes by prohibiting the sale of breech loading rifles in equatorial Africa. See MAX BOOT, WAR MADE NEW: WEAPONS, WARRIORS, AND THE MAKING OF THE MODERN WORLD 153-54 (2006). Since Europeans were typically heavily outnumbered in their colonial confrontations with African tribes, it is not difficult to surmise that without the effect of this use of strategic lawfare the colonization of Africa might not have been possible. *Id.* at 146-69. In this sense, any treaty which seeks to limit the spread of weapons can be viewed as achieving a strategic advantage for those states already possessing the weapons in question. A case in point is the Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. Despite non-adherence issues involving some states, a majority of non-nuclear states have forgone nuclear weapons development thereby enhancing the strategic position of those that do possess such weapons.

⁴⁰ WALT, *supra* note 38, at 144.

⁴¹ See David B. Rivkin, Jr., & Lee A. Casey, *The Rocky Shoals of International Law*, NAT'L INT. ONLINE (Dec. 1, 2000), <http://www.nationalinterest.org/General.aspx?id=92&id2=10704> (last visited Feb. 23, 2009).

⁴² JOHN WINTHROP, A MODEL OF CHRISTIAN CHARITY (1630), available at <http://religiousfreedom.lib.virginia.edu/sacred/charity.html>.

our founding. The Declaration of Independence was an appeal to law justifying resort to armed force against a despotic regime.⁴³ Thus, law is both America's genius and Achilles' heel.⁴⁴ So much so that Clausewitz's dismissal of international law and custom as "self-imposed, imperceptible limitations hardly worth mentioning,"⁴⁵ clearly misses the mark of the modern impact of international law on strategic interests. Indeed, the strategic importance of international law caused at least two commentators to opine that "international law may become one of the most potent weapons ever deployed against the United States."⁴⁶ Another commentator argued the validity of this warning by indicating that a common strategy is to attack public support for particular military actions by painting them as violations of international law.⁴⁷ Resort to such strategic lawfare by our adversaries, whether near-peer or otherwise, has altered the traditional warfare paradigm since the effects—real or perceived—of international treaties, laws, and resolutions will not only affect policy choices, but also military decision-making and, indeed, the very legitimacy of American military operations.

Strategic lawfare is a means of warfare that may be used for good or for ill. As with any means of warfare the nature of its use belongs to those that use it. Although some argue that international law is "a harmful fantasy"⁴⁸ it is clear that international law does indeed exist and America is bound by it.⁴⁹ Moreover, since its existence binds not only America but also other nations as well, it can be shaped "in ways that both support our national interests and that are consistent with our philosophical foundations."⁵⁰ Thus, the remedy is not apathy but engagement.

America must actively engage the international legal process in an effort to mold law in such a way as to enhance national security interests. As new technology arises and America's reliance on space-based assets increases, a lawfare strategy becomes crucial to assure maintenance of universal freedom of use and exploration of outer space. Although the Outer Space Treaty⁵¹ and its progeny have met the needs of the international community, and continue to do so, there has been a constantly increasing push to create additional restraints on American

⁴³ See Rivkin & Casey, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ CLAUSEWITZ, *supra* note 21, at 75.

⁴⁶ Rivkin & Casey, *supra* note 41.

⁴⁷ ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 39 (2003).

⁴⁸ *Id.* at 38.

⁴⁹ Rivkin & Casey, *supra* note 41.

⁵⁰ *Id.*

⁵¹ Treaty Governing the Activity of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. I, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter OST].

freedom of action in outer space.⁵² Moreover, where additional restraints have not been proposed, there has been an effort to interpret existing international law in such a way as to limit American freedom of action in outer space.⁵³ To counter this effort, American attorneys, both civilian and military, must critically analyze international law proposals and aggressively proffer alternative views of existing law that comport with American views on the utility of space. To date, much of the scholarly writing on international law applicable to outer space is often quite critical of American freedom of action in outer space.⁵⁴ As a result, America has already experienced the impact of strategic lawfare and should now pursue its own counter-strategy to reassert its interpretation of international law.

III. COMMAND OF SPACE

The intrinsic value of space, as envisioned by the Outer Space Treaty, is the utility it provides.⁵⁵ The ubiquitous nature of space technology as the signature feature of globalization continues to

⁵² See, e.g., Nancy Gallagher, *Towards A Reconsideration of the Rules for Space Security*, in PERSPECTIVES ON SPACE SECURITY (John M. Logsdon & Audrey M. Schaffer, eds., Dec. 2005) available at http://www.gwu.edu/~spi/assets/docs/PERSPECTIVES_ON_SPACE_SECURITY.pdf. Interestingly, Gallagher claims that it is the United States that seeks to “unilaterally rewrite the rules for space in support of a national security strategy” despite the fact that the U.S. position is that the current space legal regime is sufficient. *Id.* at 24. Similarly, one is at a loss in understanding the argument that additional international law is necessary when, according to Gallagher, the international community is “not satisfied by U.S. reassurances that its military space activities will be restrained by UN Charter provisions governing the use of force, by military rules of engagement, and by requirements for high-level approval of particularly consequential military space operations.” *Id.* at 23. Indeed, if the concern is that both international and domestic law and regulation are insufficient to assuage international concern, how can more law and regulations address those concerns? In other words, if the United States is predisposed to ignore international law as this proffered argument insinuates, why would one expect that additional law would matter? Thus, the inescapable conclusion is that arguments such as these are not advanced in response to a perceived unwillingness of the United States to follow international law, but rather in the hopes that the United States will continue its adherence to such law and be restricted in its ability to employ the freedom of use of outer space it currently enjoys to secure its national security interests in outer space. For an understanding of how international law is used to bind nation-states, see WALT, *supra* note 38, at 144.

⁵³ This issue is explored with respect to vertical sovereignty *infra* Section IV.

⁵⁴ See, e.g., Hui Zhang, Op-Ed, *Act Now to Stop a Space Arms Race*, FIN. TIMES, June 10, 2005, <http://www.ft.com> (search for “hui zhang race”) (last visited Jan. 18, 2010); Marko Beljac, *Arms Race in Space*, FOR. POL’Y IN FOCUS, Mar. 31, 2008, http://www.fpi.org/articles/arms_race_in_space (last visited Jan. 18, 2010); Neha Kumar, *US Anti-Satellite Weapon Test: Arms Race in Outer Space*, INST. OF PEACE & CONFLICT STUD., Feb. 28, 2008, http://www.ipcs.org/article_details.php?articleNo=2499 (last visited Jan. 18, 2010).

⁵⁵ See KLEIN, *supra* note 4, at 51. Freedom of use of outer space is guaranteed in the Outer Space Treaty. See OST, *supra* note 51.

magnify global dependence on space-based systems⁵⁶ as nations move to fully exploit space utility. However, there is no utility of space without access. Given the increasing importance of space systems to America's own national security,⁵⁷ continued access is best secured through the concept of command of space.⁵⁸ Although some may argue that command of space "collides head-on with relevant international law,"⁵⁹ such an assertion is unsupported when one applies the correct definitional construct. Applying a proper definitional construct to command of space better serves global as well as U.S. interests because it recognizes an increasing dependence on space technology and seeks to ensure universal freedom of access to space.

A. The Spherical Battlespace⁶⁰

A terrestrial-centric view of space considers space from the vantage point of the earth's surface, looking up. This conventional view, however, does not allow for the primacy of space necessary for the achievement of command and results in the pursuit of a space policy

⁵⁶ See Colin S. Gray, *Preface to DOLMAN*, *supra* note 5, at xi.

⁵⁷ Major General James Armor, Director of the Department of Defense National Security Space Office, made the following observations:

[S]pace capabilities enable unmatched battlefield awareness, advanced warning and characterization of missile attacks, precise application of force, synchronization of our combat forces, and essential command and control functions. Space capabilities also underpin many essential elements of the nation's infrastructure and enable diplomatic, informational, military, and economic elements of national power. Space capabilities are integral to U.S. economic, homeland, and national security.

Weaponizing Space: Is Current U.S. Policy Protecting our National Security?: Hearing before the Subcommittee on National Security and Foreign Affairs of the Committee on Oversight and Government Reform, 110th Cong. 37 (2007).

⁵⁸ See KLEIN, *supra* note 4, at 60.

⁵⁹ Craig H. Allen, *Command of the Commons Boasts: An Invitation to Lawfare?*, 83 INT'L LAW STUD. 21, 22 (2007), available at http://www.law.washington.edu/Directory/docs/Allen/Article_Command_of_Commons.pdf. While Professor Allen's quote is taken from an article focusing on command of the sea, its precepts are readily applicable to outer space given his discussion of the legal implications of "command" in the context of all commons rather than only the sea. *Id.* at 25-27.

⁶⁰ As the attainment and maintenance of command of space is ultimately a military mission, the use of the term "battlespace" is correct despite the fact that this thesis will propose a non-lethal strategy of attaining and maintaining putative command of space. Battlespace is generally defined as the environment, factors, and conditions that must be understood to successfully apply combat power, protect the force, or complete the mission. This includes the air, land, sea, space, and the included enemy and friendly forces; facilities; weather; terrain; the electromagnetic spectrum; and the information environment within the operational areas and areas of interest. See DOD DICTIONARY, *supra* note 31, at 62.

grounded in the perspective of enabling earth operations rather than the best approach for achieving space security. The unique terrain of space, which is better understood as a “spherical battlespace,”⁶¹ mandates a decidedly different approach to which some principles of maritime strategy may be adapted.

Spherical battlespace is described as beginning at geostationary orbit (GEO) and extending down,⁶² although it may be more appropriate to define it as beginning at the outer most point of the Hill Sphere and extending down to account for any possible technological advances. The Hill Sphere is a celestial body’s gravitational sphere of influence.⁶³ Objects are constantly in motion at speeds that can surpass 11,000 kilometers per second,⁶⁴ in a battlespace that continually changes as “objects traverse across a volume that is 6,000 times greater than the airspace of earth below it.”⁶⁵ Thus, the terrain of space’s spherical battlespace, like the high seas, cannot be reduced to possession.⁶⁶ As with the sea, one cannot “occupy,” that is, physically exclude neutrals—or enemies—from, space as one might with respect to territory on land.⁶⁷

As with sea, certain well-worn paths of travel have evolved in space,⁶⁸ called lines of communication in the military context.⁶⁹ While traditional lines of communication, whether upon land or sea or in the air, are well understood as those routes used for the transportation of goods, personnel, and supplies within the applicable medium, space lines of communication may be defined as “those lines of communication in and through space used for the movement of trade, materiel, supplies, personnel, spacecraft, electromagnetic transmissions,

⁶¹ Kehler, *supra* note 7.

⁶² *See id.* Presumably, General Kehler uses GEO as a starting point because, aside from one-way exploration missions to other parts of our galaxy and beyond, outer space beyond that point is relatively unused, especially from a military standpoint. However, it may be more appropriate from a scientific standpoint to include any point in outer space that can be affected by the earth’s gravitational pull within the spherical battlespace.

⁶³ *See Hill Sphere*, ECON. EXPERT.COM, <http://www.economicexpert.com/a/Hill:sphere.htm> (last visited Jan. 25, 2010).

⁶⁴ Kehler, *supra* note 7.

⁶⁵ *See id.*

⁶⁶ Although this statement is firmly supported in international law, see, e.g., OST, art. II, *supra* note 51; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (the possession spoken of here pertains to the military conquest rather than legalistic connotations of possession).

⁶⁷ CORBETT, *supra* note 3, at 89.

⁶⁸ KLEIN, *supra* note 4, at 51; MAHAN, *supra* note 2, at 25 (Captain Mahan recognized that the sea presents itself as a wide common over which men may pass in all directions, but had developed well-worn paths called trade routes).

⁶⁹ *See* KLEIN, *supra* note 4, at 51.

and some military effects”⁷⁰ and the means of accessing those lines of communication—such as, satellites, launch sites, etc.⁷¹ Whether on the sea or in space, protecting these lines of communication is critically important because they are the vehicles through which access and utility are enabled.⁷² Thus, the primary objective as it relates to command of space is the security of space lines of communication, a task made all the more difficult given that American space lines of communication may overlap with that of an adversary or a neutral.⁷³

B. The Legal Implications of Command of Space

The use of the term “command” in crafting a strategy for a segment of the global commons⁷⁴ is potentially controversial in the international context. Crafting a proper definition, and understanding of that definition, is important given that the era of the United States as the sole superpower may be coming to an end and a new international system is developing wherein emerging powers are increasingly asserting their own interests at the expense of American interests.⁷⁵ As relative power—diplomatic, economic, military or otherwise—becomes increasingly diversified and diffused, achieving internationally-recognized legitimacy becomes the prerequisite for successful national strategy.⁷⁶ Only through legitimacy may the United States appeal to world actors and sustain any effort.⁷⁷ Evaluating potential strategies for

⁷⁰ *Id.* Rather than use the term Space Lines of Communication, which he would abbreviate as SLOC, Klein prefers the use of the term celestial lines of communication (CLOC) to distinguish it from Sea Lines of Communication which is also abbreviated SLOC. This author prefers Space Lines of Communication, which may be abbreviated as SpLOC to avoid confusion, as it better comports with Air Force terminology than does the term celestial.

⁷¹ Although Klein terms the means of utilizing space lines of communication as “space communications” and differentiates between the two, this distinction is unnecessary from a command of space perspective as all are crucial to the maintenance of command. *Id.* at 52.

⁷² *See id.*; U.S. DEP’T OF DEF., DIR. 3100.10, SPACE POLICY (9 July 1999), available at <http://www.dtic.mil/whs/directives/corres/pdf/310010p.pdf>.

⁷³ KLEIN, *supra* note 4, at 51.

⁷⁴ The global commons, or common spaces, are those domains that lie outside the exclusive jurisdiction of any particular state but may be accessed and used by those states or their nationals. Four domains are traditionally considered to comprise the commons: Antarctica, the high seas, the atmosphere, and outer space. Access and use is not unqualified however. States (and their nationals) must utilize the global common spaces with due regard to the interests of others, a norm that is certainly implicated by the concept of command of any common space. *See* CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 224–25 (2005).

⁷⁵ *See* JOE, *supra* note 6, at 24; ZAKARIA, *supra* note 15, at 4, 37.

⁷⁶ *See* ZAKARIA, *supra* note 15, at 39.

⁷⁷ *See id.*

achieving legitimacy in the command of space according to international law requires that we distinguish between “command” in its normative sense and in its operative sense.

1. *Normative Command of Space*

Analyzing a normative concept of command of space requires evaluation of the conceptual dimension—the degree of control sought to be exercised—and the temporal dimension of such control in times of both peace and armed conflict.⁷⁸ Legitimacy requires compliance with international law both conceptually and temporally. Some normative definitions of command include “to have authoritative control over; to rule; to have at one’s disposal; to dominate by position.”⁷⁹ Such definitions could support concepts of ownership or sovereignty.⁸⁰ However, “the very nature of a commons is that no State has sovereignty over it.”⁸¹ The Outer Space Treaty, referred to by some as the *Magna Carta* of space law⁸² and the legal source of first resort in all matters pertaining to space law,⁸³ unequivocally states that “outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”⁸⁴ Thus, it is clear that “to rule” or “dominate” implies an illegitimate conceptual dimension. Similarly, “to have at one’s disposal,” also implies ownership or sovereignty and can be discarded. This leaves the normative definition of command as having “authoritative control.” The term “authoritative” implies some legitimate basis for acting⁸⁵ while the term “control” would suggest the ability “to exercise power or influence; to regulate or govern.”⁸⁶ This definitional construct, which derives its value from access and usage, is legitimate if a state has legal authority to influence or regulate access and use of outer space.

Addressing this particular issue in a 1960 lecture at Leiden University, the preeminent air and space lawyer John Cobb Cooper quoted an eloquent statement regarding the sea:

⁷⁸ See Allen, *supra* note 59, at 23-24.

⁷⁹ *Id.* at 24 (citing Webster’s II New Riverside University Dictionary (11th ed. 1988)). As this definitional model fails to provide any temporal distinction, its applicability is measured during both peace and armed conflict.

⁸⁰ See *id.* at 34.

⁸¹ *Id.*

⁸² See Nandasiri Jasentuliyana, *The Role of Developing Countries in the Formation of Space Law*, 20 ANNALS AIR & SPACE L. 95, 97 (1995).

⁸³ ROBERT A. RAMEY, *SPACE WARFARE AND THE FUTURE LAW OF WAR* 96 (1999).

⁸⁴ OST, *supra* note 51, art. II.

⁸⁵ Allen, *supra* note 59, at 24.

⁸⁶ BLACK’S LAW DICTIONARY 353 (8th ed. 2004).

Upon the ocean, then, *in time of peace*, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others.⁸⁷

This very concept was transposed into Article I(2) of the Outer Space Treaty:

Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.⁸⁸

Conceptually, the requirement that each state be permitted to explore and use outer space “without discrimination of any kind, on a basis of equality”⁸⁹ indicates that no state has the legal authority to regulate another state’s access and use of space absent some other provision of international law. Thus, the normative definition of command of space fails the test of legitimacy.

2. *Operative Command of Space*

An operative definition for command of space adequately balances the temporal and conceptual dimensions of command such that it is an entirely legitimate pursuit. “Command” is typically thought of as being attained and maintained through the use of military force and thought of in terms of “space control.”⁹⁰ However, command of space “is inclusive of much more than ‘space control.’”⁹¹ The U.S. DOD defines space control as “combat, combat support, and combat service support operations to ensure freedom of action in space for the United States and its allies and, when directed, deny an adversary freedom of

⁸⁷ John Cobb Cooper, *Fundamental Questions of Outer Space Law*, SPACE LAW 64 (Francis Lyall & Paul B. Larsen, eds., 2007) (quoting Joseph Story, former Associate Justice of the Supreme Court of the United States).

⁸⁸ OST, *supra* note 51, art. I, para. 2.

⁸⁹ *Id.*

⁹⁰ KLEIN, *supra* note 4, at 60.

⁹¹ *Id.*

action in space.”⁹² The failure to embrace the broader definition of command of space in favor of a more narrow emphasis on measures to achieve space control generates a mistaken belief that space control equates to hegemony.

From a strictly military standpoint, outer space is viewed by some as the ultimate high ground.⁹³ The highest available ground in a military operation has always been viewed as the most desirable location given its predominance of the surrounding terrain and its concomitant advantages in combating an enemy.⁹⁴ These advantages include commanding overviews, enhanced fields of fire, and a more secure defensive position.⁹⁵ While such advantages are certainly desirable in times of armed conflict, the emphasis on means of combat invokes the illegitimate hegemonic, normative definitional construct of command of space.

For example, one theorist offers a three-part plan, based on the political doctrine of *astropolitik*,⁹⁶ to achieve space control.⁹⁷ Demonstrating the plan’s illegitimacy under the current international space law regime, he first advises U.S. withdrawal from all space-related treaties.⁹⁸ Next, he advocates that the United States immediately “seize control of low-Earth orbit” which would, in effect, establish “a police blockade of all current spaceports, monitoring and controlling all traffic both in and out.”⁹⁹ Lastly, he suggests the creation of a national space agency to regulate all space activity.¹⁰⁰ These three steps would provide the total domination in space that some within the U.S. military advocate.¹⁰¹

Clearly, the requirement for legitimacy to achieve effective U.S. command of space prohibits withdrawing from the current international

⁹² DOD DICTIONARY, *supra* note 31, at 501.

⁹³ This includes at least one former president and one former undersecretary of the Air Force. See Peter B. Teets, Speech before the Air Force Association Symposium (Nov. 15, 2002) *quoted in* U.S. DEP’T OF AIR FORCE, DOCTRINE DOCUMENT 2-2.1, COUNTERSPACE OPERATIONS viii (2 Aug. 2004) [hereinafter AFDD 2-2.1]; U.S. DEP’T OF AIR FORCE, DOCTRINE DOCUMENT 2-2, SPACE OPERATIONS 1 (27 Nov. 2006) (quoting then-Senator Lyndon B. Johnson) [hereinafter AFDD 2-2].

⁹⁴ See AFDD 2-2, *supra* note 93, at 1.

⁹⁵ See DOLMAN, *supra* note 5, at 152.

⁹⁶ Astropolitik “is identified as a determinist political theory that manipulates the relationship between state power and outer-space control for the purpose of extending the dominance of a single state over the whole of the Earth.” DOLMAN, *supra* note 5, at 15.

⁹⁷ See *id.* at 157.

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.* at 157-58.

¹⁰¹ See *id.* at 156-58; see also Master Sergeant Scott Elliott, *Teets: America Must Reach for Space Dominance*, A.F. PRINT NEWS, available at <http://www.af.mil/news/story.asp?storyID=123008652> (statement from Secretary of the Air Force Peter B. Teets, advocating similar domination in space).

legal regime governing space. Rather, at a minimum, legitimacy would require firm grounding upon the principle of freedom of use outlined in Article I of the Outer Space Treaty, rather than any high ground theory. The distinction illustrates the difference between positive and negative command. Much like space control, positive command denotes access assurance, while negative command represents access denial with respect to an adversary.¹⁰² However, negative command does not constitute or require unilateral action outside the existing legal regime. Rather, positive command and negative command are inextricably linked, in that both seek to maintain freedom of access to and use of outer space.¹⁰³ Negative command is the self-defense component of command of space when positive command is challenged by an adversary.¹⁰⁴

a. Positive Command

Positive command of space is the freedom of action necessary to maintain unhindered access to outer space and the use of space lines

¹⁰² A more elaborate definition is command of space may be viewed as the ability to ensure freedom of access to and use of outer space and its lines of communication (positive) and the ability to deny the same to an enemy (negative) where that access and use presents a threat to the national security interests of the United States. See KLEIN, *supra* note 4, at 60.

¹⁰³ Although the word “access” is not used within the Outer Space Treaty, it is clearly envisioned as a right of all states. The specific wording of Article I of the Outer Space Treaty states that “[o]uter space, including the Moon and other celestial bodies, shall be free for exploration and use by all States.” OST, *supra* note 51, art. I, para. 2. In attempting to clarify these freedoms, three “positive” aspects of the principle of freedom of outer space have been distinguished: (1) the right of free access, (2) the right of free exploration, and (3) the right of free use. NICOLAS M. MATTE, *SPACE ACTIVITIES AND EMERGING INTERNATIONAL LAW* 270 (1984). Moreover, the rights of exploration and use are predicated upon access to outer space and cannot be exercised without such access.

¹⁰⁴ Negative command of space is synonymous with “counterspace operations.” Counterspace operations “are the ways and means by which the Air Force achieves and maintains space superiority.” AFDD 2.2-1, *supra* note 93, at 2. Space superiority is defined as “[t]he degree of dominance in space of one force over another that permits the conduct of operations by the former and its related land, sea, air, space, and special operations forces at a given time and place without prohibitive interference by the opposing force.” DOD DICTIONARY, *supra* note 31, at 502. It is implicit in the tone of this definition and in the specific use of the term “opposing force” that space superiority is contemplated in the context of armed conflict rather than during peacetime. This temporal aspect separates it from positive command of space in that it is not exercised at all times. Moreover, the “dominance” referred to is limited solely to the “opposing force” which removes it from any association with the normative definitional construct of command of space. Further support for the proposition that negative command of space is temporally separated from positive command of space, i.e. that it does not take place during peacetime, is reflected in the Air Force statement that “space and air superiority are crucial first steps in any military operation.” AFDD 2-2.1, *supra* note 93, at 1.

of communication, and is predicated on America's commitment "to the exploration and use of outer space by all nations for peaceful purposes, and for the benefit of all humanity."¹⁰⁵ This commitment flows from the free exploration and use principle contained in the Outer Space Treaty. As this freedom of action in outer space is vitally important to U.S. national interests, the U.S. National Space Policy "considers space systems to have the rights of passage through and operations in space without interference."¹⁰⁶ Thus, America will "preserve its rights, capabilities, and freedom of action in space."¹⁰⁷

Accordingly, the United States "oppose[s] the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space."¹⁰⁸ The United States rightly believes that such new legal regimes have the potential to be counterproductive in the sense that they could be crafted to, intentionally or unintentionally, restrict free access to outer space and erode the important principles of free transit and operations in outer space.¹⁰⁹ However, this opposition to restrictions on freedom of action in outer space is not reserved solely for the benefit of U.S. freedom of action. Since at least the end of World War II, the United States has consistently acted to secure the global commons for the benefit of all.¹¹⁰ This preservation of universal continued right of access extends to the present day with respect to space. Indeed, the U.S. National Space Policy contains no indication that the United States intends to reserve or protect freedom of access and use only for itself or its allies.¹¹¹ Moreover, as articulated to the First Committee of the United Nations General Assembly, the United States recognizes that "the modern world relies upon [the] free right of passage in space" and urges other nations to embrace this interest in maintaining unimpeded access to outer space.¹¹²

¹⁰⁵ National Security Presidential Directive 49, U.S. National Space Policy (Aug. 31, 2006), available at <http://www.fas.org/irp/offdocs/nspd/space.html> [hereinafter National Space Policy].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Robert Luaces, U.S. Representative to the U.N. General Assembly First Committee on Disarmament and International Security, Statement before the U.N. General Assembly First Committee (Oct. 11, 2006) [hereinafter Luaces Statement], available at <http://www.reachingcriticalwill.org/political/1com/1com06/statements/USoct11.pdf>.

¹¹⁰ U.S. DEP'T OF DEFENSE, NATIONAL DEFENSE STRATEGY 16 (June 2008), available at <http://www.defenselink.mil/news/2008%20national%20defense%20strategy.pdf>.

¹¹¹ Admittedly, the National Space Policy does discuss the ability to "deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests." National Space Policy, *supra* note 105. However, as discussed below, this capability falls within the realm of negative command which is predicated upon the preservation of the right to free access and use of space as enumerated within the OST.

¹¹² Luaces Statement, *supra* note 109.

Despite its firm commitment to freedom of access to space as recognized by the Outer Space Treaty, the United States understands the potential vulnerability of space systems from both natural and man-made sources.¹¹³ Irrespective of the freedom of access principle, prudence mandates the understanding that some may attempt to interfere with the right of access to space. If not previously concluded from decades of competition among the several nations with space capabilities, certainly the Chinese test of a direct-ascent anti-satellite weapons system in January of 2007 starkly demonstrates that space is now a contested domain.¹¹⁴ Recognizing the truth stated by Thomas Hobbes, that “covenants, without the sword, are words and of no strength to secure man,”¹¹⁵ there is a need to “cooperate with our allies and the private sector to identify and protect against intentional and unintentional threats to U.S. and allied space capabilities.”¹¹⁶ The ability to protect this right of access is embraced within the concept of negative command of space.

b. Negative Command

The capability to exercise negative command of space does not violate any international law. Although command of space embraces the ability to deny another state’s access to space, analysis of the legality of any such action depends on the actor’s intent not with the capability itself. In that respect, the declared and apparent U.S. intent is incontrovertibly one of self defense, in support of the legitimate objective of maintaining its legal right to continued and assured access.¹¹⁷

¹¹³ *See id.*

¹¹⁴ U.S. DEP’T OF DEFENSE, ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE’S REPUBLIC OF CHINA 28 (2008) [hereinafter 2008 PRC REPORT], available at <http://www.defenselink.mil/pubs/china.html>.

¹¹⁵ *See Allen, supra* note 59, at 323 & n.87 (quoting THOMAS HOBBS, THE LEVIATHAN (1651)).

¹¹⁶ The White House.gov, Defense, <http://www.whitehouse.gov/issues/defense/> (last visited Dec. 21, 2009).

¹¹⁷ Indeed, the U.S. Air Force “executes the counter space function *to protect* US military and friendly space capability while denying space capability to the adversary, as situations require.” AFDD 2-2.1, *supra* note 93, at 1 (emphasis added). Some may continue to balk at this justification given that space denial envisions an offensive space capability. *Id.* at 31-34. However, as articulated by the great naval strategist Sir Julian Corbett, this assumption confuses the issue in that it substitutes means for the objective; it presupposes that the classifications of offensive and defensive are mutually exclusive rather than mutually complimentary. Defense must always be supported by the offensive for “even behind the walls of a fortress men know that sooner or later the place must fall unless by counter-attack . . . they can cripple [the enemy’s] power of attack.” It is for this reason that classifications of offense and defense are discarded in favor of positive and negative. CORBETT, *supra* note 3, at 30-31.

Over 200 years ago, Chief Justice Marshall opined that “the authority of a nation within its own territory is absolute and exclusive. . . . But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.”¹¹⁸ This principle was later reiterated by former Secretary of State Elihu Root when he discussed the “right of self protection” as “a right recognized by international law” in stating: “[t]he right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend its effect beyond the limits of the territorial jurisdiction of the State exercising it.”¹¹⁹ Articles III and IV of the Outer Space Treaty, when read in conjunction, authorize self-defense in space.¹²⁰

Article IV specifically addresses military uses of outer space:

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortification, the testing of any type of weapons and the conduct of military manoeuvres [sic] on celestial bodies shall be forbidden.¹²¹

Note that the article does not prohibit self-defense, but only specific *means* of exercising self-defense, specifically nuclear weapons and weapons of mass destruction. In other words, it is noteworthy for what it fails to do: prohibit the exercise of self-defense in outer space via non-nuclear weapons and non-weapons of mass destruction.¹²² Self-

¹¹⁸ *Church v. Hubbart*, 6 U.S. (2 Cranch) 187 (1804). Although Chief Justice Marshall was referring to the exercise of extraterritorial self defense in the context of the maritime domain, it is equally applicable to outer space. See Cooper, *supra* note 87, at 66.

¹¹⁹ Cooper, *supra* note 87, at 66.

¹²⁰ The use of the language “in accordance with international law” coupled with the general rule of interpretation of treaties leaves no doubt as to the extraterrestrial application of international law via Article 3. Vienna Convention on the Law of Treaties, art. 31, May, 23 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention]. See *infra* notes 130-6 and accompanying text for argument supporting this contention.

¹²¹ OST, *supra* note 51, art. IV.

¹²² See Nicholas Berry, Existing Legal Constraints on Space Weaponry (Feb. 1, 2001), <http://www.cdi.org> (search for “existing legal constraints”) (last visited Mar. 6, 2010).

defense, both kinetic and non-kinetic,¹²³ is legally permissible under the OST.

Article IV's "peaceful purposes"¹²⁴ engenders considerable debate over whether it should be interpreted to refer to "non-military" or "non-aggressive or non-hostile."¹²⁵ The United States has consistently taken the latter position.¹²⁶ Moreover, international state practice appears to support this position,¹²⁷ and current U.S. space doctrine employs this same definition.

The majority of nations have traditionally held that the "peaceful purposes" language does not prohibit military activities in outer space; such activities have taken place throughout the space age without significant international protest. The phrase, rather, has been interpreted to require that activities in space be non-aggressive, or in other words, in compliance with the requirements under the United Nations Charter and international law to refrain from the threat or use of force except in accordance with the law, such as in self-defense or pursuant to United Nations Security Council authorization.¹²⁸

Thus, American space doctrine correctly relies on the application of international law via Article III of the OST as support for negative command of space.¹²⁹

¹²³ For our purposes, a kinetic weapon may be defined as any device that uses the energy derived from its motion to destroy or disable an intended target. Such weapons may or may not contain explosives. See Global Security.org, Kinetic Energy Weapons, <http://www.globalsecurity.org/space/systems/kew.htm> (last visited Jan. 27, 2010).

¹²⁴ Although Article IV mentions the phrase "peaceful purposes" solely within the context of the moon and other celestial bodies, this thesis will not explore the possible ramifications. Rather, this thesis will assume *arguendo* that such phrase applies to the entirety of outer space given its use within the preamble as illustrative of the context and purpose of the treaty. Vienna Convention, *supra* note 120, art. 31, para. 2.

¹²⁵ Michael N. Schmitt, *International Law and Military Operations in Space*, 10 U.N.Y.B. 89, 101 (2006).

¹²⁶ BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 515 (1997).

¹²⁷ The Vienna Convention states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be considered, in context with the treaty, for purposes of treaty interpretation. Vienna Convention, *supra* note 120, art. 31, para. 3(b); see also, Schmitt, *supra* note 125, at 101 (stating that such state practice is "widespread").

¹²⁸ AFDD 2-2, *supra* note 93, at 27.

¹²⁹ Air Force doctrines states: "Article III clarifies that international law applies to activities in outer space. The right of self-defense, as recognized in . . . international law, applies in outer space. Also, law of war precepts such as necessity, distinction and proportionality will apply to any military activity in outer space." *Id.* at 26.

Article III of the OST sets forth the extraterrestrial application of international law.

States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.¹³⁰

As referenced by Article III of the OST, the UN Charter in turn mandates that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹³¹

Despite this seemingly universal prohibition on the use of force, the UN Charter does provide for exceptions to this general rule, of which Article 51 is relevant here.¹³² Although Article 51 further abolishes the right to wage aggressive war,¹³³ it does not completely bar the use of force.¹³⁴ “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”¹³⁵ Since the principal purpose of the UN Charter is to “maintain international peace and security,” the exercise of self-defense is consistent with that purpose and would in turn satisfy “the interest of maintaining international peace and security” as prescribed by the Outer Space Treaty. A key difference, however, between the UN Charter and the Outer Space Treaty is that the latter is weapon specific while the former is not.¹³⁶ Thus, extraterrestrial self-defense is permissible so long as such action does not contravene the exclusions in Article IV of the Outer Space Treaty.

The ability to exercise negative command of space, that is, space denial as a component of access assurance, is therefore clearly permissible under both the Outer Space Treaty and the UN Charter in at

¹³⁰ OST, *supra* note 51, art. III.

¹³¹ U.N. Charter, art. 2, para. 4.

¹³² A second exception to the rule proscribing the threat or use of force in international relations is collective U.N. action pursuant to article 42. *Id.* art. 42.

¹³³ The U.N. Charter uses the term “armed attack” in lieu of “war.” *Id.* art. 51.

¹³⁴ See generally INGRID DETTER, *THE LAW OF WAR* 82-103 (2d ed. 2000).

¹³⁵ U.N. Charter, art. 51.

¹³⁶ See Michel Bourbonniere & Ricky J. Lee, *Legality of the Deployment of Conventional Weapons in Earth Orbit: Balancing Space Law and the Law of Armed Conflict*, 18 EUR. J. INT’L L. 873, 888 (2007).

least some circumstances.¹³⁷ In turn, command of space grounded in the freedom of use principle of the Outer Space Treaty is legitimately supported by international law. However, that does not mean that command of space *should* be exercised in that way. The current peacetime status requires maintaining command of space by means other than armed force—otherwise, the United States could be deemed the aggressor in violation of international law thereby forfeiting the legitimacy of its actions. To avoid such a result, the United States must actively harness international law to achieve military objectives such as command of space, rather than simply viewing it as a roadblock.

C. Employment of Space Weapons to Achieve Command of Space

As discussed above, the protection of space lines of communication is synonymous with American command of space.¹³⁸ In seeking to protect those lines of communication, some advocate the introduction of kinetic weapons in space.¹³⁹ This is impractical and ill-advised in the space environment. Employment of kinetic weapons in space generates an extremely dangerous debris cloud with a very long orbital life—in effect, perpetual shrapnel that poses a grave threat to all other satellites in orbit. While our potential adversaries may consider such weapons, the United States must avoid doing so because of the great risk of collateral damage to our own and our allies' space lines of communication. The United States should pursue a prohibition on the use of such weapons in order to preserve the global commons of space from space debris.¹⁴⁰

¹³⁷ The discussion thus far has been limited to the right of self-defense as set forth in the U.N. Charter. The use of the phrase “inherent right” in Article 51 in recognizing the right of self-defense raises the issue of whether such right exists outside the U.N. Charter construct. As this section has been limited merely to the development of the understanding that the exercise of negative command has a legitimate basis in international law in at least some circumstances, the issue of self-defense outside the U.N. Charter is not discussed.

¹³⁸ See *supra* notes 68-73 and accompanying text.

¹³⁹ See DAVID E. LUPTON, ON SPACE WARFARE: A SPACE POWER DOCTRINE (1998) (arguing in favor of a space control doctrine of which space weapons is a necessary component) available at <http://aupress.au.af.mil/Books/Lupton/lupton.pdf>. This doctrinal school of thought is the prevalent American space strategy. See, e.g., National Space Policy, *supra* note 105, at 4 (charging the Secretary of Defense with maintaining capabilities to execute, *inter alia*, a space control mission); AFDD 2-2.1, *supra* note 93 (discussing offensive counterspace operations).

¹⁴⁰ In light of the previous analysis of China's use of strategic lawfare, it might be easy to dismiss this advice as succumbing to the pressure of potential adversaries given the joint proffer of a treaty banning weapons in space and the use of force against space objects by China and Russia. See Victor Vasiliev, *The Draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force Against Outer Space Objects*, in SECURITY IN SPACE: THE NEXT GENERATION, CONFERENCE REPORT, MAR. 31-APR. 1, 2008, at 145 (U. N. Inst. Disarmament Research ed., 2008), available

Any such prohibition, however, must focus on the effect to be prevented rather than any particular weapon.¹⁴¹ One method to address this issue is the proposed development of a Space Code of Conduct that would require states “to refrain from harmful interference against space objects.”¹⁴² However, as acknowledged by its drafters, this suggestion suffers from the same challenge as the exercise of defining space weapons: what is “harmful interference”?¹⁴³ While it would obviously encompass permanent physical destruction or functional disablement of a satellite, what about temporary interference with a satellite’s operation or capabilities that causes no long term damage or limitation? The principal drafter of the code believes that the inclusion of radio frequency jamming within the definition of harmful interference would likely limit significant support for adoption of the code by space-faring nations.¹⁴⁴ Moreover, since the code itself is not binding, debris mitigation is still left to the goodwill of space-faring nations.

As a proposal, the code’s redemptive value lies in the fact that it directs attention away from space weapons *per se* to instead focus on the intent of the space actor, that is, the desired effect, by proscribing intentional generation of space debris regardless of method or means. This is a critical step in developing a successful international space debris mitigation strategy that would be compatible with U.S. space security. However, in order to not limit the right of self-defense, the proposed prohibition would have to permit the potential use of non-kinetic measures that do not generate such debris.¹⁴⁵ For example, the

at <http://www.unidir.org/pdf/articles/pdf-art2822.pdf>. Indeed, this is a classic use of strategic lawfare that may be providing dividends for its sponsors as is argued in the writings of Gallagher and Zhang. See sources cited *supra* notes 52 & 54. However, as noted within the text below, this only encompasses kinetic weapons since the use of such weapons by any party poses a threat to American space objects. To the extent that this proposed draft treaty seeks to prohibit non-kinetic weapons, it must be avoided as inconsistent with national security interests.

¹⁴¹ Definitional issues surrounding space weapons present a significant barrier to the goal of space sanctuarians, such as the Secure World Foundation, that seek to maintain outer space as a sanctuary free from war and, thus, support the prohibition of weapons in space. See Secure World Foundation, Avoidance of a Space Arms Race: Sustainable Space Security, <http://www.secureworldfoundation.org> (search for “sustainable space security”) (last visited Jan. 27, 2010). Indeed, during negotiations on a space arms control regime in the late 1970s, the Soviet Union argued passionately that the American Space Shuttle should be classified as a space weapon. See Theresa Hitchens, *When is a Space Weapon Not a Space Weapon?*, SPACE NEWS, Jan. 12, 2004, available at <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=2012>.

¹⁴² SECURE WORLD FOUNDATION, SPACE CODE OF CONDUCT: FACTSHEET (May 28, 2008), available at http://www.secureworldfoundation.org/siteadmin/images/files/file_18.pdf.

¹⁴³ *Id.* According to Michael Krepon, the principle drafter of this Space Code of Conduct, the failure to define the term was intentional. *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Examples of such weapons include radio frequency jamming, blinding a satellite’s optical sensors, and enslaving the satellite by taking command of it. See William Spacy,

European Code of Conduct for Debris Mitigation simply prohibits the “intentional destruction of a space system or any of its parts in orbit.”¹⁴⁶ This language could serve as the foundation for a broader international agreement to prohibit the intentional creation of space debris, which would be compatible with U.S. command of space.

However, such a prohibition alone is insufficient to provide an effective foundation for U.S. space security. America cannot rely solely upon the professed peaceful intentions of its strategic competitors. Indeed, our reliance on space assets presents a lucrative target for any potential adversary.¹⁴⁷ Several non-kinetic measures could provide a defensive capability without also jeopardizing America’s own space assets or that of its allies. Rather than destroying an adversary satellite, such measures could temporarily disable, degrade, or otherwise render it incapable of functioning to the adversary’s benefit. Such measures could limit an adversary’s space lines of communication without endangering our own or that of a third party.¹⁴⁸

The international discussion on the problem of space debris presents America with an opportunity to enhance its space security by advocating a complete prohibition of the intentional creation of space debris. While this proposal would certainly dictate a rejection of kinetic space control methods that the United States might otherwise choose to develop and employ, the advantages outweigh the disadvantages. The degree of importance of American space assets to national security cannot be overstated. Although myriad threats to space security exist, space debris is the only threat that is self-replicating. Given the crucial importance of space debris mitigation vis-à-vis effective military operations, and that its accomplishment must occur through international law, shepherding an international legal response to space debris generation becomes an inherent component of any successful command of space strategy.

II, *Assessing the Military Utility of Space-Based Weapons*, in *SPACE WEAPONS: ARE THEY NEEDED?* 195-97 (John M. Logsdon & Gordon Adams eds., 2003).

¹⁴⁶ EUROPEAN CODE OF CONDUCT FOR SPACE DEBRIS MITIGATION, para. 4.1.2 (June 28, 2004), available at <http://www.cnsa.gov.cn/n615708/n676979/n676983/n893604/appendix/2008529151013.pdf>. To date, only France has adopted this Code. See Centre National d’Etudes Spatiales, *Code of Conduct for Space Debris Mitigation*, CNES Press Release PR61-2004, available at http://www.cnes.fr/html/_455_465_3018_.php.

¹⁴⁷ Taylor Dinerman, *Space Weapons Agreements, Treaties, and Politics*, THE SPACE REV., Mar. 10, 2008, available at <http://www.thespacereview.com/article/1078/1>.

¹⁴⁸ In addition to limiting the creation of space shrapnel, another benefit to the use of non-kinetic weapons over kinetic weapons is the ability to limit adversary use of third party satellites without unduly antagonizing the third party. This scenario raises questions of neutrality under international law which could be avoided through the use of non-kinetic weapons. See Michel Bourbonniere, *The Ambit of the Law of Neutrality and Space Security*, 36 ISR. Y.B. HUM. RTS. 205 (2006).

IV. CHINA'S STRATEGIC LAWFARE TO LIMIT U.S. COMMAND OF SPACE

*The lack of transparency in China's military and security affairs poses risks to stability by increasing the potential for misunderstanding and miscalculation. This situation will naturally and understandably lead to hedging against the unknown.*¹⁴⁹

Potential adversaries, such as China, may also employ strategic lawfare to limit U.S. command of space. Recognizing its current technological inferiority in space as compared to the United States, China has focused its military efforts on “developing capabilities that target potential vulnerabilities of the United States.”¹⁵⁰ This is particularly the case with American dependence on space assets, something China views as America’s “soft ribs and strategic weakness.”¹⁵¹ Aware that military options are not a viable choice at this time given the financial, military, and technological gap between it and America, China is beginning to use international law as a means of countering American space power, in part to buy itself time to develop capabilities to take advantage of America’s space vulnerabilities.¹⁵² To justify its future military actions in space, China is continually developing doctrine and legal justifications to garner support within the international community.¹⁵³ It has, in essence, taken Machiavelli’s advice¹⁵⁴ and not only sought to achieve its military objectives through resort to law, but also to legitimize its military actions in case resort to military means become necessary.

A. Chinese Lawfare

The Chinese view space as an essential arena for future warfare.¹⁵⁵ Rather than attempt to achieve parity and directly compete with U.S. space capabilities, China appears focused on an asymmetric strategy “to deny its opponent use of [space] as much as possible.”¹⁵⁶ Thus, China is pursuing means to inhibit American freedom of action in

¹⁴⁹ 2008 PRC REPORT, *supra* note 114, at I.

¹⁵⁰ U.S.-CHINA ECON. & SEC. REV. COMM’N, 2008 ANNUAL REPORT TO CONGRESS 161 (2008), available at http://www.uscc.gov/annual_report/2008/annual_report_full_08.pdf [hereinafter 2008 REPORT TO CONGRESS].

¹⁵¹ *Id.* at 156.

¹⁵² See Trevor Brown, *Soft Power and Space Weaponization*, 23 AIR & SPACE POWER J. 66, 67 (2009).

¹⁵³ See LARRY M. WORTZEL, THE CHINESE PEOPLE’S LIBERATION ARMY AND SPACE WARFARE: EMERGING UNITED STATES-CHINA MILITARY COMPETITION (Oct. 17, 2007), available at http://www.aei.org/docLib/20071017_Space_Warfare.pdf.

¹⁵⁴ See MACHIAVELLI, *supra* note 1.

¹⁵⁵ See 2008 REPORT TO CONGRESS, *supra* note 150, at 160.

¹⁵⁶ Allen, *supra* note 59, at 35.

space through the development of capabilities to destroy, damage, and interfere with American satellite systems in an effort to blind and deafen the U.S. military in the event of conflict.¹⁵⁷ Complementing its increase in military capabilities, China has embraced asymmetric warfare at a level previously unimagined.¹⁵⁸ Chinese doctrine views warfare as not only “a military struggle, but also a comprehensive contest on fronts of politics, economy, diplomacy, and law.”¹⁵⁹ Thus, China appears to eschew the tactical use of lawfare in favor of its strategic use as an “active defense” to be employed in advance of actual conflict and across the spectrum of human activity.¹⁶⁰

The Chinese formulation of full-spectrum warfare is contained in the concept of “Three Warfares” that combines and incorporates psychological, media, and legal components into a coordinated strategy.¹⁶¹ The legal component describes “the use of international and domestic laws to gain international support and manage possible political repercussions of China’s military actions”¹⁶² and advocates seizing “the earliest opportunity to set up regulations.”¹⁶³ Further, Chinese military doctrine closely intertwines public opinion warfare—media and psychological warfare—and lawfare. Media warfare seeks to manipulate the news media to achieve a propaganda victory and break an enemy’s will to fight.¹⁶⁴ Psychological warfare employs the use of “selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups and individuals . . . to induce or reinforce foreign attitudes and behavior favorable to [China].”¹⁶⁵ Thus, China blends lawfare and public opinion warfare in order to achieve international legitimacy for its actions.¹⁶⁶ This strategy

¹⁵⁷ See 2008 PRC REPORT, *supra* note 114, at 19, 22-23.

¹⁵⁸ See QIAO & WANG, *supra* note 23; 2008 PRC REPORT, *supra* note 114, at 19-21.

¹⁵⁹ 2008 PRC REPORT, *supra* note 114, at 19; see also Qiao & Wang, *supra* note 23, at 56.

¹⁶⁰ 2008 PRC REPORT, *supra* note 114, at 16-19; WORTZEL, *supra* note 153.

¹⁶¹ Use of this concept was approved in 2003 by the Chinese Communist Party Central Committee and the Central Military Commission. See 2008 PRC REPORT, *supra* note 114, at 19.

¹⁶² *Id.*

¹⁶³ QIAO & WANG, *supra* note 23, at 55.

¹⁶⁴ See *China’s Views of Sovereignty and Methods of Access Control: Hearing Before the U.S.-China Econ. & Sec. Rev. Comm’n*, 110th Cong. (Feb. 27, 2008) (statement of Phillip A. Meek, Assoc. General Counsel (Int’l Affairs), U.S. Dep’t of A.F.) available at http://www.uscc.gov/hearings/2008hearings/written_testimonies/08_02_27_wrts/08_02_27_meek_statement.php [hereinafter Meek Statement].

¹⁶⁵ *Id.*

¹⁶⁶ A Congressional Report states:

China uses news media and information resources to develop a favorable environment to achieve propaganda objectives and break the adversary’s will to fight. Such activities, although they do not

finds current expression in China's actions regarding the sea—a use of lawfare that has enormous implications for its projected activities in the space domain.

B. China's Maritime Predicate

China is a signatory to the United Nations Convention of the Law of the Sea (UNCLOS),¹⁶⁷ which provides that territorial waters end at the twelve nautical mile mark as measured from a nation's low-water line along its coast.¹⁶⁸ Within this territorial sea, ships of all nations enjoy the right of innocent passage.¹⁶⁹ Passage is deemed innocent if it is not prejudicial to the peace, good order, and security of the coastal state.¹⁷⁰ A ship is considered to be operating prejudicial to the peace, good order, or security of a coastal state if it engages, *inter alia*, in any act aimed at collecting information to the prejudice of the defense or security of the coastal state.¹⁷¹ Although China ratified UNCLOS the United States is not a party, but the United States asserts that the navigation provisions of UNCLOS are reflected in and supported by customary international law.¹⁷²

In addition to the exclusive nature of territorial waters, UNCLOS permits a nation to enjoy exclusive economic rights within its Exclusive Economic Zone (EEZ), which extends outward two hundred nautical miles from the same baseline used to determine territorial

make use of military force, are employed for the purpose of catalyzing negative international opinion concerning the nation or national activity against which they are targeted. The PRC government's use of public opinion warfare may entail comments to the press by Chinese officials, articles in China's daily newspapers and publications, advertisements purchased in domestic or foreign publications, employment of public relations firms or lobbyists, and actions of Chinese representatives at various international venues, including UN gatherings. China frequently employs these venues to deliver criticisms of or rebuttals to claims that run counter to those of the PRC government. Although they are nonmilitary attacks, these occasions are used to produce negative international opinion of the nations that oppose China's interests or desires.

2008 REPORT TO CONGRESS, *supra* note 150, at 154.

¹⁶⁷ See UNCLOS, *supra* note 66.

¹⁶⁸ See *id.* art. 3.

¹⁶⁹ See *id.* art. 17.

¹⁷⁰ See *id.* art. 19, para. 1.

¹⁷¹ See *id.* art. 19, para. 2(c).

¹⁷² Since the Reagan Administration, the official U.S. position has been that the navigational provisions of UNCLOS are reflected in customary international law. See Peter Buxbaum, *U.S. Administration Pushes UNCLOS*, INT'L REL. & SECURITY NETWORK (Aug. 24, 2007), <http://www.isn.ethz.ch/isn/> (search ISN for "UNCLOS") (last visited Jan. 28, 2010).

waters.¹⁷³ Within the EEZ, a nation enjoys “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources,”¹⁷⁴ but cannot restrict another state’s freedom of navigation or overflight.¹⁷⁵ However, China has consistently sought to extend its sovereignty beyond the limits of internationally recognized territorial waters through its adoption of a domestic law regulating passage and overflight through its EEZ.¹⁷⁶ It has used this interpretation of UNCLOS and its domestic law “to substantiate the interception, harassment, and engagement of U.S. aircraft flying above its [EEZ]”¹⁷⁷ and U.S. ships operating within its EEZ.¹⁷⁸ In April 2001, a People’s Liberation Army Navy (PLAN) F-8II fighter struck an unarmed U.S. Navy EP-3E (Aries II) reconnaissance aircraft flying on a routine mission in international airspace approximately 70 miles off the coast of China.¹⁷⁹ The U.S. aircraft survived the near-fatal encounter and landed

¹⁷³ *See id.* art. 57.

¹⁷⁴ *Id.* art. 56.

¹⁷⁵ *See id.* art. 58, 87.

¹⁷⁶ *See* 2008 REPORT TO CONGRESS, *supra* note 150, at 145. Indeed, China’s extension of sovereignty with respect to the sea began the day it ratified the treaty. Upon ratification of UNCLOS, China made a declaration that, *inter alia*, placed a notification requirement on warships exercising the right of innocent passage as provided by Article 17 of UNCLOS. *See* P.R.C., Declaration Upon Ratification of UNCLOS, *supra* note 66 (June 7, 1996), available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China_Upon_ratification. UNCLOS fails to distinguish between warships and other ships with respect to innocent passage. So long as foreign ships, whether warships or otherwise, operate peacefully by adhering to the requirements of innocent passage as enumerated in Article 19(2), they are entitled an unhindered right of innocent passage. Although a coastal state may adopt laws and regulations regarding innocent passage, Article 21 of UNCLOS limits such laws and regulations to safety and environmental concerns. China’s notification requirement is not related to such concerns and the fact that it applies solely to a particular class of ships further supports this contention. As a result, China’s attempted extension of jurisdiction past its territorial waters runs afoul of UNCLOS. This area of dispute is compounded by the fact that China opted out of the treaty’s dispute settlement mechanisms, leaving no mechanism for the impartial consideration of China’s claims. *See id.*

¹⁷⁷ 2008 REPORT TO CONGRESS, *supra* note 150, at 145.

¹⁷⁸ *See Naked Aggression: China and America Spar at Sea* [hereinafter *Naked Aggression*], *ECONOMIST*, Mar. 12, 2009, available at <http://www.economist.com> (search for “naked aggression”).

¹⁷⁹ *See* RICHARD BEST, ET AL., CONGRESSIONAL RESEARCH SERVICE, CHINA-U.S. AIRCRAFT COLLISION INCIDENT OF APRIL 2001: ASSESSMENTS AND POLICY IMPLICATIONS 1 (Oct. 10, 2001), available at <http://www.fas.org/sgp/crs/row/RL30946.pdf>. The United States contends that the Chinese pilot flew so close to the EP-3 as to clip its wings thereby causing a near fatal accident. Although China and the United States disagree as to the cause of the incident, there is photographic evidence identifying the pilot as the same individual involved in previous dangerous incidents. In the previous incidents, the pilot flew within ten feet of another U.S. Navy aircraft, and in one encounter even held up a piece of paper with his email address written on it, thereby lending credence to the American version of this incident. *See id.* at 4, 9-10.

safely at a Chinese naval base where the crew and craft were promptly detained by the Chinese government.¹⁸⁰

In March 2009, five Chinese Navy ships intercepted and impeded the free navigation of the USNS *Impeccable*, an American naval vessel under supervision of the U.S. Navy but carrying a civilian crew, while it was conducting a survey of the ocean floor about 75 nautical miles from China's Hainan Island.¹⁸¹ The Chinese forced the American ship to come to an emergency stop before she eventually withdrew from the area.¹⁸² Despite the fact that both of these incidents took place outside Chinese territorial waters, China asserts that the United States violated its sovereignty by conducting military operations—alleged military reconnaissance in these two cases—within the Chinese EEZ.¹⁸³

Both China and the United States agree that the EP-3E aircraft and the *Impeccable* were operating outside China's territorial sea but within China's EEZ.¹⁸⁴ Despite the unambiguous language of the UNCLOS treaty, China continues to pursue a strategy of gradually extending its strategic depth or sovereignty in order to support offshore defensive operations.¹⁸⁵ China's adherence to this flawed legal interpretation, reinforced by aggressive military action, demonstrates that "through an orchestrated program of scholarly articles and symposia, China is working to shape international opinion in favor of [its preferred] interpretation of the Law of the Sea by shifting scholarly views and national perspectives away from long-accepted norms of freedom of navigation and toward interpretations of increased coastal state sovereign authority."¹⁸⁶ By doing so, China is not only distorting

¹⁸⁰ See *id.* at 1.

¹⁸¹ See *Naked Aggression*, *supra* note 178. China claims that the ship was actually conducting a reconnaissance mission of Chinese submarine bases on Hainan Island. *Id.* This distinction does not affect the legal analysis of Chinese maritime sovereignty claims that follow.

¹⁸² See *id.*

¹⁸³ See James Kraska & Brian Wilson, *China Wages Maritime "Lawfare,"* FOR. POLICY, Mar. 11, 2009, available at http://experts.foreignpolicy.com/posts/2009/03/11/china_wages_maritime_lawfare. It is interesting to note that although China claims that U.S. military reconnaissance operations within the Chinese EEZ are a violation of international law, it has engaged in the very same conduct with respect to Japan. See Vaudine England, *Who's Right in the South China Sea Spat?*, BRIT. BROADCASTING NEWS, Mar. 13, 2009, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7941425.stm> (arguing, incorrectly (see *supra* notes 175-76 and accompanying text) that the requirements of innocent passage as defined in Article 19 of UNCLOS applies to transit through a coastal state's exclusive economic zone).

¹⁸⁴ See BEST, *supra* note 179, at 1; *Naked Aggression*, *supra* note 178.

¹⁸⁵ Kraska & Wilson, *supra* note 183.

¹⁸⁶ *Id.* China has a maritime-related dispute with at least five other nations: Philippines, Malaysia, Vietnam, Brunei, and Taiwan. See Pauline Jelinek, *Chinese Vessels "Harassed US Navy Ship,"* INDEP., Mar. 9, 2009, available at <http://www.independent.co.uk> (search for "harassed us navy ship").

the settled law of the sea, but perhaps also preparing to deploy a similar strategy in the space domain.

C. Chinese Assertions of Vertical Sovereignty in Space

Absolute national sovereignty over the airspace above a state's territory has "been claimed and exercised as far back into history as proof may exist of the creation and protection by state law of exclusive private property rights in such place."¹⁸⁷ Land and airspace, therefore, were viewed as inseparable; a rule that can be traced to Roman times.¹⁸⁸ This right of absolute vertical sovereignty continued to prevail until the Chicago Convention of 1944 when, despite the convention's failure to define airspace, it defined an aircraft as "any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of air against the earth's surface."¹⁸⁹ By indicating that the convention would apply "only to those parts of the atmosphere where gaseous air is sufficiently dense to support balloons and airplanes," the convention set a de facto limit on airspace.¹⁹⁰ This proposition was reinforced when no nations objected to the overflight of satellites above their territorial airspace at the dawn of the space age.¹⁹¹ However, the lack of a definitive resolution of this issue in international law has permitted some in China to advocate vertical sovereignty in space.¹⁹²

Consistent with China's seamless view of warfare, a number of Chinese authors¹⁹³ are exploring the nexus between traditional notions

¹⁸⁷ John Cobb Cooper, *Roman Law and the Maxim "Cujus est solum" in International Air Law*, reprinted in JOHN COBB COOPER, *EXPLORATION IN AEROSPACE LAW* 58 (Ivan A. Vlastic, ed., 1968).

¹⁸⁸ *See id.*

¹⁸⁹ INTERNATIONAL CIVIL AVIATION ORGANIZATION, *INTERNATIONAL STANDARDS: AIRCRAFT NATIONALITY AND REGISTRATION MARKS, ANNEX 7 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION* (5th ed. 2003). The words "other than the reactions of the air against the earth's surface" were added in the 1960s to exclude hovercraft from the definition of aircraft.

¹⁹⁰ John Cobb Cooper, *Legal Problems of Upper Space*, reprinted in JOHN COBB COOPER, *EXPLORATION IN AEROSPACE LAW* 272 (Ivan A. Vlastic, ed., 1968).

¹⁹¹ John Cobb Cooper, *The Russian Satellite—Legal and Political Problems*, reprinted in JOHN COBB COOPER, *EXPLORATION IN AEROSPACE LAW* 282 (Ivan A. Vlastic, ed., 1968). It is interesting to note that one week after Russia launched its Sputnik satellite, twenty-one nations (including Great Britain, Canada, France, and the United States) submitted a draft disarmament resolution calling for an international inspection system to ensure outer space would be used for peaceful purposes. This proposal supports the argument that the sponsors believed sovereignty did not extend to the space beyond airspace (as derived from the Chicago Convention's definition of aircraft). Otherwise, a multilateral inspection system would not be necessary as any state could prohibit such activity by exercising their sovereign rights. *See id.* at 282-83.

¹⁹² Meek Statement, *supra* note 164.

¹⁹³ There is an opaque quality of China's space doctrine and policy that complicates an understanding of China's true intentions. Pinning down Chinese policy positions is even

of state sovereignty and space, with particular emphasis on attempting to establish a legal foundation for potential military operations in space. Although such apparent assertions of Chinese vertical sovereignty may only be in their formative stages, the United States must respond and counter them now or risk permitting China to gain credibility, regarding potential military operations, which would restrict freedom of movement in the space domain.

1. *The Chinese Position and Its Implications*

China's most prominent advocate for vertical sovereignty is Major General Cai Fengzhen, the Deputy Chief of Staff of the People's Liberation Army Air Force.¹⁹⁴ General Cai contends that the space above ground, including airspace and space, is inseparable and integrated.¹⁹⁵ Thus, General Cai reaches back to the Roman-based doctrine of *cujus est solum, ejus est usque ad coelum*,¹⁹⁶ which essentially means "he who owns the soil, owns up to the sky."¹⁹⁷ Absent a clear demarcation between airspace and space, international law does not directly contradict or prohibit this view.¹⁹⁸ Indeed, Bin Cheng warned in 1997 that "States which object to certain types of satellites, such as those that engage in remote sensing, [may] claim sovereignty over national space above the usual heights at which such satellites orbit so as to subject them to the consent and control of the States overflown but not necessarily to exclude them."¹⁹⁹

This is precisely the position taken by Bao Shixiu, a Senior Fellow at the Academy of Military Sciences of the People's Liberation

more difficult because China, when challenged, can always deny that a specific author's opinion represents those of the government and, in turn, assert that the international community was on notice when taking actions consistent with published opinions. Given the risk involved in determining Chinese intent through its authors, one must understandably hedge against the unknown. See 2008 PRC REPORT, *supra* note 114, at I; Meek Statement, *supra* note 164. Any argument that these writings are merely academic lost credibility in the aftermath of China's 2007 anti-satellite weapon test. See BRUCE W. MACDONALD, CHINA, SPACE WEAPONS, AND U.S. SECURITY 7 (2008) available at <http://www.cfr.org/publication/16707/>.

¹⁹⁴ See 2008 REPORT TO CONGRESS, *supra* note 151, at 147; Royal Air Force, *Chinese People's Liberation Army Air Force Visits RAF Leuchars* (Nov. 22, 2007), <http://www.raf.mod.uk/news/archive.cfm?storyid=67FB2780-1143-EC82-2E106DA30199531A> (last visited Jan. 28, 2010).

¹⁹⁵ See 2008 REPORT TO CONGRESS, *supra* note 150, at 147.

¹⁹⁶ See Cooper, *Roman Law*, *supra* note 187, at 58.

¹⁹⁷ See HERBERT T. TIFFANY & BASIL JONES, *TIFFANY REAL PROPERTY* § 583 (1939); C. R. McCorkle, Annotation, *Liability for Obstruction or Diversion of Subterranean Waters in Use of Land*, 29 A.L.R. 2d 1354 (1953).

¹⁹⁸ See Meek Statement, *supra* note 164.

¹⁹⁹ Cheng, *supra* note 126, at 398.

Army of China.²⁰⁰ In his critique of the U.S. 2006 National Space Policy (NSP), Bao advances the notion of vertical sovereignty with the following curious statement: “[t]he NSP declares that U.S. space systems should be guaranteed safe passage over all countries without exception (such as ‘interference’ by other countries, even when done for the purpose of safeguarding their sovereignty and their space integrity).”²⁰¹ However, the statement in the NSP to which Bao refers is not limited solely to U.S. space systems. It reads: “The United States considers space systems to have the rights of passage through and operations in space without interference.”²⁰² Thus, the rights recognized in the U.S. space policy are applicable to all space systems, which is compatible with the Outer Space Treaty. However, the principal concern vis-à-vis potential Chinese claims of vertical sovereignty over portions of space above their territory lies not with a claim of complete sovereignty, but rather with the assertion that satellite navigation above Chinese territory is subject to Chinese “consent and control” as articulated by Professor Cheng.²⁰³

This space sovereignty position is directly analogous to China’s assertion of sovereignty over the airspace above its seaborne EEZ.²⁰⁴ Recall that China alleges that military reconnaissance missions constitute an abuse of overflight rights.²⁰⁵ China may easily adapt and extend this same position to the space domain, applying it to overflight by American military satellites passing over Chinese territory.²⁰⁶

Legal scholar Ren Xiaofeng summarizes Beijing's sensitivity to reconnaissance and military activities in its exclusive economic zone (EEZ) and its adjacent airspace this way: "Freedom of navigation and overflight does not include the freedom to conduct military and reconnaissance activities. These things [military reconnaissance activities] amount to forms of military deterrence and intelligence gathering as

²⁰⁰ Although the authoritativeness of civilian Chinese authors is difficult to access, the writings of researchers at the Academy of Military Sciences (AMS) are accorded significantly more weight because Chinese military doctrine is developed by researchers and academics rather than warfighters and the AMS is considered to have the most reputable staff. Kevin Pollpeter, *The Chinese Vision of Space Military Operations*, CHINA’S REVOLUTION IN DOCTRINAL AFFAIRS: EMERGING TRENDS IN THE OPERATIONAL ART OF THE CHINESE PEOPLE’S LIBERATION ARMY 329-30 (James Mulvenon & David Finkelstein eds., 2005).

²⁰¹ Bao Shixiu, *Deterrence Revisited: Outer Space*, CHINA SECURITY, Winter 2007, at 2.

²⁰² National Space Policy, *supra* note 105.

²⁰³ Cheng, *supra* note 126, at 398.

²⁰⁴ See Meek Statement, *supra* note 164.

²⁰⁵ See BEST, *supra* note 179, at 20.

²⁰⁶ See Meek Statement, *supra* note 164.

battlefield preparation." These activities in the EEZ, according to Ren, connote preparation to use force against the coastal state. When Ren refers to the "adjacent airspace," he includes outer space and space reconnaissance.²⁰⁷

China's ostensible military objective for such action is denial, "the temporary elimination of some or all of a space system's capability to produce effects, usually without physical damage."²⁰⁸ This legal argument, if ultimately successful, would have the strategic effect of rendering American military satellites useless and could establish a lawful predicate for Chinese military action against those satellites.²⁰⁹ Given its increased military expenditures for research and development of counterspace²¹⁰ technology, China could contemplate action that would effectively blind the United States with regard to Chinese military actions. International acquiescence or acceptance of Chinese assertions of vertical sovereignty would effectively vitiate national means of verification of compliance regarding any existing or new arms reduction treaties, and would render meaningless any proposal to ban or limit weapons in space.

2. Legal Analysis

Reliance on the absence of an explicit airspace-space demarcation ignores historical context by attempting to identify a minimum altitude at which space begins. In fact, there is no controversy that all current satellite orbits transit within the space domain.²¹¹ Irrespective of the demarcation argument, Articles I and II of the Outer Space Treaty (OST) expressly refute any conception of vertical sovereignty.²¹² Article I designates outer space, including the moon and other celestial bodies, as "the province of all mankind." This language has been universally understood to mean that "all nations have a

²⁰⁷ WORTZEL, *supra* note 153.

²⁰⁸ AFDD 2-2.1, *supra* note 93, at 31. The American definition is used here despite the discussion's focus on Chinese military objectives for lawfare because the Chinese vision of space warfare draws heavily from American doctrine and writings. Pollpeter, *supra* note 200, at 351.

²⁰⁹ See Meek Statement, *supra* note 164. Although one may point to real or perceived American space capabilities and make the same argument, the difference is that, unlike China, American does not advance a policy that limits freedom of navigation.

²¹⁰ Counterspace operations are the ways and means by which an air force achieves and maintains air superiority, which means that it enjoys freedom to attack in space as well as freedom from attack in space. AFDD 2-2.1, *supra* note 93, at 1.

²¹¹ See Meek Statement, *supra* note 164.

²¹² OST, *supra* note 51.

nonexclusive right to use and explore space.”²¹³ Article II further prohibits in space any “national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.” Thus, the OST clearly permits all uses of the space domain short of an appropriation by claim of sovereignty or the like.²¹⁴

It therefore seems clear that the plain language of the OST prohibits any claim of vertical sovereignty in space. Sovereignty denotes supreme authority within a territory,²¹⁵ “the right to command and correlatively the right to be obeyed,” with the term “right” connoting legitimacy.²¹⁶ Thus, a claim of sovereignty over space, or any portion thereof, seeks, in some measure, to extend a state’s territorial sovereignty into the space domain.²¹⁷ The holder of sovereignty derives its authority for sovereignty from some mutually acknowledged source of legitimacy.²¹⁸ In space, the OST’s explicit prohibition on appropriation removes the essential support for legitimate sovereignty.²¹⁹

In this sense, the vertical sovereignty argument is akin to the 1976 Bogota Declaration that geostationary orbit was not part of outer space since its nature depends specifically on gravitational phenomena from earth.²²⁰ Thus, the Declaration further argued, those portions of geostationary orbit directly above equatorial states are sovereign territory of those states rather than part of outer space.²²¹ The international community rejected this argument.²²² Likewise, it should reject the vertical sovereignty argument.²²³

²¹³ Joanne Irene Gabrynowicz, *Still Relevant (and Important) After All These Years: The Case for Supporting the Outer Space Treaty*, SPACE LAW, Oct. 22, 2007, available at <http://rescommunis.wordpress.com/2007/10/page/2/> (emphasis added).

²¹⁴ As the vertical sovereignty claim centers on a perceived legal right to regulate activity within that portion of outer space directly above a state’s territory, there is no indication that said state is actually making use of that portion of outer space or occupying it in such a way as to invoke an analysis of an appropriation “by means of use or occupation” as that phrase is used with Article II of the Outer Space Treaty. OST, *supra* note 51.

²¹⁵ See Dan Philpott, Stanford Encyclopedia of Philosophy: Sovereignty (Mar. 17, 2009), available at <http://plato.stanford.edu/entries/sovereignty/>.

²¹⁶ *Id.*

²¹⁷ KATRIN NYMAN METCALF, ACTIVITIES IN SPACE—APPROPRIATION OR USE? 95 (1999) (defining sovereignty as “the right of states to determine the rules applicable to a certain area and to enforce those rules”).

²¹⁸ See Philpott, *supra* note 215.

²¹⁹ See *id.*

²²⁰ See METCALF, *supra* note 217, at 232.

²²¹ See *id.*

²²² See *id.* at 237.

²²³ Philpott states that sovereignty can be absolute or non-absolute. Absolute sovereignty bestows unconditional authority over all matters within a specified territory while non-absolute limits the scope of such authority to certain matters. See Philpott, *supra* note 215. Vertical sovereignty seeks only to regulate certain aspects of use of the

Unsuccessful advocates of vertical sovereignty may fall back on a lesser claim of jurisdiction, the right to make and enforce rules outside of a state's territory.²²⁴ A state asserting such a right to consent and control could effectively deny space access, which would constitute an appropriation by other means under Article II of the OST.²²⁵ Because space cannot be possessed,²²⁶ or cordoned off from the use of others,²²⁷ any asserted right to deny certain uses of space would clearly contravene the freedom of use protected by the OST.

A further derivative argument related to vertical sovereignty examines states' "exclusive" use of their own satellites, that is, a use of certain "space" that excludes other states from the same free access and use of the satellite and the "space" it "occupies" or transits. However, the OST prohibition of appropriation cannot apply so broadly.²²⁸ A more reasonable interpretation would restrict a state from denying a use of space by another state, unless it interfered with its own use or was otherwise not permitted under international law. A satellite passing over a state does not temporarily or permanently preclude any other use of the space through which it travels, to the extent that such transit would constitute an impermissible appropriation.²²⁹ Similarly, apart from the OST's provisions prohibiting military uses, most space treaties do not impose any limitations on the use of space.²³⁰ Thus, satellite overflight for military reconnaissance, communications, and related activities are permitted and may not be restricted by invalid claims of vertical sovereignty or related concepts.

V. CONCLUSION

Whether or not the United States is the "preeminent" military power in the world has become irrelevant.²³¹ American power troubles the rest of the world.²³² Even our allies find little assurance in the historical absence of armed conflict among fellow democratic societies,²³³ and worry about the concentration of power in the hands of

outer space above a state's territory with respect to specific military operations. *See supra* notes 190-207 and accompanying text.

²²⁴ *See* METCALF, *supra* note 217, at 97.

²²⁵ *See* OST, *supra* note 51.

²²⁶ Of course, in contrast to outer space, celestial bodies can be physically possessed but such possession is not the subject matter of this work.

²²⁷ *See* METCALF, *supra* note 217, at 218.

²²⁸ *See id.* at 240-41.

²²⁹ *See id.* at 222.

²³⁰ *See id.*; *see also* CHENG, *supra* note 126, at 526-38.

²³¹ *See* WALT, *supra* note 38, at 11.

²³² *See id.*

²³³ *See* DOLMAN, *supra* note 5, at 4.

a single country.²³⁴ The United States unintentionally exacerbates this concern by expressing an ill-defined desire to control, master or “command” space. Going forward, a sensible strategy must rely on mechanisms of international law to craft an acceptable definition of command of space. Such a definition would comport with our national security and international law, and thereby avoid needlessly generating additional competitors and adversaries. Similarly, agreement to ban kinetic effects in space would address international concerns while concomitantly mitigating a portion of the known danger to U.S. space assets.

A de facto ban on kinetic weapons in space would likely face opposition in the U.S. military, although such opposition is shortsighted. A lawfare strategy to achieve command of space without resort to the most destructive of weapons would allay some if not most of other nations’ fears. But the primary basis for this proposal is to advance effective security of American space lines of communication, while interacting with our potential adversaries. As Sun Tzu advised, “that which depends on me, I can do; that which depends on the enemy cannot be certain.”²³⁵ A ban on kinetic effects in space will in no way guarantee that an adversary will never employ so called space weapons in the future. Nevertheless, because our own use of such weapons will generate debris, the United States should act regardless of this uncertainty and in doing so would continue to retain the ability to respond non-kinetically in space and kinetically on earth. Such a ban would find strong support in international law, and could possibly and practically eliminate the threat of space debris from kinetic weapons entirely.

While leveraging legitimacy in international law to further American national security in space, we must be aware that potential adversaries may attempt to employ similar measures to restrict our interests while furthering their own: an effective, and unanswered, international legal argument could weaken American freedom of action in space. Strategic lawfare to combat such efforts must guard against an unnecessary expansion of international law and ensure a proper interpretation of existing international law. Thus, the United States must swiftly and cogently oppose any claim of vertical sovereignty and shape international law to eliminate attempts at curbing American freedom of action in space. America must advocate a proper interpretation of applicable international law, and implement a strategy to further that interpretation, in order to secure the very freedoms guaranteed in that law.

²³⁴ See WALT, *supra* note 38, at 11.

²³⁵ HANDEL, *supra* note 18, at 29.

UNCONTRACTING: THE MOVE BACK TO PERFORMING IN-
HOUSE

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*Today, America must be spiritually, economically, and militarily strong, for her own sake and for humanity. She must guard her solvency as she does her physical frontiers. This means elimination of waste, luxury, and every needless expenditure from the national budget.*¹

*[T]axpayers deserve to have their dollars spent wisely. To instill a new sense of responsibility when it comes to spending the taxpayers' dollars, [the President] has charged federal departments and agencies with . . . terminating unnecessary contracts, strengthening acquisition management, ending the overreliance on contractors, and reducing the use of high-risk contracts across government.*²

*Everything old is new again.*³

I. INTRODUCTION

Anytime a presidential administration changes, so will presidential policies and priorities. When the party alliance of the chief executive also changes, the policy shifts are even more dramatic. However, “change” does not always mean “new,” as exemplified by the roller-coaster ride of “outsourcing” over the last four decades. Outsourcing—or contracting out, or commercial sourcing, or whatever moniker one uses—is the acquisition world’s Jekyll and Hyde, either embraced as a miraculous cost-saving tool or pilloried as the embodiment of all that is wrong with government contracting. This article examines the transformations and the validity of the associated policies and claims.

Admittedly, the Obama Administration’s desire to run government more efficiently is perfectly natural, expected and appropriate. However, even a president who runs on a platform of change cannot achieve those efficiencies alone. Any newcomer who wants to change something about his operating environment must understand the process of change and those who impact the process must assist in allowing the change.⁴ Nowhere is this principle more

¹ DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS, MANDATE FOR CHANGE: 1953–1956 33 (1963). This statement on June 4, 1952, in Abilene, Kansas, was part of Eisenhower’s first speech in which he “was universally addressed and treated by everyone as a candidate” for President. *Id.*

² OFF. OF MGMT. & BUDGET, ACQUISITION AND CONTRACTING IMPROVEMENT PLANS AND PILOTS: SAVING MONEY AND IMPROVING GOVERNMENT 1 (Dec. 2009) [hereinafter OMB, CONTRACTING IMPROVEMENT PILOTS], available at http://www.whitehouse.gov/omb/assets/reports/2009_acquisition_contracting_improvement.pdf

³ PETER ALLEN, *Everything Old is New Again*, from ALL THAT JAZZ (Twentieth Century Fox 1979) (soundtrack).

⁴ See ATL. SYS. GUILD INC., *On Setting the Context—Some Notes* (“Getting the right context is one of the earliest activities of the development cycle, and the one that has the

crucial than within the U.S. Government, where failure to understand the system's functional context and intertwined parts may negate the desired efficiencies.⁵

How the government decides whether to perform certain functions in-house or contract out for goods and services reveals how misunderstanding context—combined with a lack of cooperation among those affecting the process—limits the impact of efficiency-creating measures.⁶ Policies and procedures also affect how the government ultimately obtains goods or services, either by providing the goods or services in-house or by purchasing them from an outside source.⁷ Policymakers and lawmakers need to understand the proper context in setting up principles and procedures.⁸ When the lawmakers and the policymakers do not work together or work against each other, implementation becomes problematic. This paper will analyze the presidential policy relating to outsourcing, how it has changed, and how Congress has affected this policy. Specifically, this article will analyze Section 324 of the 2008 National Defense Authorization Act and show how it has provided the impetus to reverse the policy relating to the performance of functions by military personnel versus contractors.⁹

greatest potential to cause serious problems if it is done wrongly.”), <http://www.systemsguild.com/GuildSite/JSR/contextart.html> (last visited Feb. 20, 2009).

⁵ See *Poor Performance by Federal Contractors: Hearing Before the Subcomm. on Government Management, Organization, and Procurement of the H. Comm. on H. Oversight and Government Reform*, 2007 WL 2062979 (July 18, 2007) [hereinafter *Government Management, Organization, and Procurement Hearing*] (statement of Richard Skinner, Inspector General, Department of Homeland Security discussing Department of Homeland Security's acquisition challenges in context of mission performance); Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 655–56 (2007) (discussing context).

⁶ See generally *DHS Dependency on Contractors: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 2007 WL 3025457 (Oct. 17, 2007) [hereinafter *Homeland Security and Governmental Affairs Hearing*] (statement of Steven L. Schooner, Co-Director, Government Procurement Law Program, George Washington University); see also *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

⁷ See generally *Homeland Security and Governmental Affairs Hearing*, *supra* note 6 (discussing the steps the Department of Homeland Security could take to improve its management and oversight of its contractors); see also *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

⁸ See *Government Management, Organization, and Procurement Hearing*, *supra* note 5.

⁹ See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 324, 122 Stat 3, 60 (2008) (codified at 10 U.S.C. § 2463) [hereinafter FY08 NDAA]; see also U.S. GEN. ACCT. OFF., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT, FINAL REPORT 14 (April 2002) [hereinafter GAO FINAL REPORT]. In 2004, GAO became the Government Accountability Office. U.S. Government Accountability Office, About the GAO, <http://www.gao.gov/about/namechange.html> (last visited Feb. 16, 2010).

In the 2008 National Defense Authorization Act, Congress passed legislation that almost completely reversed the presidential outsourcing efforts of the last few decades.¹⁰ Specifically, 10 U.S.C. § 2463 requires government agencies to consider “using, on a regular basis, Department of Defense civilian employees to perform new functions and functions that are performed by contractors.”¹¹ Although Circular A-76 and the outsourcing processes still exist,¹² the new law calls for special consideration of functions now performed by contractors and formerly performed by DOD civilians.¹³

To understand how outsourcing has changed over time, this article will first provide some background information about outsourcing’s origins and then define some basic terms. Next, this article will briefly explain the A-76 process used to determine whether a function can be performed more cost effectively “in-house” versus “contracted out.” The focus will then turn to how outsourcing began, how it evolved, the perceived benefits of outsourcing, and a summary of its shortcomings. Finally, the article will explain why the move back to insourcing provides the most benefit to the federal government.

This article argues that overestimated cost savings and global changes negatively impacted the outsourcing process.¹⁴ Not only did the cost savings fail to materialize, outsourcing caused other tangible losses.¹⁵ The government lost personnel experience and continuity,¹⁶ along with operational control,¹⁷ by moving to contractors. Although insourcing¹⁸ will not be a miracle cost-saving tool, performing more

¹⁰ See National Defense Authorization Act for Fiscal Year 2008, § 324; GAO Final Report, *supra* note 9, at 14. See *infra* note 144 and accompanying text regarding the 2009 Omnibus Appropriations Act, which prevents funding for new A-76 competitions at least for fiscal year 2009.

¹¹ National Defense Authorization Act for Fiscal Year 2008, § 324.

¹² The Office of Management and Budget uses a “system of Circulars and Bulletins . . . to communicate various instructions and information to the executive departments and establishments. The Circular series is used when the nature of the subject matter is of continuing effect.” OFF. OF MGMT. & BUDGET, CIRCULAR NO. A-1 (Revised Aug. 7, 1952). Circular No. A-76 deals with the “Performance of Commercial Activities,” and thus “A-76” is used to informally refer to the government’s commercial sourcing activities. This article discusses the A-76 process further later in this article, starting in Section II.A. See, e.g., *infra* notes 21 and 40-44 and accompanying text. The 2009 Omnibus Appropriations Act temporarily prevents funding for new A-76 competitions. See *infra* note 144 and accompanying text.

¹³ National Defense Authorization Act for Fiscal Year 2008, § 324.

¹⁴ See discussion *infra* Section IV.

¹⁵ See discussion *infra* Section IV.B.

¹⁶ See discussion *infra* Section IV.D.E.

¹⁷ See discussion *infra* Sections IV.E.

¹⁸ “In-sourcing is the conversion of *any* currently contracted service/function to DOD civilian or military performance, or a combination thereof.” Memorandum from Deputy Secretary of Defense, to Secretaries of the Military Departments et al., subject: In-sourcing Contracted Services—Implementation Guidance, Attach. 1, at 2 (May 28, 2009)

functions with federal employees instead of contractors will better equip the government to operate in current global conditions.

II. BACKGROUND

Outsourcing has existed for several decades but evolved in terms of its name, processes, and legal authority.¹⁹ This section of the article will discuss these changes, focusing on the distinctions between outsourcing²⁰ and commercial services management, the changes in the overall process, and the policy and legal reforms behind contracting out. The paper will then turn to a brief description of the A-76 process, then discuss how outsourcing has changed, and end with the current state of the law.

A. The Origins of Outsourcing

After many years of perceived government growth, the Eisenhower administration began to examine the size of government and determine how to curb its growth.²¹ In his inaugural address, President Eisenhower noted, “The government today has four times the number of civilian employees it had when the Republicans were last in power (2,591,000 as against 630,000) and its budget has been multiplied by about twenty.”²² He planned to disband a large part of this oversized government,²³ viewing the competitive enterprise system as the primary source of national economic strength.²⁴ Eisenhower saw “the biggest opportunity the business community has ever had to test the application

(internal citations omitted) (emphasis in original), *available at* [http://prhome.defense.gov/docs/DepSecDef Memo In-sourcing Contracted Services-Implementation Guidance \(28 May 2009\).pdf](http://prhome.defense.gov/docs/DepSecDef%20Memo%20In-sourcing%20Contracted%20Services-Implementation%20Guidance%20(28%20May%202009).pdf).

¹⁹ See GOV'T ACCOUNTABILITY OFF., CIVILIAN AGENCIES DEVELOPMENT AND IMPLEMENTATION OF INSOURCING GUIDELINES 1 (Oct. 6, 2009).

²⁰ Outsourcing has undergone several name changes. Although in some cases “outsourcing” is a term of art, referring only to contracting out functions outside the A-76 process, this article uses it to refer to the general concept of federal employees competing against contractors to perform functions. See *infra* notes 41-45 and accompanying text.

²¹ See DWIGHT D. EISENHOWER, THE WHITE HOUSE YEARS, WAGING PEACE: 1956-1961 239 (1965); see also JAMES JAY CARAFANO, PRIVATE SECTOR, PUBLIC WARS: CONTRACTORS IN COMBAT—AFGHANISTAN, IRAQ, AND FUTURE CONFLICTS 3-5 (2008); Martin J. Medhurst, *Eisenhower's Rhetorical Leadership: An Interpretation*, in MEDHURST, EISENHOWER'S WAR OF WORDS 294 (1994).

²² RICHARD H. ROVERE, AFFAIRS OF STATE, THE EISENHOWER YEARS 74 (1956).

²³ *Id.*

²⁴ OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES ¶ 4.a (Aug. 4, 1983, Revised 1999) [hereinafter 1999 OMB CIR. A-76] (note OMB CIR. A-76 was revised again in 2003; however, the 1999 version contained background information relating to purpose of the program which was not included in later revisions).

of business knowledge and business techniques to broader problems.”²⁵ In recognition of this principle, Eisenhower and subsequent presidents relied on this general policy of using commercial suppliers of products and services the government needed, thereby reducing the size of government and the costs of providing those products and services.²⁶

What today is known as commercial services management began under the Eisenhower presidency.²⁷ Eisenhower, the first Republican president since the New Deal,

was deeply concerned about the growth of the federal government and the systematic loss of state and local autonomy. He was concerned about a . . . government that spent more than it took in, a government in which the twin threats of spiraling defense spending and an ever larger federal largess threatened to turn the country into a “garrison state” where individual liberties might be easily lost.²⁸

Initially, outsourcing aimed to cut government spending²⁹ while also decreasing the size of the government, especially the military.³⁰ Eisenhower worried that big government “would make decisions that suited them best, undermining democracy. In short, they might use the pursuit of making Americans safer as cover for all kinds of ills.”³¹

Beginning in 1955, the Bureau of the Budget³² issued a series of bulletins establishing federal policy for obtaining goods and services from the private sector.³³ Adopting the idea that “Government should not compete with its citizens,”³⁴ the Bureau stated that the federal government would “not start or carry on any commercial activity” that the private sector could do.³⁵ Individual freedom and initiative were

²⁵ ROVERE, *supra* note 22, at 75.

²⁶ 1999 OMB CIR. A-76, *supra* note 24, ¶ 4.a.

²⁷ *Id.*

²⁸ MEDHURST, *supra* note 21, at 294. Medhurst is a professor at Baylor University.

²⁹ EISENHOWER, *supra* note 21, at 128.

³⁰ CARAFANO, *supra* note 21, at 3-4.

³¹ *Id.* at 4.

³² The Bureau of the Budget was the predecessor of the Office of Management and Budget (OMB). See OMB CIR. A-11, PREPARATION, SUBMISSION AND EXECUTION OF THE BUDGET ¶ 15.2 (Aug. 7, 2009), available at http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc/; see also CARAFANO, *supra* note 21, at 73.

³³ JOHN R. LUCKEY, CONG. RES. SERV. REP., OMB CIRCULAR A-76: EXPLANATION AND DISCUSSION OF THE RECENTLY REVISED FEDERAL OUTSOURCING POLICY (2003); see also EISENHOWER, *supra* note 21, at 128; ROVERE, *supra* note 22, at 74-75.

³⁴ See 1999 OMB CIR. A-76, *supra* note 24, ¶ 4.a.

³⁵ BERNARD D. ROSTKER, A CALL TO REVITALIZE THE ENGINES OF GOVERNMENT 3 (2008).

seen as strengths of the competitive enterprise system.³⁶ The move to decrease the size of government gained renewed momentum in the 1970s, especially after the Watergate scandal.³⁷ During the Carter administration many government officials advocated for the virtues of contracting.³⁸ “[M]any saw the government bureaucracy as inflexible and unresponsive. Cost was the easiest metric by which to rationalize a move to competition and contracting, but it was by no means the only motivation.”³⁹ Additionally, the Reagan and first Bush administrations—in line with the traditional Republican touchstones of less government and enhanced private enterprise—codified a preference for contracting over in-house activities.⁴⁰

Outsourcing is moving a function from performance in-house to an outside entity.⁴¹ The rationale for such action is that an outside entity could perform the function cheaper, if not better.⁴² However, as will be discussed later, the requirement to outsource does not always benefit the government, in part because of Congress’s continued attempts to regulate the process. Due to the negative connotations that eventually became associated with “outsourcing,” the concept later transformed to “competitive sourcing.”⁴³

Competitive sourcing is a general term describing a process whereby a federal agency compares the performance by government employees against a commercial entity to determine which can provide a specified level of service at the lowest cost.⁴⁴ The A-76 process

³⁶ *Id.*; see AM. B. ASS’N, GOVERNMENT CONTRACT LAW, THE DESKBOOK FOR PROCUREMENT PROFESSIONALS 275 (2007); see also CARAFANO, *supra* note 21, at 73.

³⁷ ROSTKER, *supra* note 35, at 1.

³⁸ See *id.* at 3.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ USLegal, Inc., Outsourcing Law & Legal Definition, <http://definitions.uslegal.com/o/outsourcing/> (last visited Feb. 20, 2009). Some commentators consider that outsourcing within the federal government arena “refers to a decision to contract without the A-76 process.” ROSTKER, *supra* note 35, at 3 n.5. However, this article does not use that definition, which is limited not only in scope but in acceptance among government practitioners in the area. See *infra* note 49.

⁴² *Id.*

⁴³ USLegal, Inc., *supra* note 41; see also AM. B. ASS’N, *supra* note 36, at 275 n.1; Share A-76! and CSM, Repository of Competitive Sourcing and CSM Information, Frequently Asked Questions, <http://sharea76.fedworx.org/ShareA76/faqs/faq.aspx> (last visited Feb. 20, 2009) (This website is a place for stakeholders throughout the federal community to share knowledge and lessons learned about the A-76 process. The website is designed to capture and communicate the experiences of field operators from all federal agencies, including contractors and consultants, as well as anyone interested in the A-76 cost comparison process.).

⁴⁴ RAND RESEARCH BRIEF, DOES COMPETITIVE SOURCING PAY OFF? THE DOD EXPERIENCE 2 (2000), available at <http://sharea76.fedworx.org/ShareA76/docs/36%20-%20General%20DoD/RB7536.pdf>; see also AMERICAN BAR ASS’N, *supra* note 36, at 275 n.1.

frequently relies on competitive source to carry out federal policy as stated by the Office of Management and Budget (OMB). “In the process of governing, the Government should not compete with its citizens” and therefore, should let the private sector perform commercial activities.⁴⁵ “[C]ompetitive sourcing complies with OMB Circular A-76. Public-private competitions under the Circular can only be conducted on activities performed by government personnel.”⁴⁶ Although competitive sourcing allows internal suppliers (government employees) to compete, it does not provide for former government employees to later compete to get their jobs back.⁴⁷ Under competitive sourcing, government employees could create a Most Efficient Organization (MEO) and demonstrate that they could perform the specific function more cheaply than a contractor and thus earn the right to continue in their jobs.⁴⁸

The OMB renamed competitive sourcing to “commercial services management” in early 2008 “to recognize that agencies improve the operation of their commercial functions using a variety of techniques.”⁴⁹ Commercial services management thus goes beyond competitive sourcing.⁵⁰ Under competitive sourcing, only certain governmental functions are examined for the public-private competition.⁵¹ Commercial services management, however, goes beyond such public-private competitions or conversions to “track agencies’ business process reengineering (BPR) efforts that rely on disciplined management practices.”⁵² Under competitive sourcing, the “savings” were limited to those jobs and functions the MEO and private

⁴⁵ AM. B. ASS’N, *supra* note 36, at 275 (referencing Circular A-76, ¶ 4.a. (1999)).

⁴⁶ ROSTKER, *supra* note 35, at 3 n.5. Thus, technically, competitive sourcing could be viewed as differing from outsourcing. According to a Rand study, competitive sourcing allows internal *and* external suppliers to compete to provide services; outsourcing only looked to external suppliers for cheaper services. RAND RESEARCH BRIEF, *supra* note 44, at 2.

⁴⁷ OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED SUPPLEMENTAL HANDBOOK, PERFORMANCE OF COMMERCIAL ACTIVITIES 5 (Mar. 1996 (updated through Transmittal Memorandum 20, June 1999)) [hereinafter OMB REVISED SUPPLEMENTAL HANDBOOK].

⁴⁸ RAND RESEARCH BRIEF, *supra* note 44.

⁴⁹ Memorandum from Clay Johnson III, Deputy Director for Management, OMB, to President’s Management Council, subject: Plans for Commercial Services Management (July 11, 2008) [hereinafter Johnson 2008 Memo], *available at* <http://share76.fedworx.org> (search for “plans for commercial services management”).

⁵⁰ *Id.*

⁵¹ Memorandum from Executive Office of the President, OMB, to Heads of Executive Departments and Establishments, subject: Performance of Commercial Activities, Circular No. A-76, at 6 (Aug. 4, 1983) (Revised 1999), *available at* <http://www.whitehouse.gov/omb/rewrite/Circulars/a076/a076.html>.

⁵² *Id.*

contractor competed to perform.⁵³ Conversely, commercial services management considers the “savings,” even from those functions that will always remain in-house, by implementing cost saving measures similar to those from an MEO.⁵⁴ Commercial services management, therefore, forces government agencies to examine whether they can more efficiently reorganize or restructure *all* government functions, whether suitable for contracting out or not. Thus, government officials expect commercial services management “to continue strengthening the acquisition workforce and improving the management and oversight of federal contractors.”⁵⁵

B. Overview of the A-76 Process

*Unlike the public sector, the private sector is bred for efficiency. Left to its own devices, it will always find the means to provide services faster, cheaper, and more effectively than will governments.*⁵⁶

That theory drove the push for competitive sourcing and created the system to analyze whether the private sector can outperform the federal government.⁵⁷ Under the A-76 circular, OMB established the policy and procedures for determining whether certain “activities are best provided by the private sector, by government employees, [or] by another agency through a fee-for-service agreement.”⁵⁸ The A-76 cost comparison process has two parts.⁵⁹ Part one looks at the various governmental functions to determine whether the function is 1) inherently governmental and must remain in-house, or 2) a commercial activity that could be performed outside the federal government.⁶⁰

OMB defines an “inherently governmental” function as follows:

a function that is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying

⁵³ See generally GEN. ACCT. OFF., COMPETITIVE SOURCING: GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE 6 (Feb. 2004) (discussing GAO’s findings regarding competitive sourcing).

⁵⁴ Johnson 2008 Memo, *supra* note 49, para. 2.

⁵⁵ *Id.* para. 5.

⁵⁶ CARAFANO, *supra* note 21, at 37.

⁵⁷ Share A-76! and CMS, *supra* note 43.

⁵⁸ Share A-76! and CMS, *supra* note 43.

⁵⁹ See generally GAO FINAL REPORT, *supra* note 9, at 16-18 (discussing the A-76 process).

⁶⁰ Carl Peckinpugh, *Keep Outsourcing Apolitical*, FED. COMPUTER WK. (Jan. 21, 2001), available at http://www.fcw.com/print/7_2/news/72562-1.html.

Government authority or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlements.⁶¹

In 1998, Congress passed the Federal Activities Inventory Reform (FAIR) Act.⁶² The FAIR Act requires executive agencies to conduct an accounting each year for all non-inherently governmental functions performed by federal employees and submit them to OMB.⁶³ Additionally, the agencies must assess all inherently governmental activities performed by federal employees, and the resulting lists are known as “FAIR Act Inventories.”⁶⁴ Once OMB reviews and approves an agency’s inventory, the agency must post it on its public web site.⁶⁵ The lists reflect activities or functions—not specific positions or job titles, reflecting that one employee could perform both inherently governmental and commercial activities.⁶⁶ As part of a system to maintain government accountability, an interested party can contest a particular activity’s inclusion on or exclusion from the list.⁶⁷ The FAIR Act also requires the head of each executive agency to use the A-76 process when considering whether to contract with a private sector source to perform the commercial activity.⁶⁸

Part two of the A-76 cost comparison process requires an agency to complete the following six steps in the cost comparison.⁶⁹

1. Create a performance work statement (PWS)⁷⁰ that identifies the agency’s technical, functional, and performance requirements.⁷¹

⁶¹ OMB Policy Letter 92-1, To the Heads of Executive Agencies and Departments, subject: Inherently Governmental Functions, Sep. 23, 1992, Allan V. Burman, Administrator, http://www.whitehouse.gov/omb/rewrite/procurement/policy_letters/92-1_092392.html

⁶² Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105–270, 112 Stat. 2382 (1998) (codified as amended at 31 U.S.C. § 501 (2006)).

⁶³ FAIR Act § 2(a).

⁶⁴ Share A-76! And CMS, *supra* note 43, (regarding the question, “How do government employees know whether they are performing commercial or inherently governmental activities?”).

⁶⁵ FAIR Act § 2(b)-(c).

⁶⁶ Share A-76! and CMS, *supra* note 43 (regarding the question, “How do government employees know whether they are performing commercial or inherently governmental activities?”) (last visited Feb. 20, 2009).

⁶⁷ FAIR Act § 3.

⁶⁸ *See* FAIR Act § 2(d).

⁶⁹ GAO FINAL REPORT, *supra* note 9, at 16.

⁷⁰ *Id.*

⁷¹ 1999 OMB CIR. A-76, *supra* note 24, at D-7.

2. Develop a Government Management Plan to determine the government's MEO.⁷²

3. Independently develop a cost estimate for in-house performance.⁷³

4. Issue a solicitation, under the provisions of the Federal Acquisition Regulation (FAR), for private sector offers.⁷⁴ The solicitation must follow the FAR provisions governing federal procurements because if the private sector wins the competition, the company will be awarded a contract to perform the service.⁷⁵

5. Conduct the cost comparison between the best private offeror and the in-house estimate and select the lower cost alternative.⁷⁶

6. Process any appeals.⁷⁷

Although all six steps are vital to the A-76 process, the MEO step warrants additional explanation. The MEO—the government's in-house organization set up to perform a commercial activity⁷⁸—stems from the management plan and is based upon the PWS for the competed activity.⁷⁹ The management plan identifies the organizational structures; staffing and operating procedures; equipment; and transition and inspection plans the in-house activity will need to perform efficiently and cost effectively.⁸⁰ For example, the MEO may be the current organizational structure or a completely reorganized one.⁸¹ The MEO may consist entirely of federal employees or a combination of federal employees and contracted support.⁸² If the MEO wins the competition, the government must conduct a post-award review to confirm that the MEO followed the transition plan, verify the MEO's ability to perform according to the PWS and to substantiate that actual costs are within the in-house estimates.⁸³

⁷² GAO FINAL REPORT, *supra* note 9, at 16.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.*; see CARAFANO, *supra* note 21, at 73.

⁷⁷ GAO FINAL REPORT, *supra* note 9, at 16.

⁷⁸ OMB REVISED SUPPLEMENTAL HANDBOOK, *supra* note 47, at 36.

⁷⁹ *Id.*

⁸⁰ *Id.* at 11.

⁸¹ *See generally id.* at 11-14 (discussing the organization of the MEO).

⁸² *Id.* at 36.

⁸³ *Id.*

C. Outsourcing and the Pendulum

“Deciding whether to outsource work or do it in-house [has been] one of the most contentious issues in government contracting,”⁸⁴ and as a result, outsourcing has repeatedly transformed both in form and substance.⁸⁵ Remarkably, however, the government’s policy has remained essentially unchanged since 1955,⁸⁶ despite the numerous changes of administration and political party.⁸⁷ The Congressional viewpoint has typically been non-partisan, in that everyone generally agrees that the government should spend taxpayer money wisely.⁸⁸

Between 1978 and 1994, the Department of Defense (DOD) conducted more than 2100 public-private competitions using the A-76 process and procedures.⁸⁹ However, beginning in 1988 the number of A-76 studies began to decline substantially, as several legislative provisions limited DOD’s outsourcing efforts.⁹⁰ In 1988, a law known as the “Nichols Amendment,” gave installation commanders the authority to determine whether to conduct A-76 studies until 1995.⁹¹ Many commanders chose not to, citing factors such as “disruptions to

⁸⁴ Peckinpaugh, *supra* note 60. After all, while *someone* will perform the work under any scheme, it is not easy nor politically palatable to tell government employees that they will lose their jobs.

⁸⁵ After its original issue in 1955, the policy first appeared in its current A-76 form on 3 March 1966, during Lyndon Johnson’s presidency. CARAFANO *supra* note 21, at 73. It has been changed four times: in 1967, 1979, 1983, and 2003. AM. B. ASS’N, *supra* note 36, at 275. In 1979, OMB issued a “Supplemental Handbook,” which spelled out the complex details on conducting competitions. OMB also revised the handbook three times: in 1983, 1996, and again in 1999. Finally, the handbook was abandoned with the current OMB Circular A-76, published on 29 May 2003. ROSTKER, *supra* note 35, at 3, n.3.

⁸⁶ *Id.*

⁸⁷ See generally Peter Levine, Gen. Couns., S. Armed Services Comm., the 25th Annual Cuneo Lecture at The Judge Advocate General’s Legal Center and School, U.S. Army (TJAGLCS), 2008 Contracts and Fiscal Law Symposium (Dec. 5, 2008) (video recording available from TJAGLCS) (discussing how the policy remained consistent through administration changes).

⁸⁸ *Id.* (discussing that differences in viewpoints typically occur between different committees or between the House and Senate rather than along political party lines).

⁸⁹ *Defense Outsourcing, Challenges Facing DOD as It Attempts to Save Billions in Infrastructure Costs: Hearings Before the Subcomm. on Readiness of the H. Comm. on National Security*, 105th Cong. 7 (Mar. 12, 1997) [hereinafter *Hearings on Readiness*] (testimony of David R. Warren, Director, Defense Management Issues, National Security and International Affairs Division).

⁹⁰ *Id.*

⁹¹ *Id.* (“[T]he first provision, contained in the National Defense Authorization Act for fiscal years 1988-89 (P.L. 100-180), gave authority to installation commanders to determine whether to study activities for potential outsourcing. . . . [Act was later] codified at 10 U.S.C. 2468, was effective through September 30, 1995.”)

their workforce, the cost of conducting studies, and a desire for more direct control of their workforce.”⁹²

In addition, Section 8087 of the fiscal year 1991 DOD Appropriations Act prohibited funding for A-76 studies exceeding 24 months.⁹³ This was followed by provisions in the DOD Authorization Acts for fiscal years 1993 and 1994, sections 312 and 313 respectively, prohibiting the DOD “from entering into contracts resulting from cost studies done under OMB Circular A-76.”⁹⁴ As a result, DOD imposed a moratorium on A-76 studies, canceling roughly 75 percent of ongoing studies.⁹⁵ In April 1994 the prohibition expired, and the department later lifted the moratorium.⁹⁶

In 1996, the OMB revised its supplemental handbook to streamline the outsourcing process.⁹⁷ The revised process attempted to “capture the benefits of the tradeoff process, while maintaining the perceived objectivity of a cost-only selection.”⁹⁸ The agency now had to “measure the selected private-sector proposal against the MEO and . . . if the two do not offer the same level of performance and quality,” the agency had to adjust the MEO’s proposal.⁹⁹ Only after that adjustment was made could the agency complete the cost-only comparison to select the winner.¹⁰⁰

Throughout the 1990s, numerous other legislative provisions impacted outsourcing, including 10 U.S.C. § 2464, which required the DOD to maintain the logistical resources and technical competence to effectively and timely respond to any contingency or national defense emergency.¹⁰¹ Only the Secretary of Defense could grant a waiver to allow contracting that function out.¹⁰² Additionally, 10 U.S.C. § 2461 required A-76 cost comparisons in order to outsource, Congressional

⁹² *Id.*

⁹³ Department of Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511 § 8087, 104 Stat. 1896 (1990); *see also Hearings on Readiness, supra* note 89, at 7.

⁹⁴ National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484 § 312, 106 Stat. 2315, 2365 (1992) (prohibiting service contracts for commercial activities resulting from A-76 studies); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160 § 313, 107 Stat. 1547, 1619 (1993) (prohibiting certain cost comparison studies); *see also Hearings on Readiness, supra* note 89, at 7.

⁹⁵ *Hearings on Readiness, supra* note 89, at 7.

⁹⁶ *Id.*

⁹⁷ *Id.* at 8.

⁹⁸ GAO FINAL REPORT *supra* note 9, at 42.

⁹⁹ *Id.*

¹⁰⁰ *Id.* A leveling process is, for the most part, antithetical to FAR procurements, and agencies sometimes failed to implement it, leading to sustained GAO protests. *See id.*

¹⁰¹ *Hearings on Readiness, supra* note 89, at 23; *see* DEPOT MAINTENANCE: OPPORTUNITIES TO PRIVATIZE REPAIR OF MILITARY ENGINES 6, 9, 18, and 21 (Mar. 5, 1996) (GAO/NSIAD-96-33); *see also* National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 105-85 § 356, 111 Stat. 1629, 1694 (1997) (codified at 10 U.S.C. § 2464 (2006)).

¹⁰² *Id.*

notification of most studies, and annual reports to the Congress on outsourcing.¹⁰³ Moreover, 10 U.S.C. § 2465 prohibited the DOD from outsourcing civilian firefighter or security guard positions after September 1983.¹⁰⁴ As discussed earlier, the FAIR Act of 1998¹⁰⁵ forbade the government from outsourcing any inherently governmental function.¹⁰⁶

As the new millennium began, Congress continued to influence the process but now shifted the balance in favor of outsourcing. Section 832 of the National Defense Authorization Act for Fiscal Year 2001¹⁰⁷ required the Comptroller General to convene a panel to study transferring commercial activities from performance by federal employees to performance by contractors.¹⁰⁸ “[T]he Panel was to consider procedures for determining whether functions should continue to be performed by government personnel, and for comparing the cost of performance of functions by government personnel with the cost of the functions by contractors.”¹⁰⁹ Part of the panel’s purpose was to create a process that reflected “a balance among taxpayer interests, government needs, employee rights, and contractor concerns.”¹¹⁰ Congress also

¹⁰³ See 10 U.S.C. § 2461 (2006) (mandating Congressional notification if the competition involves ten or more civilian employees). The numerous legislative changes in this area attest to outsourcing’s status as a hot political issue. See *Hearings on Readiness*, *supra* note 89, at 24; see Department of Defense Authorization Act, 1983, Pub. L. No. 97-252 § 112, 96 Stat. 718, 747 (1982); see also Department of Defense Authorization Act, 1981, Pub. L. No. 96-342 § 502, 94 Stat. 1077, 1086 (1980) (requiring studies involving competitions of fifty or more civilian employees); Department of Defense Authorization Act, 1983, Pub. L. No. 97-252 § 112, 96 Stat. 718, 747 (1982) (requiring studies involving competitions of ten or more civilian employees); Department of Defense Authorization Act, 1986, Pub. L. No. 99-145 § 1234, 99 Stat. 583, 734 (1985) (requiring studies involving competitions of forty or more civilian employees); National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661 § 1221, 100 Stat. 3816, 3976 (1986) (requiring studies involving competitions of forty-five or more civilian employees). The language of 10 U.S.C. § 2461 currently requires Congressional notification if the competition involves ten or more civilian employees.

¹⁰⁴ See 10 U.S.C. § 2465 (2006); see also *Hearings on Readiness*, *supra* note 89, at 24 (“DOD’s fiscal year 1996 inventory of civilian and military personnel performing commercial activities show[ed] that about 9,600 firefighters and 16,000 security guards [were] exempt from outsourcing because of this law and other considerations, such as mobility requirements.”).

¹⁰⁵ See discussion *supra* Section II.B. FAIR Act 1998, Pub. L. No. 105-270, 112 Stat. 2381 (1998) (codified as amended at 31 U.S.C. § 501 (2006)); see also CARAFANO, *supra* note 21, at 75.

¹⁰⁶ VALERIE BAILEY GRASSO, CONG. RES. SERV. REP., DEFENSE OUTSOURCING: THE OMB CIRCULAR A-76 POLICY 3 (2003).

¹⁰⁷ National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398 § 832, 114 Stat. 1654, 1654A-221 (2000).

¹⁰⁸ GAO FINAL REPORT, *supra* note 9, at 32.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

directed the panel to study the DOD's implementation of the FAIR Act and A-76 cost comparison procedures.¹¹¹

In 2002, then-President Bush's Management Agenda identified competitive sourcing as one of its five government-wide initiatives,¹¹² placing "a new emphasis on selection of the best service provider, public or private."¹¹³ President Bush stated that it was the administration's policy to "achieve efficient and effective competition between public and private sources . . . to better publicize the activities subject to competition and to ensure senior level agency attention to the promotion of competition."¹¹⁴ To accomplish this policy objective, the Bush Administration set a goal of completing public-private or direct conversion competitions for at least five percent of the executive branch's full-time equivalent positions.¹¹⁵

However, Congress once again stepped in and began to swing the pendulum back away from the perceived presidential move to outsourcing. In the 2003 National Defense Authorization Act (NDAA) Congress again imposed notice requirements for A-76 conversion studies and prevented DOD from converting to contractors until after reporting the findings to Congress.¹¹⁶ Then the 2004 NDAA prevented

¹¹¹ *Id.* The panel concluded that the system offered advantages yet suffered from some valid criticisms. Advantages included the following: (1) establishing procedural rules intended to "ensure that sourcing decisions are based on uniform, transparent, and consistently applied criteria"; (2) enabling "federal managers to make cost comparisons between sectors that have vastly different approaches to cost accounting"; and (3) achieving "significant savings and efficiencies for the government," with savings of 20 percent or more regardless of outcome. *Id.* at 9-10. On the other hand, the panel "heard criticism of the A-76 process as being slow, too complicated, unfair to either or both sectors, and causing needless distress to federal workers." *Id.* at 10.

In the Panel's view, however, the most serious shortcoming of the A-76 process is that it has been stretched beyond its original purpose, which was to determine the low-cost provider of a defined set of services. Circular A-76 has not worked well as the basis for competitions that seek to identify the best provider in terms of quality, innovation, flexibility, and reliability.

Id.

¹¹² ROSTKER *supra* note 35, at 3; see OFF. OF MGMT. & BUDGET, THE PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, 17 [hereinafter FY02 PRESIDENT'S MANAGEMENT AGENDA], available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>. The other four were strategic management of human capital, improved financial performance, expanded electronic government, and budget and performance integration. FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 4.

¹¹³ ROSTKER, *supra* note 35, at 3.

¹¹⁴ *Id.*; see also FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 17.

¹¹⁵ ROSTKER *supra* note 35, at 3; see FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 18.

¹¹⁶ National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314 § 331, 116 Stat. 2458, 2512 (2002).

any further A-76 studies until 45 days after the Secretary of Defense submitted a report to Congress on the effects of the 2003 OMB revision to the A-76 process.¹¹⁷ Additionally in 2004, Congress directed a pilot program for high-performing organizations,¹¹⁸ organizations that “focus on achieving results and outcomes, and [where] a results-oriented organizational culture is fostered to reinforce this focus.”¹¹⁹ While these high-performing organizations were exempt from the A-76 competition, the savings that occurred from the related business reorganizations were credited to the public-private competition goals.¹²⁰

In the 2005 NDAA, Congress partially lifted the A-76 moratorium. The law still prevented DOD from contracting out a function unless contractor performance would save the lesser of \$10 million or “10 percent of the most efficient organization’s personnel related costs for performance of the activity or function by civilian employees.”¹²¹ If this standard was not met, an agency could not convert work to private-sector performance “even if the agency can demonstrate that private sector performance would provide a superior solution, when both cost and quality considerations are taken into account.”¹²² A year later, Congress permanently codified the above limitation for the DOD.¹²³ Additionally, the 2006 NDAA required the Secretary of Defense to establish “guidelines and procedures for

¹¹⁷ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136 § 335, 117 Stat. 1392, 1443 (2003).

¹¹⁸ *Id.* § 337.

¹¹⁹ GEN. ACC’T OFF., HIGH-PERFORMING ORGANIZATIONS: METRICS, MEANS, AND MECHANISMS FOR ACHIEVING HIGH PERFORMANCE IN THE 21ST CENTURY PUBLIC MANAGEMENT ENVIRONMENT (Feb. 2004), *available at* <http://www.gao.gov/new.items/d04343sp.pdf>.

[The report] identified key characteristics and capabilities of high-performing organizations that support this results-oriented focus, which include having a clear, well-articulated, and compelling mission, strategically using partnerships, focusing on the needs of clients and customers, and strategically managing people. High-performing organizations have a coherent mission, the strategic goals for achieving it, and a performance management system that aligns with these goals to show employees how their performance can contribute to overall organizational results.

Id.

¹²⁰ *Id.*

¹²¹ National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 327, 118 Stat. 1811, 1849 (2004).

¹²² Memorandum from Clay Johnson III, Acting Director for Management, OMB, to Heads of Executive Departments and Agencies, subject: Competitive Sourcing under Section 842(a) of Public Law 109-115 para. 2 (Apr. 24, 2006) [hereinafter Johnson 2006 Memo], *available at* <http://www.whitehouse.gov/omb/memoranda/fy2006/m06-13.pdf>.

¹²³ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (2006).

ensuring that consideration is given to using Federal Government employees for work that is currently performed or would otherwise be performed under Department of Defense contracts.”¹²⁴ The section did not mandate insourcing but did require DOD to consider returning to performance by government employees when a contract has been “poorly performed due to excessive costs or inferior quality.”¹²⁵ While the 2006 NDAA simply directed DOD to ensure federal employees receive consideration for work currently or potentially performed by contractors, more recent legislation continued the swing away from hiring contractors to perform government functions.¹²⁶

D. Current Law

Current legislation has nearly completed the pendulum swing and is set to undo the past five decades of government outsourcing. The 2008 National Defense Authorization Act returned government policy to its pre-Eisenhower state.¹²⁷ Specifically, Section 324 of the 2008 NDAA provided revised guidelines on “Insourcing New and Contracted Out Functions.” It required the DOD to regularly consider using civilian employees to perform functions and functions currently performed by contractors—without “limitation or restriction on the number of functions or activities” that could be brought back in-house.¹²⁸ Section 324 also challenged the 2003 rewrite of A-76 by significantly limiting the categories of functions considered appropriate candidates for outsourcing.¹²⁹ The 2003 rewrite opened the door to contracting out additional functions as long as the activities were not “substantially inherently governmental.”¹³⁰ However, Section 324 carved out “special consideration” for insourcing any function even

¹²⁴ National Defense Authorization Act for Fiscal Year 2006, § 343. In this same section, Congress pointed to the flexible hiring authority of the National Security Personnel System (NSPS) as a tool to bolster performance of work by federal employees instead of contractors. *Id.* § 343(b).

¹²⁵ *Id.* § 343(a)(2)(D).

¹²⁶ Compare National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181 § 324, 122 Stat. 3, 60 (2008) with National Defense Authorization Act for Fiscal Year 2006, § 343.

¹²⁷ See National Defense Authorization Act for Fiscal Year 2008, § 324. In a report on competitive sourcing for calendar year 2007, OMB noted the number of positions competed had declined and asserted that “this decrease is due, in large part, to legislative actions that block or otherwise defund competitions.” The OMB noted the Consolidated Appropriations Act, FY 2008, P.L. 110-161, contained at least eight provisions addressing competitive sourcing. OFFICE OF MGMT. & BUDGET, COMPETITIVE SOURCING, REPORT ON COMPETITIVE SOURCING RESULTS FISCAL YEAR 2007, at 7 (May 2008) [hereinafter OMB 2007 REPORT].

¹²⁸ *Id.* (codified at 10 U.S.C.S. § 2463 (2009)).

¹²⁹ ROSTKER *supra* note 35, at 13.

¹³⁰ *Id.*

“closely associated with the performance of an inherently governmental function.”¹³¹ Cost issues aside, this “special consideration” grew out of concerns that contractors were taking on functions that, while not themselves inherently governmental, provided the type of support that could impact government decision making, policy development and program management—without adequate government supervision or oversight.¹³²

Additionally, Section 322 was modified to change the competition requirements¹³³ and reduce any advantage a contractor might gain by offering reduced employee benefits. Specifically, Section 322 excluded health care and retirement costs from the commercial sourcing cost comparison “if the contractor’s contribution towards its employees’ benefits is less than what the Congress requires . . . [DOD] to contribute for the benefits of federal civilian employees.”¹³⁴ Section 322 did not “require contractors to provide the same level of health and retirement benefits” as DOD but did offer them “full credit” for using benefit plans such as health-savings accounts, 401(k) plans and profit-sharing arrangements.¹³⁵

The 2008 NDAA contained three other provisions that pulled back the outsourcing pendulum. Section 326 gave federal employees an additional appeal right to have the Government Accountability Office (GAO) review any decisions to contract out, providing another avenue to stop outsourcing.¹³⁶ Section 323 removed the requirement to

¹³¹ National Defense Authorization Act for Fiscal Year 2008, § 324.

¹³² See ROSTKER *supra* note 35, at 4 (describing the results of a GAO audit into outsourcing professional and management support services).

¹³³ H.R. REP. NO. 110–146, at 308 (2007) (discussing H.R. 1585 relating to the FY 08 NDAA).

¹³⁴ *Id.* at 307. The 2008 National Defense Authorization Act repealed 10 U.S.C. § 2467, which provided for the inclusion of retirement costs. See National Defense Authorization Act for Fiscal Year 2008, § 322.

¹³⁵ H.R. REP. NO. 110–146, at 307–8 (discussing the relation of H.R. 1585 to the FY08 NDAA § 322).

¹³⁶ National Defense Authorization Act for Fiscal Year 2006, § 326 (codified at 10 U.S.C. § 2465 (2006)).

Section 326 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108–375) allow[ed] an appeal to be filed on behalf of federal employees by an Agency Tender Official (ATO), a senior procurement official acting on behalf of the employees, only in A-76 competitions [involving more than 65 full time equivalents]. However, the committee [was] concerned that federal employees may not be adequately represented and question[ed] whether an agency tender official would have sufficient resources to employ qualified counsel. Furthermore, the committee notes that there are many instances in which there is no ATO at all, such as in a streamlined OMB Circular A-76 competition, which can include up to 65 employees.

recompete work where the public-private competition favored federal employees, removing federal employees from a cycle of continuous competition.¹³⁷ Finally, Section 327 applied the DOD requirement to conduct public-private competitions before contracting out functions performed by ten or more civilians to the entire government.¹³⁸

One piece of proposed legislation absent from the final 2008 NDAA further demonstrates Congress's intent to reel in outsourcing. Section 328 of the House version of the bill prohibited OMB from assigning any mandatory quotas to DOD for A-76 competitions.¹³⁹ The committee report revealed concern that OMB continued to impose competition quotas throughout the federal government but also pointed out that this section would not prohibit DOD from conducting A-76 reviews. "However, such decisions must be made independently of any direction or requirement from OMB."¹⁴⁰ Ultimately, this language was removed, leaving only a requirement that the Secretary of Defense ensure any competitions follow the regulations.¹⁴¹

Addressing the current state of the law requires a look at the Obama administration's position and how the law may be changed. Just before the 2008 election, one commentator predicted a shift from the Bush administration's emphasis on privatization.¹⁴² Obama's campaign platform included a vow to save billions of dollars each year by cutting government contracts.¹⁴³

The past two administrations have faced the dilemma of providing more federal services efficiently without expanding government. They tackled these issues differently—Bush through a greater dependence on the private sector and Clinton through streamlining the size

H.R. REP. NO. 110-146, at 308 (2007). The 2008 NDAA gave federal employees the right to file a protest through any appointed representative, not just the ATO, and the appeal was not limited to functions involving 65 or more full time equivalents. National Defense Authorization Act for Fiscal Year 2008, § 326.

¹³⁷ H.R. REP. NO. 110-146, at 308 (2007); *see also* National Defense Authorization Act for Fiscal Year 2008, § 323 (codified at 10 U.S.C. § 2462).

¹³⁸ H. ARMED SERVICES COMM. REP. NO. 110-146 § 330 (2007); *see* National Defense Authorization Act for Fiscal Year 2008, § 327 (codified at 10 U.S.C. § 2466 (2006)); *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (codified at 10 U.S.C.S. 2461 (2006)).

¹³⁹ *Id.* at 308.

¹⁴⁰ *Id.*

¹⁴¹ H.R. REP. NO. 110-477, 878 (2007) (regarding § 325); *see* National Defense Authorization Act for Fiscal Year 2008, § 325 (stating generally that OMB cannot require A-76 studies).

¹⁴² Robert Brodsky, *Great Expectations*, GOV'T EXECUTIVE.COM, (Oct. 1, 2008), <http://www.govexec.com/features/1008-01/1008-01s1.htm> (last visited Dec. 3, 2009).

¹⁴³ *Id.*

of the federal workforce—but the results were the same:
more contractors¹⁴⁴

Obama campaign officials said he supports scaling back some privatization initiatives and restoring balance between in-house efforts and outsourcing. While he had not then determined whether to continue the Bush administration's competitive sourcing agenda, he pledged to "end the abuse in contracting."¹⁴⁵

While the pendulum swing favoring insourcing will likely survive through the new administration, after a year in office, President Obama has not signaled that he is ready to give up on outsourcing. Although he signed the 2009 Omnibus Appropriations Act, which prevents funds from being used to begin or announce A-76 studies or competitions,¹⁴⁶ he has not taken any executive actions to terminate the A-76 process.¹⁴⁷ However, he has required each of the government's largest contracting agencies to identify "at least one pilot initiative where potential overreliance on contractors may be affecting performance and [to] take steps, as part of these pilots, to determine the best mix of in-house and contractor skills and workforce size to help the organization operate at its best."¹⁴⁸ The DOD and six other agencies are studying outsourcing of acquisition functions, while another nine agencies are studying information management support.¹⁴⁹

III. BENEFITS OF OUTSOURCING?

Allowing the private sector to assume functions performed by government personnel began as a means to reduce the size of the government.¹⁵⁰ However, the overriding reason to conduct outsourcing, competitive sourcing or commercial services management is simple—to save the government money. The competition requires the government to first examine what functions it is performing and focus on what its

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ David Alexander, *Obama Signs Big Spending Bill Despite Earmarks*, WASH. POST, Mar. 11, 2009, available at <http://www.reuters.com/article/idUSTRE52A4H020090312>; see H.R. 1105, 111th Cong. Div. D, Title VII, § 737 (2009) (the Omnibus Appropriations Act, 2009 bill was approved by the Senate).

¹⁴⁷ See Presidential Executive Orders, available at <http://www.whitehouse.gov/briefing-room/presidential-actions/> (last visited Nov. 17, 2009).

¹⁴⁸ OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 2; see also Memorandum from President Barack Obama, to the Heads of Executive Departments and Agencies, subject: Government Contracting, 74 Fed. Reg. 9,755 (Mar. 4, 2009) [hereinafter Obama Memo] ("Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.").

¹⁴⁹ OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 9.

¹⁵⁰ ROVERE, *supra* note 22, at 74-75; CARAFANO, *supra* note 21, at 5 (citing MARTIN J. MEDHURST, EISENHOWER'S WAR OF WORDS: RHETORIC AND LEADERSHIP 294 (1994)).

mission really is, as well as forcing the government to determine how to most efficiently use its resources and the best way to organize to perform necessary functions.¹⁵¹

A. Cost Savings

Financial savings are crucial as the federal government, especially the DOD, fights for scarce spending dollars.¹⁵² Two advisory boards—the Commission on Roles and Missions (CORM) and the Defense Science Board (DSB)—“have made outsourcing and privatization the centerpiece of their reforms to reduce infrastructure and support costs.”¹⁵³

In 1995 the CORM report “recommended that [DOD] outsource or privatize all current and newly established commercial-type support services,” a move that could save an estimated \$3 billion a year.¹⁵⁴ Similarly, in 1996, the DSB recommended DOD restructure its support framework “by maximizing the use of the private sector for almost all support functions.”¹⁵⁵ According to the DSB, doing so could reduce defense infrastructure costs by more than \$30 billion annually by the year 2002.¹⁵⁶

The GAO also agreed that outsourcing could achieve substantial savings, concluding that “outsourcing is cost-effective because the competitions generate savings—usually through a reduction in personnel—whether the competition is won by the government or the private sector.”¹⁵⁷ Based on these reports and studies, the DOD moved forward with private-public competitions.

The Department of Defense had a “goal to save billions of dollars by outsourcing work to the private sector and through other initiatives.”¹⁵⁸ In fiscal year 1997, the Department of Defense estimated it would spend almost two thirds of its budget, nearly \$146 billion, on

¹⁵¹ See Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. OF CONT. MGMT. 13 (Summer 2008); see also ROVERE, *supra* note 22, at 74-75.

¹⁵² See GRASSO, *supra* note 106, at 2.

¹⁵³ *Hearings on Readiness*, *supra* note 89, at 1. The CORM provided a report on the roles and missions of the Department of Defense focusing on the needs of the commanders in chief and recommended a more vigorous reliance on the private sector for services in order to restructure the DOD Support organizations and not perform services unless they needed to be performed by the government. The DSB advises the Pentagon on scientific, technical, manufacturing, and acquisition processes of special interest to the Department of Defense.

¹⁵⁴ *Hearings on Readiness*, *supra* note 89, at 16.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The dramatic difference between the two cost-savings estimates illustrates the often tenuous nature of such predictions, as this article discusses later.

¹⁵⁷ *Hearings on Readiness*, *supra* note 89, at 16-17.

¹⁵⁸ *Id.* at 1.

operations and support activities, which generally included installation and infrastructure maintenance, generalized training, health care, equipment repair and spare-part inventories.¹⁵⁹ The DOD viewed these support activities as offering the greatest potential for savings.¹⁶⁰ By reducing the size of the steady force needed, DOD would then decrease the cost of feeding, lodging, and caring for the force. Contracting out for support services only as needed would slash not just the force size but the cost to maintain that force and its necessary equipment.¹⁶¹

A few years later, a RAND study of competitive sourcing further supported the government's cost savings argument.¹⁶² The study examined personnel costs for several DOD public-private competitions between 1989 and 1996, comparing bidders' proposed costs with actual expenses and assessing contractors' planned cost-cutting methods.¹⁶³

According to the study, most bidders accurately projected personnel cost savings, which tended to run about 30 to 60 percent. Winning bidders obtained most of these savings by using fewer people, and they maintained those lower personnel costs over time.¹⁶⁴ Cost savings also occurred from eliminating unnecessary duplication of effort so common in government. "New programs are frequently created with little review or assessment of the already-existing programs to address the same perceived problem. Over time, numerous programs with overlapping missions and competing agendas grow up alongside one another—wasting money and baffling citizens."¹⁶⁵

More recent reports bolster the financial argument. The OMB released a Report on Competitive Sourcing Results in 2008 estimating that, over the life of the contracts, taxpayers would save more than \$7.2 billion from A-76 efforts during the 2003 to 2007 fiscal years.¹⁶⁶ A 2007 study on the need for reform in Army contracting lauded competitive sourcing. "As a result of this progress in Defense personnel policies, each of the Services has outsourced tasks previously performed by personnel in uniform . . . and done so at significant savings to the

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See U.S. Defense Science Board, *Report of the Defense Science Board Task Force on Outsourcing and Privatization* 1A, 6A, 17-17A, 28A (August 1996); see CARAFANO, *supra* note 21, at 43.

¹⁶² RAND RESEARCH BRIEF, *supra* note 42, at 1.

¹⁶³ *Id.* (discussing Susan M. Gates & Albert A. Robbert, *Personnel Savings in Competitively Sourced DoD Activities: Are They Real? Will They Last?* (2000)).

¹⁶⁴ *Id.* Despite the savings, the study expressed doubt that "without significant managerial and organizational changes, the Pentagon [could apply] lessons it has learned in these initial competitive sourcing experiences to large segments of its uniformed and civilian workforce." *Id.*

¹⁶⁵ FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 3.

¹⁶⁶ OMB 2007 REPORT, *supra* note 127, at 4.

taxpayer.”¹⁶⁷ These savings came from competitive sourcing actions where the federal government team won more than half of the public-private competitions. “[J]ust because the government team won, does not mean there is not cost savings. Even if the in-house federal government team wins, there can be cost savings to the government because the competition improved how the government performed the function.”¹⁶⁸

B. A Better Product

Competition can do more than save money. The private sector may be able to perform the function better than the federal government.¹⁶⁹ “Outsourcing permits organizations to focus on what they do best . . . while relying upon other more efficient entities to provide the goods, services, and support necessary to do so.”¹⁷⁰ Militaries have relied on contractors to assist in conflict for nearly as long as there have been wars.¹⁷¹ Now, more than ever, the military depends on contractors to perform food services, lodging management, and supply management.¹⁷² “Experience suggests that privatization offers many potential benefits, including surge capacity, flexibility, innovation, and quite often, the ability to meet agency missions using limited government personnel, abilities, and resources.”¹⁷³

The military has caps on the number of personnel, military and civilian, that it can maintain.¹⁷⁴ Contracting out some functions allows the limited number of government employees to focus on their primary mission, while the contractors can concentrate on and specialize in the contracted functions, learning to perform more efficiently with better end products. “In successful outsourcing arrangements, the vendor utilizes new technologies and business practices to improve service

¹⁶⁷ REPORT OF THE COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING, 13-14 (Oct. 31, 2007) [hereinafter GANSLER REPORT].

¹⁶⁸ *Id.*

¹⁶⁹ See Schooner & Greenspahn, *supra* note 151, at 13.

¹⁷⁰ *Id.*

¹⁷¹ See CARAFANO, *supra* note 21, at 14-28; see also GEN. ACC’T OFF., CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM 1-2 (Feb. 1997) [hereinafter LOGCAP Report] (noting that the Army used contractors extensively in Korean and Vietnam to boost logistical support).

¹⁷² See Obama Memo, *supra* note 148 (memo discussing government contracting).

¹⁷³ Schooner & Greenspahn, *supra* note 151, at 13.

¹⁷⁴ CARAFANO, *supra* note 21, at 52-54. While the requirement to manage civilian personnel by end strengths was repealed with the Department of Defense Appropriations Act, 1991, P.L. 101-511 § 8016A, 104 Stat. 1856, 1878 (Nov. 1990), end strengths are still limited based on the funding of personnel accounts. *Id.* at 54-56.

delivery or reduce support costs.”¹⁷⁵ Competitive sourcing thus can do more with less—enhancing the military’s warfighting capabilities while saving the taxpayer money.¹⁷⁶

IV. OUTSOURCING VS. INSOURCING—WHERE SHOULD THE PENDULUM STOP?

Despite increased effectiveness, improved capabilities and taxpayer savings, competitive sourcing ultimately fails for a number of reasons. The biggest drawbacks roughly correspond to benefits offered by insourcing. The anticipated cost savings turned out to be inflated at best and non-existent at worst. In some cases, outsourcing has actually cost the government more, in part because of an inability to properly manage the contracts and contractor personnel, and the recurring recompetition requirement. Insourcing, on the other hand, would not only reverse the financial roller-coaster but would allow the government to better control personnel while retaining in-house expertise.

A. Cost Savings?

With estimates ranging from \$3 billion to \$30 billion in savings, outsourcing sounded like a good deal during the past decades. Ironically, the same basic justification used to support outsourcing—lower cost—was recently touted as the reason for returning to in-house performance.¹⁷⁷ After passage of the 2008 NDAA, defense officials stated, “This new legislation should improve our ability to reduce costs and manage the Defense workforce.”¹⁷⁸ They issued implementing guidance to “help ensure that when DOD Components make decisions to use DOD civilian employees, the decisions are fiscally informed and

¹⁷⁵ GRASSO, *supra* note 106, at 2 (quoting DEPT. OF DEF, OFFICE OF THE UNDERSECRETARY OF DEFENSE FOR ACQUISITION AND TECHNOLOGY, REPORT OF THE DEFENSE SCIENCE BOARD, TASK FORCE ON OUTSOURCING AND PRIVATIZATION 7a (Aug. 1996)).

¹⁷⁶ GANSLER REPORT, *supra* note 167, at 13-14.

¹⁷⁷ Compare 1999 OMB CIR. A-76, *supra* note 24, with Memorandum from Gordon England, the Deputy Undersecretary of Defense, to Secretaries of the Military Departments, et al., subject: Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA)—Guidelines and Procedures on In-sourcing New and Contracted Out Functions (4 Apr. 2008) (both outsourcing and insourcing use the claim of lower costs for support) [hereinafter England Memo], available at <http://prhome.defense.gov/docs/OSDIn-sourcingGuidance04184-08.pdf>. Admittedly, government contracts are a necessity. The government cannot produce everything it needs, and in certain instances commercial companies can provide the product or service more efficiently than the government itself. The problem arises when a government agency is forced to perform either insourcing or outsourcing

¹⁷⁸ England Memo, *supra* note 177, at 2.

analytically based.”¹⁷⁹ Similarly, when advocating insourcing, OMB echoed the rationale originally supporting outsourcing: “to ensure that commercial activities are performed by the best source at the lowest possible cost.”¹⁸⁰

Public-private competitions have at times saved money—but outsourcing, in all its forms, never produced the cost savings and better products promised.¹⁸¹ Reasons range from inherent difficulties in calculating the costs and resulting savings, to a failure to track the actual expenses, to short-term savings that led to long-term increases in cost. For example, the government is expected to become sufficiently “fiscally informed” to make “analytically based” decisions.¹⁸² Utilizing the A-76 process, the government first determines what activity or function to potentially compete and what work it involves.¹⁸³ The next step is to determine the government in-house estimate: what it costs for government employees to do the work?¹⁸⁴

The primary problem with the competitive process has been calculating the true cost of a DOD employee.¹⁸⁵ A computer program, COMPARE, considers everything from current pay and medical benefits to retirement and likely temporary duty costs when determining the government in-house estimate.¹⁸⁶ The calculation formulas can take into account a number of factors,¹⁸⁷ but including or removing certain factors can manipulate the ultimate results.¹⁸⁸

¹⁷⁹ *Id.* at 1-2.

¹⁸⁰ 1999 OMB CIR. A-76, *supra* note 24.

¹⁸¹ See John C. Anderson, Force Management, Manpower and Resources, Office of the Assistant Secretary of the Army, Manpower and Reserve Affairs, Lecture at TJAGLCS 2008 Contracts and Fiscal Law Symposium: Insourcing (Dec. 4, 2008) (video recording available from TJAGLCS).

¹⁸² England Memo, *supra* note 177, Attach. 2.

¹⁸³ GAO FINAL REPORT *supra* note 9, at 16.

¹⁸⁴ *Id.*

¹⁸⁵ See *id.*

¹⁸⁶ See OFFICE OF DEP’Y UNDER SEC’Y OF DEF. FOR INSTALLATIONS & ENVIRONMENT, HOUSING & COMPETITIVE SOURCING OFFICE, COMPARE USER MANUAL ¶ 2.5 (Mar. 31, 2009) [hereinafter COMPARE USER MANUAL], available at <http://www.compare76.com/>.

¹⁸⁷ The government cost estimate considers, among other expenses, personnel costs, material and supply costs, overhead costs, total cost of agency performance, private sector price or public reimbursable costs, contract administration costs, one-time conversion costs, gain from disposal or transfer of assets, federal income tax adjustment, total adjusted cost of private sector or public reimbursable performance, adjusted total cost of agency performance, adjusted total cost of private sector or public reimbursable performance, cost difference, and low-cost provider. *Id.* (demonstrating the extent to which all possible costs are attempted to be taken into account).

¹⁸⁸ See H.R. REP. NO. 110-146, 307 (2007) (discussing the repeal of 10 U.S.C. § 2467, which provided for the inclusion of retirement costs, the consultation of DOD employees in cost comparisons, and Congressional notification of cost comparison waivers, by Pub. L. No. 110-181 § 322 (FY08 NDAA)).

The ability to modify the calculations allows critics on both sides to complain about the system. “To compare the cost of in-house performance to private sector performance, detailed estimates of the full cost of government performance to the taxpayer have to be calculated. The development of these estimates has devolved into a contentious and rigid exercise in precision.”¹⁸⁹

Labor unions, such as the American Federation of Government Employees (AFGE), have been among outsourcing’s most vocal foes.¹⁹⁰ The union’s argument against contracting out federal positions is that the federal government saves money by contracting work to employers who pay less than a living wage.¹⁹¹ At the lower ranges of the pay scale, federal jobs have historically paid better and had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers.¹⁹²

In response to criticisms such as these, Section 322 of the 2008 NDAA excluded health care and retirement costs from the cost comparison process.¹⁹³ This exclusion applied if the contractor’s contribution towards employee benefit plans was less than what the DOD contributed for the benefits of federal civilian employees, thus removing any competitive edge a contractor might have in this area.¹⁹⁴

However, other actions short of legislation can impact computations. For example, in a 2006 cost-cutting effort, “Air Force officials extended the average assignment length for most Airmen from three years to four years, which has reduced the number of yearly PCS moves.”¹⁹⁵ Because the COMPARE software considers a number of

¹⁸⁹ FY02 PRESIDENT’S MANAGEMENT AGENDA, *supra* note 112, at 17.

¹⁹⁰ American Federation of Government Employees, *2008 Conference Issue Papers, Department of Defense: Keeping Our Nation Safe and Secure* (Feb. 5, 2008), <http://www.afge.org/index.cfm?page=2008ConferenceIssuePapers&Fuse=Content&ContentID=1417> (last visited Nov. 16, 2009).

¹⁹¹ See, *Competitive Sourcing: Hearing Before The H. Comm. on Government Reform*, 2003 WL 21481705 (F.D.C.H.) (June 26, 2003) (statement by Bobby L. Harnage, Sr., National President, AFGE, AFL-CIO, claiming that contractors could gain a “competitive advantage from providing inferior benefits or no benefits at all”).

¹⁹² CHAUNA BROCHT, ECON. POL’Y INST., *THE FORGOTTEN WORKFORCE, MORE THAN ONE IN 10 FEDERAL CONTRACT WORKERS EARN LESS THAN A LIVING WAGE* (Nov. 1, 2000), available at http://www.epi.org/content.cfm/briefingpapers_livwage; see also Robert Jensen, *Bush Puts a Contract Out on Federal Jobs*, COUNTERPUNCH (Nov. 25, 2002), (arguing that any savings come “at the cost of lower wages and reduced benefits for workers”), available at <http://www.counterpunch.org/jensen1125.html>.

¹⁹³ See H.R. REP. NO. 110-146 (2007), at 307.

¹⁹⁴ *Id.* at 307-308 (discussing H.R. 1585 relating to the FY08 NDAA).

¹⁹⁵ A.F. News Service, *PCS Policy Changes Promote Stability, Quality of Life*, Jun. 17, 2009, at <http://www.af.mil/news/story.asp?id=123154669>.

factors, including personnel costs, even seemingly small changes can impact overall competition calculations.¹⁹⁶

Additionally, the fact that the government uses a detailed process to determine costs does not guarantee that the private competitor will conduct such an exacting pricing evaluation. Contractors' bids should reflect their overhead costs, such as training personnel and providing medical and retirement benefits; their more direct costs, such as wages; and what they plan to charge the government to achieve a reasonable profit.¹⁹⁷ However, contractors have an economic incentive to overestimate their savings and efficiencies: award of the contract.¹⁹⁸ In a fixed-price contract, the contractor bears the risk of underbidding, but if the government commits to reimbursing the contractor's costs, the government may realize no savings.¹⁹⁹ No matter how the results are calculated, they are simply estimates, which may or may not play out as expected.²⁰⁰

Most outsourcing savings estimates failed to account for typical growth in contract costs.²⁰¹ Admittedly, the government can obtain some simple goods and services more cheaply through contracting out.²⁰² However, frequently "the short-term savings that [outsourcing] promises evaporate quickly once competitors drop out; contractors who underbid to win a contract are free to raise rates later or in follow on contracts, often leaving government representatives with little choice but to accept."²⁰³ While the GAO recognized that outsourcing can be cost-effective, in a report to Congress it questioned some of the savings projections.²⁰⁴ The GAO reported doubts that the services would ever achieve the projected 20 to 30 percent savings.²⁰⁵ In fact, the "GAO found that contracting outside of A-76 can actually cost the government more than doing the work in-house."²⁰⁶ According to GAO, both DOD and OMB lacked "reliable data" at every stage of the outsourcing effort. Neither agency had the right information at the start "to assess the soundness of savings estimates,"²⁰⁷ and DOD then failed to consistently

¹⁹⁶ COMPARE USER MANUAL, *supra* note 186, ¶ 2.5.

¹⁹⁷ See GAO FINAL REPORT, *supra* note 9, at 16.

¹⁹⁸ See Levine, *supra* note 87; see also GRASSO, *supra* note 106, at 6.

¹⁹⁹ See Obama Memo, *supra* note 148 (discussing government contracting).

²⁰⁰ See OMB 2007 REPORT, *supra* note 127, at 6, 11, 35-36 (discussing that while efforts are in place to capture actual cost savings, the savings numbers are based on estimates).

²⁰¹ *Hearings on Readiness*, *supra* note 89, at 19.

²⁰² Jensen, *supra* note 199.

²⁰³ *Id.*

²⁰⁴ *Hearings on Readiness*, *supra* note 89, at 18 (reporting that GAO audits found "the estimated savings did not achieve the projections, even though the costs of the competitions were not taken into consideration")

²⁰⁵ *Id.*

²⁰⁶ ROSTKER, *supra* note 35, at 6.

²⁰⁷ *Hearings on Readiness*, *supra* note 89, at 18; see also LOGCAP Report, *supra* note 171, at 5 (noting that the Army's original contractor-developed estimate for logistical

track and analyze cost data to determine whether the contract achieved the savings.²⁰⁸ The process takes into account anticipated costs; it does not look at what a contract costs the government in the end.²⁰⁹

GAO pointed to the DOD-wide initiative to “standardize and consolidate automatic data processing systems” that was projected to save \$2.18 billion during 1991 through 1995.²¹⁰ Not only was this program abandoned without realizing any savings, GAO found that most “consolidation initiatives” never achieved the anticipated billions of dollars of savings.²¹¹ In those cases where savings did materialize, GAO identified the competition itself as the primary cause, rather than the function’s actual outsourcing.²¹²

Overall, GAO summarized the problem with anticipated savings as follows: (1) savings estimates represent projected, rather than realized savings; (2) the costs of the competitions were not included; (3) baseline cost estimates are lost over time; (4) actual savings have not been tracked; (5) where audited, projected savings have not been achieved; and (6) in some cases, work contracted out was more expensive than estimated before privatization.²¹³

As early as 1991, various studies showed that contracts are more expensive than government employees. For example, the GAO concluded that 11 out of 12 contractors in their study were about 25 percent more costly.²¹⁴ Studies after years of outsourcing confirmed this early data. In 2007, a Congressional study found that contracts for intelligence support cost, on average, almost twice as much as in-house performance.²¹⁵ In 2008, the Office of the Director of National Intelligence reported that the cost of a federal employee—including not just salary but all benefits such as retirement and healthcare—was

support in Bosnia was \$350.2 million, yet three months later, the DOD reduced the estimate to \$191.6 million—without supporting documentation for doing so).

²⁰⁸ *Id.* at 8; see GEN. ACCT. OFF., OMB CIRCULAR A-76: DOD’S REPORTED SAVINGS FIGURES ARE INCOMPLETE AND INACCURATE (Mar. 15, 1990) (report GAO/GGD-90-58 to the Chairman, Subcomm. on Federal Services, Post Office, and Civil Service, S. Comm. on Governmental Affairs).

²⁰⁹ ROSTKER, *supra* note 35, at 6.

²¹⁰ *Hearings on Readiness, supra* note 89, at 2.

²¹¹ *Id.*

²¹² *Id.* at 19; see also Levine, *supra* note 87.

²¹³ *Hearings on Readiness, supra* note 89, at 8; see GEN. ACCT. OFF., DEFENSE DEPOT MAINTENANCE: COMMISSION ON ROLES AND MISSION’S PRIVATIZATION ASSUMPTIONS ARE QUESTIONABLE (July 15, 1996) (letter report GAO/NSIAD-96-161).

²¹⁴ ROSTKER, *supra* note 35, at 6 (citing J. DEXTER PEACH, ENERGY MANAGEMENT: USING DOE EMPLOYEES CAN REDUCE COSTS FOR SOME SUPPORT SERVICES 2 (1991) (GAO/RCED-91-186)).

²¹⁵ *Id.* (citing House Select Committee on Intelligence, Intelligence Authorization Act for Fiscal Year 2008, 28 (2007)).

\$125,000, while the direct cost (excluding overhead) for each contractor employee was \$207,000.²¹⁶

As can be seen from post-competition review, this competition process, at least from a government perspective, fails to address the cost of changes to the contract, changes in requirements or future price hikes. One of the expected tradeoffs during the military drawdown was the fact that contracting for contingencies would be more expensive for the short term, with overall long term savings. In other words, after the post-Cold War reduction in the size of the military, some concluded it would be cheaper to contract out for support services only when needed.²¹⁷ However, at some point what was originally viewed as a wartime flux became normal operations and the long term savings now point back to performing in-house.

Prolonged military operations requiring services in more isolated and less technically developed locations such as Iraq and Afghanistan have overcome any potential savings achieved by paying a higher cost for short durations.²¹⁸ A prime example is the Army's Logistics Civil Augmentation Program, or LOGCAP, the subject of a 1997 GAO report.²¹⁹ While the Army centrally managed the single, worldwide LOGCAP contract, each operational commander defined his organization's requirements, paid for the services, and integrated contract employees into mission performance.²²⁰

Responding to Congressional concerns about LOGCAP usage in Bosnia, GAO found that in just a year contract costs jumped 32 percent, from \$350.2 million to \$461.5 million.²²¹ GAO attributed the increased costs mainly to changes in requirements, stemming from factors such as unfamiliarity with the operating environment. However, other causes included lack of guidance on using the contract and insufficient monitoring and tracking systems.²²²

Because operational commanders at all levels lacked guidance and experience in using the LOGCAP contract, they failed to understand

²¹⁶ ROSTKER, *supra* note 35, at 6 (citing RONALD SANDERS, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE TRANSCRIPT: CONFERENCE CALL ON THE RESULTS OF THE FISCAL YEAR 2007 U.S. INTELLIGENCE COMMUNITY INVENTORY OF CORE CONTRACTOR PERSONNEL 8 (2008)). The apparent contradiction between these findings and labor union arguments that contractor employees would earn less only emphasizes the questionable nature of much of the purported "data" on both sides of the outsourcing argument.

²¹⁷ See CARAFANO, *supra* note 21, at 51-56.

²¹⁸ See *id.* at 44-45; see also Schooner & Greenspahn, *supra* note 151, at 12-13.

²¹⁹ LOGCAP Report, *supra* note 171, at 1. The Army established LOGCAP in 1985 to "(1) preplan for the use of contractor support in contingencies or crises and (2) take advantage of existing civilian resources in the United States and overseas to augment active and reserve forces." *Id.* at 2.

²²⁰ *Id.* at 4.

²²¹ *Id.* at 1, 4.

²²² *Id.* at 4-5.

how their contracting decisions impacted the ultimate cost.²²³ GAO provided this example:

[T]he decision to accelerate the camp construction schedule required the contractor to fly plywood from the United States into the area of operations because sufficient stores were not available in Europe, which increased costs. For example, the contractor reported that the cost of a 3/4-inch sheet of plywood, 4' x 8', purchased in the United States was \$14.06. Flying that sheet of plywood to the area of operations from the United States increased the cost to \$85.98 per sheet, and shipping by boat increases the cost to \$27.31 per sheet. According to a U.S. Army, Europe official, his commander "was shocked" to find the contractor was flying plywood from the United States.²²⁴

Thus, one of the primary benefits of insourcing is to undo outsourcing efforts that brought neither cost savings nor improved mission performance.²²⁵ In 1995, "the goal of downsizing the Federal workforce [was] widely perceived as placing [DOD] in a position of having to contract for services regardless of what is more desirable and cost effective,"²²⁶ and little has changed since then. The DOD has a history of cutting both personnel and funding without properly restructuring to obtain the hoped-for efficiencies.²²⁷ These forced reductions came about because of ever increasing goals to complete public-private or direct conversion competitions of the full-time equivalent employees listed on the FAIR Act inventories.²²⁸ Military

²²³ LOGCAP Report, *supra* note 171, at 17-18. "One official likened the employment of LOGCAP without doctrine and guidance to giving the Army a new weapon system without instructions on how to use it." *Id.* at 17.

²²⁴ *Id.* at 18.

²²⁵ This process will require work by both the Personnel and Comptroller communities, for example, reprogramming contract funding to pay for personnel costs and re-creating the federal employing positions. However, information exists regarding guidelines and procedures to insource positions. See Anderson, *supra* note 181; England Memo, *supra* note 182, at para. 3; see also Memorandum from Ronald J. James, Assistant Secretary of the Army, Manpower and Reserve Affairs, to HQDA Principals et al., subject: Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 119-181 (FY 2008 NDAA))—Guidelines and Procedures on Insourcing New and Contracted Out Functions (8 May 2008); U.S. Army Management Directorate G-8, Service Contracts and Insourcing Policy VTC, (Jul. 30, 2008) (unpublished PowerPoint Presentation, on file with author).

²²⁶ *Hearings on Readiness*, *supra* note 89, at 10 (reporting the findings of a DOD IG study on cost growth).

²²⁷ *Id.*

²²⁸ FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 18.

commanders saw outsourcing as a direct way to achieve the mandated across-the-board reductions—the need to reduce civilian positions became greater than the need to save money.²²⁹ Under pressure to conduct these conversions, the government seldom secured the best bargain.

Additionally, insourcing removes the government from the revolving door of re-competition, which impacts both costs and less-tangible results. The government expends both significant time and effort to determine the most efficient organizational structure,²³⁰ resources that are taken away from performing the “real” mission.²³¹ Seldom do the cost-savings projections adequately account for this resource drain, especially because competitions tend to take longer than anticipated.²³² All these factors reduce the realized savings, both in the short term and the long run.²³³

Although the 2008 NDAA limited the re-competition requirement, outsourcing calculations must still consider the re-competition costs.²³⁴ Section 323 removed the requirement to re-compete “work being performed by federal employees that was won by the employees under a public-private competition process.”²³⁵ Thus, the law did not entirely eliminate re-competition but instead made it a discretionary management option.²³⁶

Interestingly, the A-76 Handbook states, “If the Government believes that quality is unacceptable or prices appear unreasonable, a cost comparison is conducted to justify conversion [back] to in-house”²³⁷—yet procedures were never laid out for conducting a re-competition to bring an outsourced function back in-house.²³⁸ It was not

²²⁹ See *Hearings on Readiness*, *supra* note 89, at 10 (discussing results from GAO’s review of outsourcing base support operations).

²³⁰ See generally GRASSO, *supra* note 106, at 5. Insourcing also reduces the harm to morale from outsourcing, in which individuals may be less motivated to work or even quit. *Id.* at 12.

²³¹ The authors concede that outsourcing can bring about cost savings. However, these savings generally flow from creating the MEO, and at some point during the continued re-competition, the MEO has become as “efficient” as it will ever be. Any additional “savings” occur from evolving organizations or technological improvements that occur outside the competition process. See U.S. GEN. ACCT. OFF., DOD COMPETITIVE SOURCING, LESSONS LEARNED SYSTEM COULD ENHANCE A-76 STUDY PROCESS 11 (July 1999) (GAO/NSIAD-99-152).

²³² See *id.* at 25.

²³³ *Id.*

²³⁴ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No 110-181 § 323, 122 Stat. 3, 60 (2008) (codified at 10 U.S.C. § 2462) (addressing re-competition requirements).

²³⁵ *Id.*

²³⁶ *Id.*; see also H.R. CONF. REP. NO. 110-477, 877 (regarding section 323).

²³⁷ OMB REVISED SUPPLEMENTAL HANDBOOK, *supra* note 47, at 4.

²³⁸ *Id.* at 10-14.

until the 2006 NDAA that insourcing was put forth as a realistic option—and then only one that the DOD had to “consider.”²³⁹

B. Contract Administration Difficulties

The government’s inability to properly administer contracts has contributed to the lack of cost savings. It has also revealed several major flaws with outsourcing, including the fundamental question of whether outsourcing is appropriate for an organization where the primary mission is to fight the country’s wars.²⁴⁰

Beginning in the mid-1990s, the DOD drastically increased spending on government contracts.²⁴¹ The DOD now spends more for service contracts than any other activity, including major weapons systems.²⁴² Additionally, in an eight-year period, the number of service contracts more than doubled,²⁴³ while contract growth as a whole increased 178 percent from 1999 to 2008.²⁴⁴ From fiscal year 2000 to fiscal year 2007, contractor totals jumped from 730,000 to 1.5 million,²⁴⁵ as DOD has used contractors to compensate for organic personnel shortages.²⁴⁶

With contract growth comes a corresponding increase in both complexity and volume of the workload of contracting personnel at all stages—from drafting and negotiating the contract to monitoring and enforcing performance.²⁴⁷ Yet simultaneously, the contracting career field has shrunk, exacerbating the strain and ultimately degrading mission performance.²⁴⁸ “If the military commander has gained

²³⁹ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 341, 119 Stat. 3136, 3195 (2006), § 343. As stated earlier, this section directed the DOD to ensure “that consideration is given to using Federal Government employees” for work currently or potentially performed by a contractor. Similarly, the section required DOD to consider insourcing when a contract resulted in excessive costs or poor performance. *Id.*

²⁴⁰ “Of course, nobody seriously recommends that the military be privatized If death and disaster on a considerable scale are inevitable products, the rule seems to be that this responsibility is the business of government.” P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 3 (2003) (quoting DAVID SICHOR, PUNISHMENT FOR PROFIT).

²⁴¹ CARAFANO, *supra* note 21, at 75. *See generally* Schooner & Greenspahn, *supra* note 148, at 12.

²⁴² Levine, *supra* note 87. *See generally* Schooner & Greenspahn, *supra* note 151, at 12.

²⁴³ Levine, *supra* note 87.

²⁴⁴ Anderson, *supra* note 181 (lecture on insourcing). *See generally* Schooner & Greenspahn, *supra* note 151, at 12.

²⁴⁵ Levine, *supra* note 87.

²⁴⁶ *See generally id.* (discussing use of contractors).

²⁴⁷ GANSLER REPORT, *supra* note 167, at 14.

²⁴⁸ *Id.*

riflemen, but not added contract professionals who can acquire the support services his unit needs, then he has lost capability.”²⁴⁹

In March 2000, the increased number of service contracts and the decreased number of personnel in the acquisition workforce prompted the DOD’s Inspector General to audit all service contracts for professional, administrative, and management support activities.²⁵⁰ The report found that *every one* of the 105 audited contracts had at least one of the following issues:

- Failure to use prior history to define requirements (69%)
- Inadequate Government cost estimates (77%)
- Cursory technical reviews (57%)
- Inadequate competition (60%)
- Awarding a single contract where multiple awards would have worked better (18%)
- Insufficient documentation of how the price was negotiated (68%)
- Inadequate contract surveillance (67%)
- Lack of cost control (25%)²⁵¹

These deficiencies, the IG said, “occurred because acquisition officials lacked training, familiarity and time to fulfill their duties,” leaving the DOD procurement system with “material weaknesses” in control measures.²⁵²

In hearings before Congress, GAO officials echoed these same concerns over potential for cost growth, especially in weapons system procurements.²⁵³ First, cost growth arises because the weapons system arena tends to lack a pre-existing competitive commercial market.²⁵⁴ Second, the depot work, such as major overhauls, is generally sole-sourced to the original equipment manufacturer, with the cost increase typical of lack of competition.²⁵⁵ Finally, the GAO pointed to the

²⁴⁹ *Id.* at 13-14.

²⁵⁰ GRASSO, *supra* note 106, at 25.

²⁵¹ U.S. DEP’T OF DEF., OFF. OF THE INSPECTOR GEN., CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE AND MANAGEMENT SUPPORT SERVICES 4 (Mar. 10, 2000) [hereinafter DOD IG Report].

²⁵² *Id.* at 4, i; *see also* SINGER, *supra* note 240, at 153 (asserting that “full-time contract monitoring not only raises costs” but is “particularly difficult”). A follow-up audit three years later looked at 113 contracts valued at about \$17.8 billion found that 98 suffered from similar shortcomings. U.S. DEP’T OF DEF., OFF. OF THE INSPECTOR GEN., CONTRACTS FOR PROFESSIONAL, ADMINISTRATIVE AND MANAGEMENT SUPPORT SERVICES 5-6 (Oct. 30, 2003) (Audit Report No. D-2004-015).

²⁵³ *Hearings on Readiness*, *supra* note 89, at 22.

²⁵⁴ *Id.*

²⁵⁵ *Id.* For example, the DOD IG pointed to the Army’s contract for engineering services on the HAWK missile system. Despite 39 years of contract history that could

resulting reduction in core capability proficiency and the organic repair capability to question whether outsourcing is the appropriate model for most weapon systems.²⁵⁶ Similarly, during the Navy's efforts to privatize weapons handling, some critics charged that our "national security interests are being compromised."²⁵⁷

From an institutional level, the military continues to rely heavily upon contractors, but without the manpower to oversee contractor performance. The lack of control over contractors—both while performing the contract and ensuring the continued availability of their needed expertise—puts the DOD at risk. Simply increasing the acquisition workforce will not in and of itself guarantee proper oversight of the numerous DOD contracts. Without proper oversight, contracting out does not always provide a better product or service for the government nor address the government's long-term needs. Insourcing can resolve these concerns.

C. Retaining Experience

The DOD has long touted the value of "partnering" with contractors.²⁵⁸ But "[w]hile some exalt the benefits of the blended workforce,²⁵⁹ others are concerned about the loss of in-house expertise,²⁶⁰ lack of ethical standards for contractors, and the 'pirating' of government employees by contractors."²⁶¹ Particularly frustrating for organizations that require specialized expertise and experience, such as intelligence agencies, are organic personnel who leave for better pay with contractors after the government has trained them, obtained their security clearances, and given them experience.²⁶² The government pays to get the worker qualified, then ends up "leasing back . . . former

have been used to determine an appropriate fixed price for the work, the Army gave Raytheon Corp. a \$36.2 million cost-reimbursement contract. DOD IG Report, *supra* note 251, at 8.

²⁵⁶ *Hearings on Readiness, supra* note 89, at 22

²⁵⁷ GRASSO, *supra* note 106, at 26-27.

²⁵⁸ See, e.g., ARMY MATERIEL COMMAND, HANDBOOK OF ARMY PUBLIC-PRIVATE PARTNERING (undated); JOHN R. WILLIAMS, DEFENSE CONTRACTORS SBIR/STTR PARTNERING MANUAL (Aug. 1, 2008). "SBIR" stands for Small Business Innovation Research, "STTR" for Small Business Technology Transfer. *Id.* Interestingly, Williams, the U.S. Navy's director of SBIR/STTR Programs, wrote the manual "with assistance from" two contractors. *Id.*

²⁵⁹ ROSTKER, *supra* note 35, at 7 (citing James R. Thompson & Sharon H. Mastracci, *The Blended Workforce: Maximizing Agility Through Nonstandard Work Arrangements*, HUMAN CAP. MGMT (2005)).

²⁶⁰ *Id.* (citing S. Appropriations Comm., Department of Homeland Security Appropriations Bill 2009, 14 (2008)).

²⁶¹ *Id.* (citing JOHN D. NEGROPONTE, DIRECTOR OF NATIONAL INTELLIGENCE, FIVE YEAR STRATEGIC HUMAN CAPITAL PLAN (2006)).

²⁶² Walter Pincus, *Increase in Contracting Intelligence Jobs Raises Concerns*, WASH. POST, Mar. 20, 2006, at A3.

employees.”²⁶³ Some individuals complain this “phenomenon is partly the result of Congress’s approving large funding increases . . . but not increasing the limit on the number of full-time persons that agencies can hire.”²⁶⁴ With the limit on positions, government agencies turn to contractors to make up for the lack of federal positions.²⁶⁵

It is one thing to contract out to provide surge capability, especially in austere environments. However, it is another to rely completely on contractors for such functions. “Since these services are needed, and now are being provided by commercial vendors instead of organically, they can now *only be fulfilled* through the acquisition process”²⁶⁶ In contrast to outsourcing, insourcing can build and exploit “a reach-back capability to not only capture and institutionalize best practices but to draw in and leverage other U.S. Government-wide experts. Reliance on outsourcing continues and even promotes the ad hoc responses, inhibiting or preventing required institutional learning and connections.”²⁶⁷

Retaining experience in the federal workplace, mainly through federal civilian employees, frequently provides the only continuity in DOD organizations. Not only can military personnel be tasked at any moment to perform a necessary mission elsewhere,²⁶⁸ they traditionally transfer to a new assignment every two to four years.²⁶⁹ The resulting turnover, while beneficial in many ways, creates a continuing learning curve for those who fill military billets—and a continuous training workload for the more permanent workers who remain. Long-term civilian personnel are DOD’s only “corporate memory,” providing better continuity of operations and understanding of previous issues.²⁷⁰

Finally, without an in-house cadre of knowledgeable professionals, the government will never be able to properly monitor and administer contracts.²⁷¹ To properly write requirements, evaluate proposals and oversee and assess contractor performance, the

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ See Pincus, *supra* note 262, at A03.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ Matt Armstrong, *In-sourcing the Tools of National Power for Success and Security*, SMALL WARS J. (Jan. 3, 2008), available at <http://smallwarsjournal.com/blog/2008/01/insourcing-the-tools-of-nation/>.

²⁶⁸ See U.S. DEP’T OF ARMY, FIELD MANUAL 206-22, LEADERSHIP ROLES, LEADERSHIP LEVELS AND LEADERSHIP TEAMS 11-56 (12 Oct. 2006) [hereinafter FM 206-22].

²⁶⁹ WILLIAM M. HIX ET AL., PERSONNEL TURBULENCE: THE POLICY DETERMINANTS OF PERMANENT CHANGE OF STATION MOVES (1998), http://www.rand.org/pubs/monograph_reports/MR938/MR.938.ch2.pdf; see also GEN. ACCT. OFFICE, MILITARY PERSONNEL: LONGER TIME BETWEEN MOVES RELATED TO HIGHER SATISFACTION AND RETENTION 3 (Aug. 2001) (Briefing Report GAO-01-841 to the S. Subcomm. on Defense C. on Appropriations).

²⁷⁰ FM 206-22, *supra* note 268, at 3-26 and 11-61.

²⁷¹ See CARAFANO, *supra* note 21, at 44.

government needs someone with sufficient experience in the field. The more functions the government outsources, the less experience it retains internally to ensure it is receiving the best goods and services.

D. Control of Personnel

*[T]he privatized military industry introduces very real contractual dilemmas into the realm of international security. The overall issues of these contractual dilemmas come down to divided loyalties and goals For governments, the public good and the good of the private companies are not identical . . . [and] these two parties' interests will never exactly coincide.*²⁷²

Perhaps the most crucial benefit of insourcing is the control it gives the government over both the work results themselves and those doing the work.²⁷³ One concern relating to a blended workforce is danger of confusion regarding appropriate lines of authority.²⁷⁴ “The desire to treat the contractor as part of the team is understandable”—but frequently misguided.²⁷⁵ Government employees and contractor employees work for different organizations and are bound by different standards and rules. While government employees can be prosecuted for conflict-of-interest violations, such rules often do not apply to contractor employees.²⁷⁶ Government employees are expected to always keep the public good in mind; contractors are usually motivated by profits.²⁷⁷

The bottom line is this: “[w]hen we contract, we give up an element of control and flexibility.”²⁷⁸ Nothing can surpass the amount of control the government has over military personnel, who may be tasked to do just about any job. Some would also say that civilian personnel do not have to perform anything that is not in their position descriptions and it is difficult to change position descriptions.²⁷⁹ However, in most cases, a civilian employee can eventually be tasked to

²⁷² SINGER, *supra* note 240, at 151.

²⁷³ AIR FORCE MATERIEL COMMAND, GUIDE FOR THE GOVERNMENT-CONTRACTOR RELATIONSHIP 6 (May 2005) (emphasis in original) (on file with the authors) [hereinafter AFMC GUIDE] (“The fundamental difference between government employees and contractor personnel is *control*.”).

²⁷⁴ ROSTKER, *supra* note 35, at 7; *see also* SINGER, *supra* note 240, at 153 (asserting that contractual relationships can “blur the chain of command and diffuse responsibility”).

²⁷⁵ AFMC GUIDE, *supra* note 273, at 5.

²⁷⁶ *See* CARAFANO, *supra* note 21, at 48-50.

²⁷⁷ SINGER, *supra* note 240, at 151 (asserting that “private companies as a rule are more interested in doing well than good”).

²⁷⁸ AFMC GUIDE, *supra* note 273, at 9.

²⁷⁹ *See* U.S. DEP’T OF DEFENSE, CIVILIAN PERSONNEL MANAGEMENT GUIDE FOR MANAGEMENT OFFICIALS DURING CONTINGENCIES AND EMERGENCIES 1-5 (Mar. 2003), available at http://www.cpms.osd.mil/civ_prep/ManagementGuide.pdf.

work on new projects, but with contractors “there are no ‘other duties as assigned.’”²⁸⁰ Any work that is not within the scope of a contract will either not get done or will come at increased cost to the government.²⁸¹ Thus, government employees may not supervise contractor personnel, or vice versa, and no employer-employee relationship exists between the two groups.²⁸²

The need to avoid such “personal services” contractual relationships is a particularly thorny one—especially in “revolving door” circumstances where DOD personnel leave government service on Friday and show up on Monday working for a contractor in their old office.²⁸³ As a result, the military branches have issued guidance on everything from how contractor employees must identify themselves in e-mails to when government and contractor employees may ride together in rental cars.²⁸⁴ While some of these rules may seem rather pedantic, at their root, they all aim to ensure contractor personnel do not perform inherently governmental functions—those functions that go to the very heart of what it means to govern, those acts that are “so intimately related to the public interest as to mandate performance by Government employees.”²⁸⁵

Contractor personnel and government employees may work side-by-side and may perform essentially the same job—but they are not interchangeable.²⁸⁶ “Private employees have distinctly different motivations, responsibilities and loyalties than those in the public military. . . . [T]hey are hired, fired, promoted, demoted, rewarded and disciplined by the management of their private company, not by government officials or the public.”²⁸⁷ Critics predicted privatization would bring risks such as safety compromises; operational damage from

²⁸⁰ AFMC GUIDE, *supra* note 273, at 9.

²⁸¹ See CARAFANO, *supra* note 21, at 76-77, 84.

²⁸² AFMC GUIDE, *supra* note 273, at 6.

²⁸³ *Id.* at 10 (“Many of the contractor personnel working side by side with government employees were once government employees themselves (e.g., retired military or former civil servants). It is important that government employees recognize that these individuals’ employment status has changed and, therefore, so have the rules applied to that employee.”); see also SINGER, *supra* note 240, at 154 (noting that this scenario “risks strict, unbiased supervision” and creates an inherent potential for conflicts of interest”).

²⁸⁴ AFMC GUIDE, *supra* note 273, at 10, 25-26.

²⁸⁵ See OMB Policy Letter 92-1, *supra* note 61 (defining inherently governmental functions). Such functions usually “require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government.” *Id.*

²⁸⁶ AFMC GUIDE, *supra* note 273, at 8.

²⁸⁷ SINGER, *supra* note 240, at 154.

strikes, prohibited for most federal workers; and an emphasis on profits above all else.²⁸⁸

This prediction has proven prescient, as a lack of control has created situations that range from offensive to expensive, from dangerous to deadly. The primary contractor in the Army's LOGCAP contract in the Balkans faced allegations of discrimination, sexual harassment and maltreatment. Among other complaints, the company was accused of "posting security guards to keep foreign employees out of American-only restrooms."²⁸⁹ In June 2009, a strike by 800 contractor and subcontractor employees grounded flying operations at Vance Air Force Base (AFB), Oklahoma, for two weeks.²⁹⁰ The 71st Flying Training Wing, which normally generates 1,250 training sorties a week, sent twenty-seven students and their instructors to Randolph AFB and Dyess AFB in Texas to continue training.²⁹¹ Additionally, base leaders brought in augmentees from three other bases to provide fire-fighting services.²⁹² Maintenance operations in overseas combat zones were equally at risk, according to one expert in outsourcing who cited allegations that contractor DynCorp used "waitresses, security guards, cooks and cashiers" with no mechanical or aviation experience to maintain U.S. aircraft.²⁹³

Perhaps the most egregious case is the alleged "unprovoked and illegal attack" by Blackwater Worldwide security guards that killed at least fourteen and wounded twenty.²⁹⁴ Federal prosecutors brought a 35-count indictment that included manslaughter charges. Those charges were possible only because Congress had changed the law to give federal authorities jurisdiction for contractor criminal misconduct committed outside the United States.²⁹⁵ In late December 2009, a

²⁸⁸ GRASSO, *supra* note 106, at 26-27 (discussing the Navy's efforts to privatize weapons handling); see also Janet Wilson, *Navy to Seek Private Bids for Weapons Handling*, L.A. TIMES, Mar. 13, 1999, at A14; SINGER, *supra* note 240, at 151-68 (discussing the "contractual dilemmas" that arise in outsourcing battlefield work).

²⁸⁹ *Id.* at 140.

²⁹⁰ *Contract Employees Strike at Vance*, A.F. NEWS SERV., Jun. 8, 2009, available at <http://www.af.mil/news/story.asp?id=123153117>; *Labor Dispute Ends at Vance*, A.F. NEWS SERV., Jun. 23, 2009, available at <http://www.af.mil/news/story.asp?id=123155577>.

²⁹¹ *Labor Dispute Ends at Vance*, *supra* note 290.

²⁹² *Contract Employees Strike at Vance*, *supra* note 290.

²⁹³ SINGER, *supra* note 240, at 156. Singer quotes a DynCorp mechanic: "The management here is looking at the bottom line, and they surely do not seem to care what kind of person works on the helicopters. I guess that makes good business sense, but to me not at the cost of our servicemen and women." *Id.* DynCorp settled a related lawsuit but denied any wrongdoing. *Id.* at 281, n.28.

²⁹⁴ Del Quentin Wilber, *Contractors Charged in '07 Iraq Deaths*, WASH. POST, Dec. 9, 2008, at A02.

²⁹⁵ *Id.*; see also Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 212, Pub. L. No. 106-523, 114 Stat 2488 (2000) (addressing contractor accountability and ability to prosecute); FM 206-22, *supra* note 268, at 3-28.

federal judge dismissed the manslaughter and weapons charges based on prosecutor's use of statements given under promises of immunity.²⁹⁶

"When we contract, we give up an element of control and flexibility."²⁹⁷ These government tradeoffs include not just cost oversight, but management practices, accountability and organic expertise.²⁹⁸ Recognizing "the need to promote [insourcing] and gain tighter control over the contractor workforce," the Army instituted new policies that insourced 585 positions at an average savings of \$48,000 per year per position.²⁹⁹

Similarly, the OMB states that the current pilot programs examining outsourcing will "give each agency the opportunity to reshape its workforce and strike the right balance between staffing positions with permanent federal employees—to build and sustain its in-house capabilities—and, where appropriate, utilizing the expertise and capacities of contractors available in the marketplace."³⁰⁰ OMB points with pride to a DOD use of "in-house" expertise to improve the Javelin, a contractor-produced, shoulder-fired missile. After early versions suffered cracks in the launch tubes, a team of Defense engineers designed a protective coating that will save an estimated \$10 million over the five-year contract.³⁰¹

E. Politics and Policy

One final point deserves discussion regarding the pendulum swing between insourcing and outsourcing—the impact of political forces and policy decisions. The background section of this article analyzed some of the historical political underpinnings of pushes to outsource.³⁰² However, the move to insource also certainly has a strong tie to political pressure.

When Congress passes laws, it is supposed to be acting on behalf of the entire population. However, individuals and groups, including labor unions, successfully lobby Congress in many cases. The unions testify before Congress on a number of labor issues.³⁰³ With

²⁹⁶ Timothy Williams, *Iraqis Angered as Blackwater Charges Are Dropped*, N.Y. TIMES, Jan. 1, 2010, at A4; see also Del Quentin Wilber, *Missteps, Errors and Miscommunication Doomed Blackwater Case*, WASH. POST, Feb. 11, 2010, at 4.

²⁹⁷ AFMC GUIDE, *supra* note 273, at 9.

²⁹⁸ 2008 Army Posture Statement, Information Paper on Army In-sourcing, http://www.army.mil/aps/08/information_papers/sustain/Army_Insourcing.html (last visited Jan. 13, 2009).

²⁹⁹ *Id.*

³⁰⁰ OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 9.

³⁰¹ *Id.* at 5

³⁰² See *supra* Section II.A.

³⁰³ See, e.g., *Competitive Sourcing: Hearing Before The H. Comm. on Government Reform*, 2003 WL 21481705 (F.D.C.H.) (June 26, 2003) (statement by Bobby L.

regard to the outsourcing debate the union particularly pushed hard, with the obvious motivation of preserving their constituent's jobs. An example of how the unions attempted to drive the insourcing debate can be seen in the American Federation of Government Employees's (AFGE) Defense Conference (DEFCON) which is held in conjunction with the union's Legislative Conference.³⁰⁴ AFGE's DEFCON "allows for the voluntary participation of [DOD local unions] in serving as an activist group committed to using their collective strength in representing federal employees."³⁰⁵ Activists in the AFGE's DEFCON held demonstrations at different DOD procurement hubs to protest what it referred to as the "controversial outsourcing of defense functions [and] waste of taxpayer money."³⁰⁶ In a 2009 press release AFGE also touted its support from members of Congress for legislatively reversing the privatization trend.³⁰⁷

In 2008 the AFGE union criticized the Bush administration for cuts to the federal workforce, labeling it the "primary threat to the DOD workforce." The union also accused the administration of "feverishly attempting to privatize the jobs of hundreds of thousands of DOD employees."³⁰⁸ At the union's 2008 conference it claimed victory in that the FY06 Defense Authorization Bill forbade "the Defense Department from giving work performed by civilian employees to contractors through direct conversions."³⁰⁹

Harnage, Sr., National President, American Federation of Government Employees (AFGE), AFL-CIO, regarding the "new" 2003 OMB Circular A-76 and discussing that the agency is getting around Congressional limits on privatization, there are no real savings only estimated savings, AFGE seeks legislation to extend federal employees the same appeal rights that contractors have to the GAO, OMB forced conferees to drop provisions in Defense Authorization Bills, and AFGE is working to make sure contractors do not gain a "competitive advantage from providing inferior benefits or no benefits at all"; *Improving Federal Employee Performance: Hearing Before the Subcomm. on Oversight of Government Management, The Federal Workforce, And The District Of Columbia, of the S. Comm. on Homeland Security and Governmental Affairs*, 2008 WL 2817177 (July 22, 2008) (statement of John Gage, National President, AFGE supporting House Resolution 5550); *Recruiting and Retaining Federal Employees Through Better Benefits: Hearing Before the Subcomm. on Federal Workforce, Postal Service and The District Of Columbia, of the H. Comm. on Oversight and Government Reform*, 2008 WL 1891774 (Apr. 29, 2008) (statement of John Gage).

³⁰⁴ American Federation of Government Employees, AFGE's Defense Conference 2009, <http://www.afge.org/Index.cfm?page=DEFCON> (last visited Mar. 1, 2010).

³⁰⁵ *Id.*

³⁰⁶ American Federation of Government Employees, Press Release, *Civilian Defense Employees' Union Launches Campaign to Clean up Contract Mess*, May 26, 2009, available at <http://www.afge.org/Index.cfm?Page=PressReleases&PressReleaseID=996>.

³⁰⁷ *Id.*

³⁰⁸ American Federation of Government Employees, *2008 Conference Issue Papers, Department of Defense: Keeping Our Nation Safe and Secure* (Feb. 5, 2008), <http://www.afge.org/index.cfm?page=2008ConferenceIssuePapers&Fuse=Content&ContentID=1417> (last visited Nov. 16, 2009).

³⁰⁹ *Id.*

A political consideration on the opposite side of the debate is the capability of driving social policy through contracting. Small businesses have been provided preferences for government contracts.³¹⁰ In particular, the government acquisition structure aims to send a significant amount of federal contracting dollars to small businesses owned by historically disadvantaged segments of society.³¹¹ The government is willing to pay a slightly higher cost for such policy reasons.³¹² Reducing the amount of contracting dollars spent on outsourcing efforts will subsequently reduce the amount of federal dollars that can be steered toward minority-owned businesses. Ultimately, one must keep in mind that cost comparisons alone do not dictate the outcome of this debate. Outside influences with agendas to press can also impact the governmental decision of outsourcing versus insourcing.

V. CONCLUSION

*"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."*³¹³

Context means everything when determining whether the government should provide goods or services in-house or purchase them from an outside source.³¹⁴ Depending on the context, outsourcing may or may not benefit the DOD.³¹⁵ However, outsourcing and its implementation often did not ultimately produce the touted cost savings, and the reasons why are many, varied and frequently ill-defined.³¹⁶ Still, the outsourcing efforts of the past few decades do offer a few clear-cut lessons.

First, the DOD has failed to adapt outsourcing to the current military environment and operational tempo, where the military no longer responds just to short-lived, intermittent contingency operations.

³¹⁰ See GEN. SERVS. ADMIN. ET. AL., FEDERAL ACQUISITION REG. pt. 19 (Small Business Programs) (July 2009) [hereinafter FAR]. Specifically, see 15 U.S.C. §§ 631-650; FAR 19.201.

³¹¹ See, e.g., FAR 19.8 (procedures for the 8(a) program which permits sole-sourcing to small "disadvantaged" businesses).

³¹² See AM. B. ASS'N, *supra* note 36, at 123-26.

³¹³ LEWIS CARROLL, THROUGH THE LOOKING GLASS: AND WHAT ALICE FOUND THERE 123 (1897).

³¹⁴ Weidemaier, *supra* note 5, at 655-56.

³¹⁵ *Hearings on Readiness*, *supra* note 89, at 1, 16; see also FY02 PRESIDENT'S MANAGEMENT AGENDA, *supra* note 112, at 3.

³¹⁶ ROSTKER, *supra* note 35, at 6; see *Hearings on Readiness*, *supra* note 89, at 8; see also L. NYE STEVENS, OMB CIRCULAR A-76: DOD'S REPORTED SAVINGS FIGURES ARE INCOMPLETE AND INACCURATE 2-6 (Mar. 15, 1990) (report GAO/GGD-90-58 to the Chairman, Subcomm. on Federal Services, Post Office, and Civil Service, S. Com. on Governmental Affairs).

Secondly, the outsourcing explosion coincided with long-term reductions to the acquisition workforce³¹⁷—which ultimately led to outsourcing under the wrong conditions or for the wrong work, poor government oversight of contractors, and a loss of control over governmental functions necessary to conduct military contingency operations.³¹⁸ Thus, the pendulum has—and will continue for the foreseeable future—to swing back to favoring in-house performance.

However, no matter what arc the pendulum follows, it will never come to rest entirely at one extreme or the other. The reality is that in some cases turning commercial activities over to the public sector can be beneficial. “Agencies use both federal employees and private-sector contractors to deliver important services to citizens.”³¹⁹ As DOD and other federal agencies do so, their leaders “must recognize the proper role of each sector’s labor force and draw on their respective skills so the government operates at its best.”³²⁰ In today’s fluid environment, the decision to outsource must consider a number of factors rather than cost alone. Although insourcing has its own difficulties, using government employees, whether military or civilian, involves fairly well understood and expected costs, as well as the resources and control necessary to accomplish the mission. Insourcing, under the current military operational tempo, will provide cost savings and the retention of experience to control functions necessary to carry out contingency operations. Determining the best mix of resources in the “total force” workforce will not be easy, but it will ensure the DOD can utilize the power of the pendulum’s swing, rather than just trying to hold on.

³¹⁷ CARAFANO, *supra* note 21, at 48-50; *see* National Defense Authorization Act for Fiscal Year 2008, 10 U.S.C. § 101(a)(13); *see also* Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 212, Pub. L. No. 106-523, 114 Stat 2488 (2000); FM 206-22, *supra* note 268, at 3-28.

³¹⁸ *Hearings on Readiness*, *supra* note 89, at 5; ROSTKER, *supra* note 35, at 7 (citing S. Appropriations Comm., Department of Homeland Security Appropriations Bill, 2009, 14 (2008)).

³¹⁹ OMB, CONTRACTING IMPROVEMENT PILOTS, *supra* note 2, at 8.

³²⁰ *Id.*

YET ANOTHER INDUSTRY ON THE TAXPAYER-SUBSIDIZED
DOLE: WHY SECTION 8093 OF THE CONTINUING
AUTHORIZATION ACT OF 1988 (40 U.S.C. § 591) SHOULD BE
REPEALED

MAJOR FRANK D. HOLLIFIELD

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*The current economic strategy is right out of “Atlas Shrugged”: The more incompetent you are in business, the more handouts the politicians will bestow on you With each successive bailout, to “calm the markets,” another trillion of national wealth is subsequently lost. Yet, as “Atlas” grimly foretold, we now treat the incompetent who wreck their companies as victims, while those resourceful business owners who manage to make a profit are portrayed as recipients of illegitimate “windfalls.”*¹

I. INTRODUCTION

Stephen Moore, in his Wall Street Journal article “‘Atlas Shrugged’: From Fiction to Fact in 52 Years,”² notes a set of circumstances eerily similar to both the roots of the current national economic crisis and the sentiment behind opposing the repeal of Section 8093 of the Continuing Authorization Act of 1988 (Section 8093).³ In

¹ Stephen Moore, ‘Atlas Shrugged’: From Fiction to Fact in 52 Years, WALL ST. J., Jan. 9, 2009, at W11.

² *Id.*

³ The provisions of Section 8093 were originally passed as a part of the Continuing Authorization Act of 1988. See Pub. L. No. 100-202, 101 Stat. 1329–79. These provisions were later codified at 40 U.S.C. § 490, as a note under the statute, in the 104th Congress. See Pub. L. No. 104-208, 110 Stat. 3009 (1996). However, practitioners continue to refer to the provisions as Section 8093. See, e.g., *infra* notes 65 and 120 and accompanying text; see also GENERAL SERVS. ADMIN., ET AL. FEDERAL ACQUISITION REG. pt. 41.201(d)(1) (Jan. 2009) [hereinafter FAR]. The final version of these provisions were codified at 40 U.S.C. § 591. See Pub. L. No. 107-217, 116 Stat. 1062 (2002). The provisions of 40 U.S.C. § 591, which substantially mirror the provisions of previous legislation, are as follows:

§ 591. Purchase of Electricity

- (a) General limitation on use of amounts. A department, agency, or instrumentality of the Federal Government may not use amounts appropriated or made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including—
 - (1) state utility commission rulings; and
 - (2) electric utility franchises or service territories established under state statute, state regulation, or state-approved territorial agreements.
- (b) Exceptions.
 - (1) Energy savings. This section does not preclude the head of a federal agency from entering into a contract under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287).
 - (2) Energy savings for military installations. This section does not preclude the secretary of a military department from—
 - (A) entering into a contract under section 2394 of title 10; or purchasing electricity from

Atlas Shrugged, an enterprising business owner, with an idea to benefit the public, is “continuously badgered, cajoled, taxed, ruled and regulated—always in the public interest—into bankruptcy.”⁴ Instead of blocking the development of a revolutionary rail delivery system⁵, electric utilities have sought to block repeal of Section 8093, citing a regulatory compact⁶ and stranded costs.⁷ Under this guise of protecting the consumers’ interests, Congress actually elected to penalize all federal taxpayers by passing the provisions of Section 8093, which subjects federal agencies to state-sanctioned monopolies in electric utility purchases. Subjecting federal agencies to these state-sanctioned utility monopolies saddles the federal taxpayer with the additional

any provider if the Secretary finds that the utility having the applicable state-approved franchise (or other service authorization) is unwilling or unable to meet the unusual standards of service reliability that are necessary for the purposes of national defense.

40 U.S.C. § 591 (2006).

⁴ AYN RAND, *ATLAS SHRUGGED* (Penguin Group 1999) (1957). Significant among the pieces of legislation in the novel is the “Anti Dog-Eat-Dog Act,” which curbed “destructive” competition in favor of “large, established railroad systems . . . essential to the public welfare.” *Id.*

⁵ *Id.*

⁶ Adam Thierer, *Electricity Deregulation: Separating Fact From Fiction in the Debate Over Stranded Cost Recovery*, HERITAGE FOUNDATION (1997). As to “regulatory compact,” Thierer’s report notes:

The notion of a regulatory compact . . . was largely invented by utilities to justify a regulatory system that is biased against the interests of consumers and in favor of utilities. “Because regulatory commission across the United States gradually came to an unstated conclusion that it was more important to protect the health of companies they regulated than the interests of customers, an entitlement mentality was born and nurtured among utilities.” . . . [This] entitlement mentality led to a rate-of-return mindset . . . which in turn “leads utilities to the unsupportable conclusion that they own their current customers; that these customers have always been their clientele; that they have served them throughout their corporate life; and, therefore, that these customers are obliged to pay for their losses in the future.”

Id.

⁷ Leigh H. Martin, *Deregulatory Takings: Stranded Investments and the Regulatory Compact in a Deregulated Electric Utility Industry*, 31 GA. L. REV. 1183 (1997). “Stranded costs” occur under circumstances where the market (including demand represented by customers) fails to compensate utilities, via the price for power, which allows the utility a “fair rate of return.” *Id.* at 1183. “Rate of return” is the gain or loss of an investment over a specified period of time, expressed as a percentage of increase over initial investment cost. *Id.*; see also discussion *infra* Section IV.A.1.

expense caused by the inability of federal agencies to shop around for the best deal in electric utility services. The provisions of Section 8093 remain on the books despite serious questions about the justification presented to Congress at the time of passage. The law is also out of step with federal energy and procurement policy as it existed at the time of passage and as it exists now. Congress should repeal the provisions of Section 8093 because they run counter to federal energy and acquisition policies, because the premise that its repeal would unfairly and necessarily burden other customers and investors with stranded costs is unfounded, and because good stewardship of federal taxpayers' money demands circumstances that allow for better deals in electric utility purchases.

This case for repeal of Section 8093 includes three main arguments. First, Sections II and III of this article trace the historical development of energy market regulation to demonstrate that, while proponents of Section 8093 claimed that the passage of Section 8093 was consistent with federal energy policy, this was not and is not the unvarnished truth. Instead, the continued existence of Section 8093 on the books represents a significant inconsistency in federal energy and procurement policy. Second, Section IV of this article examines the proponents' principal argument—that the threat of stranded costs posed by deregulation in general and the participation of federal agencies in a competitive market in particular—and demonstrates stranded costs are not as automatic, significant, or unusual as the electric utility industry claims. Third, in light of these factors, Sections V and VI of this article argue the concept of stewardship of federal taxpayers' money, and the sheer size of the federal agencies' share of the market, call for repeal of Section 8093.

II. SECTION 8093 AND FEDERAL POLICY

A. Status Quo Ante

Before the passage of Section 8093 in December 1987, federal agencies were able to purchase electric utility power, unfettered by state law.⁸ During this status quo ante, the Supremacy Clause of the Constitution prevented states from forcing federal agencies to contract with a specific utility.⁹ States lack jurisdiction over exclusive federal

⁸ See Pub. L. No. 100-202, 101 Stat. 1329-79.

⁹ *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir. 1987). “Congress has the power ‘to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.’” *Id.* at 668 (citing U.S. CONST. art I, § 8, cl. 17). “The grant of ‘exclusive’ legislative power

enclaves under most circumstances.¹⁰ The outer boundaries of the interplay between state and federal legislative jurisdiction are simply that states have some power to legislate over property that is not a federal enclave—such as lands subject to concurrent or proprietary jurisdiction. However, absent some specific congressional approval, the state has no power over enclaves.¹¹ In addition to this general premise of federal sovereignty, the Public Utility Regulatory Policies Act of 1978 (PURPA) passed as an amendment to the Federal Power Act of

to Congress over federal enclaves, by its own weight, bars state regulation without *specific congressional approval.*” *Id.* at 668 (emphasis added).

¹⁰ *Id.*

¹¹ *Id.* The *Black Hills* court noted an important distinction between jurisdiction over state-owned land and that over a Federal enclave, as articulated by the U.S. Supreme Court in *Penn Dairies, Inc. v. Milk Control Comm’n of Pa.*, 318 U.S. 261 (1943). The *Penn Dairies* decision was predicated on a situation where an Army post was established on Pennsylvania state lands (not a Federal enclave). In this instance, the Court noted:

We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state’s borders Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy.

Id. at 270-1 (citation omitted); *see also* U.S. DEP’T OF AIR FORCE, INSTR. 32-9001, ACQUISITION OF REAL PROPERTY attach. 2 (27 July 1994) (descriptions of jurisdictional types). The *Black Hills* court noted another aspect of the limits of exclusive federal jurisdiction over federal property. The court cited to the *Pacific Coast Dairy, Inc. v. CA Dept. of Agric.*, 318 U.S. 285 (1943), where the Court stated:

When the federal government acquired the tract, local law not inconsistent with federal policy remained in force until altered by national legislation. The state statute involved was adopted long after the transfer of sovereignty and was without force on the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by California law. To hold otherwise would affirm that California may ignore the Constitutional provision that “This Constitution, and the laws of the United States which shall be made in pursuance thereof; shall be the supreme Law of the Land.”

Id. at 294 (footnotes omitted).

1935)¹² and the Competition in Contracting Act of 1984 (passed prior to 1988)¹³ are based on notions very different from the basis of Section 8093.

The Federal Power Act of 1935 (especially as amended by PURPA) does not support any assertion that federal agencies were before 1987 somehow subject to utility monopolies under state law,¹⁴ especially where the utility industry felt it necessary to have a provision passed to make the federal government subject to state rule in these cases.¹⁵ Further, the Federal Power Act, as amended by PURPA, reveals that the federal government was not subject to state laws before the passage of Section 8093 in 1988.¹⁶ Significantly, the provisions of PURPA actually required utilities to purchase power from outside sources at a lower (or avoided) cost than they would have otherwise incurred by producing the power themselves.¹⁷ PURPA stands for the notion that electric utility generation will be improved by more-efficiently-produced electricity, with equitable rates for electric

¹² Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1984).

¹³ Competition in Contracting Act of 1984, Pub. L. No 98-369, Title VII, § 2701, 98 Stat. 1175 (1984) (codified in part as amended at 10 U.S.C. § 2304 (2006)).

¹⁴ See *generally* Federal Power Act of 1935, Pub.L. No. 74-838, 49 Stat. 863; *supra* note 11 and accompanying text.

¹⁵ 133 CONG. REC. H. 6320 (July 15, 1987). Specifically, Section 8093 was justified as a means of preventing the federal agencies from “disregard[ing]” the “long-established regulatory system,” where the states regulate retail sale and distribution of electricity” within the states. *Id.* The need to pass a provision to prevent federal agencies from buying utility service outside of state regulation does not agree with the assertion that federal law somehow prevented them from doing so in the first place.

¹⁶ See *generally* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617.

¹⁷ AMY ABEL, SPECIALIST IN ENERGY POLICY RES., SCI., & INDUS. DIV., CONG. RES. SERV., ELECTRIC UTILITY REGULATORY REFORM: ISSUES FOR THE 109TH CONGRESS (2005), *available at* <http://ncesonline.org/NLE/CRS/abstract.cfm?NLEid=1416>. The historical background provided in FERC Order No. 888 provides a good overview of PURPA and its impact on the electric utility industry.

In enacting PURPA, Congress recognized that the rising costs and decreasing efficiencies of utility-owned generating facilities were increasing rates and harming the economy as a whole. To lessen the dependence on expensive foreign oil, avoid repetition of the 1977 natural gas shortage, and control consumer costs, Congress sought to encourage electric utilities to conserve oil and natural gas. In particular, Congress sanctioned the development of alternative generation sources designated as “qualifying facilities” (QFs) as a means of reducing the demand for traditional fossil fuels. PURPA required utilities to purchase power from QFs at a price not to exceed the utility’s avoided costs and to sell backup power to QFs.

Fed. Energy Regulatory Comm’n (FERC) Order No. 888, 21-22 (Apr. 24, 1996).

consumers.¹⁸ To that end, PURPA provided for small power production facilities and qualifying small power production facilities, which would augment or serve as adjuncts to traditional public utilities.¹⁹ PURPA provides for interconnection and wheeling (movement of power between power grids), which facilitate interconnection and movement of power between individual grids, service territories, and even across state lines.²⁰ The final arbiter of these processes is the Federal Energy Regulatory Commission (FERC), not state utility or public service commissions.²¹ These provisions of PURPA actually cut against state-sanctioned utility monopolies, because they provide for the sale and importation of power from other states and locations, effectively providing an entry for competitors into the market.

The fact that the Federal Power Act of 1935 did not subject federal agencies or instrumentalities to the rule of state law,²² and PURPA actually facilitated and encouraged practices that would transcend state franchise boundaries and territories, evidences that federal policy contradicts the congressional rationale for Section 8093. Section 8093 subjects the federal government to the constraints posed by purchase of electric utility service subject to state-regulated monopolies.²³ At the time of implementation, other federal laws contradicted the policy of Section 8093 as well.

The authority to purchase utility services, as delegated from the General Services Administration, is subject to the provisions of the Competition in Contracting Act of 1984.²⁴ The Competition in Contracting Act, as reflected by the provisions of 10 U.S.C. § 2304, provide for a rule in favor of full and open competition, with limited exceptions.²⁵ Purchase of utility services, as subject to state law under the provisions of Section 8093, is not one of the enumerated exceptions to full and open competition under the provisions of 10 U.S.C. § 2304.²⁶ Section 8093 falls under the catch-all exception to the broad full and open competition policy behind the Competition in Contracting Act (CICA), and it has not been properly squared with the over-arching policy for full and open competition in federal procurement. This catch-all simply provides for an exception to CICA where “another statute expressly authorizes or requires that the procurement be made through

¹⁸ *Id.*

¹⁹ Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3134-35 (1984).

²⁰ *Id.* at 3135-38.

²¹ *Id.* at 3119, 3135-38.

²² See sources cited *supra* note 14.

²³ See *supra* notes 16-22 and accompanying text.

²⁴ FAR, *supra* note 3, pt. 41.103(a).

³³ See 10 U.S.C. § 2304 (2006).

²⁶ *Id.*

another agency or from a specified source.”²⁷ The provisions of Section 8093, later 40 U.S.C. § 591, provide this statutory exemption or authorization, as distilled into the provisions of FAR 41.201(d)(1).

Given the provisions of PURPA and the Competition in Contracting Act of 1984, it is difficult to see how the provisions of Section 8093 have ever been regarded as consistent with the status quo ante, much less passed into law on that basis. The rest of the discussion in this section outlines both the circumstances behind Section 8093’s passage and its growing inconsistency with federal law and energy policies.

B. The Black Hills Case

The *Black Hills Power & Light Co. v. Weinberger* case is the seminal event in the passage of Section 8093 and its subsequent codification into the provisions of 40 U.S.C. § 591.²⁸ The *Black Hills* case challenged the U.S. Air Force’s attempt to competitively purchase electric utility services after the change in an established arrangement with two electric utilities in the area.²⁹ The Air Force, at Ellsworth Air Force Base, South Dakota, attempted to avoid returning to the service arrangement with Black Hills Power and Light Co., by contracting with a local competitor at a better price and under better terms.³⁰ The stepping-off point for the District Court of South Dakota, Western Division, was the Supremacy Clause of the Constitution of the United States.³¹ Accordingly, the court found for the Air Force and Department of Defense, noting that the Air Force could make utility service purchase not subject to state law, and Black Hills Power and Light appealed to the Eighth Circuit.³² The Eighth Circuit, affirming the District Court’s decision, noted that the Supremacy Clause prevented the State of South Dakota from forcing the U.S. Air Force to contract with a specified electric utility; in addition, the court found that the State of South Dakota lacked jurisdiction over an exclusive federal enclave.³³ This decision spurred the electric utility industry into action.³⁴

²⁷ See 10 U.S.C. §2304(c)(5) (2006).

²⁸ See *Black Hills Power & Light Co. v. Weinberger*, 808 F.2d 665 (8th Cir. 1987).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Black Hills Power & Light Co. v. Weinberger*, 1985 U.S. Dist. LEXIS 14879, at *6-7 (D.S.D. Oct. 16, 1985); see also U.S. CONST. art. VI, ¶ 2 (“The Supremacy Clause”).

³² *Id.*; see also *Black Hills*, 808 F.2d 665.

³³ *Id.* at 668.

³⁴ *Can the Pentagon Wheel and Deal With the Best?*, ENERGY ECON., Nov. 1, 1996.

C. The Passage of Section 8093 of the Continuing Authorization Act of 1988

The utilities claimed to Congress that the provisions of Section 8093 were consistent with long standing federal policy.³⁵ However, the remarks as read on the floor of the House also point out a subtle difference between the state of the law before the passage of Section 8093 and the argument made that Section 8093 was consistent with previous laws.³⁶ The remarks on the House floor in support of Section 8093 note that states regulate retail sale and distribution of electricity within their borders.³⁷ This observation of state regulatory power does not rise to the level of a claim that the federal government, prior to the passage of Section 8093, *waived* federal sovereignty in favor of state regulation of federal agency choice in electric utility service.³⁸ This gulf in logic between the consistency of law and policy justification for Section 8093 and the circumstances of federal supremacy, raises the question of how Section 8093 ever came to be.

The *Energy Economist*, in a 1 November 1996 article entitled “Can the Pentagon Wheel and Deal With the Best?” describes the manner in which Section 8093 was “quietly slipped” into the Continuing Authorization Act of 1988.³⁹ The provision was sponsored almost

³⁵ See 133 CONG. REC. H. 6320 (July 15, 1987). The record states:

I consider it unwise and inappropriate for Federal agencies to administratively alter the long-established Federal-State relationship in this area of energy policy. Since 1935, the authority to regulate the retail sale and distribution of electricity has been expressly reserved to the States. For decades, state autonomy in this area has been steadfastly preserved by Federal statute. Without [Section 8093], we will take the first step towards dismantling this long-established regulatory system. We will then permit the Federal Government—the nation’s largest single electricity consumer—to disregard the rules which govern all other participants in the heavily-regulated market for retail electric service.

Id.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *supra* notes 8-13 and accompanying text.

³⁹ *Can the Pentagon Wheel and Deal With the Best?*, *supra* note 34. The process of including Section 8093 in the Continuing Authorization Act of 1988 is described as follows:

The soft-spoken but effective [Mel] Hall-Crawford did what a good lobbyist should do. Skillfully by-passing the Energy Committee and assisted by Senator J. Bennett Johnston (D-Louisiana), via some jiggery-pokery in the Rules Committee, where her husband George was a staffer, she quietly slipped into the 1988 Defense Authorization Act, Section 8093, an amendment that forbade the

exclusively by the special utility interests.⁴⁰ The justification for the provisions that would become Section 8093 even more starkly indicates the pro-utility bent behind the proposal and passage of the provisions in question.⁴¹ It characterizes the process of subjecting federal agencies to state laws governing utility franchise as fair-minded, because it does not allow the federal government “to ignore state established utility service territories.”⁴²

Further, the statements in support of Section 8093 assert that the proposed law only “requires the Federal Government to *abide by restrictions in the Federal Power Act . . .* when it buys electricity.”⁴³ But the Federal Power Act of 1935 does not subject federal agencies to state law before the passage of Section 8093.⁴⁴ The references made to the relationship between state governments and *any* federal agency, instrumentality, etc., are limited to the separation between the power of the states over *intrastate* utility matters and the power of the federal government to regulate matters that affect *interstate commerce*.⁴⁵ This is different from dealing with how to treat federal agencies as electric utility customers. Further, the comments read on the floor of Congress on 15 July 1987 point out the key utility interest argument for Section 8093: the prevention of stranded costs that would *automatically* pass on to rank and file consumers.⁴⁶ This is contrary to the basic principle of utility ratemaking that rate increases are subject to an adversarial administrative process,⁴⁷ and the basic notion that, in utility rate-

military from competitively bidding for electricity, even though the military nowadays puts out to competitive bidding every other supply, from paper clips to natural gas to jet fighters. Section 8093 mandated that the military buy its electricity from the state-franchised IOU.

Id.

⁴⁰ *Id.*

⁴¹ See 133 CONG. REC. H. 6320 (July 15, 1987).

⁴² *Id.*

⁴³ *Id.* (emphasis added).

⁴⁴ See discussion *supra* Section II.A.

⁴⁵ See generally Federal Power Act of 1935, Pub. L. No. 74-838 (1935) (codified at 16 U.S.C. §§ 791a-828c (2006)).

⁴⁶ 133 CONG. REC. H.6320. The statement relays, in pertinent part: “If we allow this to happen—if nonutilities are allowed to bid for the Federal Government’s electricity needs—then utility rates will inevitably rise for consumers who reside in areas where there is a military base or other large Federal establishment.” *Id.*

⁴⁷ *Id.* The assertion that any stranded costs will automatically be shouldered by customers, other than Federal customers in their absence, is disingenuous, given that the following is also a part of the same statement. “Under the present system, the Federal Government is not being charged too much for its electricity. Utilities are highly regulated industries and state public utility commissions are effective in preventing all utility customers—including the Federal Government—from being charged excessive utility rates.” *Id.*

making, the cost causer is the cost payer.⁴⁸ Simply put, other consumers do not automatically shoulder stranded costs.⁴⁹ The process of dealing with stranded costs is subject to an adversarial administrative process, part and parcel of which is the determination as to whether the payer of the costs is the causer of the costs.⁵⁰

The statement, as read into the Congressional Record, does not take into account the then current legal and policy realities, where it asserts that the federal government's attempts in the 1980s to purchase utility services on a competitive basis is a first, dangerous step towards "dismantling [the] long-established regulatory system" and "administratively alter the long-established Federal-state relationship in this area of energy policy."⁵¹ While compelling, the statement is not true as of this date, and it was not true at the time it was read onto the record. The statement ignored the previous *major* steps in altering the relationship between the federal government and state governments under the provisions of PURPA, passed into federal law in 1978.⁵²

The cumulative, practical effect of Section 8093's requirement that federal agencies "purchase electricity in a manner consistent with

⁴⁸ See *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir, 1992). The D.C. Circuit noted:

Section 4 of the [Natural Gas Act] is the touchstone in any legal analysis of FERC-approved rate schemes. Its Spartan language requires only that rates be "just and reasonable." Significantly, however, FERC and the courts have added flesh to these bare statutory bones, establishing what has become known in Commission parlance as the "cost-causation" principle. Simply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.

Id. at 1300-01. The D.C. Circuit previously stated:

While neither statutes nor decisions of this court require that the Commission utilize a particular formula or a combination of formulae to determine whether rates are just and reasonable, it has come to be well established that . . . rates should be based on the costs of providing service to the utility's customers plus a just and fair return on equity. FERC itself has stated that "it has been this Commission's long standing policy that rates must be cost supported. Properly designed rates should produce revenues from each class of customers *which match, as closely as practicable, the costs to serve each class or individual customer.*"

Alabama Electric Coop., Inc. v. FERC, 684 F.2d 20, 27 (D.C. Cir. 1982) (emphasis in original) (citation and footnote omitted).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ 133 CONG. REC. H. 6320 (July 15, 1987).

⁵² See *supra* notes 16-21 and accompanying text.

state law” is that Department of Defense installations in non-deregulated states, must purchase electric utility services from state-sanctioned monopolies.⁵³ Only in instances when states are deregulated may federal agencies or installations exercise choice in electric utility purchase.⁵⁴ Deregulation for the purposes of this article occurs where states stop issuing franchises or allocating specific territories to specific utilities to operate as regulated monopolies under state law.⁵⁵ This process of deregulation is, at best, piecemeal, and states can return to regulated monopolies.⁵⁶ The effect of Section 8093 on the purchase of electric utility service has become so ingrained in the practice of electric utility acquisition by federal agencies and instrumentalities that it is described as a bar from buying electric utility services competitively⁵⁷ and represents a prevalent justification for why the Department of Defense essentially buys electric utility services on a sole source basis.⁵⁸

Congress later codified its provisions at 40 U.S.C. § 591.⁵⁹ Despite this, as noted in the next section, federal energy policy and the laws putting that policy into effect have diverged farther and farther from the premises behind Section 8093. Therefore, the whole notion that Section 8093 comports with established federal policy and is a legitimate limitation on federal procurement is suspect.

⁵³ Major Jeffrey A. Renshaw, *Utility Privatization in the Military Services: Issues, Problems, and Potential Solutions*, 53 A.F. L. REV. 55, 61 (2002).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ FED. FACILITIES COUNCIL, *COMPETITION IN THE ELECTRIC INDUSTRY: EMERGING ISSUES, OPPORTUNITIES, AND RISKS FOR FACILITY OPERATORS 1* (Nat'l Acad. Press 1996), available at <http://www.nap.edu/openbook/0309056810/html/1.html>.

The federal government is the largest consumer of electricity in the United States, spending several billion dollars per year to power its military installations, office buildings, and other facilities. Potentially, the federal government could save millions of dollars per year through competitive procurement of electricity. However, federal agencies, which are classified as retail, not wholesale, consumers of electricity, are currently barred from buying electricity competitively by section 8093 of the 1988 Defense Appropriations Act.

Id.

⁵⁸ Robert Kittel, *Acquisition of Utilities Services: Some Legal Considerations*, in FED. FACILITIES COUNCIL, *supra* note 57. “If asked why they buy electric power on a sole source basis, most people who buy power for the Department of Defense (DoD) would say that the reason is section 8093 of the 1988 Department of Defense Appropriations Act.” *Id.*

⁵⁹ See 40 U.S.C. § 591 (2006).

D. Federal Legislation and Rulemaking After Section 8093's Passage

In line with the policy established by PURPA, both Congress and the Federal Energy Regulatory Commission have passed a body of statutes, rules, and regulations that created an environment for a more competitive retail electric utility market and an environment that substantially undercuts any preference for state-sanctioned regulated monopolies. Congress first set the scene with the Energy Policy Act of 1992, with which it removed regulatory barriers to allow for wholesale generators to participate in an interstate wholesale market.⁶⁰ The provisions of the Energy Policy Act of 1992 were reflected in the rules promulgated by the Federal Energy Regulatory Commission in FERC Orders 888 and 889.⁶¹ These rules further refined the means of allowing wholesale generators to participate in an interstate competitive market, by removing many of the impediments to transmitting electricity between electrical grids in an interstate market.⁶² The provisions of FERC Order 2000 bolstered previous statutes and rules because it established entities and mechanisms to further ensure the ability for wholesale generators to wheel power between grids in order to give consumers a choice. The capstone to this effort is the repeal of the Public Utility Holding Company Act (PUHCA) of 1935⁶³ under the provisions of the Energy Policy Act of 2005 to make the process of producing, selling, and transmitting wholesale power a more viable business. All of these measures add up to the end-state in which competition is favored over regulated monopolies.

1. *The Energy Policy Act of 1992*⁶⁴

The provisions of PURPA are far from the last provisions passed by Congress over the past three decades. Despite this trend to open the electric utility market, the provisions of Section 8093 have remained.⁶⁵ The Energy Policy Act (EP Act) of 1992 took a significant step toward opening the market, when it removed pre-existing regulatory barriers for entities interested in electricity generation to

⁶⁰ FERC Orders No. 888, 889 (Apr. 24, 1996) (codified in various sections at 18 C.F.R., Parts 35-37).

⁶¹ *Id.*

⁶² FERC Order No. 2000 (Mar. 8, 2000) (codified in various sections at 18 C.F.R., Part 34).

⁶³ Public Utility Holding Company Act of 1935, 15 U.S.C. 79, *repealed by* The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

⁶⁴ Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified as amended in scattered section of 42 U.S.C.).

⁶⁵ *See supra* note 3 and accompanying text.

increase competition in the electric utility industry.⁶⁶ The EP Act of 1992 provides for the creation of entities called exempt wholesale generators (EWGs) that can generate and sell electricity at wholesale without being regulated as utilities under the provisions of PUHCA.⁶⁷ The EP Act of 1992 also provides the mechanism to ensure transmission of wholesale power to wholesale purchasers.⁶⁸ The Congressional Research Service (CRS) Report for Congress entitled “Electric Utility Regulatory Reform: Issues for the 109th Congress” best states the practical result of the EP Act of 1992.

EPACT allowed for a robust wholesale market in electricity. The transmission is now used extensively for bulk-power transfers between utilities, even though the physical system was designed to handle primarily intra-utility transfers. Utilities now depend on a combination of self-generation, merchant generators, and other utilities to meet their retail electricity demand.⁶⁹

This system, under which utilities receive electricity from a number of sources that are subject to FERC jurisdiction is a far cry from the regime represented to Congress during the argument for Section 8093’s passage in 1987. The status quo that the utility interests argued to support Section 8093’s passage presupposed vertically-integrated utilities.⁷⁰

⁶⁶ ABEL, *supra* note 17, at CRS-3; *see also* FERC Order No. 888, *supra* note 17 (provides a good placement of EP Act of 1992 in the path toward the current regulatory scheme).

⁶⁷ *Id.*; *see also* Energy Policy Act of 1992, § 711. The “eligible facility” referred to under this section of the EP Act of 1992 is either “(A) used for the generation of electric energy exclusively for sale at wholesale, or (B) used for the generation of electric energy and leased to one or more public utilities” Energy Policy Act of 1992, § 711.

⁶⁸ ABEL, *supra* note 17, at CRS-3; *see also* Energy Policy Act of 1992, § 722. Section 722 provides:

An order under section 211 shall require the transmitting utility subject to the order to provide wholesale transmission services Such rates, charges, terms, and conditions shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential.

Energy Policy Act of 1992, § 722.

⁶⁹ ABEL, *supra* note 17, at CRS-3.

⁷⁰ 133 CONG. REC. H. 6320 (July 15, 1987). The statement read onto the record permits inference of the presumption (at least on the part of the lawmakers) that utilities were “vertically integrated” entities. *Id.* The statement refers to non-utility sources vying for federal contracts (a creature of PURPA). *Id.* The statement also makes reference to the cost of “powerplant” and “other equipment” being spread to other customers. *Id.* Further, a subsequent statement on the matter, read during the same session stated that “[a]n electric utility is required to make its long-term decisions about powerplant

That is, the utilities owned the generation, transmission, and distribution pieces of the puzzle.⁷¹ This is a far cry from the policy direction initiated by the provisions of PURPA and the EP Act of 1992, carried through to the present day. The FERC, in furthering the goals of the EP Act of 1992, passed the provisions of FERC Orders 888 and 889.⁷²

2. FERC Orders Numbered 888 and 889

Order Number 888, issued by the FERC on 24 April 1996, contained three final interrelated rules “to remove impediments to competition in the wholesale bulk power marketplace”: rules on open access to transmission lines, rules on the recovery of stranded costs, and an accompanying rule on the Open Access Same-Time Information System (OASIS).⁷³ The desired effect articulated by FERC was increased competition and lower cost power for consumers.⁷⁴ The first

construction and capacity needs based upon the needs of all the customers in its service territory. *Id.* When a major electricity customer is permitted to leave the system, the considerable costs of that system must then be redistributed among the ratepayers who are unable to leave the system. *Id.*

⁷¹ *Id.*; see also FERC Order No. 888, *supra* note 17, at 13-14. The “Background” to FERC Order No. 888 provides an excellent overview of this contrast and transition:

The Federal Power Act was enacted in an age of mostly self-sufficient, vertically-integrated electric utilities, in which generation, transmission, and distribution facilities were owned by a single entity and sold as a part of a bundled service (delivered electric energy) to wholesale and retail customers. Most electric utilities built their own power plants and transmission systems, entered into interconnection and coordination agreements with neighboring utilities, and entered into long-term contracts to make wholesale requirements sales (bundled sales of generation and transmission) to municipal, cooperative, and other investor-owned utilities (IOUs) connected to each utility’s transmission system In the late 1960s and throughout the 1970s, a number of significant events occurred in the electric industry that changed the perceptions of utilities and began to shift to a more competitive marketplace for wholesale power.

FERC Order No. 888, *supra* note 17, at 13-14.

⁷² See generally *id.*; Fed. Energy Regulatory Comm’n (FERC) Order No. 889 (Apr. 24, 1996) (codified at 18 C.F.R. § 37 (2009)).

⁷³ FERC Order No. 888, *supra* note 17, at 1.

⁷⁴ *Id.* In its “Introduction/Summary,” FERC states:

Today the Commission issues three final, interrelated rules designed to remove impediments to competition in the wholesale bulk marketplace and to bring more efficient, lower cost power to the Nation’s electricity consumers. The legal and policy cornerstone of these rules is to remedy undue discrimination in access to the monopoly owned transmission wires that control whether and to

rule regarding open access to transmission lines under FERC Order 888 requires public utilities to file a single open access tariff for transmission of electricity.⁷⁵ This rule, under Order 888, required that all public utilities subject to the jurisdiction of the Federal Energy Regulatory Commission meet the new standards for filing and conditions of non-discriminatory transmission.⁷⁶ The second rule, in order to further the goal of transiting from a regulated monopoly regime to a more price-competitive regime, promulgated procedures to allow for recovery of stranded costs, under certain circumstances.⁷⁷ The final rule permits recovery of stranded costs outside wholesale requirements contracts (via FERC) and provides that FERC will be the primary forum for utilities to seek recovery of stranded costs associated with both wholesale-turned-retail and retail-turned-wholesale transmission customers.⁷⁸ This rule only permits recovery for retail stranded costs because the state does not have the authority to address these stranded costs at the time of transition from retail power to transmission customer.⁷⁹ Retail stranded costs are those costs that were previously incurred to provide service to a retail customer that subsequently becomes a transmission customer, with the electricity commodity coming from another source.⁸⁰ The provisions for the recovery of wholesale stranded costs are more detailed and robust, because interstate commerce is the exclusive jurisdiction of FERC.⁸¹ As noted above, these three general rules under FERC Order 888 provide for FERC Order 888's desired end-state.

The CRS Report for Congress, entitled "Electric Utility Regulatory Reform: Issues for the 109th Congress" provides a good overview of the end-state of FERC Order 888.

Under Order 888, the Open Access Rule, transmission line owners are required to offer point-to-point and network transmission services under comparable terms and conditions that they provide for themselves. The

whom electricity can be transported in interstate commerce. A second critical aspect of the rules is to address recovery of the transition costs of moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced.

Id. at 1-2.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1-2.

⁷⁸ *Id.* at 8; *see also* 18 C.F.R. § 35.26(a), (c), (d) (2009).

⁷⁹ FERC Order No. 888, *supra* note 17, at 8-9; *see also* 18 C.F.R. § 35.26(a), (d) (2009).

⁸⁰ *See* 18 C.F.R. § 35.26(b)(5) (2009).

⁸¹ 18 C.F.R. § 35.26(a), (c).

rule provides a single tariff providing minimum conditions for both network and point-to-point services and non-price terms and conditions for providing these services and ancillary services. This rule also allows for so-called stranded costs, with these costs being paid by the wholesale customers wishing to leave their current supply arrangements. The rule encourages but does not require creation of independent system operators (ISOs) to coordinate intercompany transmission of electricity.⁸²

While FERC Order 888 goes a long way towards paving the way for an open market for electric utility service, it lacked controls over a crucial part of the puzzle: information. FERC Order 889 addressed this part of the puzzle.

Under FERC Order 889, the Commission establishes the Open Access Same-Time Information System (OASIS) and prescribes standards of conduct to ensure a level playing field for all market participants through access to information.⁸³ Under FERC Order 889, the Commission provides that each public utility that owns, controls, or operates facilities used for the transmission of electric energy in interstate commerce will be required to create or participate in an OASIS.⁸⁴ This provides open access transmission customers with information about available transmission capacity, prices, and other information that will enable them to obtain open access non-discriminatory transmission service.⁸⁵ The rule under Order 889 was issued in tandem with the provisions of Order 888 in order to satisfy the requirement that open access non-discriminatory transmission service makes information about the transmission system available to all customers to further the goal of transparency.⁸⁶ As FERC Orders No. 888 and 889 provided substance furthering the goals of the EP Act of 1992, they also take federal policy further away from the notion that it somehow stands to protect utilities as regulated monopolies. Despite the best of intentions, the Commission noted that the progress realized after the passage of Orders 888 and 889 left inadequacies to be addressed with management of transmission grids and continued problems with “discrimination in the provision of transmission services

⁸² ABEL, *supra* note 17, at CRS-4.

⁸³ FERC Order No. 889, *supra* note 72, at i; *see also* ABEL, *supra* note 17, at CRS-4.

⁸⁴ FERC Order No. 889, *supra* note 72, at i.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1; *see also* ABEL, *supra* note 17, at CRS-4, 11.

by vertically integrated utilities.”⁸⁷ This led to the passage of FERC Order 2000.⁸⁸

3. FERC Order Number 2000

In order to address the previous inadequacies, the Commission proposed that the establishment of Regional Transmission Organizations (RTOs) would “(1) improve the efficiencies in transmission grid management; (2) improve grid reliability; (3) remove remaining opportunities for discriminatory transmission practices; (4) improve market performance; and (5) facilitate lighter handed regulation.”⁸⁹ The provisions of Order 2000 also provide for the consideration of “innovative transmission rate treatments for RTOs.”⁹⁰ These innovative rate treatments serve to incentivize participation in these RTOs.⁹¹ Order 2000 also requires that participation in an RTO by a utility requires a transfer of operational control over the utility’s transmission facilities to the RTO.⁹² This can, but does not necessarily, include transfer of ownership of the facilities in addition to the transfer of operational control.⁹³ When utilities do not file a proposal to participate in an RTO, they must: describe efforts made to participate in an RTO; give a detailed explanation of the economic, operational, commercial, regulatory or other reasons the utility has not filed a proposal to participate; and a specific plan, with timetables, the utility will follow in order to participate in an RTO at some future time.⁹⁴ Order 2000 addresses the potential for capture, abuse, and discrimination in RTO arrangements.⁹⁵ These provisions include: independence of the RTO as an entity, scope and regional configuration of the RTO, the operational authority of the RTO over all of the transmission facilities under its

⁸⁷ *Id.*

⁸⁸ Fed. Energy Regulatory Comm’n (FERC) Order No. 2000, 2-3 (Dec. 20, 1999) (codified at 18 C.F.R. § 35 (2009)). The Commission noted: “Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for relative service.” *Id.*

⁸⁹ *Id.* at 3.

⁹⁰ 18 C.F.R. § 35.34(e) (2009).

⁹¹ *Id.* The provisions at 18 C.F.R. § 35.34(e) include the following as “innovative rate treatments” to induce participation in RTOs: transmission rate moratoriums; rates of return that are formulaic, consider risk premiums and account for demonstrated adjustments in risk, or do not vary with capital structure; non-traditional depreciation schedules for new transmission investment; transmission rates based on “levelized” recovery of capital costs; transmission rates that combine elements of incremental cost pricing for new transmission facilities with an embedded-cost access fee for existing transmission facilities; or performance-based transmission rates. *Id.*

⁹² *Id.* at § 35.34(f).

⁹³ *Id.*

⁹⁴ *Id.* at § 35.34(c)(2), (g).

⁹⁵ *Id.* at § 35.34(j).

control, and the required functions of the RTO.⁹⁶ As with the provisions of FERC Orders 888 and 889, the passage of FERC Order 2000 works to bring the electric utility industry *even further* from the notion of protecting regulated electric utility monopolies, which are best served by the provisions of Section 8093. While the goal of increased competition through regionalization and unbundling of utility services has made tremendous strides, there is a problem with assurance of adequate transmission capacity and adequate management of the overall system to move power.⁹⁷

The current growth of generation capacity has outstripped transmission capacity and additions to that capacity.⁹⁸ According to transmission utilities, a significant factor attributed to this imbalance is the current transmission pricing mechanism, which discourages investment.⁹⁹ One means of remedying the lackluster investment in transmission infrastructure was the repeal of the provisions of the Public Utility Holding Company Act (PUHCA) of 1935, which placed significant limitations on utility holding companies' portfolios.¹⁰⁰ Such a repeal of PUHCA would "significantly expand the ability of utilities to diversify their investment options."¹⁰¹ The Energy Policy Act (EP Act) of 2005, in pertinent part, dealt with this issue.¹⁰²

4. *The Energy Policy Act of 2005*

Section 1263 of the EP Act of 2005¹⁰³ repealed PUHCA.¹⁰⁴ With the repeal of PUHCA, electric utilities are freer to further diversify assets, thereby improving economic efficiency and providing for economies of scale.¹⁰⁵ The repeal of PUHCA and the allowance for diversification of assets by electric utilities "[also] improve[d] the risk profile of electric utilities in much the same way as in other businesses."¹⁰⁶ Because "[t]he risk of any one investment is diluted by

⁹⁶ *Id.* Required RTO functions include: tariff administration and design, congestion management, parallel path flow, ancillary services, OASIS and Total Transmission Capability (TTC) and Available Transmission Capacity (ATC), market monitoring and auditing, planning and expansion, and interregional coordination. *Id.*

⁹⁷ ABEL, *supra* note 17, at CRS-8.

⁹⁸ *Id.*

⁹⁹ *Id.* at CRS-9.

¹⁰⁰ *Id.* at CRS-10.

¹⁰¹ *Id.*

¹⁰² *Id.* at CRS-11.

¹⁰³ The Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁴ *Id.* at §1263.

¹⁰⁵ ABEL, *supra* note 17, at CRS-11.

¹⁰⁶ *Id.*; see also GAO: *FERC Should be Tougher on Utility Mergers*, GAS DAILY, Mar. 11, 2008, at 1. The article notes: "Congressional repeal of the Public Utility Company Holding Act of 1935 removed limitations on companies' ability to merge with utilities

the risk associated with all investments,¹⁰⁷ diversification leads to better use of otherwise underutilized resources, due to seasonal demand.¹⁰⁸ Yet another attractive aspect of PUHCA's repeal is the alignment of utilities with other business interests that have innately higher growth potential than the traditional utilities themselves.¹⁰⁹ The results of the repeal of PUHCA have yet to bear definitive results as of this date.¹¹⁰ However, for the purposes of this paper the end state is less important than the fact that the current state of affairs represents a dramatic departure from the electric utility industry of the late-1980s. The direction of policies concerning the regulation of electric utilities

or invest in them The utilities supported the repeal, saying it would remove heavy regulatory burdens and allow more flexibility and needed investment." *Id.*

¹⁰⁷ See ABEL, *supra* note 17, at CRS-11.

¹⁰⁸ *Id.*

¹⁰⁹ *A New Wave of Consolidation in the Utility Industry*, ELECTRIC LIGHT & POWER, July 1, 2006, at 36(3). The article notes:

With PUHCA behind us and its myriad of obstacles removed, the question that many analysts have asked is, will this result in a new consolidation wave? At first blush, PUHCA's repeal appears to have opened the door to future consolidation with other parts of the energy industry, as well as private equity funds and other financial players expanding utility industry investments

One reason utilities might consider a merger is that capital markets have priced earnings growth assumptions of 5 to 10 percent into stocks. These long-term earnings growth rates are significantly greater than the utility industry's historical low single-digit organic growth rates. If interest rates begin to rise, investors will expect these higher growth rates, and companies that can deliver the growth will be rewarded. Those cannot be penalized.

For the utility looking to achieve such growth, few options exist. Investing in higher growth businesses outside of the utility's core strength is highly unlikely since it was non-core ventures in the 1990s that created the problems from which the industry has just emerged. The back-to-basics strategy will not yield to high growth either. It was an effective strategy for restoring investor confidence and bringing the industry back on solid ground, but did not significantly impact earnings growth.

To meet Wall Street's expectations, all signs point to mergers of complimentary utilities that can achieve synergies in excess of the amount paid for acquisition premiums. And with at least one regulatory hurdle removed, we have begun to see several large transactions.

Id.

¹¹⁰ *Merger Review Strikes Appropriate Balance for Investors and Consumers*, Kelliher Says, INSIDE FERC, Feb. 4, 2008, at 4. The article notes: "The chairman and his colleagues have taken some heat for past merger approvals. But when 'we have asked critics to identify completed mergers approved by the commission that have resulted in harm to consumers or competitive markets, the answer has been silence,' Kelliher asserted." *Id.*

points away from regulated monopolies and towards a competitive retail market. Simply put, the state of law and policy neither supported the passage of Section 8093 in 1987, nor justify its continued existence to this date.

III. INTERMEZZO: A REALITY AND FACT CHECK

Every step taken by the federal government since 1978 represents a significant advance in federal policy towards promoting competition in the electric utility industry. Each step has brought the overall utility system to more successfully competitive states. This indicates two things: (1) federal policy in 1987 was not inclined toward protection of traditional vertically-integrated utilities, and (2) federal policy is now even more at odds with a policy that would protect the traditional vertically-integrated utilities.

Given the pace of change in federal electric utility policy over the past two decades the question becomes whether the industry's defense of Section 8093 has changed too. The answer is simple: no.¹¹¹ In 2008, the electric utility industry sent a letter to the Senate Armed Services Committee in defense of Section 8093.¹¹² The letter penned in opposition to the repeal of the Section 8093 provisions states that "[t]his proposal is inconsistent with longstanding federal and state electricity policies and would preempt the ability of *states* to oversee and define how electric service is provided to DOD facilities."¹¹³ This letter still distills the rationale of the electric utility industry in favor of Section 8093 into the same reasoning given in 1987: the hobgoblin of stranded rates and the passing of costs to consumers.¹¹⁴ The justification given by the utility group ignores the well-settled legal principle of the cost causer as the cost payer, under the adversarial rate-making process.¹¹⁵ Another, almost incredible argument posited by the letter is that the repeal of Section 8093 would exempt the federal government from the fundamental principle of states regulating intrastate transactions by

¹¹¹ See generally, Letter from Am. Pub. Power Ass'n, et al., to Chairmen for the Committee on Armed Services, subject: Proposed Language in FY 2009 Defense Authorization Bill That Would Repeal 40 U.S.C. § 591 (Apr. 25, 2008) (on file with author) [hereinafter Letter to Senate Armed Services Committee]; see also "Utilities, NARUC Take Aim at Pentagon Power Play," Defense Daily, May 1, 2008, available at <http://www.defensedaily.com/publications/dd/2539.html>.

¹¹² *Id.* The signatories of the letter include: the American Public Power Association, the Edison Electric Institute, the National Association of Regulatory Utility Commissioners, and the National Rural Electric Cooperative Association. *Id.*

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Id.* The letter states: "In states with traditional utility regulation, because military facilities typically are such large customers, their departure from the host utility's system could result in significant cost-shifting onto remaining customers." *Id.*

¹¹⁵ See *supra* note 48 and accompanying text.

creating a special exemption for federal facilities to take advantage of potential choices in electric utility service providers.¹¹⁶ This argument ignores the U.S. Constitution’s Supremacy Clause,¹¹⁷ which makes federal law the supreme law of the land.¹¹⁸ The argument also ignores that the market has changed in a way that *already* puts the same pressure on utilities via the policies and legislation discussed above in Section II. The hysteria over the possibility of federal agencies purchasing electricity on a competitive basis mirrors that which fueled the passage of the “Anti Dog-Eat-Dog Rule” in *Atlas Shrugged*.¹¹⁹ The proposition that Section 8093’s repeal somehow puts a unique pressure via stranded costs on utilities continues to exist at the heart of the utilities’ argument. Therefore, it is appropriate to address this issue of stranded costs.

IV. DOES THE HOBGOBLIN OF STRANDED COSTS REALLY EXIST?

As noted above, the utility industry repeatedly uses the logic that if federal agencies are allowed to shop around for more economical utility solutions, stranded costs are inevitable, and those costs will be passed to other consumers.¹²⁰ The argument is convenient for the electric utility industry, as it is both simple and powerful. However, the more nuanced truth includes four factors that the electric utility industry rarely, if ever, takes into account as they make use of the stranded cost argument. First, the dogged justification for Section 8093, via the stranded cost argument, does not reflect the legal and regulatory reality. Second, stranded costs, in and of themselves, do not justify arguments against consumer choice. Third, the electric utility industry’s stranded cost argument ignores their own obligation to mitigate stranded costs. Fourth, the electric utility industry ignores the development of a retail market in some states, which undercuts the stranded costs argument through cases proving that markets can effectively account for stranded costs. These factors seriously undercut the magnitude, effect, and legitimacy of the utilities’ argument.

¹¹⁶ Letter to Senate Armed Services Committee, *supra* note 111. The letter states: “in every state, regardless of whether it has restructured its electricity markets, retail electricity customers continue to purchase electricity in a manner consistent with that state’s electricity laws. DoD is proposing to exempt itself from this fundamental principle by creating a special exemption for military and other federal facilities.” *Id.* (emphasis added).

¹¹⁷ U.S. CONST. art. VI, cl. 2 (the Supremacy Clause).

¹¹⁸ *Id.*

¹¹⁹ See *supra* note 4 and accompanying text.

¹²⁰ See *supra* notes 46-47 and accompanying text.

A. The Justification for Section 8093 Does Not Reflect Current Reality

The realities of the electric utility industry and the regulations governing it have outpaced the traditional stranded cost argument proffered by the electric utility industry as justification for Section 8093. This section of the article will discuss four aspects of the current environment that weigh against Section 8093. First, the electric utility industry does not possess a *right* to recover stranded costs under the Fifth Amendment of the U.S. Constitution.¹²¹ Second, industry claims a regulatory compact justifies a right to stranded costs, but this argument relies on the now outmoded regulatory monopoly concept. Third, the U.S. Supreme Court does not and has not provided a right or guarantee to recovery of stranded costs, especially in today's changing environment. Fourth, the lack of right or guarantee for stranded cost recovery with the current changes in the electric utility industry and its regulation necessitates a shift in expectations regarding stranded cost recovery. This shift in expectation is simply that the outmoded concept of guaranteed recovery of stranded costs under the assumption of a regulated monopoly should not hinder a market that benefits customers, including the federal government.

1. *Right to Stranded Costs and Fifth Amendment Takings Arguments*

Stranded costs occur under circumstances when “the market fails to compensate utilities, via the price for power, in a way which allows the utility a fair rate of return.”¹²² Rate of return is the gain or loss of an investment over a specified period of time, expressed as a percentage of increase over initial investment cost.¹²³ The key question is whether utilities, as a matter of right, are allowed to recover stranded costs in the process of deregulation and movement toward a retail market. As in any move toward a competitive market, deregulation poses “a risky undertaking for both utility shareholders and ratepayers.”¹²⁴ Resolving the key question of stranded costs requires balancing the economic benefits of deregulation with impermissible takings under the Fifth Amendment.¹²⁵

Historically, rate regulation creates claims and litigation over unlawful confiscations contrary to the Fifth Amendment.¹²⁶ The

¹²¹ The Fifth Amendment provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

¹²² Martin, *supra* note 7, at 1183.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

question of unconstitutional takings of utility property, via rate of return on investment, is not new.¹²⁷ The electric utility industry's claim of right to these stranded costs is based largely on their reliance on a supposed "regulatory compact."¹²⁸ The process of deregulation and movement of regulatory emphasis to a competitive retail market has simply shifted the concern over potential unconstitutional takings into a new context.¹²⁹

2. *The Regulatory Compact and the Takings Argument*

The regulatory compact is "the relationship created by a government-regulated monopoly: the government grants a utility a captive market in return for the ability to regulate the utility's price and requires the utility to serve all customers reliably."¹³⁰ To the industry's credit, the compact has been the basis for their ability to rely on a constant customer base as a basis for incurring "significant infrastructure costs such as building power plants and transmission lines and entering into long-term contracts in order to meet future electricity demand."¹³¹ The move towards deregulation potentially leaves at least some players in the electric utility industry without an opportunity to fully recover on some of their investments. The electric utility industry, in formulating its stranded cost arguments, ignores some current realities that serve to mitigate the damages they claim from the process of deregulation and movement toward a retail market.

Changes in technology have caused a significant decline in the cost of building new generation units.¹³² Newer gas-fired combustion turbines are smaller, more efficient, and can be built more quickly than units built in the past.¹³³ The passage of the statutes and regulations concerning improvements in transmission and distribution, discussed above, has resulted in the ability for electric utilities to participate in long-distance power sales.

While means of mitigating stranded costs do exist, some potential for stranded costs in deregulation remain.¹³⁴ This potential is posed by the competition with new market entrants that are not saddled with paying debts incurred in the building of larger, more cost-intensive

¹²⁷ *Id.*

¹²⁸ *Id.* at 1185-6.

¹²⁹ *Id.* at 1183.

¹³⁰ Martin, *supra* note 7, at 1185.

¹³¹ *Id.*; see also Marilyn Hattie David, Competition in the Electricity Industry and Its Legal and Policy Implications, 56-57 (Sept. 30, 1996) (unpublished LL.M. thesis George Washington University), available at <http://dspace.wrlc.org/bitstream/1961/5027/1/Daviddisplay.pdf>.

¹³² Martin, *supra* note 7, at 1189.

¹³³ *Id.*

¹³⁴ *Id.* at 1189-90; see also David, *supra* note 131, at 62-63.

nuclear and coal plants.¹³⁵ Established utilities also “labor under inefficient long-term contracts based upon planning assumptions that failed to account for the changing market.”¹³⁶ Even the passage of the statutes and regulations, such as EP Act of 1992, accounts for some risk for established utilities. The purchase of power from Qualified Facilities (QFs)¹³⁷ established under PURPA at an avoided cost rate was more often than not based on long-term fuel forecasts that have proven to be extremely high.¹³⁸ A common thread runs through each of these risks: they result from business decisions based on an assumption that the utilities are part of a regulatory compact.¹³⁹

This regulatory compact is not a signed agreement. It is a concept that largely exists to protect the interests of utilities.¹⁴⁰ As such, the stranded costs argument is a claim that a proposed course of action impairs rights, which are not established by contract. That is, the argument relies on the authority of the Takings Clause of the Fifth Amendment. The U.S. Supreme Court articulated a test specifically for determining unconstitutional takings in the context of regulatory action.¹⁴¹

3. *The U.S. Supreme Court and Stranded Cost Arguments*

The U.S. Supreme Court articulated two principal factors in *Duquesne Light Co. v. Barasch* to consider when evaluating whether a taking has occurred.¹⁴² First, the court should determine whether the slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital.¹⁴³ Second, the court should consider whether the rates are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme.¹⁴⁴ The second prong of the test specifically takes into account “whether the shareholder’s investment expectations have been protected, [and] compares the rate of return allowed by the state [as regulator] to the return on investments with a commensurate level of risk.”¹⁴⁵ The *Duquesne Light* Court further noted that a

¹³⁵ Martin, *supra* note 7, at 1189.

¹³⁶ *Id.*

¹³⁷ See *supra* notes 18-20 and accompanying text.

¹³⁸ Martin, *supra* note 7, at 1190.

¹³⁹ See *supra* note 6 and accompanying text.

¹⁴⁰ Martin, *supra* note 7, at 1185, 1215-17.

¹⁴¹ See generally Martin, *supra* note 7, at 1197-1200; see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

¹⁴² *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

¹⁴³ *Id.* at 310-12.

¹⁴⁴ *Id.* at 314-15.

¹⁴⁵ *Id.*

regulator may regulate an industry in a manner which has a detrimental economic effect on a business without causing a taking of property that requires compensation.¹⁴⁶ In addition, the U.S. Supreme Court has considered the interest of the public as a factor in the determination as to whether a regulatory action is confiscatory.¹⁴⁷ Commentators have observed that the open-ended treatment of the matter by the U.S. Supreme Court potentially gives lower courts and state power commissions “license to sacrifice the financial viability of utilities in the interest of economic efficiency.”¹⁴⁸

Federal Power Comm’n v. Hope Natural Gas, a seminal case in the jurisprudence of rate-making, even lends support to the “idea that a strong public interest can justify an unlimited amount of utility property loss.”¹⁴⁹ The *Hope Natural Gas* decision can be “interpreted as allowing a strong public interest to justify destruction of a utility’s financial integrity.”¹⁵⁰ Further, the current trend toward deregulation and movement toward a retail electric utility market changes the basic assumption and underpinnings of utilities’ stranded cost and unconstitutional takings arguments.¹⁵¹ When electric utilities can no longer claim captive markets and guaranteed customers, they also cannot hold the expectation that their takings claims should be analyzed within the framework developed for regulated monopolies.¹⁵² Under the emerging framework for analysis, the interests of the shareholders and the public will certainly change.¹⁵³ Absent the existence of the same rate of return expectations for investors under the regulated monopoly scheme, the application of the same analysis under a deregulated, retail market is inappropriate and makes no sense.¹⁵⁴

These shareholder expectations should be viewed in relation to the actual deregulation process and its product, rather than the appropriate rate of return analysis under the traditional model of a regulated monopoly.¹⁵⁵ Courts have consistently noted that investor interests are only one factor that the Commission should consider in setting just and reasonable rates.¹⁵⁶ However, the floor for investor

¹⁴⁶ *Id.* at 310.

¹⁴⁷ Martin, *supra* note 7, at 1200.

¹⁴⁸ *Id.*; see also David, *supra* note 131, at 66.

¹⁴⁹ Martin, *supra* note 7, at 1200-01 (citing *Federal Power Comm’n v. Hope Natural Gas*, 320 U.S. 591 (1944)).

¹⁵⁰ *Id.* at 1201 (citing *Hope Natural Gas*, 320 U.S. at 603 (stating that conditions that might deprive a utility of its financial viability and still be constitutional “[while they may exist] are not important here”).

¹⁵¹ *Id.* at 1205.

¹⁵² Martin, *supra* note 7, at 1205.

¹⁵³ See generally *id.* at 1208-11.

¹⁵⁴ See *id.* at 1210.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1202.

interests is the observation by the Ohio State Supreme Court that the “Constitution no longer provides any special protection for the utility investor.”¹⁵⁷ Utilities are not guaranteed net revenues. Utilities and their investors bear the risks of unprofitability and diminished financial integrity.¹⁵⁸

On the other hand, consumers’ interests, absent a regulatory monopoly, are not tied to a particular utility.¹⁵⁹ Under a deregulated retail market customers have a number of choices if their local utility becomes insolvent.¹⁶⁰ Along the same vein, customers who believe that their utility can no longer reliably provide electric utility service can find another provider.¹⁶¹ While the customers’ new interests in an emerging retail market may not be sufficient to unconstitutionally take from utilities under the Fifth Amendment via stranded costs, the interests of utilities and consumers are sufficiently different to force a new way of looking at stranded costs and unconstitutional takings.¹⁶² That is, the potential for stranded costs and loss to the utility and investor is no longer a barrier to changes that benefit the consumer.¹⁶³

4. *Synthesis: Changes Mean a Needed Shift in Expectations for Stranded Costs*

In light of the deregulation and movement toward a retail market, the electric utility industry’s bare argument for stranded costs, whether recovered from customers, or passed on to investors, or decried as an unconstitutional taking, does not justify a claim of entitlement. As noted above, determination of stranded costs first requires a determination by the adjudicator that there is a wrongful taking, not simply an unpalatable decision. Second, the interests of the utilities and their investors are weighed against the interests of the party they exist to serve: the customer. The basis of the relationship under both case law and state statute and regulation is that the party with primacy is the customer, with the utility obligated to provide reliable service.¹⁶⁴ Under the current circumstances, because the utilities’ and customers’ interests are becoming widely divergent, there is no longer room for the assumption that stranded costs are a matter of entitlement and can block development of a more beneficial market for the customer. Further,

¹⁵⁷ *Id.* (citing *Ohio Edison Co. v. Public Util. Comm’n*, 589 N.E.2d 1292, 1300 n.8 (Ohio 1992)).

¹⁵⁸ *Id.* at 1202.; *see also* William J. Baumol & J. Gregory Sidak, *Stranded Costs*, 18 HARV. J. L. & PUB. POL’Y 835, 839-40 (1995).

¹⁵⁹ Martin, *supra* note 7, at 1210.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1210-11.

¹⁶³ *See generally id.* at 1209-11.

¹⁶⁴ *See* *Federal Power Comm’n v. Hope Natural Gas*, 320 U.S. 591, 610 (1944).

aspects of the concept of stranded costs itself cut against its use as a talisman against consumer choice.

B. Stranded Costs Do Not Justify Arguments against Consumer Choice

The concept of stranded costs and realities that undergird that concept do not justify their use as a means to argue against government action to benefit consumers by offering choice. As the electric utility industry makes its standard costs argument it ignores three basic aspects of the concept. First, stranded costs as a potentially recoverable cost exist as an artifact of regulated monopolies. The notion that utilities may recover such costs, as opposed to absorbing them as a cost of doing business, exists to make more palatable the uneconomical investments in infrastructure that are necessary to reliably serve all customers. Second, quantification of stranded costs, by its very nature, is prospective and imprecise and does not justify use of the concept as a complete defense to deregulation in favor of consumer benefit. Third, the fact that stranded costs are already a cost of doing business in the electric utility industry undermines the concept as a complete defense to the Federal Government competitively obtaining electricity.

1. *Stranded Costs Were Invented in Aid of Consumers, Not Utilities Over Consumers*

Stranded cost recovery potentially creates conditions for inefficiency in both production and allocation.¹⁶⁵ Productive inefficiency is the result of utilities using more resources than really required to deliver services.¹⁶⁶ Allocative inefficiency is the result of the utility setting the price of the service above the marginal cost to provide the service.¹⁶⁷ The root of this argument is that, if utilities are allowed to recover any and all costs incurred, however imprudently, then the process of regulation rewards inefficiency.¹⁶⁸ Laura Starling provides a poignant hypothetical example: should utilities be allowed to recover the stranded costs, say for a nuclear power plant, built in the face of signals that suggested the utility should have cut back on production?¹⁶⁹ To allow such costs as a matter of entitlement and without holding utilities responsible for business risk, results in a burden

¹⁶⁵ Laura R. Starling, *Don't Be Shocked! Electric Utility Deregulation CAN Benefit Low-Cost States*, 74 TUL. L. REV. 1519, 1526 (1999-2000) (citing John Burritt MacArthur, *Cost Responsibility or Regulatory Indulgence for Electricity's Stranded Costs?*, 47 AM. U. L. REV. 775, 849 (1998)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1528.

¹⁶⁹ *Id.*

that will inevitably fall on the consumers, because the utility will not choose to burden its investors, despite their risk in investing.¹⁷⁰ Further, the very formulation of stranded costs casts doubt at least as to the amount of the stranded costs claimed.¹⁷¹

2. Stranded Costs Are Imprecise, Prospective and Do Not Justify Refusal to Change to Benefit the Consumer

The concept of stranded costs is often simply couched as fixed costs of a generating plant, for example, that have been expended with little or no ability to recover the stranded costs via future sales.¹⁷² In an example provided by Gregory Basheda, et al., in “The FERC, Stranded Cost Recovery, and Municipalization”, a utility expends \$50 million in anticipation of complete recovery of their investment in a regulated environment. However, after deregulation the forecasted earnings drop to \$40 million, resulting in \$10 million of stranded costs.¹⁷³

This basic formula for determining stranded costs is not as difficult and fraught with uncertainty as the real-world determination that requires prospective measurement and forecast of stranded costs before they can be known.¹⁷⁴ Even if one can assume that the prospective measurements and costs can be forecast accurately, the true or actual stranded costs are determined based on the difference between what present and future regulators would have allowed.¹⁷⁵ In a best case scenario, regulators control one-half of this equation.¹⁷⁶ The other half of the equation is determined later, in the actual marketplace.¹⁷⁷ Basheda, goes so far as to conclude that the FERC model for stranded cost recovery poses significant threat of inaccuracy and misuse, contains inherent inaccuracies, and requires exceptional care in its application to avoid miscalculation.¹⁷⁸ The cure posed by the process of recovering stranded costs contains enough peril and uncertainty to make preferable the malady of foregoing the costs in favor of the customer’s interest. Since stranded cost recovery presupposes that regulation should protect the utility’s interest over the consumer’s, little incentive remains for smart economic behavior by utilities.¹⁷⁹ The stranded cost

¹⁷⁰ *Id.*

¹⁷¹ Gregory N. Basheda, et al., *The FERC, Stranded Cost Recovery, and Municipalization*, 19 ENERGY L. J. 351, 360-61 (1998).

¹⁷² *Id.* at 359-60.

¹⁷³ *Id.* at 360.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 360-61.

¹⁷⁶ *Id.* at 361.

¹⁷⁷ *Id.*

¹⁷⁸ *See generally id.* at 375-76 (conclusion).

¹⁷⁹ Scott B. Finlinson, *The Pains of Extinction: Stranded Costs in the Deregulation of the Utah Electric Industry*, 1998 UTAH L. REV. 173, 189-90 (1998).

argument also ignores the fact that utilities *already* operate with stranded costs as a part of business.¹⁸⁰

3. *Stranded Costs Are Already a Part of Doing Business*

Electric utilities, as regulated entities, base investment decisions on factors that are significantly different than entities operating in a competitive market.¹⁸¹ Regulated electric utilities may make investment decisions “based on requirements imposed by the state, for political reasons, or other factors.”¹⁸² Scott B. Finlinson, in his article “The Pains of Extinction: Stranded Costs in the Deregulation of the Utah Electric Industry,” discusses such situations that already would result in stranded costs for utilities.

This process generates two types of situations that can result in stranded costs. In the first instance, an electric utility may undertake an economically unfeasible, yet necessary, project In the second instance, noneconomic factors may induce an electric utility to undertake an economically unsound project The project, or the assets built by the project, become stranded when the electric utility cannot recover its fixed costs in running the asset out of the market price of electricity.¹⁸³

Other sources for potential stranded costs, aside from those potentially posed by deregulation of the electric utility market include:

(1) investments in generation assets whose market values may have declined below book values; (2) long-term agreements to purchase fuel or deliver electricity at prices that may no longer be competitive; (3) ‘regulatory assets’ that represent previously incurred expenditures whose collection has been deferred by regulators; and (4) state-mandated participation in ‘energy welfare’ programs, such as subsidies to renewable energy providers and low income consumers.¹⁸⁴

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 189.

¹⁸² *Id.*

¹⁸³ *Id.* at 189-90.

¹⁸⁴ Ajay Gupta, *Tracking Stranded Costs*, 21 ENERGY L. J. 113, 113 (2000).

As a matter of fact, Ajay Gupta, in his article “Tracking Stranded Costs,” notes that significant stranded costs existed within the electric utility industry *before* deregulation was introduced in any state:

[Baxter and Hirst estimated] stranded costs . . . before deregulation was introduced in any state. Baxter and Hirst examined 160 investor-owned utilities in the United States and concluded that 153 of them would face some stranded costs under competition. Of these, 17 have stranded costs that exceed 100% of their equity, and another 120 have stranded costs between 10 percent and 100 percent of their equity. Baxter and Hirst estimated the utilities total stranded costs at \$68.8 billion, a figure that represented 38% of their combined equity.¹⁸⁵

Baxter and Hirst’s observation in early-1995, fourteen years ago—and two years after the Energy Policy Act of 1992 largely opened the door to deregulation and the development of a retail market—indicates that the issue of stranded costs is a long-standing issue that utilities have continued to ignore, despite deregulation. If anything, Gupta’s observations show that stranded costs are a problem that often occurs independently of deregulation.¹⁸⁶ Moreover, as discussed in Section III, it shows that the electric utility industry, in the face of significant deregulation, gambled foolishly by failing to adapt beyond old arguments and assumptions. The industry’s reliance on stranded costs to ward off any attempts at deregulation, or even repeal of Section 8093, is misplaced and illegitimate.

C. The Stranded Cost Argument Ignores the Obligation to Mitigate Stranded Costs

When arguing in support of Section 8093, the industry also fails to address mitigation of stranded costs, as noted in Section II. The legal regime and overall energy policy that has unfolded over the past 30 years provides a means for mitigating stranded costs, which utilities are obligated to use.¹⁸⁷ A unifying theme, noted by Gregory Basheda, among industry stranded cost policies is the notion that “utilities should pursue all reasonable measures available to reduce or ‘mitigate’ stranded

¹⁸⁵ *Id.*; (citing LESTER BAXTER & ERIC HIRST, ESTIMATING POTENTIAL STRANDED COMMITMENTS FOR US INVESTOR-OWNED ELECTRIC UTILITIES, ORNL/CON-406 (Jan. 1995), available at <http://www.osti.gov/bridge/index.jsp> (search for report title)).

¹⁸⁶ Ajay Gupta, *Tracking Stranded Costs*, 21 ENERGY L. J. 113, 113 (2000).

¹⁸⁷ *Id.*

costs.”¹⁸⁸ One means of mitigation occurs through sale of now unused capacity on the market.¹⁸⁹ When a customer group leaves a utility, the most direct way of recouping stranded costs is to put the excess capacity on the market at the highest possible price.¹⁹⁰ To assume that selling electricity as a commodity is not a viable option is tantamount to assuming that utilities will be unable to sell a valuable commodity in a market facing a shortage in supply.¹⁹¹ The Federal Energy Regulatory Commission’s own formula concerning stranded costs illustrates this reasoning.¹⁹² The formula used by FERC stands for the proposition that: “lost revenues are to be mitigated by the revenues received from the sale of the stranded capacity and/or power generated by the stranded capacity, so the [Stranded Cost Obligation] is reduced by [Competitive Market Value Estimate], the revenues gained from mitigation via sale of power.”¹⁹³

Another means by which stranded costs are mitigated, though not by the utility’s affirmative action, is displacement.¹⁹⁴ Basheda describes the concept of displacement:

If the customer group leaves, the utility sells 500,000 MWh less power to its remaining customers and receives \$15 million per year less in revenue. However, the utility also eliminates the power purchase, reducing its costs by \$10 million. Since the utility has lost \$15 million, but has to pay \$10 million less in power costs, it would seem that its stranded cost is \$5 million.¹⁹⁵

The above example is not proffered to be a one-size-fits-all explanation or solution to the problem posed by stranded costs. It also does not illustrate that there will be no cost to utilities. However, it does illustrate an instance where utilities overstate stranded costs and their effects. It also calls into question whether the problem of stranded costs is as dire, simplistic, or automatic as the electric utility industry would have policymakers believe. While this article does not attempt to encourage ignorance of the concept of stranded costs and their effect on utilities, policy makers must also focus on the fact that mitigation is not only a possibility, but an obligation on the part of utilities.¹⁹⁶

¹⁸⁸ Basheda, *supra* note 171, at 371.

¹⁸⁹ *Id.* at 370-71.

¹⁹⁰ *Id.* at 372.

¹⁹¹ *AEP CEO: U.S. Needs New Electric Authority*, UNITED PRESS INT’L, May 5, 2008, available at <http://www.upi.com/> (search “U.S. Needs New Electric Authority”).

¹⁹² Basheda, *supra* note 171, at 372.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Baumol & Sidak, *supra* note 158, at 848.

A basic premise of American contract law states that the party entitled to compensation for damages is obligated to mitigate those damages.¹⁹⁷ Accordingly, contract case law also includes an obligation for parties in a position to mitigate loss to do so.¹⁹⁸ The Federal Energy Regulatory Commission's 1994 Notice of Proposed Rulemaking on the subject of stranded costs addresses this obligation.¹⁹⁹ Baumol and Sidak highlight the commission's observation that "the problem of distribution of loss among departing customers, remaining customers, and shareholders of the utility *only* arises '[i]f the utility does not have an alternate buyer for the power previously sold to the departing wholesale requirements customer, or some other means of mitigating the stranded costs'"²⁰⁰ In a market facing a supply shortage, a utility should only be unable to mitigate stranded costs if it chooses to not sell power to alternate buyers.²⁰¹ While there is a legal and regulatory obligation to mitigate stranded costs, obligations to customers and legal obligations to the business entity, itself, also require mitigation of stranded costs.²⁰²

As previously discussed, the utility is obligated to mitigate stranded costs regarding customers, because the legal test in *Hope Natural Gas* requires that the cost causer be the cost payer.²⁰³ Despite assertions to the contrary in the comments made at the initial passage of Section 8093 and the letter opposing its repeal, the stranded costs are not simply automatically passed to other customers.²⁰⁴ As discussed above in Section IV.A.3, the utility is loath to simply pass the purported loss represented by stranded costs to investors, because it would diminish the utility's ability to raise capital.²⁰⁵ This occurs where utilities diminish the rate of return to investors on their investment by passing losses via stranded costs to investors, instead of consumers.²⁰⁶ The utilities, by their own argument, cannot simply absorb the stranded costs. These conditions lead to the conclusion that utilities ignore: mitigation is a business necessity. Utilities also ignore that it is in their interest to mitigate stranded costs.²⁰⁷

¹⁹⁷ RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

¹⁹⁸ Baumol & Sidak, *supra* note 158, at 848.

¹⁹⁹ *Id.* (citing Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Notice of Proposed Rulemaking, 59 Fed. Reg. 34, 274, 35,277 (proposed June 29, 1994)) (codified at 18 C.F.R. § 35.26 (2009)).

²⁰⁰ *Id.*

²⁰¹ Baumol & Sidak, *supra* note 158, at 848.

²⁰² *Id.*

²⁰³ See *supra* notes 48-50 and accompanying text; see also *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 617-18 (1944).

²⁰⁴ See *supra* notes 46-48 and accompanying text.

²⁰⁵ See discussion *supra* Section IV.A.3.

²⁰⁶ Martin at 1206-8.

²⁰⁷ Baumol & Sidak, *supra* note 158, at 848.

As illustrated by Baumol and Sidak, in their article “Stranded Costs”:

Though it is clear the utility’s duty to mitigate stranded costs serves the interests of consumers, on closer inspection it is also clear that mitigation serves the utility’s best interest as well. This is so because the utility’s customers do not have contracts that terminate simultaneously. As customers with early expiration dates depart, they leave the as-yet-unrecovered portion of stranded costs to be borne by a dwindling number of remaining customers. But the overwhelming number of those remaining (commercial and industrial) customers can be presumed to operate in competitive market for their own goods and services. A firm in a competitive market that is made to pay a higher price than its rivals for an essential input such as energy, particularly for the extended term envisioned in the typical supply contract, will suffer losses and eventually will cease operations. Companies that cease operations do not buy any electricity, even if they remain contractually obligated to do so.

Knowing that it cannot bankrupt its remaining customers in this manner, the utility has a strong incentive to find new customers for its excess capacity. The obligation illustrates that the interests of the utility and consumers are indeed often entirely compatible, despite appearances to the contrary.²⁰⁸

The power of the above example does not just stem from what it says, but also from what it does not say.²⁰⁹ It does not presume that passing stranded costs on to other consumers is inevitable.²¹⁰ In addition, it does not expend time addressing the obvious obligation of corporate officers to make decisions in the best interests of the utility as a business entity.²¹¹ If the example is taken to its logical conclusion, the utility that fails or refuses to mitigate will place itself in a position of progressively suffering increasing unrecoverable stranded costs, until it becomes financially unviable.²¹² If one couples the above example with the fact that the utility is constrained from automatically passing the costs of

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ WILLIAM E. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 1.05 (7th ed. 2002).

²¹² Baumol & Sidak, *supra* note 158, at 848.

departing customers to remaining customer by operation of law, as noted above, and is obligated to take steps in the interests of the survival of the corporate entity, the motivation of the utility to mitigate is very powerful.

The discussion above concerning the existence, nature, and possible mitigation of stranded costs, as an impediment to the repeal of Section 8093, has been based, admittedly, on academic discussion and what the electric utility industry may call conjecture. However, the body of law and emerging policy of the United States concerning the nature of the electric utility industry have not occurred in a vacuum and have had an impact on the way the electric utility industry does business. The experience of the industry and its regulators under the new and emerging policy and legal regime provides another part of the answer to the electric utility industry's cries of stranded costs both in the face of deregulation and repeal of Section 8093. This experience has provided a number of examples of states and the federal government providing a means for dealing with stranded costs in the face of deregulation.

D. Stranded Costs Argument Ignores States Already Dealing With Stranded Costs

The electric utility industry ignores the facts that policy has worked against Section 8093 over the past three decades, that stranded costs are not as monolithic as they claim, and that there are ways around the stranded cost problem. The electric utility industry is also slow to acknowledge that many states either have or are developing means to deal with stranded costs in the face of deregulation. As before, these do not purport to be a one-size-fits-all solution to the problem, but the examples point out what utilities are loath to admit: there are ways to survive deregulation and the repeal of Section 8093. Each of the examples below provides one of a myriad of ways of coping with the challenge and excuse of stranded costs as an impediment to useful deregulation of the industry.

1. FERC Order No. 888 Requirements for Dealing With Stranded Costs

When it established requirements for dealing with wholesale stranded costs, FERC's stated purpose was to embody: "FERC's belief that utilities that made large capital expenditures or long-term commitments to buy power many years ago should not now be held responsible for failing to foresee the fundamental changes in the industry that are now being imposed."²¹³ Based on this premise, FERC determined that its stranded cost policy should allow utilities "to recover legitimate and verifiable stranded costs associated with the development of competitive wholesale markets."²¹⁴ Based on the above premises, FERC promulgated Order 888 with two general principles in mind.²¹⁵ First, FERC proffers the opportunity for the departing customers to pay stranded costs via an exit fee.²¹⁶ As above, the exit fee to be paid must be based on legitimate and verifiable stranded costs.²¹⁷ The concept of the exit fee is to allow for a balance between allowing the utility to recover some stranded costs from the customer, while allowing the customer the right to change.²¹⁸ Second, FERC Order 888, as noted by Scott Finlinson, provides that the "recovery of retail stranded costs through FERC-jurisdictional rates is available only if the state regulatory body lacks, or expressly declines to assert, authority under state law to address stranded costs when retail wheeling is required."²¹⁹ In other words, the FERC means of addressing stranded costs under its jurisdiction is only available if the states, who exercise primary jurisdiction in the matter, do not or cannot address these costs.²²⁰ As noted below, a number of states have addressed the issue of stranded costs in the process of deregulating the electric utility industry and market.

2. The Number of Ways Ahead for Dealing With Stranded Costs in Deregulation

Since 1995 a number of states, including California, New Hampshire, Rhode Island, Massachusetts, Maine, and Pennsylvania, have dealt with stranded costs as a part of deregulation and movement from deregulated monopolies. The State of California's plan to deal with stranded costs include recovery through a Competitive Transition

²¹³ Finlinson, *supra* note 179, at 203.

²¹⁴ *Id.* at 203-04.

²¹⁵ *Id.* at 204.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

Charge (CTC) assessed to all customers, along with an initial rate reduction and later price freeze under which it would allow recovery of stranded costs.²²¹ California's plan also provides for "a special class of bonds to finance and buy out utilities' stranded costs,"²²² and subsidization of the process by taxpayers.

The State of New Hampshire, in its plan, provides for a balancing of interests as a part of the ratemaking process before the utility commission.²²³ The balance "lies in the interests of the ratepayers and utilities against the public interest."²²⁴ The New Hampshire plan focuses on determining (1) the legitimacy of *net* stranded costs and (2) ensuring fair application of the burden of stranded costs, along with required mitigation of costs.²²⁵

The State of Rhode Island's plan authorizes a transition charge for wholesale electricity suppliers as a means to recover stranded costs.²²⁶ Rhode Island's plan seeks to roughly spread the burden of stranded costs across the customer base, while using a performance-based rate system to "prevent residential customers from paying higher rates as a result of higher competition."²²⁷

The plan utilized by Massachusetts generally follows the FERC Order No. 888 framework, because it creates a new deregulated industry with an Independent System Operator (ISO) and power exchange system with divested generation and transmission services.²²⁸ The Massachusetts stranded cost recovery plan centers around phased incentives to break down utilities into separate generation, distribution, and transmission entities.²²⁹ Recovery of proven, mitigated stranded costs would then occur through the sales of electricity and transmission services.²³⁰

The plan proffered by the State of Maine is very similar to the Massachusetts plan, but Maine requires divestiture of assets during the conversion to a retail market.²³¹ The plan proffered by the State of Pennsylvania calls for a fair and accurate determination of what the stranded costs are, the proper apportionment of the pro rata costs among

²²¹ Finlinson, *supra* note 179, at 204-05.

²²² *Id.* at 205.

²²³ Kenneth Wilson, *Electric Utility Deregulation: The Recovery of Stranded Costs*, 33 NEW ENG. L. REV. 557, 577-78 (1999).

²²⁴ *Id.* at 578.

²²⁵ *Id.* (citing N.H. Rev. Stat. Ann. § 374-F:3(d) (LEXIS through 2009)).

²²⁶ Wilson, *supra* note 223, at 579 (citing Rhode Island General Laws, § 39-1-27.4(a) (LEXIS through 2009)).

²²⁷ *Id.* (citing Rhode Island General Laws, § 39-1-27.5(a) (LEXIS through 2009)).

²²⁸ *Id.* at 580.

²²⁹ *Id.* at 580-81.

²³⁰ *Id.*

²³¹ *Id.* at 582-83.

customers leaving the incumbent electric utility service, and an assessment of a transition charge to help defray the stranded costs.²³²

As noted in the subheading title, the number of ways of dealing with stranded costs is as significant, if not more so, than the methods of dealing with stranded costs, themselves. The bite of the stranded cost argument loses its potency when stranded costs have already been an issue necessarily dealt with in the deregulation plans. Whether the utilities like the movement from the relative safety of regulated monopolies or not, the fact is that the movement is occurring and the issue of stranded costs is being addressed.

E. Recap: What All of This Discussion of Stranded Costs Means

What good does the above discussion of stranded costs do for the case for repealing Section 8093? The above discussion distills into four, simple propositions:

(1) Stranded costs did not and do not represent a viable reason for keeping Section 8093.

(2) The electric utility industry ignores that the stranded costs they claim, in the event of the repeal of Section 8093, are subject to analysis for viability, determination of correct assessment to customers, and mitigation required under law.

(3) Stranded costs already exist in the normal way of doing business in the electric utility industry, and utilities and regulatory bodies already deal with them on a fairly regular basis.

(4) Recent regulatory history is replete with examples of states—only some of which are noted above—that either have or are already dealing with the stranded cost issues within the context of deregulation.

The unchanged industry rationale, in the face of decades of changes in laws, regulations, and policy, does not justify a refusal to repeal Section 8093. Further, the impact of electric utility service purchase on the federal budget and the obligation to practice responsible stewardship provide even more justification for the repeal of Section 8093.

²³² *Id.* at 586 (citing 15 PA. CONS. STAT. ANN., §§ 7407(b), (c) (Westlaw through 2009)).

V. THE OBLIGATION OF RESPONSIBLE STEWARDSHIP

As noted above, the federal government literally spends billions of dollars per year on electric utility services and is the largest single consumer of electricity in the United States.²³³ Untold millions of dollars are lost each year Section 8093 prevents the federal government from purchasing electric utility services on a competitive basis.²³⁴ One estimate, as of 1996, put the figure at “up to \$400 million.”²³⁵ For the Department of Defense, this money comes from Operations and Maintenance budgets.²³⁶ The money that finances the Department of Defense comes from federal taxpayers’ money.²³⁷ As the predecessor to the Competition in Contracting Act of 1984 states, the goal of the procurement system is to “[ensure that] the procurement will be made to the best advantage of the Government.”²³⁸ Because the hand of federal agencies is fettered by a statute that forces them to purchase from state-sanctioned monopolies, the government loses untold millions of dollars per year.²³⁹ The Competition in Contracting Act requires full and open competition to get the best value for the government, and the provisions of Section 8093 call for the opposite in the name of utilities’ financial security, in the face of a utility market that has steadily changed over the past three decades to make retail competition more commonplace. Simply put, despite a general rule that requires it to use full and open competition, the Department of Defense is one of the last hold-outs to take advantage of the competitive electric utility market, with the untold millions of dollars belonging to the Operations and Maintenance budgets of the Department of Defense—and the federal taxpayers—hanging in the balance.

²³³ See *supra* note 57 and accompanying text.

²³⁴ See *supra* note 57 and accompanying text.

²³⁵ David, *supra* note 131, at 86. An estimated loss to utilities, attributed to a proposed change allowing for competitive purchase of electric utility service under the FAR, was set at \$2.4 billion by the Edison Electric Institute in 1986. The article further states that the utility industry was marshalling a legal response in the form of a provision in the FY 1987 appropriations bill. The response to the potential upset of a “regulatory balance” by the proposed FAR provision was Section 8093. *Utilities Stand to Lose \$2.4 Billion in Federal Load Under FAR Scheme*, ELECTRIC UTIL. WKLY., Sept. 8, 1986, available at <http://www.platts.com>.

²³⁶ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-631, DEFENSE BUDGET: TRENDS IN OPERATION AND MAINTENANCE COSTS AND SUPPORT SERVICES CONTRACTORS 1-3 (May 2007).

²³⁷ *Id.*

²³⁸ See The Armed Services Procurement Act of 1947, Pub. L. No. 80-413, 61 Stat. 21 (1947), amended by The Competition in Contracting Act of 1984, Pub. L. No. 93-369, tit. VII, § 2701, 98 Stat. 1175 (codified as amended at 10 U.S.C. §§ 2304-2305 (2006)).

²³⁹ See *supra* notes 3, 57 and accompanying text.

VI. CONCLUSION

Francisco d'Anconia, in his moment of denouement in *Atlas Shrugged*, provides the best explanation for the existence of Section 8093.²⁴⁰ As d'Anconia ponders the ruins of the work of his and his family's lives, he recalls the government regulations passed to cripple the successful businessman and aid competitors, "because they were loafing failures."²⁴¹ John Galt, in his climactic speech in *Atlas Shrugged*, lays bare the substance of the book's plot, and the theme that mirrors the basis of arguments against Section 8093:

The symbol of all relationships among such men, the moral symbol of respect for human beings is *the trader*. We, who live by values, not by loot, are traders, both in matter and in spirit. A trader is a man who earns what he gets and does not give or take the undeserved. A trader does not ask to be paid for his failures, nor does he ask to be loved for his flaws The mystic parasites who have, throughout the ages, reviled the traders and held them in contempt, while honoring the beggars and looters, have known the secret motive of their sneers: a trader is an entity they dread—a man of justice.²⁴²

Why does the electric utility industry seek the preservation of Section 8093 in the face of an industry and market changing in favor of consumer choice over the past three decades? Where is the justification for an anti-competitive statute, under which the federal government is subject to the laws of the states and local monopolies? The answer to both questions is simple: the utilities would have the federal government reward protectionist regulatory practices that soak both the federal government and its taxpayers.

The provisions of Section 8093 are not grounded in existing or even viable federal policy. They exist only to protect the interests of an industry attempting to resist change in the face of a changed reality, and they waste millions of dollars of taxpayers' money. The law, ill-founded as it is, continues to be at odds with the emerging electric utility industry and the laws and policy governing it. The use of stranded costs as a talisman against change that is inconvenient, but consistent with prevailing laws and policy, makes little sense. Furthermore, the anticipated impacts are exaggerated and fail to account for the fact that

²⁴⁰ *ATLAS SHRUGGED*, *supra* note 4, at 765-67.

²⁴¹ *Id.* at 767.

²⁴² *Id.* at 1022.

stranded costs are already a part of doing business. The longer the law remains in effect, the longer the federal government and the federal taxpayers pay for the convenience of the utilities. In this same vein, the “Atlas Shrugged” conclusion finds the Constitution being amended to prohibit laws fettering free trade.²⁴³ Similarly, our means of unfettering free trade and relieving unfair burdens from federal taxpayers' shoulders is to recognize that Section 8093 is a non-competitive law enacted solely for industry's convenience, and repeal Section 8093.

²⁴³ ATLAS SHRUGGED, *supra* note 4, at 1167-8.

DEFINING THE CRIME OF AGGRESSION: IS THERE AN
ANSWER TO THE INTERNATIONAL CRIMINAL COURT'S
DILEMMA?

MAJOR KARI M. FLETCHER

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*War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.*¹

I. INTRODUCTION

The Rome Statute established the International Criminal Court (ICC) in 2002.² The ICC is the culmination of decades of attempts to define aggression and set up an international court with jurisdiction to hold individuals responsible for what the state parties considered the most serious crime—the crime of aggression.³ The Rome Statute confers subject matter jurisdiction with respect to “the most serious crimes of international concern”: genocide, crimes against humanity, war crimes and the crime of aggression.⁴ Although the Rome Statute defined the other three crimes, the definition of aggression led to many heated debates and subsequently, postponement of ICC jurisdiction for it until the state parties could agree on a definition and set out the conditions for jurisdiction.⁵ In 2002, the Assembly of States Parties established the Special Working Group on the Crime of Aggression (Special Working Group) to propose a definition of aggression and establish the conditions for the exercise of jurisdiction.⁶

This article begins by examining the history of the doctrine of aggression starting with the ancient concept of *jus ad bellum* as defined by the Romans and Christian theologians. The article will then survey modern concepts of aggression as set forth in the Kellogg-Briand Pact, the Nuremberg Trials, and the Charter of the United Nations. Following this discussion, the article will examine the definition of aggression as set forth in General Assembly Resolution 3314 and the events leading

¹ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 120 (4th ed., 2005) (citing International Military Tribunal (*Nuremberg Trial*), Judgment (1946), 1 IMT 171, 219-23). This quote comes from a passage of the IMT judgment discussing the defendants’ crimes of aggression. The phrase “supreme international crime” was again used in the IMT for the Far East judgment to describe the crimes of aggression perpetrated by the Japanese.

² Arash Abizadeh, *Introduction to the Rome Statute of the International Criminal Court*, 34 *WORLD ORDER* 2, 19 (2002-03).

³ See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (2007).

⁴ Rome Statute of the International Criminal Court, art. 1, 5, July 17, 1998, U.N. Doc. A/CONF.183.9 [hereinafter Rome Statute].

⁵ Mark S. Stein, *The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power?*, 16 *IND. INT’L & COMP. L. REV.* 1 (2005).

⁶ *Id.* at 2.

up to the Rome Statute and the creation of the International Criminal Court (ICC). This article will also briefly examine the U.S. position regarding the ICC and the crime of aggression. Section III examines the Special Working Group's proposed jurisdictional conditions and definition of aggression.

The Special Working Group needs to resolve two major issues: (1) how is the ICC going to exercise jurisdiction over the crime of aggression; and (2) how to define aggression to satisfy a majority of the state parties.⁷ Section IV of this article offers recommended changes to the Special Working Group's proposed definition of aggression, to include eliminating a Security Council determination of aggression as a prerequisite for jurisdiction. The ICC must act as an independent arbiter of justice if it is to provide a general deterrent to future crimes against peace and punish those who use armed force with impunity.

II. HISTORY OF THE DOCTRINE OF AGGRESSION

A. *Jus ad Bellum*

The concept of *jus ad bellum* or "just war" traces back to ancient Rome and the *jus fetiale*.⁸ The Romans followed *fetial* law, believing they had to please the gods in order to wage war.⁹ The *fetiales* were priests whose duties included determining whether sufficient reasons justified resorting to war.¹⁰ According to Cicero, a war was not just unless the aggressor (1) made an official demand for satisfaction with a time allotted for a response; and (2) issued a formal declaration of war.¹¹

Christian doctrine originally took a pacifist view toward war.¹² Christians were not even allowed to become soldiers.¹³ However, this changed in the time of Constantine when he established Christianity as

⁷ Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 HASTINGS INT'L & COMP. L. REV. 530, 532; see also Benjamin Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUDIES L. REV. 551, 553 (2007) (discussing the history of the crime of aggression leading up to the formation of the ICC).

⁸ DINSTEIN, *supra* note 1, at 63. The concept of *jus ad bellum* refers to the conduct of belligerents in the generation of war. *Id.* at 74.

⁹ ALEX J. BELLAMY, *JUST WARS: FROM CICERO TO IRAQ 19* (2006).

¹⁰ DINSTEIN, *supra* note 1, at 63.

¹¹ *Id.* See KURT A. RAAFLAUB, *WAR AND PEACE IN THE ANCIENT WORLD* 17 (2007), for a detailed discussion of war in the ancient world and the role of the *fetiales*. The demands set by Rome were usually non-negotiable and often set to an impossible standard so most states could not or would not accept them. BELLAMY, *supra* note 9, at 19; see also DINSTEIN, *supra* note 1, at 63; RAAFLAUB, *supra* note 11, at 17.

¹² BELLAMY, *supra* note 9, at 39.

¹³ DINSTEIN, *supra* note 1, at 64.

the official religion of the empire.¹⁴ Christian theologians decided that good Christians were expected to fight for God; therefore, they needed to change their stance on war.¹⁵ In his book, *The City of God*, St. Augustine formulated the fundamental principle that wars were a lamentable occurrence, but the suffering of victims of aggression necessitated the need for waging “just wars.”¹⁶ St. Thomas Aquinas expanded on this theory and opined that in order for a war to be just, three conditions must be met.¹⁷ First, a prince must authorize the war.¹⁸ Second, there had to be a just cause to go to war.¹⁹ Finally, one must have the right intention to promote good over evil.²⁰ Aquinas believed violence was never justifiable unless its purveyor sought the greater good of the community.²¹

B. The Modern Concept of *Jus ad Bellum*

Modern theorists developed the *jus ad bellum* concept at the beginning of the 20th century after the devastation of World War I.²² It was then that the international community first looked at prosecuting individuals for crimes against peace.²³ Articles 228-230 of the Treaty of Versailles mention prosecution of German combatants for violations of the laws and customs of war.²⁴ The Versailles Treaty formally arraigned Kaiser Wilhelm II, the German ruler who initiated World War I, for “a supreme offence against international morality and the sanctity of treaties.”²⁵ The German Government never tried Kaiser Wilhelm II because he fled to Holland where the Dutch Government refused extradition.²⁶ Holland justified denying extradition because they believed the charges against the Kaiser were retroactive criminalization and violated the Dutch Constitution and international law.²⁷ This failed attempt to bring the Kaiser to justice for waging a war of aggression

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see Petty, *supra* note 7, at 532; BELLAMY, *supra* note 9, at 39.

¹⁹ DINSTEIN, *supra* note 1, at 64.

²⁰ *Id.*; see Petty, *supra* note 7, at 532; BELLAMY, *supra* note 9, at 39.

²¹ BELLAMY, *supra* note 9, at 38.

²² Petty, *supra* note 7, at 532.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ SCHABAS, *supra* note 3, at 3; see also NEIL M. HEYMAN, *WORLD WAR I 167* (1997) (discussing in detail the life of Kaiser Wilhelm II and his role in WWI).

²⁶ *Id.*

²⁷ *Id.*; see also PETER J. VAN KRIEKEN & DAVID MCKAY, *THE HAGUE: LEGAL CAPITAL OF THE WORLD 14* (2005) (discussing the Dutch position that the Kaiser had immunity for acts committed while he was the head of the German State).

prompted the international community to attempt to criminalize aggression.²⁸

In Paris in 1928, several nations signed the General Treaty for Renunciation of War as an Instrument of National Policy (known as the Kellogg-Briand Pact).²⁹ Although the Pact only contained three articles, it renounced war as a solution for international controversies and dictated that all disputes be settled by pacific means.³⁰ However, this step towards regulating state conduct failed to address individual criminal liability.³¹ The Kellogg-Briand Pact “established the illegality of war as an instrument of national policy;” but it did not mention self-defense, set limits as to the legality of war as an instrument of international policy, or address forcible acts short of war.³²

Despite the Kellogg-Briand Pact and its renunciation of war as a solution for international controversies, nations soon found themselves in the midst of another world war. After realizing the extent of the atrocities committed during World War II, the leaders of the Allied powers had one primary goal in mind with regard to prosecution of Nazi leaders—punish aggression.³³ Without a codified definition of aggression, the drafters of the Charter of the International Military Tribunal (IMT) struggled to formulate the legal basis for the crime of aggression.³⁴ One issue in drafting the IMT Charter was whether to state in detail the mens rea and actus rea of the offense or leave it for the judges to determine.³⁵ The U.S. contingent sought a definition of aggression to preclude potential defenses that the crime of aggression lacked precise elements.³⁶ France and the Soviet Union opposed the U.S. definition because they doubted that international law prescribed individual criminal responsibility for aggressive war.³⁷ The allies agreed that the process needed to be quick while maintaining the

²⁸ SCHABAS, *supra* note 3, at 3; *see also* DINSTEIN, *supra* note 1, at 117 (discussing Kaiser Wilhelm’s acts as offenses not against international law, but of international morality).

²⁹ Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

³⁰ DINSTEIN, *supra* note 1, at 83.

³¹ Kellogg-Briand Pact, *supra* note 29.

³² DINSTEIN, *supra* note 1, at 85.

³³ M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 17 (2d rev. ed., 1999).

³⁴ *Id.*

³⁵ Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUDIES L. REV. 527, 528 (2007).

³⁶ *Id.* at 531 (citing the Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg, Judgment and Sentences, 41 AM. J. INT’L L. 172, 221) (1947)).

³⁷ *Id.*

appearance of fairness and legality.³⁸ Although the result of the trial seemed pre-ordained, the judges wanted to create precedence for the future and hopefully prevent the waging of aggressive wars.³⁹ Justice Robert Jackson, Chief U.S. Prosecutor during the Nuremberg Trials, in the opening statement to the tribunal stated: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”⁴⁰

Justice Jackson believed nothing justified going to war.⁴¹ He stated that “[w]hatever grievances a nation may have, warfare is an illegal means for settling those grievances.”⁴² In October 1945, the Nuremberg Court served indictments on twenty-two Nazi leaders which became known as the Trial of the Major War Criminals.⁴³ The four victorious allies of World War II adopted the Charter of the International Military Tribunal after the Nazi leaders committed their crimes.⁴⁴ Because of this, the defense criticized the tribunal for violating the principle of *nullem crimen nulla poena sine lege* (there is no crime, nor punishment, without a law),⁴⁵ echoing Holland’s excuse for not extraditing Kaiser Wilhelm II.⁴⁶ Critics also declared observed that the tribunals were not permanent and only represented the four allies, not the international community.⁴⁷ In its defense, the tribunal stated the Kellogg-Briand Pact set forth the prohibition for crimes against peace.⁴⁸ This was not about arbitrary justice by the victors, but an “expression of international law existing at the time of its creation.”⁴⁹ Ultimately, the tribunal found the Nazi leaders guilty of planning and waging aggressive war.⁵⁰ In his report to the President of the United

³⁸ BASSIOUNI, *supra* note 36, at 17.

³⁹ *Id.*

⁴⁰ Ferencz, *supra* note 7, at 552.

⁴¹ *Id.*

⁴² *Id.*

⁴³ SCHABAS, *supra* note 3, at 6.

⁴⁴ *Id.*

⁴⁵ *Id.* The tribunal rejected the defense argument saying that because the defendants occupied the positions they did in the German government, they must have known of the treaties signed by Germany and that they were acting against international law when they carried out their plans of invasion of other nations. See *Nuremberg, Judgment and Sentences*, 41 AM. J. INT’L L. 172, 221 (1947).

⁴⁶ SCHABAS, *supra* note 3, at 3.

⁴⁷ Michael O’Donovan, *Criminalizing War: Toward a Justifiable Crime of Aggression*, 30 B.C. INT’L. & COMP. L. REV. 507, 512 (2007).

⁴⁸ SCHABAS, *supra* note 3, at 3.

⁴⁹ Ferencz, *supra* note 7, at 552. The Tribunal found that the crime of aggression was customary international law prior to the beginning of WWII. *Id.*; see also Clark, *supra* note 35 (outlining a detailed history of the Nuremberg Tribunal and the cases of each of the defendants).

⁵⁰ Ferencz, *supra* note 7, at 552.

States, Justice Jackson stated, “at long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right.”⁵¹

The Charter of the International Military Tribunal (IMT) became the foundation for the 1946 Charter of the Military Tribunal for the Far East.⁵² This charter adopted the language regarding aggression with the addition that a war of aggression could be “declared or undeclared.”⁵³ The tribunal added this clarifying language in order to block assertions that the Japanese had not technically been at war.⁵⁴ The IMT for the Far East indicted twenty-eight defendants for crimes against peace.⁵⁵ The Tribunal divided the crimes against peace charge into multiple counts to include the planning and preparation of wars of aggression, initiation of wars of aggression, and individual responsibility for conspiracy to commit murder as crimes against peace.⁵⁶ The defense argued that acts of the state do not trigger individual criminal responsibility under international law.⁵⁷ While the tribunal found most of the defendants guilty, accusations of political interference and prosecutorial bias surrounded the trials primarily because of the U.S. decision to exonerate the Emperor.⁵⁸ The arguments made by the defense in both the Nuremberg and Far East trials continue to surround the formulation of a definition of the crime of aggression.

Despite criticisms, the tribunals at Nuremberg and the Far East did much to set new legal standards of individual responsibility, particularly the elimination of the “just following orders” defense and the immunity of heads of state.⁵⁹ When the United Nations General Assembly affirmed the Nuremberg Principles, it effectively affirmed individual culpability for crimes against peace.⁶⁰

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *In re Hirohito and Others* (International Military Tribunal for the Far East, Tokyo Trials, 1948), 15 ANN. DIG. & REP. OF PUB. INT’L LAW CASES 356, 373 [hereinafter Tokyo Trials].

⁵⁵ Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT’L L. J. 161, 165 (2008).

⁵⁶ *Id.*

⁵⁷ *Id.* at 166.

⁵⁸ *Id.*

⁵⁹ See DINSTEIN, *supra* note 1, at 142.

⁶⁰ International Law Commission of the United Nations, Principles of the Nuremberg Tribunal, *Report of the International Law Commission Covering its Second Session, 5 June-29 July, 1950*, Document A/1316, pp. 11–14 [hereinafter The Nuremberg Principles].

C. Defining Aggression

Despite the successes of the Nuremberg and Far East Tribunals, neither of the tribunals' implementing documents actually defined aggression.⁶¹ The judges decided whether a state had in fact committed aggression and then assigned individual blame for those acts.⁶² Because the Kellogg-Briand Pact denounced war as an instrument of foreign policy, the IMT used this as its basis to criminalize aggression.⁶³ The tribunal stated: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁶⁴ The court said in order for the prohibition of war to have any real effect, the international community must hold those individuals who commit these acts on behalf of the state responsible.⁶⁵ The Nuremberg and Far East trials held those at the policy-making level accountable; not the soldiers on the battlefield.⁶⁶

Article 6 of the IMT Charter established jurisdiction over the crimes against peace, war crimes and crimes against humanity.⁶⁷ The IMT Charter defined crimes against peace as "planning, preparation, ignition or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."⁶⁸ Article 6 specifies that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan" to commit crimes against peace are responsible for the acts of those who executed the plan.⁶⁹ These provisions laid the

⁶¹ Petty, *supra* note 7, at 534; *see also* Clark, *supra* note 35, at 531 (stating that one of the major elements of the Nuremberg Charter, aggressive war, was undefined).

⁶² Petty, *supra* note 7, at 534.

⁶³ DINSTEIN, *supra* note 1, at 120.

⁶⁴ Ferencz, *supra* note 7, at 551.

⁶⁵ DINSTEIN, *supra* note 1, at 119. Charter of the International Military Tribunal, Annexed to the London Agreement for the Establishment of an International Military Tribunal art. 6, Aug 8, 1945, 9 Int. Leg. 632, 639-40 [hereinafter London Charter].

⁶⁶ SCHABAS, *supra* note 3, at 7.

⁶⁷ O'Donovan, *supra* note 47, at 512; London Charter, *supra* note 63, art. 6.

⁶⁸ DINSTEIN, *supra* note 1, at 119 (citing the Charter of the International Military Tribunal, Annexed to the London Charter Agreement for the Establishment of an International Military Tribunal, Aug. 8, 1945, 9 INT. LEG. 632, 639-40); *see also* Clark, *supra* note 35, at 536 (commenting on the Soviet Union proposal for individual participation using the language of directing and participating in the preparation of carrying out aggressive acts on behalf of the European Axis Powers—a term that would have limited the definition only to the Axis Powers instead of future conduct by other nations—one of the main goals of Justice Jackson).

⁶⁹ DINSTEIN, *supra* note 1, at 119.

foundation for the numerous attempts by the U.N. to codify the “supreme international crime.”⁷⁰

After World War II, the U.N.’s goal was to establish a permanent international criminal court and codify the definition of aggression.⁷¹ Unfortunately, the U.N. committees pursued these tasks independently, instead of jointly.⁷² In 1949, the International Law Commission (ILC) began work on the Code of Offences against the Peace and Security of Mankind.⁷³ The Nuremberg Principles taken from the Nuremberg Charter and affirmed by the U.N. General Assembly formed the basis for this code; yet the ILC only released draft codes with no formal resolution.⁷⁴ In 1950, the General Assembly established a special committee representing seventeen states whose purpose was to draft a convention for the establishment of an international criminal court.⁷⁵

While the international community generally favored establishing an international criminal court, many of the world’s major powers had reservations.⁷⁶ The United States and Soviet Union both felt an international criminal court threatened their sovereignty.⁷⁷ France favored an international criminal court, but was unwilling to commit resources.⁷⁸ The United Kingdom believed the world was not ready for such a court to exist.⁷⁹ The special committee eventually created a draft convention in 1951 and then another revision in 1953.⁸⁰ Political pressures from states caused the committee to revise certain provisions.⁸¹ In particular, the new draft limited the new court’s jurisdiction and allowed states to retain more control.⁸² This debate over jurisdiction would reemerge forty years later in the establishment of the ICC, specifically concerning the crime of aggression.⁸³

While the work on the international court continued, the International Law Commission (ILC) sent an approved draft code of

⁷⁰ See *supra* note 1 and accompanying text.

⁷¹ *Id.*

⁷² See generally Weisbord, *supra* note 55, at 166 (setting forth a detailed history of the progress of the various committees).

⁷³ *Id.*; see also M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 13 (1998) (presenting an introductory history leading to the formation of the ICC followed by a compilation of ICC documents).

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* at 13.

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* at 13.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Weisbord, *supra* note 55, at 171.

⁸¹ BASSIOUNI, *supra* note 73, at 13.

⁸² *Id.*

⁸³ *Id.*

offences to the General Assembly in 1954.⁸⁴ The draft contained thirteen international crimes.⁸⁵ Article 2(1) of the draft code stated that any act of aggression constituted an offense.⁸⁶ Article 1 declared that offenses contained in the code are “crimes under international law, for which the responsible individuals shall be punished.”⁸⁷ However, the U.N. General Assembly postponed approval of the code due to disagreements over the definition of aggression.⁸⁸

It was not until 1974 that the U.N. General Assembly finally agreed on a definition for aggression.⁸⁹ The U.N. General Assembly passed Resolution 3314 (G.A. Res. 3314) to guide the Security Council in making a determination of aggression under Article 39 of the U.N. Charter.⁹⁰ The definition differentiated between an act of aggression (creating international responsibility) and war of aggression (a crime against peace).⁹¹ This indicated that acts of aggression short of war do not trigger individual responsibility.⁹²

Article 1 of G.A. Res. 3314 defined aggression as “the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”⁹³ This definition is similar to Article 2(4) of the U.N. Charter except that the threat of force is excluded, the adjective armed is inserted in front of force, and the victim is another state instead of any state.⁹⁴ Article 2 creates a rebuttable presumption in that the first use of armed force in contravention of the U.N. Charter is prima facie evidence of an act of aggression.⁹⁵ The Security Council can determine otherwise “in light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”⁹⁶ Article 3 of G.A. Res. 3314 enumerates specific acts of

⁸⁴ *Id.* at 14; Draft Code of Offences Against the Peace and Security of Mankind, 1954, 9 UN GAOR Supp. (No. 9) at 11, U.N. Doc. A/2693 (1954) [hereinafter Draft Code of Offences, 1954].

⁸⁵ BASSIONI, *supra* note 73, at 13; Draft Code of Offences, 1954, *supra* note 88, at 11.

⁸⁶ DINSTEIN, *supra* note 1, at 124.

⁸⁷ *Id.* (citing the Draft Code of Offences against the Peace and Security of Mankind, Report of the International Law Commission, 6th Session, U.N. Doc. A/2693 (1954) reprinted in 2 Y.B. INT'L L. COMM'N 140, 149 (1954)).

⁸⁸ BASSIUNI, *supra* note 73, at 14; *see also* DINSTEIN, *supra* note 1, at 124 (examining the progress of the international community in attempting to define aggression).

⁸⁹ DINSTEIN, *supra* note 1, at 125.

⁹⁰ *Id.* at 126; G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

⁹¹ DINSTEIN, *supra* note 1, at 125.

⁹² *Id.*

⁹³ G.A. Res. 3314, *supra* note 94, art. 1.

⁹⁴ DINSTEIN, *supra* note 1, at 127.

⁹⁵ *Id.*

⁹⁶ *Id.* art. 2.

aggression⁹⁷ and Article 4 states that the acts listed in Article 3 are not an exhaustive list in that the Security Council may equate other acts to aggression.⁹⁸ Article 5(2) states: “A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.”⁹⁹ This definition provides a generic definition of aggression in Article 1 with a non-exhaustive list of aggressive acts in Article 3.¹⁰⁰

While the 1974 definition was a major milestone in the work towards criminalizing acts of aggression, many nations felt that the definition was only a guideline for the Security Council and not meant as a basis for criminal prosecution.¹⁰¹ One aspect of the 1974 definition supporting this critique is that it does not go beyond the *actus reus* (criminal act) to provide a *mens rea* (criminal consciousness).¹⁰² This concern that the definition was not sufficient to form a basis for criminalizing aggression is still apparent in the ongoing discussions of the Special Working Group on the crime of aggression.¹⁰³

The ILC, charged by the General Assembly to formulate the Nuremberg Principles into a workable product, produced the draft Code of Crimes Against the Peace in 1996.¹⁰⁴ The ILC cited the Nuremberg Principles and the U.N. Charter as sources for individual criminal responsibility for acts of aggression, but not the 1974 definition.¹⁰⁵ The ILC claimed the 1974 definition was too political and legally imprecise.¹⁰⁶ The 1996 definition assigned responsibility to an “individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state shall be responsible for a crime of aggression.”¹⁰⁷ Despite the work of the ILC in 1996, it is the 1974 definition, along with the Nuremberg Principles, that forms the basis for the current debate within

⁹⁷ *Id.* art. 3.

⁹⁸ *Id.* art. 4

⁹⁹ *Id.* art. 5.

¹⁰⁰ *Id.*

¹⁰¹ Weisbord, *supra* note 55, at 168.

¹⁰² DINSTEIN, *supra* note 1, at 136.

¹⁰³ Weisbord, *supra* note 55, at 168; Int’l Crim. Ct., Assembly of States Parties, Resumed sixth session, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/6/20/Add.1/Annex II, 5 (June 2-6, 2008) [hereinafter *Report of the Special Working Group*].

¹⁰⁴ Weisbord, *supra* note 59, at 170; Draft Code of Crimes Against the Peace and Security of Mankind, 1996, 51 UN GAOR Supp. (No. 10) at 14, U.N. Doc. A/CN.4/L.532, corr. 1, corr. 3 (1996) [hereinafter *Draft Code of Crimes, 1996*].

¹⁰⁵ Weisbord, *supra* note 59, at 170.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing M. CHERIF BASSIOUNI & BENJAMIN FERENCZ, *THE CRIME AGAINST PEACE IN INTERNATIONAL CRIMINAL LAW* 313, 316 (M. Cherif Bassiouni ed., 2d ed. 1999)).

the ICC Special Working Group on how to define aggression, as will be discussed in detail in Section II of this article.¹⁰⁸

In the multiple armed conflicts following World War II, no court has indicted a country for crimes of aggression.¹⁰⁹ The Security Council created ad hoc tribunals in response to the atrocities committed in the former Yugoslavia and Rwanda; however, their charters do not list crimes of aggression as crimes within their mandates.¹¹⁰ These ad hoc tribunals focused on genocide, war crimes and crimes against humanity.¹¹¹

D. The Rome Statute and the International Criminal Court

Almost sixty years after World War II and numerous attempts by the U.N. to create an international criminal court, the Rome Statute made the ICC a reality.¹¹² Only those nations who voluntarily become a party to the Rome Statute are bound by it.¹¹³ Once again, major issues surfaced with respect to the crime of aggression at the Rome Conference.¹¹⁴ The concerns centered around three basic questions:

¹⁰⁸ Weisbord, *supra* note 55, at 168; *Report of the Special Working Group*, *supra* note 107.

¹⁰⁹ Weisbord, *supra* note 55, at 168; *see also* DINSTEIN, *supra* note 1, at 121 (stating that no indictments for crimes of aggression in violation of *jus ad bellum* have been brought against the numerous nations involved in armed conflicts since WWII). Dr. Lavers cites to only three instances where the Security Council has determined an act of aggression. Dr. Troy Lavers, *[Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Court its Freedom?*, 71 ALB. L. REV. 299, 303 (2008). The first was the situation involving South Africa and Angola in 1976. The second was the Israeli bombing of the PLO headquarters in Tunisia in 1985. The third determination by the Security Council was condemnation of acts of armed aggression perpetrated against the People's Republic of Benin in 1977. *See* S.C. Res. 387, ¶ 6, U.N. Doc. S/RES/387 (Mar. 31, 1976) (South Africa); S.C. Res. 573, ¶ 1, U.N. Doc. S/RES/573 (Oct. 4, 1985) (Israel); and S.C. Res. 405, ¶ 2, U.N. Doc. S/RES/405 (Apr. 14, 1977) (Benin). Other acts of aggression, such as the Falklands War and the U.S. invasion of Iraq, received no such condemnation by the United Nations, highlighting the political difficulty in the UN Security Council being responsible for identifying crimes of aggression. *See* Dr. Troy Lavers, *[Pre]Determining the Crime of Aggression: Has the Time Come to Allow the International Court its Freedom?*, 71 ALB. L. REV. 299, 303 (2008).

¹¹⁰ DINSTEIN, *supra* note 1, at 121–122.

¹¹¹ *Id.*

¹¹² Rome Statute, *supra* note 4. Jelena Pejic, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 853-54 (1997).

¹¹³ DINSTEIN, *supra* note 1, at 91 (citing the 1969 Vienna Convention on the Law of Treaties which states that an obligation may arise for a Third State from a provision of a treaty only if the Third State accepts the obligation expressly and in writing).

¹¹⁴ *Report of the Special Working Group*, *supra* note 103.

(1) whether or not to include aggression under the jurisdiction of the ICC, (2) how to define aggression, and (3) what role, if any, should the United Nations have in determining aggression.¹¹⁵

The delegates' opinions varied as to how to define aggression and whether or not the ICC should exercise jurisdiction without Security Council involvement.¹¹⁶ Some delegates took the position that aggression should not be included within the jurisdiction of the court because it was a political determination and not a judicial one. Others felt that to not include the "supreme international crime"¹¹⁷ would result in retroactive or ex post facto law and forfeit what Nuremberg had accomplished.¹¹⁸ Some delegates wanted inclusion of aggression only if a precise definition could be agreed upon and others thought that the definition in G.A. Res. 3314 was sufficient.¹¹⁹ Finally, some delegates felt that aggression should be expanded to include threats of the use of force and aggression to the environment.¹²⁰ What resulted was a last minute compromise proposed by Chairman Philippe Kirsch of Canada: include aggression and postpone resolution of a definition for another day.¹²¹ Therefore, while Article 5(1) gives ICC jurisdiction over the crime of aggression, Article 5(2) states that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime."¹²²

This may seem like a workable compromise, but it will be difficult to achieve. After the Rome Statute's entry into force,¹²³ seven years had to pass before a Review Conference could convene to consider amendments; meaning 2009 was the first time an amendment could be considered.¹²⁴ While the Special Working Group concluded its

¹¹⁵ Lavers, *supra* note 109, at 302.

¹¹⁶ *Id.* See generally BASSIOUNI, *supra* note 73 (documenting the formation of the ICC by providing a compilation of some of the Reports of the Preparatory Committee on the Establishment of the International Criminal Court that includes proposals by various States Parties).

¹¹⁷ See *supra* note 1 and accompanying text.

¹¹⁸ Weisbord, *supra* note 55, at 171.

¹¹⁹ *Id.*

¹²⁰ *Id.*; see DINAH SHELTON ET AL., JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW 7 (2006) (discussing various cases in Latin American courts that consider living in a healthy environment a right that is judicially enforceable; a right to live in a place where the natural resources are preserved and free from pollution and waste).

¹²¹ *Id.*; see also BASSIOUNI, CRIMES, *supra* note 33, at 31 (discussing the last minute work of the Drafting Committee in preparing the Rome Statute for signature in July 1998).

¹²² Rome Statute, *supra* note 4, art. 5.

¹²³ Rome Statute, *supra* note 4.

¹²⁴ *Id.* art. 121(3).

discussion on the crime of aggression in February 2009, discussions continued during informal sessions as to other issues surrounding adoption of an amendment on aggression.¹²⁵ In concluding its work on aggression, the Special Working Group drafted a proposal for a provision on aggression that would be put forth to the Review Conference in May 2010.¹²⁶ An amendment requires two-thirds majority of parties to approve and then it will only enter force for the respective state party one year after it ratifies the amendment.¹²⁷ With all the political debates on aggression coupled with the numerous procedural requirements to approve an amendment, some doubt surrounds whether or not individual culpability for aggression will ever become a reality.

E. The U.S. Position on the ICC and Crime of Aggression

One of the initial proponents of the ICC was the United States.¹²⁸ However, the position the United States eventually took resembled the position of the Soviet Union almost fifty years earlier in that the United States felt the ICC threatened its sovereignty.¹²⁹ The U.S. delegation spokesman stated the United States was “subject to special responsibilities and special exposure to political controversy over [its] actions” and that the United States was “called upon to act, sometimes at great risk, far more than any other nation.”¹³⁰

One of the initial issues on defining aggression was whether or not to codify existing customary international law regarding aggression or create new law.¹³¹ The United States did not want the definition of aggression to be based on G.A. Res. 3314 because the United States felt the resolution did not reflect customary international law at the time of

¹²⁵ ICC, Assembly of States Parties, Resumed 7th Sess., *Report of the Special Working Group on the Crime of Aggression*, Annex II, 20 ICC-ASP/7/20/Add.1 (Feb 9-13, 2009) [hereinafter Final Report of the Special Working Group].

¹²⁶ *Id.* at 29.

¹²⁷ *Id.* art. 121(5). The amendment procedure regarding articles 5-8 is different from that of the other articles of the Rome Statute in that all states are bound by subsequent amendments unless the state party chooses to withdraw from the statute altogether under article 121(6).

¹²⁸ See BASSIOUNI, *supra* note 73, at 19-26; see also Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies: American Foreign Policy and the International Criminal Court, Washington D.C., May 6, 2002, available at <http://www.state.gov/p/us/rm/9949.htm> [hereinafter Grossman Remarks].

¹²⁹ Grossman Remarks, *supra* note 128; see O'Donovan, *supra* note 47.

¹³⁰ David J. Sheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 20 (1999).

¹³¹ SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW, VOL. I: 1999-2001, at 386 (2002).

its adoption.¹³² Theodor Meron, a U.S. delegate to the 1998 Rome Conference, stated that “[t]o define a new crime by treaty, to follow the legislative approach, would open the door to governments and individuals contesting in the future the legitimacy of the ICC. This can and should be avoided, basing our work on [the] firm foundation of customary law.”¹³³

The United States signed the Rome Statute under the Clinton administration, but then unsigned it under the Bush administration.¹³⁴ Since the ratification of the Rome Statute, the United States pressured the Security Council to adopt a resolution that exempted states not party to the Rome Statute but who participated in U.N. operations.¹³⁵ Upon the renewal of this resolution, Ambassador James Cunningham, Deputy U.S. Representative to the United Nations, reiterated the U.S. concern that American personnel may find themselves subject to the ICC although the United States is not a party to the Rome Statute.¹³⁶ This concern included fear of prosecutions for aggression, which the United States believed must be determined by the Security Council prior to any action by the ICC.¹³⁷

In 2008, the United States abstained from using its veto to block a U.N. Security Council resolution referring the situation in Darfur to the ICC.¹³⁸ This seemed contrary to the earlier position the United States took against the ICC. Yet, in fact, this is exactly how the United States wanted the ICC to work with the Security Council.¹³⁹ The United States has always believed that the Security Council can grant jurisdiction over particular matters.¹⁴⁰

The current administration is taking a more cautious approach to the ICC as indicated by comments from Secretary of State Hillary Clinton. In her response to questions during the nomination process for Secretary of State, she stated “whether we work toward joining or not, we will end the hostility toward the ICC, and look for opportunities to encourage effective ICC action

¹³² *Id.* at 386.

¹³³ *Id.* (citing Theodor Meron, U.S. Dep’t of State, Statement on Crime of Aggression before the ICC Preparatory Commission, at 2-3 (Dec. 6, 2000)).

¹³⁴ Grossman Remarks, *supra* note 128.

¹³⁵ S.C. Res. 1422, ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002).

¹³⁶ Press Release #85, U.S. Mission to the United Nations, Statement by Ambassador James Cunningham, Deputy U.S. Representative to the United Nations, on the Renewal of Resolution 1422 (June 12, 2003), *available at* <http://www.amicc.org/docs/US1422Stmt12June03.pdf>.

¹³⁷ MURPHY, *supra* note 131, at 382.

¹³⁸ RACHEL KERR & EIRIN MOBEKK, PEACE AND JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR 67 (2007).

¹³⁹ MURPHY, *supra* note 137, at 382.

¹⁴⁰ KERR & MOBEKK, *supra* note 144, at 67.

in ways that promote U.S. interests by bringing war criminals to justice.”¹⁴¹ During his election campaign, then Senator Obama gave his position on the ICC, stating that he “will consult thoroughly with our military commanders and also examine the track record of the court before reaching a decision on whether the [United States] should become a State Party to the ICC.”¹⁴² While it appears that the current administration is less hostile to the ICC, it also does not seem likely that the United States will ratify the Rome Statute any time in the near future.

III. ANALYSIS

A. Jurisdiction

1. *General ICC Jurisdiction*

Ratification of the Rome Statute on 11 April 2002 signaled a huge step in international criminal law.¹⁴³ After years of debate and political wrangling, were state parties finally ready to see international crimes punished on a world stage? The answer remains undetermined, but this article will look at some of the issues surrounding the inclusion of the crime of aggression.

One of the first big debates surrounding the formation of the ICC was jurisdiction and its exercise.¹⁴⁴ First, this article will look at ICC jurisdiction in general and then at the jurisdictional issues regarding aggression. The state parties made several compromises on jurisdiction in order to ensure ratification of the statute.¹⁴⁵ The first set of compromises, pushed by the United States, dealt with *ratione temporis*, substantive issues, and what can best be called political issues.¹⁴⁶

Jurisdiction *ratione temporis* limits prosecution of crimes to those committed after the Rome Statute’s entry into force.¹⁴⁷ The Rome

¹⁴¹ Questions for the Record, Senator John Kerry, Nomination of Hillary Rodham Clinton, Department of State, Secretary of State 66 (Jan. 13, 2009), *available at* <http://www.foreignpolicy.com/files/KerryClintonQFRs.pdf>.

¹⁴² Senator Barack Obama, Response to Citizens for Global Solutions Questionnaire, Oct. 6, 2007, *available at* <http://globalsolutions.org/08orbust/quotes/2007/10/31/quote484>.

¹⁴³ See Ferencz, *supra* note 7, at 551.

¹⁴⁴ Lavers, *supra* note 109, at 302; *see also* Petty, *supra* note 7, at 533.

¹⁴⁵ Weisbord, *supra* note 55, at 171.

¹⁴⁶ *Id.*; William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law*, 24 MICH. J. INT’L L. 1, 6 (2002).

¹⁴⁷ Rome Statute, *supra* note 4, art. 11(1).

Statute further limits the court's jurisdiction over state parties to their individual dates of ratification.¹⁴⁸ Therefore, the ICC will have no jurisdiction for crimes committed before July 2002—when the Rome Statute came into force—or even later for crimes committed by states who join later.

Substantive jurisdictional constraints, found in Article 1 of the Rome Statute, limit the ICC to prosecute only those “persons who commit the most serious crimes of international concern.”¹⁴⁹ Article 5 lists those crimes as genocide, war crimes, crimes against humanity and crimes of aggression.¹⁵⁰ Article 5 goes on to reiterate that jurisdiction is limited to “the most serious crimes of concern to the international community as a whole.” It also reiterates the “most serious crimes” limitation.¹⁵¹ Some delegates to the Rome Conference argue that this adds an additional limitation to what crimes the ICC may prosecute.¹⁵² For example, this could deny the ICC jurisdiction over isolated or small incidents of crimes against humanity, incidents that may not rise to the level of international concern.¹⁵³

The political limitations on jurisdiction arise from the state parties themselves. Whether state parties or the ICC Prosecutor *proprio motu* (of one's own accord)¹⁵⁴ refers cases to the ICC, several preconditions exist.¹⁵⁵ Article 12(2) requires either the territorial state (the location where the crime occurred) or the national state (the defendant's state of nationality) be a state party or accept jurisdiction with respect to the defendant.¹⁵⁶ This limits the ICC because in the current world, the most likely scenarios for international crimes involve violence conducted internally by states, instead of crimes committed by states against states.¹⁵⁷ In this situation, a state will not likely self-refer, thereby subjecting one of its citizens or government leaders to

¹⁴⁸ *Id.* art. 11(2).

¹⁴⁹ *Id.* art. 1.

¹⁵⁰ *Id.* art. 5(1).

¹⁵¹ *Id.* art. 5(1). The language referring to the most serious crimes is found in the Preamble and articles 1 and 5.

¹⁵² *Report of the Special Working Group*, *supra* note 103, at 24.

¹⁵³ James Nicholas Boeving, *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT'L L. 557, 578 (2008).

¹⁵⁴ KERR & MOBEKK, *supra* note 144, at 64. The Office of the Prosecutor is to act independently as a separate organ of the Court and is to be headed by the Prosecutor. The Prosecutor has full authority over the management and administration of the Office, including the staff, facilities and other resources. Rome Statute, *supra* note 4, art. 42.

¹⁵⁵ Rome Statute, *supra* note 4, arts. 14-15.

¹⁵⁶ *Id.* art. 12(2).

¹⁵⁷ Boeving, *supra* note 159, at 578.

prosecution. In addition, the states committing international crimes are even more likely not parties to the ICC.¹⁵⁸

The most traditional form of jurisdiction is found in Article 13.¹⁵⁹ The ICC exercises jurisdiction for cases referred to it by the Security Council under the Security Council's Chapter VII authority.¹⁶⁰ This type of referral bypasses the Article 12 prerequisite for the national or territorial state to be a party to the Rome Statute.¹⁶¹ Under Article 13, the Security Council must have Chapter VII authority and the five permanent members of the Security Council would have to not exercise their veto power in order for the ICC to have jurisdiction.¹⁶² This scenario also seems unlikely to occur, given the political dynamics of the permanent five members as well as the Security Council's reticence in labeling acts by states as aggressive.¹⁶³

The second major compromise regarding jurisdiction, also pushed by the United States, involves the concept of complementarity.¹⁶⁴ Complementarity recognizes the primacy of the right of states to prosecute their own nationals.¹⁶⁵ The Preamble to the Rome Statute emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."¹⁶⁶ The statute establishes that a case will be inadmissible before the ICC whenever it "is being investigated or prosecuted by a State that has jurisdiction, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁶⁷

Complementarity alleviated a major concern of some of the nations by preserving state sovereignty. The issue with leaving prosecution of a state's leaders to the state itself is political bias.¹⁶⁸ It is doubtful whether a state would ever prosecute one of its own leaders for a crime of aggression. However, Article 17 gives the ICC jurisdiction to open its own investigation if it feels that a state was simply shielding

¹⁵⁸ *Id.*

¹⁵⁹ Rome Statute, *supra* note 4, art. 13.

¹⁶⁰ *Id.* Under Chapter VII of the UN Charter, the Security Council (1) determines the existence of a threat to the peace, a breach of the peace, or an act of aggression in accordance with Article 39, and (2) recommends or decides what measures shall be taken to maintain or restore international peace and security in accordance with Articles 41 and 42. UN Charter art. 39.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Lavers, *supra* note 109, at 303.

¹⁶⁴ Pejic, *supra* note 112, at 854.

¹⁶⁵ Burke-White, *supra* note 146, at 9.

¹⁶⁶ Pejic, *supra* note 112, at 855; Rome Statute, *supra* note 4, Preamble.

¹⁶⁷ Rome Statute, *supra* note 4, art. 17(a).

¹⁶⁸ Dan Derby, *Enforcement of Nuremberg Norms: The Role for Mechanisms other than the ICC*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 278, 282 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

its own people.¹⁶⁹ A state is unwilling or unable to prosecute when the state prosecutes for the purpose of shielding the accused from proceedings before the ICC, where it unjustly delays prosecution or where the state fails to conduct independent or impartial investigations.¹⁷⁰ The problem with the ICC stepping in after such a determination is that the ICC depends on state cooperation. If the state refers a situation to the court, then cooperation is assumed; however, if the court initiates an investigation on the basis that the state was shielding its own people, then cooperation by the state may not happen.¹⁷¹

Whether or not the crime of aggression falls under the general provisions mentioned above for jurisdiction or under new provisions creating additional requirements for jurisdiction forms the basis for debate among the state parties. This article will now focus on the proposed amendments for the ICC to exercise jurisdiction for the crime of aggression as well as incorporating the basic provisions mentioned above.

2. *Jurisdiction with Respect to the Crime of Aggression*

Besides the basic limitations set forth in the Rome Statute discussed above, much heated debate specifically surrounded the crime of aggression and exactly how the ICC should exercise jurisdiction.¹⁷² The Special Working Group held their final meeting to discuss the crime of aggression on 9-13 February 2009.¹⁷³ The general consensus was that Article 13 would apply to the crime of aggression allowing Security Council referral, state party referral, or initiation of an investigation by the prosecutor as triggers for an investigation of the crime of aggression.¹⁷⁴ The question remained as to what role, if any, the Security Council or other body of the United Nations would play in determining whether or not an act of aggression occurred.¹⁷⁵ The following discussion focuses on three options considered by the Special Working Group: (1) Security Council determination of aggression as a prerequisite for ICC jurisdiction; (2) failure of the Security Council to make a determination within a specified time limit; and (3) General Assembly or International Court of Justice (ICJ) determinations for aggression. A fourth option discussed, although not specifically

¹⁶⁹ *Id.*; Rome Statute, *supra* note 4, art. 17(a).

¹⁷⁰ *Id.* art. 17(2).

¹⁷¹ KERR & MOBEKK, *supra* note 138, at 64.

¹⁷² *Final Report of the Special Working Group*, *supra* note 125, at 20.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 23-24.

¹⁷⁵ *Id.* at 24.

delineated in the chairman's draft amendment is the independent authority of the ICC without any U.N. involvement. The chairman proposed the following language for presentation to the Review Conference:

Article 15 bis
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13,¹⁷⁶ subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

Alternative 1

3. In the absence of such a determination, the Prosecutor may not proceed with the investigation of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.¹⁷⁷

¹⁷⁶ Rome Statute, *supra* note 4, art. 13. Article 13 allows for the exercise of jurisdiction by Security Council referral, State Party referral, or initiation of investigations by the Prosecutor.

¹⁷⁷ Int'l Crim. Ct., Assembly of States Parties, Resumed sixth session, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, ICC-ASP/6/20/Add.1 13 n.5 (June 2-6, 2008) [hereinafter *Discussion Paper*]. This option is based on a discussion for a procedural "go-ahead" by the Security Council without a determination that an act of aggression has occurred. Weisbord, *supra* note 55, at 205.

Alternative 2

3. Where no such determination is made within [six] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

Option 1 – end the paragraph here.

Option 2 – add: provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

Option 3 – add: provided the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

Option 4 – add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

4. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.¹⁷⁸

a. Security Council Determination as a Prerequisite

In the proposed amendment of Article 15 bis, paragraph two mandates that the prosecutor shall first consult the Security Council to see if they found that the state concerned committed an act of aggression.¹⁷⁹ Two alternatives discuss options for the prosecutor in the absence of a Security Council determination.¹⁸⁰ It is unclear what the prosecutor may do, if anything, if the Security Council makes a determination of an act of aggression. If the Security Council determines that a state did not commit an act of aggression, may the prosecutor proceed against an individual anyway? Will this create a defense for the state? If the Security Council determines that a state has committed an act of aggression, does this automatically give the

¹⁷⁸ Int'l Crim. Ct., Assembly of States Parties, Resumed seventh session, *Proposals for a Provision on Aggression Elaborated by the Special Working Group on the Crime of Aggression*, ICC-ASP/7/20/Add.1/Annex II, 20 (Feb 9-13, 2009) [hereinafter *Proposals for Amendment*].

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

prosecutor authority to proceed, or is there some requirement for an express authorization by the Security Council? The Security Council may determine a state committed an act of aggression, but in order to maintain international peace and security, decide that it is best not to pursue a criminal investigation against an individual of that state. At this point, the Security Council would be forced to adopt a resolution that requests the ICC to defer an investigation or prosecution under Article 16.¹⁸¹

Under Article 39 of the U.N. Charter, “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”¹⁸² Article 24 of the U.N. Charter gives the Security Council “primary responsibility for the maintenance of international peace and security.”¹⁸³ Article 5(2) of the Rome Statute requires the definition of the crime of aggression to be “consistent with the relevant provisions of the Charter of the United Nations.”¹⁸⁴ Reading these provisions together one can argue that only the Security Council has the authority to determine whether or not an act of aggression has occurred before the ICC may exercise jurisdiction.¹⁸⁵ Because aggression is such a contentious topic, some scholars believe that making a determination as to whether a state act constitutes aggression is a political issue rather than a judicial one and more suitably made by the Security Council.¹⁸⁶ Alternative 1, Option 1 of the proposed amendment reflects this position.¹⁸⁷

A counter argument to the Security Council having exclusive authority to determine acts of aggression is that Article 39 of the U.N. Charter authorizes the Security Council to determine aggression solely for maintaining international peace and security, not for establishing criminal responsibility.¹⁸⁸ Some international law scholars interpret Article 24 of the U.N. Charter to mean that the Security Council has primary, not exclusive, responsibility for maintaining international peace and security.¹⁸⁹

¹⁸¹ Rome Statute, *supra* note 4, art. 16.

¹⁸² UN Charter art. 39.

¹⁸³ *Id.*, art. 24.

¹⁸⁴ Rome Statute, *supra* note 4, art. 5(2).

¹⁸⁵ Weisbord, *supra* note 55, at 198.

¹⁸⁶ See Lavers, *supra* note 109, at 309.

¹⁸⁷ *Discussion Paper*, *supra* note 177, at 13. Option 2 to alternative one is based on a discussion that gives the Prosecutor a sort of green light to proceed without the Security Council making a substantive determination that an act of aggression has occurred.

¹⁸⁸ Lavers, *supra* note 109, at 309; Weisbord, *supra* note 55, at 198.

¹⁸⁹ Lavers, *supra* note 109, at 309; *see also* Weisbord, *supra* note 55, at 198.

The Security Council's analysis of what constitutes acts of aggression for political purposes is distinct from the criminal liability analysis of a judicial body.¹⁹⁰ Allowing the Security Council to make the determination of aggression would subordinate the ICC to the political views of the Council and potentially undermine the independence and credibility of the Court.¹⁹¹ ICC dependence on the Security Council could give the Security Council a quasi-judicial role; a role it was not meant to take.¹⁹² The Security Council is a political body, not a judicial one.¹⁹³ The U.N. Charter states that the International Court of Justice is the principal judicial organ of the U.N.¹⁹⁴

Finally, the Security Council has a poor track record in determining acts of aggression;¹⁹⁵ instead the Council prefers the phrase "threats to international peace and security" rather than acts of aggression.¹⁹⁶ By making a Security Council determination a prerequisite for ICC jurisdiction, it could allow the five permanent members of the Council to insulate themselves or their allies from ever facing prosecution for acts of aggression.¹⁹⁷ This inconsistency makes setting any legitimate legal precedent for what constitutes an act of aggression almost impossible.

b. Time Limit on Security Council Determination

Alternative 2 of the proposed amendment allows the prosecutor to proceed with an investigation if, after six months after notification, the Security Council fails to make a determination of an act of

¹⁹⁰ See DINSTEIN, *supra* note 1, at 120 (citing J.I. Garvey, *The UN Definition of "Aggression": Law and Illusion in the Context of Collective Security*, 17 VA. J. INT'L L. 177, 193-4 (1976-77)).

¹⁹¹ Pejic, *supra* note 112, at 859.

¹⁹² Lavers, *supra* note 109, at 303.

¹⁹³ *Id.*

¹⁹⁴ U.N. Charter art. 92.

¹⁹⁵ Lavers, *supra* note 109, at 302-05. Dr. Lavers cites to only three instances where the Security Council has determined an act of aggression—South Africa and Angola in 1976, the Israeli bombing of the PLO headquarters in Tunisia, and condemnation of acts of armed aggression perpetrated against the People's Republic of Benin. See also S.C. Res. 232, ¶ 1, U.N. Doc. S/RES/232 (Dec. 16, 1966) (concerning the rebellion in Southern Rhodesia as a threat to international peace and security); S.C. Res. 660, ¶¶ 1-4, U.N. Doc. S/RES/660 (Aug. 2, 1990) (determining a breach of international peace and security regarding the Iraq invasion of Kuwait); S.C. Res. 1368, ¶ 2, U.N. Doc. S/RES/1368 (Sep. 12, 2001) (condemning acts of international terrorism as threats to international peace and security).

¹⁹⁶ Lavers, *supra* note 109, at 305.

¹⁹⁷ Stein, *supra* note 5, at 6. Because of the political nature of the Security Council, decisions would be inconsistent at best based on the veto power of the five permanent members. *Id.* at 9.

aggression.¹⁹⁸ Six months was a suggested time frame and not a general consensus as indicated by the brackets.¹⁹⁹ Option 2 adds the additional requirement of the Pre-Trial Chamber authorizing commencement of an investigation in accordance with Article 15.²⁰⁰ The arguments for and against Security Council involvement listed above also apply to this alternative. Allowing for a Security Council determination of aggression with a time delay could possibly hinder criminal prosecutions as well as produce duplicative efforts.²⁰¹ This alternative still does not resolve the question as to what the prosecutor may do if, within six months, the Security Council determines that a state did or did not commit an act of aggression.

c. General Assembly or International Court of Justice Determination

Finally, Alternative 2 adds the options of either the General Assembly or the ICJ making a determination on aggression.²⁰² Article 96 of the U.N. Charter stipulates that “[t]he General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question.”²⁰³ Again, the proposed language gives a time limit of six months in which either U.N. body may make a determination or if not, the prosecutor may proceed.²⁰⁴ Proponents for these options argue that the General Assembly and ICJ have previously determined acts of aggression in the absence of a Security Council finding.²⁰⁵ Enabling the General Assembly or ICJ to make the determination alleviates the concern of a purely political determination based on the policies of one

¹⁹⁸ *Proposals for Amendment*, *supra* note 178, at 32.

¹⁹⁹ *See Report of the Special Working Group*, *supra* note 103, at 8.

²⁰⁰ *Discussion Paper*, *supra* note 177, at 13.

²⁰¹ Lavers, *supra* note 109, at 315.

²⁰² *Proposals for Amendment*, *supra* note 178, at 32.

²⁰³ U.N. Charter, art. 96.

²⁰⁴ *Id.*

²⁰⁵ Weisbord, *supra* note 55, at 201. In the Uniting for Peace Resolution of 1950, the General Assembly exerted authority over determinations of the use of force and condemned armed attacks when the Security Council was unable to reach a consensus. *See* Uniting for Peace Resolution, G.A. Res. 337(V), U.N. Doc. A/RES/377 (Nov. 3, 1951). The ICJ in the Nicaragua Case of 1986 said that United States’ first use of armed militia amounted to armed attack by finding that article 3 of GA Res. 3314, paragraph 3(g) “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State . . . reflect[s] customary international law.” *See* *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* I.C.J. 14 (1986); *see also* Stein, *supra* note 5, at 19-21 (posing the idea that the IJC was actually determining aggression by Nicaragua to determine the validity of the United States’ claim of self-defense).

of the five veto holders of the Security Council.²⁰⁶ Involvement of one of these U.N. organizations may allow for enforcement actions under Chapter VII of the U.N. Charter to be implemented,²⁰⁷ thereby maintaining Security Council participation.²⁰⁸

Opponents to this option argue that the General Assembly is as much a political body as the Security Council, only without the veto power.²⁰⁹ The General Assembly could refuse to make a determination or refuse to request an advisory opinion from the ICJ.²¹⁰ The ICJ could refuse to give an advisory opinion as well.²¹¹ Another potential issue is that the General Assembly or ICJ standard for determining an act of aggression may differ from the ICC standard.²¹²

d. Independent Determination by the ICC

The ICC is an independent organization formed by a treaty signed by over a hundred nations; it should not be subordinate to the U.N.²¹³ Proponents for ICC independence rely on the argument that the Security Council is not the sole authority to maintain international peace and security.²¹⁴ The U.N. organizations utilize different evidentiary standards from the ICC, which could taint the criminal case.²¹⁵ The U.N.'s role focuses on the acts of states, not individuals.²¹⁶

Some of the concerns of having an independent determination of aggression made by the ICC include forcing the ICC into a political role and embroiling them in potential controversies between states.²¹⁷ The U.S. position in 2002 was that the ICC actually erodes the basic

²⁰⁶ See generally Stein, *supra* note 5, at 33 (discussing the pros and cons of either the General Assembly or the ICJ determining aggression as opposed to an exclusive role of the Security Council).

²⁰⁷ For an explanation of Chapter VII authority, see *supra* note 160 and accompanying text.

²⁰⁸ Stein, *supra* note 5, at 10.

²⁰⁹ Weisbord, *supra* note 55, at 201.

²¹⁰ *Id.*

²¹¹ Stein, *supra* note 5, at 33. Article 65 of the ICJ Statute states that the Court may give an advisory opinion on any legal question referred to it under the authority of the U.N. Charter.

²¹² Weisbord, *supra* note 55, at 201; see also DINSTEIN, *supra* note 1, at 126 (discussing the G.A. Res. 3314 definition of aggression as used by the General Assembly and as a guide to the Security Council and how it is meant to determine State acts of aggression not individual criminal liability).

²¹³ Ferencz, *supra* note 7, at 557.

²¹⁴ See Weisbord, *supra* note 55, at 198 (stating that the argument is based on Article 24 of the U.N. Charter giving the Security Council "primary responsibility for the maintenance of international peace and security").

²¹⁵ *Id.* at 201.

²¹⁶ See Lavers, *supra* note 109, at 303.

²¹⁷ Boevig, *supra* note 157, at 578.

elements of the U.N. Charter and a nation's inherent right of self-defense.²¹⁸ By the ICC judging a nation's security decisions, the ICC places a chilling effect on a nation's willingness to project military power in self-defense.²¹⁹

Another issue is the possible conflict between an ICC determination that a state committed an act of aggression and a Security Council determination that a state has not committed an act of aggression. Does a Security Council finding trump the ICC finding? May an individual use the Security Council's determination as a defense? This possible conflict could undermine any peace negotiations pursued by the United Nations. While the debate continues on the exact method for the ICC exercising jurisdiction; the more pressing issue that remains is how aggression will be defined.

B. Defining Aggression

This article will now examine a proposed definition of aggression and related issues.

1. *The Principle of Legality*

The principle of legality holds that nothing is a crime unless is it forbidden by law (*nullum crimen, nulla poena sine lege*).²²⁰ To satisfy the principle of legality, a crime must be specific enough to give perpetrators fair notice of prohibited conduct.²²¹ The Rome Statute itself limits the scope of crimes: "A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."²²² The Statute further states in Article 22(2) that the definition of a crime should be strictly construed and in cases of ambiguity, the ICC will interpret it in favor of the individual investigated.²²³ To satisfy the principle of legality, the ICC must define the crime of aggression with enough specificity to enable perpetrators to know exactly what conduct is prohibited.

²¹⁸ Grossman Remarks, *supra* note 128.

²¹⁹ *Id.*

²²⁰ Petty, *supra* note 7, at 544; *see also* DINSTEIN, *supra* note 1, at 119 (referencing the rejection of the defense's argument in Nuremberg that charging crimes against peace violated the principle of *nullem crimen, nulla poena sine lege*).

²²¹ BASSIOUNI, CRIMES, *supra* note 33, at 313.

²²² Rome Statute, *supra* note 4, art. 22(1).

²²³ *Id.* art. 22(2).

2. *Linking the State Act With the Individual Act*

The crime of aggression requires two acts: one by the state and one by an individual.²²⁴ The international community generally agrees that an aggressive act of the state must occur before assigning culpability to an individual.²²⁵ The Nuremberg Principles adopted by the U.N. affirmed individual culpability for acts of aggression.²²⁶ The General Assembly's definition served as a guide to the Security Council in making determinations of state aggression, but not individual acts.²²⁷ The ILC's 1996 definition linked the state act with individual culpability by incorporating a leadership requirement, which Section III(b)(4) will discuss in detail.²²⁸

In 2008, Chairman Christian Wenaweser drafted a discussion paper that built upon the previous Special Working Group's progress on defining aggression.²²⁹ The Chairman proposed a definition using a general definition with a non-exhaustive list of aggressive acts.²³⁰ The Special Working Group retained this definition in its proposed amendments in its final meeting on the crime of aggression.²³¹ The text states, in relevant part:

Article 8 bis Crime of Aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position to effectively exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

²²⁴ Weisbord, *supra* note 55, at 179; *see also* DINSTEIN, *supra* note 1, at 136 (discussing the importance of criminal intent as an element of crimes of aggression set forth in the *High Command* case).

²²⁵ Weisbord, *supra* note 55, at 179; *see also* DINSTEIN, *supra* note 1, at 136; Petty, *supra* note 8, at 536.

²²⁶ International Law Commission of the United Nations, Principles of the Nuremberg Tribunal, *Report of the International Law Commission Covering its Second Session, 5 June-29 July, 1950*, Document A/1316, pp. 11-14.

²²⁷ Weisbord, *supra* note 55, at 179.

²²⁸ *Id.* at 213; *see also* Petty, *supra* note 8, at 547 (noting that the Preparatory Commission required "a person to be in a position to effectively exercise control over or direct the political or military action of a State" (Int'l Law Comm'n, *Draft Code of Crimes Against the Peace and Security of Mankind, with commentaries*, U.N. Doc. A/CN.4/L.532, ¶ 42, (1996)).

²²⁹ Weisbord, *supra* note 55, at 176.

²³⁰ *Id.* at 182.

²³¹ *Proposals for Amendment, supra* note 178, at 30.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Paragraph 1 sets forth the individual conduct that amounts to a crime of aggression by describing the conduct as “act[s] of aggression.”²³² The Special Working Group prepared a draft paragraph to add to Article 25 that ensures the leadership requirement applies to all forms of participation.²³³ This definition is similar to the one found in the Nuremberg Charter.²³⁴ Paragraph 2 defines the state act of aggression and is identical to paragraph 2 of the 1974 definition.²³⁵ Since paragraph 2 defines “act of aggression” as a state’s use of armed force inconsistent with the U.N. Charter, the ICC must first find that a state used armed force, therefore making the state act an element of the crime of aggression. In the past, states used armed force to accomplish certain strategic goals.²³⁶ Now these goals are accomplished by other nonmilitary means.²³⁷ These indirect aggressive acts include economic and diplomatic pressure or aiding armed insurgents.²³⁸ Through these indirect acts a state can still “effectively exercise control over or to direct the political or military action of a State.” The use of the phrase “armed force” indicates that other acts of force such as economic force or computer attacks would not meet the definition of an act of aggression.

Assuming a U.N. organization first makes a determination of the state act of aggression, is the ICC bound by that determination? The

²³² *Report of the Special Working Group, supra* note 103, at 3.

²³³ *Id.* The draft language reads: “In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.” *Discussion Paper, supra* note 179, at 14; *Proposals for Amendment, supra* note 178, at 30.

²³⁴ *Report of the Special Working Group, supra* note 103, at 2. The IMT Charter defined crimes against peace as “planning, preparation, ignition or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” London Charter, *supra* note 65, at 639–40.

²³⁵ *Report of the Special Working Group, supra* note 103, at 5. Article 1 of G.A. Res. 3314 defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.” G.A. Res. 3314, *supra* note 90, art. 1.

²³⁶ Boeving, *supra* note 157, at 570.

²³⁷ *Id.*

²³⁸ *Id.*

answer to this question poses many issues. First, if binding on the ICC, this determination may violate a defendant's due process rights.²³⁹ Article 67 of the Rome Statute entitles an accused to the right to confront any witness.²⁴⁰ If a state act is an element of the crime and a binding determination of that element is made by a body of the U.N., how can an accused confront the U.N.? A predetermined, binding decision of an element of the crime may violate the accused's right to a presumption of innocence.²⁴¹ The Special Working Group addressed this issue and agreed that any determination of aggression by an outside organization would not bind the court; however this language needs to appear in the text.²⁴² Further, this could still permit an accused to use a prior determination by an outside organization as a defense.

3. *The Threshold Clause*

In the chairman's 2008 Proposed Amendment, the last sentence of paragraph 1 contains what is known as the threshold clause.²⁴³ An act of aggression "constitutes a manifest violation of the Charter of the United Nations."²⁴⁴ Proponents for the threshold clause argue that it limits the Court's jurisdiction to only the most serious acts under customary international law and excludes those acts of insufficient gravity.²⁴⁵ This compromise allowed for the widest support of the definition.²⁴⁶ At the 2009 meeting of the Special Working Group, the chairman emphasized the years of negotiation and compromises that led to the drafting of the threshold clause; and after much discussion, most delegates supported the draft as a balanced compromise.²⁴⁷

Those delegates opposed to the threshold clause felt it was too ambiguous and could lead to a broad array of interpretations.²⁴⁸ Delegates argued that any act of aggression violated the U.N. Charter and to exclude acts would be inconsistent with the manifest purpose of the Charter.²⁴⁹ Also, the threshold clause for individual culpability in paragraph 1 (manifest violation of the Charter of the United Nations)

²³⁹ Weisbord, *supra* note 55, at 205.

²⁴⁰ Rome Statute, *supra* note 4, art. 67(e). *See generally* Weisbord, *supra* note 55, at 205 (discussing potential violations of due process rights of an accused).

²⁴¹ Weisbord, *supra* note 55, at 218; Rome Statute, *supra* note 4, art. 66.

²⁴² *Report of the Special Working Group*, *supra* note 103, at 7.

²⁴³ *Discussion Paper*, *supra* note 177, at 12; Petty, *supra* note 7, at 541–543.

²⁴⁴ *Report of the Special Working Group*, *supra* note 103, at 4.

²⁴⁵ *Id.*

²⁴⁶ *Id.* There were some delegates who were indifferent to the threshold clause maintaining that it was irrelevant and did not add to the definition. *Id.*; *see* Petty, *supra* note 8, at 544.

²⁴⁷ *Proposals for Amendment*, *supra* note 178, at 22.

²⁴⁸ *Report of the Special Working Group*, *supra* note 103, at 4.

²⁴⁹ *Id.*

constitutes a higher threshold than that required for states in paragraph 2 (armed force in a manner inconsistent with the Charter of the United Nations).²⁵⁰ Further, a qualifier is already built in the Preamble of the Rome Statute by limiting jurisdiction to “the most serious crimes of concern to the international community.”²⁵¹ The other crimes in the Rome Statute do not have additional qualifying language in their definitions.²⁵²

4. *Actus Reus and Mens Rea*

Aggression, by its nature, requires action by someone in a position of leadership that controls the actions of a state. This is the *actus reus*. In order to be held criminally responsible, a person must plan, prepare, initiate or wage a war of aggression.²⁵³ The Nuremberg trials also required a leadership component in order to convict for waging an aggressive war.²⁵⁴ The Special Working Group’s 2008 proposal includes an amendment that would add paragraph 3 *bis* to Article 25: “In respect of the crime of aggression, the provision of this article shall apply only to persons in a position to effectively exercise control over or to direct the political or military action of a State.”²⁵⁵ Article 25 sets out the requirements for individual criminal responsibility as it applies to those crimes within the jurisdiction of the ICC.²⁵⁶ The delegates to the Special Working Group felt that adding paragraph 3 *bis* ensured application of the leadership requirement to not only the primary perpetrators, but to all those who participated.²⁵⁷ This does not limit prosecution to military or government employees; therefore the ICC could prosecute civilians if their actions met the definition. The 2009 Draft Amendment to the Rome Statute of the

²⁵⁰ *Id.*

²⁵¹ Weisbord, *supra* note 55, at 186; Rome Statute, *supra* note 4, Preamble.

²⁵² Rome Statute, *supra* note 4, arts. 6-8.

²⁵³ *Report of the Special Working Group*, *supra* note 103, at 2; *see Petty*, *supra* note 7, at 550.

²⁵⁴ The Charter of the International Military Tribunal, Annexed to the London Charter Agreement for the Establishment of an International Military Tribunal, 1945, 9 Int. Leg. 632, 639-40. The IMT Charter defined crimes against peace as “planning, preparation, ignition or waging of war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. In the *High Command Case*, the Court held that criminality hinges on the actual power of an individual “to shape or influence” the war policy of his country and those acting as instruments of the policy-makers “cannot be punished for the crimes of others.” *U.S.A. v. Von Leeb et al.*, (the High Command Case) (Nuremberg, 1948), 11 NMT 462, 486.

²⁵⁵ *Report of the Special Working Group*, *supra* note 103, at 2.

²⁵⁶ Rome Statute, *supra* note 4, art. 25.

²⁵⁷ *Report of the Special Working Group*, *supra* note 103, at 3.

International Criminal Court also retained the new language of Article 25 regarding leadership.²⁵⁸

In addition to the criminal act or *actus reus*, the Rome Statute requires all crimes within the jurisdiction of the Court to contain the *mens rea* or mental element.²⁵⁹ Article 30 requires that material elements of crimes be “committed with intent and knowledge.”²⁶⁰ Knowledge means awareness of circumstances or consequences that will occur in the ordinary course of events.²⁶¹ The requisite criminal intent is crucial with crimes of aggression because not all acts of preparing for a war are accomplished with evil intent.²⁶² All nations prepare for war in some way or another simply by forming militaries and engaging in military exercises. In some cases the nations may not intend to wage an aggressive war, but simply engage in national defense.²⁶³ The key for criminal culpability is the extent of knowledge of the aggressive plans, not just mere assistance in preparations for war.²⁶⁴

5. *Incorporation of General Assembly Resolution 3314 (XXIX)*

One of the issues the Special Working Group had to resolve was whether to use a general definition of aggression based upon the Nuremberg model, or to use a specific list based on G.A. Res. 3314.²⁶⁵ After deciding to use a mixed model with a general definition and a list, the Special Working Group next dealt with the question of whether or not to specifically reference G.A. Res. 3314 or simply incorporate the list into the definition.²⁶⁶ They compromised; the Special Working Group’s draft definition paragraph 2 lists specific acts “in accordance

²⁵⁸ *Proposals for Amendment*, *supra* note 178, at 32.

²⁵⁹ Rome Statute, *supra* note 4, art. 30; *see* Petty, *supra* note 7, at 551; *see also* DINSTEIN, *supra* note 1, at 136 (stating that all international crimes contain the criminal act and criminal intent).

²⁶⁰ Rome Statute, *supra* note 4, art. 30.

²⁶¹ *Id.*

²⁶² DINSTEIN, *supra* note 1, at 136.

²⁶³ *See generally id.*, at 137 (describing traditionally neutral nations such as Switzerland who arm and prepare for war). Dinstein also notes that the Nuremberg IMT acquitted Hjalmar Schacht (Minister of Economics in 1934, Plenipotentiary for War Economy in 1935, and President of the Reichsbank from 1923-1930 and 1937-1938), because creating an armaments division is in itself not criminal unless undertaken as part of a larger plan to wage aggressive war. *See* International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT’L L. 172, 294 (1947). For more information on the defendants of the Nuremberg trials, *see* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992) and THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

²⁶⁴ DINSTEIN, *supra* note 1, at 137.

²⁶⁵ Petty, *supra* note 7, at 534.

²⁶⁶ *Report of the Special Working Group*, *supra* note 103, at 5.

with United Nations General Assembly Resolution 3314 (XXIX)” that qualify as an act of aggression.²⁶⁷ Proponents for the inclusion of the reference felt it accomplished the best possible compromise in that the 1974 resolution had already been negotiated and reflected current customary international law.²⁶⁸

Delegates opposed to inclusion of the reference to G.A. Res. 3314 argue that in its current form, the reference appears to include all of the provisions of G.A. Res. 3314.²⁶⁹ Article 4 of G.A. Res. 3314 states that the list of enumerated acts is not exhaustive and authorizes the Security Council to determine other acts that equate to aggression.²⁷⁰ But, allowing the Security Council to determine other acts of aggression not listed may violate the principle of legality and infringe on the choice of state parties to be bound by a new definition.²⁷¹ Article 22 of the Rome Statute states that “a person shall not be criminally responsible . . . unless the conduct . . . [is] a crime within the jurisdiction of the Court.”²⁷² If the Security Council, in accordance with Article 4 of G.A. Res. 3314, determines that the actions of a state constitute an act of aggression and that act is not included in the definition list, this could arguably be considered a crime not listed in the Statute and therefore, not “within the jurisdiction of the Court.” However, this assumes that the act also did not fit within the general definition in paragraph 1.

IV. CONCLUSION

In order for the ICC to truly act as an independent, international criminal court, the major powers of the world must make compromises. Although tasked to promote the values of the U.N. Charter, the ICC is not subordinate to the U.N. To finally punish those leaders of states who use violence as a method of foreign policy, the ICC must act as an independent judicial body capable of determining aggressive acts without the political interference of the U.N. This will require powerful states, such as the United States, Russia and China, to take a look at its foreign policies and act in accordance with international law.

²⁶⁷ *Discussion Paper*, *supra* note 177, at 12; *Proposals for Amendment*, *supra* note 178, at 32.

²⁶⁸ *Report of the Special Working Group*, *supra* note 103, at 5. Whether or not G.A. Res. 3314 reflects customary international law is still debated. The ICJ in the *Nicaragua Case* held that paragraph 3(g) of G.A. Res. 3314 “may be taken to reflect customary international law” on what constitutes an armed attack. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* I.C.J. 14 (1986).

²⁶⁹ *Report of the Special Working Group*, *supra* note 103, at 5.

²⁷⁰ G.A. Res. 3314, *supra* note 90.

²⁷¹ *Report of the Special Working Group*, *supra* note 103, at 5.

²⁷² Rome Statute, *supra* note 4, art. 22.

The United States has long argued that it upholds international law and in fact is one of the leading proponents for developments in international law, particularly with regard to human rights.²⁷³ It is now time for the United States to take the step and acknowledge the ICC as an arbitrator of international justice. There are sufficient checks and balances in the Rome Statute that address most of the U.S. concerns. The U.S. concern that its personnel may be subject to the ICC while conducting operations around the world is not convincing. The core crimes that the ICC can assert jurisdiction over are genocide, war crimes, crimes against humanity, and crimes of aggression. Based on the principle of complementarity, if any U.S. personnel engage in any of the core crimes, the United States will have the first opportunity to prosecute these individuals. It is only if a state is unable or unwilling to prosecute that the ICC will have jurisdiction. Further, only those in positions to affect the acts of a state commit crimes of aggression. This is in line with the principles of the Nuremberg Charter.²⁷⁴ The United States should strongly reconsider its position on the ICC and ratify the Rome Statute. This would go a long way in improving the status of the United States as an international leader and promoter of human rights. In addition, by joining the ICC, the United States can help shape the definition of aggression instead of being merely an observer to the discussions.

No Security Council resolution should be required before the ICC exercises jurisdiction as to the crime of aggression. Subordinating the ICC to the politics of the Security Council undermines its legitimacy as an independent judicial authority. The responsibility of the ICC is international criminal justice, not diplomacy or politics. Inconsistent determinations of aggression by the Security Council necessitate an independent body intervening if there is to be any chance of punishing those who wage aggressive war and deterring future acts of aggression. The definition of aggression should contain a general definition followed by a non-exhaustive list of aggressive acts as suggested in the 2008 Chairman's Discussion Paper. This satisfies the principles of legality and allows the prosecutor sufficient room to argue that future unforeseen acts are aggressive and fall under the definition. The threshold clause should be deleted as it serves no purpose except to perhaps engender arguments as to its meaning. The crime of aggression should be in line with the other core crimes that do not add an additional gravity threshold other than the one set forth in the Preamble. The definition should not include reference to G.A. Res. 3314. The

²⁷³ John Bellinger, Legal Advisor to the U.S. Sec'y of State, The United States and International Law, Remarks at the Hague (June 6, 2007), available at <http://2001-2009.state.gov/s/l/2007/112666.htm>.

²⁷⁴ The Nuremberg Principles, *supra* note 60.

language and list of acts are already in the definition, so reference to G.A. Res. 3314 is unnecessary and could result in potential arguments as to which provisions are imported and which are not. Judicial interpretation may eventually modify it, but this basic definition is a necessary first step on the road to bringing those accountable for waging aggressive war to justice.

The success or failure of the ICC will depend upon its supporters. After suffering together through World War II, countries formed the United Nations to promote and maintain peace and international security. It is tragic to note that after all these years, most of these same countries cannot once again come together and agree on a definition of aggression.

HABEAS CORPUS IN THE GLOBAL WAR ON TERROR:
AN AMERICAN DRAMA

CAPTAIN AARON L. JACKSON

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INTRODUCTION

According to the most recent unclassified reports, there are approximately 255 detainees still held behind multiple layers of concertina wire along the shores of Guantanamo Bay, Cuba.¹ Since its inception in 2002, “Camp X-Ray” has become the “reviled symbol of the [Bush] administration’s fight against terrorism,” causing massive international outcry and scores of contested litigation.² Most notably, a foreign enemy combatant’s right to habeas corpus³ remains a starkly divided issue. The Global War on Terror is not the first time habeas corpus has taken center stage in American law. Rather, history reveals a complex line of legal arguments nearly spanning the lifetime of our infant nation. Over the past few years, international circumstances have required that we once again return to this important legal concept in the context of armed conflict. In recent cases, however, the Supreme Court has taken a drastically different approach than years past. Consider habeas corpus a dramatic performance in our nation’s legal history. According to renowned dramatist and playwright Dr. Gustav Freytag, there are five parts to any dramatic presentation: a beginning, a complication, a climax, an unraveling, and a resolution.⁴ The famous “Freytag Triangle” may be applied in this case as well.⁵ Whether to applaud the Court’s dramatic performance depends on your position.

ACT I: THE BEGINNING

According to Dr. Freytag, the beginning of a drama “explain[s] the place and time of the action . . . [and] at once briefly characterize[s] the environment.”⁶ In this dramatic performance, we shall begin in thirteenth century England. The original purpose of habeas corpus “was to bring people into court rather than out of imprisonment” and “[b]y the year 1230, the writ’s utility for that purpose was a well-known aspect of English common law.”⁷

¹ William Glaberson & Margot Williams, *Next President Will Face Test on Detainees*, N.Y. TIMES, Nov. 2, 2008, at A1.

² Steven Lee Myers, *Bush Decides to Keep Guantanamo Open*, N.Y. TIMES, Oct. 20, 2008, at A16.

³ “Habeas corpus” is defined as “[a] writ employed to bring a person before a court, most frequently to ensure that a party’s imprisonment or detention is not illegal.” BLACK’S LAW DICTIONARY 715 (7th ed. 1999).

⁴ GUSTAV FREYTAG, FREYTAG’S TECHNIQUES OF THE DRAMA: AN EXPOSITION OF DRAMATIC COMPOSITION AND ART 114-15 (Elias J. MacEwan trans., S.C. Griggs & Co. 1895).

⁵ *Id.*

⁶ *Id.* at 15.

⁷ *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 13 (D.C. Cir. 2006).

Known as “the Great Writ,” its codification into English law came by way of Parliament in the Habeas Corpus Act of 1641, created in response to the King of England’s actions during what is now referred to as *Darnell’s Case*.⁸ In *Darnell*, five English noblemen were thrown “into the castle’s dungeon deep” for failure to support their country’s dual wars against France and Spain.⁹ The men filed suit, requesting the King provide an explanation as to their imprisonment.¹⁰ King Charles I refused.¹¹ On review, the court upheld the monarchy’s steadfast silence, stating that the law did not require the King to provide any justification for their detention.¹² The public outcry against this decision was deafening, prompting Parliamentary action the following year.¹³

Parliament expanded habeas rights several years later with the Habeas Corpus Act of 1679, additionally requiring “charges to be brought within a specific time period for anyone detained for criminal acts.”¹⁴ By 1765, habeas corpus was firmly imbedded within the foundation of English law, as noted by William Blackstone, who described the Great Writ as “a second *magna carta*, a stable bulwark of our liberties.”¹⁵

This fundamental English right successfully traversed the Atlantic Ocean when our founders incorporated the doctrine of habeas corpus into the U.S. Constitution. As stated, “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁶ Known as the “Suspension Clause,” this provision specifically places the ability to suspend habeas corpus in the hands of Congress only during times of rebellion or invasion.¹⁷ Despite the clarity of the clause, the American debate on habeas corpus only begins at this point.

Congress has authorized suspension of the writ only four times in the history of our nation.¹⁸ The first instance came in response to President Lincoln’s unilateral suspension of habeas corpus during the

⁸ Frank W. Dunham, Jr., *The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law: Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 154 (2005).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The specific legislative action taken by Parliament was an act abolishing the Star Chamber in 1641, in which Parliament addressed the issue of habeas corpus. See generally T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 193 (5th ed. 1956).

¹⁴ Dunham, *supra* note 8, at 154-55.

¹⁵ *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 13 (D.C. Cir. 2006) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *133).

¹⁶ U.S. CONST. art. I, § 9, cl. 2.

¹⁷ Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Context, and American Implications*, 94 VA. L. REV. 575, 578-579 (2008).

¹⁸ *Hamdan*, 464 F. Supp. 2d at 14.

Civil War.¹⁹ The second came post-Civil War when Congress authorized President Grant to suspend the writ in the Ku Klux Klan Act.²⁰ The third authorization came about in 1902 in response to a rebellion in the Philippines, and the fourth occurred in 1941 after the attack on Pearl Harbor.²¹ President Lincoln's famous suspension of the Great Writ has received a significant amount of attention in recent years, meriting a scene to itself within Act I of the American drama.²²

In 1861, President Lincoln and the Union faced imminent peril as Confederate sympathizers loomed on all sides of Washington D.C.²³ In response to a Baltimore mob's successful blockage of Massachusetts troops moving to the capitol city, and in the hopes of deterring any future threats, President Lincoln gave Commanding General of the Army General Winfield Scott permission to suspend the writ.²⁴ As a result, "approximately 38,000 civilians were arrested and held by the military without trial and without judicial review during the war."²⁵ Notable members of society were among the detainees held by military forces, to include prominent newspaper editors who publically criticized the actions taken by President Lincoln after he assumed office.²⁶

One detention especially important to legal historians was that of John Merryman, a southern sympathizer suspected of "plotting to blow up the rail line between Baltimore and Washington, D.C. at a time when it was the only means of moving troops from the north to defend" our nation's capital.²⁷ Merryman sought review under the writ of habeas corpus, arguing that the President's unilateral suspension violated the separation of powers imbedded within the constitution.²⁸

Riding circuit at the time was Chief Justice Roger B. Taney, who received the case and ruled in Merryman's favor.²⁹ As stated by the Chief Justice:

As the case comes before me . . . I understand that the president not only claims the right to suspend the writ of habeas corpus himself, at his discretion, but to delegate that discretionary power to a military officer And I certainly listened to [the case] with some

¹⁹ *Id.*

²⁰ 42 U.S.C. §§ 1983, 1988 (2008).

²¹ *Hamdan*, 464 F. Supp. 2d at 14-15.

²² See e.g. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 4 (Oxford U. Press 1991).

²³ *Id.*

²⁴ *Id.*

²⁵ Dunham, *supra* note 8, at 154.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Ex Parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487).

²⁹ *Hamdan*, 464 F. Supp. 2d at 14.

surprise, for I had supposed it to be one of those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands, that the privilege of the writ could not be suspended, except by act of congress.³⁰

Chief Justice Taney's instruction, though explicit, fell on deaf ears. President Lincoln continued to suspend the right of habeas corpus the following two years.³¹ In 1863, Congress quashed potential litigation on the matter by authorizing the President's executive suspension, thereby "mooting the question of whether or not Lincoln's initial suspension was unconstitutional and avoiding a Supreme Court test."³² Despite President Lincoln's remarkable legacy, this piece of history paints a seemingly forgotten, but nonetheless compelling, scene: the man celebrated for his firm belief in "freedom for all" is also responsible for one of the most egregious violations of habeas corpus in the history of our nation. With this irony, the curtain closes on Act I.

ACT II: THE COMPLICATION

As described by Dr. Freytag, the complication section of a dramatic performance is that which "produce[s] a progressive intensity of interest" in the plot.³³ After *Merryman*, habeas corpus exited stage-left for nearly a century. However, in a series of post-World War II cases, the writ faced the heat and intensity of the spotlight once more, beginning with *Application of Yamashita v. Styer*.³⁴

Yamashita represented the Court's initial approach to habeas corpus review by focusing on the statutory facet of the law.³⁵ In this case, a top commanding general of the Imperial Japanese Army sought the writ after being found guilty of several war violations and subsequently sentenced to death by a military commission.³⁶ The commission consisted of five U.S. Army officers who had been appointed by Lieutenant General Wilhelm D. Styer.³⁷ The Supreme Court rejected General Yamashita's application for habeas corpus, finding that "the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the

³⁰ *Merryman*, 17 F. Cas. 144.

³¹ *Hamdan*, 464 F. Supp. 2d at 14.

³² *Id.*

³³ FREYTAG, *supra* note 4, at 125.

³⁴ *Application of Yamashita v. Styer*, 327 U.S. 1 (1946).

³⁵ *Id.* at 25.

³⁶ *Id.* at 5.

³⁷ *Id.*

trial of offenses against the law of war committed by enemy combatants.”³⁸ Because Congress lawfully created the military tribunal, the Court held it would be inappropriate to look beyond the procedural aspects of the statute.³⁹

Two years later, the Supreme Court shed additional light on this issue in *Ahrens v. Clark* by applying the same statutory approach provided in *Yamashita*.⁴⁰ In *Ahrens*, 120 German nationals were awaiting deportation at Ellis Island under removal orders issued by Attorney General Tom Clark.⁴¹ Based on Presidential Proclamation 2655 of 1945, and pursuant to the Alien Enemy Act of 1798 (AEA),⁴² the Attorney General found each individual to be “dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof.”⁴³ This determination warranted removal under the AEA.⁴⁴

Petitions for writs of habeas corpus were quickly filed. Because the Attorney General issued the removal orders after the cessation of hostilities with Germany, each petitioner argued that the orders exceeded the statutory authority granted by Congress.⁴⁵ The Supreme Court once again focused on the text of the statute, which read: “The several justices of the Supreme Court and the several judges of the circuit courts of appeal . . . within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.”⁴⁶ In light of the text and legislative history of the statute, the Court concluded that the phrase “within their respective jurisdiction” meant that Congress intended to restrict writs of habeas corpus to the territorial jurisdiction of the court in which the individual was detained.⁴⁷ Because the writs were incorrectly filed in the District Court for the District of Columbia rather than in New York, the Court dismissed the applications.⁴⁸

Although *Ahrens* provided an opportunity to advance the right of habeas corpus beyond its statutory limitations, the Court declined to do so.⁴⁹ However, behind the scenes, the Supreme Court diligently prepared for their encore performance, which would answer the broader

³⁸ *Id.* at 11.

³⁹ *Id.* at 25.

⁴⁰ *Ahrens v. Clark*, 335 U.S. 188, 192 (1948).

⁴¹ *Id.* at 189.

⁴² An Act Respecting Alien Enemies, 1 Stat. 577 (1798).

⁴³ *Ahrens*, 335 U.S. at 189.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 190 (citing 28 U.S.C. § 452 (2006)) (emphasis added).

⁴⁷ *Id.* at 192.

⁴⁸ *Id.* at 193.

⁴⁹ *Id.*

question of whether there existed a constitutional right to habeas corpus for foreign nationals.

Johnson v. Eisentrager provided the ultimate complication to the Court's dramatic performance by refusing to extend constitutional habeas corpus rights to enemy foreign nationals.⁵⁰ In *Eisentrager*, U.S. forces detained 21 German nationals in China during World War II after the surrender of Germany but prior to the surrender of Japan.⁵¹ Before capture, these ex-German forces were believed to be "collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces."⁵² With the explicit approval of the Chinese government, military commissions in China convicted the prisoners for "violating laws of war, by engaging in, permitting or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan."⁵³ After their conviction, the prisoners were repatriated to Germany to serve their sentences at Landsberg Prison under the command of a U.S. Army officer.⁵⁴ Writs of habeas corpus were filed, alleging, *inter alia*, that their convictions and imprisonment violated Articles I and III of the U.S. Constitution and the Fifth Amendment,⁵⁵ despite the fact that none of the individuals were ever physically located within the territory of the United States.⁵⁶

Precedent established by the Court in *Ahrens v. Clark* prompted the district court to dismiss the petitions.⁵⁷ This decision, however, was reversed and remanded by the Court of Appeals for the District of Columbia.⁵⁸ The court concluded that "any person, *including an enemy alien*, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his cases of any constitutional rights or limitations would show his imprisonment is illegal."⁵⁹

In a 9-3 split, the Supreme Court reversed the court of appeals.⁶⁰ The Court first relied once more on its *Ahrens* decision to eliminate the possibility of statutory habeas protection. Next, it turned to the constitutional right to habeas corpus, as discussed by the lower court,⁶¹ and ultimately concluded that habeas corpus under the U.S. Constitution

⁵⁰ *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950).

⁵¹ *Id.* at 766.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 767.

⁵⁶ *Id.* at 791.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Id.* at 791.

⁶¹ *Id.* at 771.

does not extend to an enemy alien who has engaged in war against the United States.⁶² The Court elaborated:

Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw But even by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.⁶³

After further discussion, the Court recognized that there were times in which aliens could be afforded a certain level of constitutional protection, to include the possibility of habeas review.⁶⁴ Identified as an “ascending scale of rights,” a foreign national was believed by a majority of the Court to attain a greater level of rights under the constitution as he or she “increases his identity with [American] society.”⁶⁵ Within the “ascending scale” analysis, the majority identified six reasons why constitutional habeas rights did not attach in this case:

[H]e (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁶⁶

Regardless of some possible habeas rights for foreign nationals, the Court concluded that, because the petitioners did not establish any connection or identity with American society, a constitutional right to habeas corpus was not formed in this case.⁶⁷

The dissent stood in staunch opposition to the limitations to constitutional habeas rights set forth by the majority. As stated by

⁶² *Eisentrager*, 339 U.S. at 785.

⁶³ *Id.* at 768-69.

⁶⁴ *Id.* at 770.

⁶⁵ *Id.*

⁶⁶ *Id.* at 777

⁶⁷ *Id.*

Justice Black, “Not only is United States citizenship a ‘high privilege,’ it is a priceless treasure. For that citizenship is enriched beyond price by our goal of equal justice under law—equal justice not for citizens alone, but for all persons coming within the ambit of our power.”⁶⁸ According to Justice Black, whether friend or foe, the constitutional right to habeas corpus transcends all geographic or personal barriers that may otherwise exist for foreign nationals.⁶⁹

The U.S. Court of Appeals for the District of Columbia Circuit quickly followed suit after the Supreme Court’s holding in *Eisentrager*. That same year, the court in *Nash on Behalf of Takeshi Hashimoto v. MacArthur* held that seven Japanese nationals convicted of war crimes by military commission were not entitled to habeas review.⁷⁰ Utilizing *Johnson v. Eisentrager*, the court found that “the persons detained [were] shown by the papers before us, without dispute, to be enemy aliens held in confinement in Japan as a result of convictions as war criminals by the United States.”⁷¹ As such, “the protection accorded by the Fifth Amendment [did] not extend to them.”⁷² *Johnson v. Eisentrager* provides the ultimate complication to the right of habeas corpus for alien detainees, an issue that would reach its climax shortly after the turn of the next century and a fitting conclusion to Act II.

ACT III: THE CLIMAX

Dr. Freytag defines the climax of a dramatic performance as the moment where “the results of the [complication] come out strong and decisively; it is almost always the crowning point of a great, amplified scene”⁷³ The curtain rises 51 years after the *Eisentrager* decision to the cacophonous sounds of explosions and screeching metal as the Twin Towers fall on 9/11.⁷⁴ This vision seems fitting to introduce the climactic portion of the Court’s habeas corpus performance. After the attacks of 11 September 2001, came the war in Afghanistan followed by the war in Iraq: a two-pronged engagement collectively known as the Global War on Terror.⁷⁵

⁶⁸ *Eisentrager*, 339 U.S. at 791.

⁶⁹ *Id.*

⁷⁰ *Nash on Behalf of Takeshi Hashimoto v. MacArthur*, 184 F.2d 606, 608 (D.C. Cir. 1950).

⁷¹ *Id.*

⁷² *Id.*

⁷³ FREYTAG, *supra* note 4, at 128.

⁷⁴ Serge Schmemmann, *President Vows to Exact Punishment for ‘Evil’*, N.Y. TIMES, Sept. 12, 2001, at A1.

⁷⁵ Condoleezza Rice, *U.S., World Are Clearly Safer*, U.S.A. TODAY, July 16, 2004, at 14A.

As U.S. armed forces captured enemy combatants by the M35 truckload,⁷⁶ the Bush administration pondered how to systematically detain such persons in a manner that would provide adequate detention while maintaining intelligence-gathering capabilities vital to the war efforts.⁷⁷ The answer was found on the island of Cuba: Guantanamo Bay. U.S. naval forces have occupied this site since 1903, and it seemed to provide the perfect solution.⁷⁸ Relying on the Court's previous precedent in *Johnson v. Eisentrager*, government officials believed that keeping enemy combatants outside the realm of U.S. territory would preclude such individuals from filing, among other things, claims for habeas corpus review.⁷⁹

The government's legal position was tested almost as quickly as the detainees arrived.⁸⁰ Beginning in 2002, the United States transported captured enemy combatants to the area of Guantanamo Bay known as "Camp X-Ray."⁸¹ "Applications for writs of habeas corpus by Guantanamo detainees were made as early as February 2002."⁸² The only question was how would the courts respond?

Answers came almost as quickly as the writs themselves but with divergent responses. In *Coalition of Clergy v. Bush*, the U.S. District Court for the Central District of California first approached this issue in line with government expectations.⁸³ Relying on *Johnson v. Eisentrager*, the court held that several U.S. citizens under the "Coalition of Clergy, Lawyers, and Professors" who had filed "show cause" petitions on behalf of enemy combatants held at Guantanamo Bay lacked "standing to assert claims on behalf of the detainees."⁸⁴ The court further concluded that, "[e]ven if petitioners did have standing, this court lack[ed] jurisdiction to entertain those claims."⁸⁵ Moreover, the court found that "[n]o federal court would have jurisdiction over petitioners' claims, so there is no basis to transfer this matter to another federal district court."⁸⁶ Because Guantanamo Bay remained outside U.S. sovereignty, the case closely mirrored that of *Eisentrager*.⁸⁷ As a

⁷⁶ The M-35 is a 2-1/2 ton, multi-purpose utility truck used by the U.S. armed forces. Known as the "deuce-and-a-half," this vehicle is commonly utilized to transport cargo and personnel over various distances and terrain.

⁷⁷ Katharine Q. Seelye, *A Nation Challenged: The Prisoners; U.S. May Move Some Detainees to Domestic Military Bases*, N.Y. TIMES, Jan. 4, 2002, at A15.

⁷⁸ *Gherebi v. Bush*, 374 F.3d 727, 734 (9th Cir. 2004).

⁷⁹ *Id.*

⁸⁰ Sarah Hannett, *A Tale of Judicial Perseverance: The Restoration of Habeas Rights for Guantanamo Detainees*, 2008 PUB. L. 636, 637 (Winter).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1040 (C.D. Cal. 2002).

⁸⁴ *Id.* at 1039.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 1046.

result, the United States failed to maintain jurisdiction and the court dismissed the petition.⁸⁸

The Ninth Circuit Court of Appeals took a drastically different approach in *Gherebi v. Bush*, thus fueling the already contentious debate.⁸⁹ In addressing *Eisentrager*, the court of appeals “did not read [the Supreme Court’s decision] as holding that the prerequisite for the exercise of jurisdiction is *sovereignty* rather than *territorial jurisdiction*.”⁹⁰ Although the 1903 lease of Guantanamo Bay specifically “recognize[d] the ‘continuance of ultimate sovereignty’ in Cuba,” the United States maintained territorial jurisdiction.⁹¹ “The United States has exercised ‘complete jurisdiction and control’ over the Base for more than one century now We have also treated Guantanamo as if it were subject to American sovereignty.”⁹² Therefore, “by virtue of the [U.S.] exercise of territorial jurisdiction over [the] naval base located on Cuba, habeas jurisdiction existed over [the] petition filed on behalf of [Gherebi].”⁹³ This decision reverberated in judicial halls across America, underscoring the demand for another performance by the U.S. Supreme Court.

It did not take the highest Court long to respond. Only a few months passed before *Rasul v. Bush* took center stage.⁹⁴ The facts of this case were similar to those in the lower courts, focusing on the rights of aliens detained at Guantanamo Bay to bring habeas claims in federal court.⁹⁵ The petitioners in *Rasul* consisted of two Australians and twelve Kuwaitis “captured abroad during the hostilities.”⁹⁶ The government argued that the Court’s *Eisentrager* decision controlled, requiring dismissal of the habeas corpus applications for lack of sovereign control.⁹⁷

The Supreme Court’s response went beyond the jurisdictional focus identified in the *Coalition of Clergy* and *Gherebi* cases. Rather than considering this issue in the statutory context of recent lower court decisions, the majority returned to the concept of constitutional habeas corpus rights to enemy detainees and appeared on stage singing an entirely new tune.⁹⁸

In its decision, the Court first looked to Congress’s current habeas statute, “which authorize[d] district courts, ‘within their

⁸⁸ *Id.* at 1051.

⁸⁹ *Gherebi v. Bush*, 374 F.3d 727 (9th Cir. 2004).

⁹⁰ *Id.* at 734.

⁹¹ *Id.*

⁹² *Id.* at 734-35.

⁹³ *Id.* at 727.

⁹⁴ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁹⁵ *Id.* at 472-73.

⁹⁶ *Id.* at 470.

⁹⁷ *Id.* at 475.

⁹⁸ *Id.* at 484.

respective jurisdictions,’ to entertain habeas applications by persons claiming to be held ‘in custody in violation of the . . . laws . . . of the United States.’⁹⁹ Similar to *Gherebi*, the Court decided that territorial jurisdiction provided the appropriate standard rather than independent sovereignty.¹⁰⁰ Therefore, as battled in the lower courts, the primary issue for the Court to decide hinged on the proper identification of jurisdictional control at Guantanamo Bay. As in *Gherebi*, the Court concluded that, because the United States exercised “complete [territorial] jurisdiction and control over the Guantanamo Base,” the habeas statute provided an opportunity for federal courts to applications for habeas review.¹⁰¹

But this was only the first half of the performance. The Court next approached the question of constitutional habeas rights by addressing the current applicability of *Eisentrager* and ultimately replacing its analysis with a new statutory approach.¹⁰² As held by the majority, “Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals,’ persons detained outside the territorial jurisdiction of any federal court no longer need rely on the Constitution as the source of their right to federal habeas review.”¹⁰³

The “gap filler” referred to by the majority was *Braden v. 30th Judicial Circuit of KY*, where the Court held that “[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody.”¹⁰⁴ In *Braden*, an American citizen brought a habeas corpus proceeding in the U.S. District Court of the Western District of Kentucky, alleging speedy trial violations arising from an unresolved three-year Kentucky indictment.¹⁰⁵ Although the alleged offenses occurred in the Commonwealth of Kentucky, Braden served his detention in Alabama due to an inter-state agreement with the warden of the Alabama prison.¹⁰⁶ In reviewing the federal statute limiting habeas claims to those within each court’s “respective jurisdiction[],” the District Court for the Western District of Kentucky found that the text did not preclude the court from hearing the petitioner’s claim.¹⁰⁷ The court of appeals

⁹⁹ *Rasul*, 542 U.S. at 473 (citing 28 U.S.C. §§ 2241(a), (c)(3) (2006)) (emphasis added).

¹⁰⁰ *Id.* at 478. The Court reached this decision based in part on its holding in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-95 (1973), which held that “*Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims.”

¹⁰¹ *Rasul v. Bush*, 542 U.S. at 478.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494 (1973).

¹⁰⁵ *Id.* at 487.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

reversed the decision based on the Supreme Court's statutory analysis in *Ahrens v. Clark*.¹⁰⁸ They did so reluctantly, however, because procedural laws of the Fifth Circuit prevented Braden from filing his habeas claim in either court.¹⁰⁹

The issue before the Supreme Court in *Braden* was the appropriate forum in which to bring a habeas claim under 28 U.S.C. 2241(a), the federal statute addressing the power to grant the writ of habeas corpus.¹¹⁰ Because the Court held that a detained individual seeking habeas corpus relief was not limited to the territorial jurisdiction of the detention, Braden was allowed to file his application for habeas corpus in Kentucky.¹¹¹

Braden emerged as the star performer of the Supreme Court's *Rasul* decision, returning the statutory approach previously debunked in the *Ahrens* and *Eisentrager* decisions into the main headliner. As stated by the Court, "*Braden* thus established that *Ahrens* can no longer be viewed as establishing 'an inflexible jurisdictional rule,' and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all."¹¹² With the statutory argument revitalized, the Court concluded that *Eisentrager's* previous analysis no longer applied.¹¹³

Although the Court concluded that the constitutional analysis presented in *Eisentrager* did not apply, the majority reinforced its position by returning to *Eisentrager's* "ascending scale" analysis.

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.¹¹⁴

While seeming to *dismiss Eisentrager's* constitutional approach, the Court did not expressly overturn its precedent. Rather, it merely focused on the statutory argument along with the factual differences

¹⁰⁸ *Braden*, 410 U.S. at 487.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 488.

¹¹¹ *Id.* at 501.

¹¹² *Rasul v. Bush*, 542 U.S. 466, 479 (2004).

¹¹³ *Id.*

¹¹⁴ *Id.* at 476.

between the two cases. Doing so left open the question of whether *Eisentrager* and *Ahrens* remain good law and, if so, exactly when they apply.

Justice Scalia delivered a strong dissent on behalf of the Chief Justice and Justice Thomas, calling the majority's decision a "wrenching departure from precedent."¹¹⁵ The dissent took issue with the Court's finding of jurisdiction at Guantanamo Bay in light of the 1903 lease agreement.¹¹⁶ In addition, it lambasted the majority's puzzled distinction of this case from the petitioners in *Eisentrager* and provided a pragmatic warning of the dangers presented by opening habeas relief to extraterritorial claims.¹¹⁷ As stated by Justice Scalia:

[U]nder today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum-shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.¹¹⁸

Regardless of the disputed analytical methods utilized by the majority,¹¹⁹ the Supreme Court took a bold stance on the issue, declaring in resounding vibrato that federal courts could now receive habeas applications from detainees held at Guantanamo Bay despite their alien, or enemy, status. Further decisions were soon to come, each affirming and expanding the habeas corpus rights of alleged enemy combatants.

Hamdi v. Rumsfeld addressed the federal courts' ability to receive applications for habeas relief from U.S. citizens detained as "enemy combatants."¹²⁰ Yaser Esam Hamdi was a U.S. citizen captured in 2001 on the battlefield by members of the Northern Alliance opposing the Taliban.¹²¹ After discovering his American citizenship, Hamdi was transported to the United States and placed in a naval brig¹²²

¹¹⁵ *Rasul*, 542 U.S. at 505.

¹¹⁶ *Id.* at 501.

¹¹⁷ *Id.* at 504.

¹¹⁸ *Id.* at 506.

¹¹⁹ *Id.*

¹²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

¹²¹ *Id.* at 510.

¹²² The word "brig" is commonly used by military members to reference a naval prison or detention facility.

in Charleston, South Carolina.¹²³ His father petitioned for the writ of habeas corpus as next of friend.¹²⁴ The government claimed that Hamdi was an “enemy combatant,” justifying indefinite detention by the United States under the Authorization for Use of Military Force (AUMF).¹²⁵

Hamdi addressed a distinct conflict between the due process rights afforded to U.S. citizens under the Fifth and Fourteenth Amendments and those granted to enemy combatants under the AUMF.¹²⁶ The Court erred on the side of the Constitution, holding that, under the factors originally expressed in *Mathews v. Eldridge*, “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decisionmaker.”¹²⁷ In addition, the Court reiterated the limitations on executive power, even in time of war, by stating, “[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹²⁸

In the wake of the Supreme Court’s *Rasul* and *Hamdi* decisions, Deputy Defense Secretary Paul Wolfowitz issued an order establishing the combatant status review tribunal (CSRT)—a process of classifying detainees as “enemy combatants” in a manner that satisfied basic due process requirements.¹²⁹ In addition, Congress created the Detainee Treatment Act of 2005 (DTA), which, among other things, expressly removed federal jurisdiction for writs of habeas corpus filed by Guantanamo Bay detainees.¹³⁰ In creating this law, however, Congress failed to specify whether writs filed prior to the enactment of the DTA survived.¹³¹ The writ of habeas corpus filed by Salim Ahmed Hamdan was one such writ pending federal review.¹³²

The Court remained resolute in *Hamdan v. Rumsfeld*, confirming not only right of habeas corpus for enemy aliens but the procedural protections afforded them under the U.S. Constitution.¹³³ Salim Hamdan was a Yemeni national captured in Afghanistan, held in

¹²³ *Hamdi*, 542 U.S. at 510.

¹²⁴ *Id.* at 511.

¹²⁵ *Id.* at 517 (citing Pub. L. No. 107-40, 115 Stat. 224 (2001)).

¹²⁶ *Id.* at 516.

¹²⁷ *Id.* at 533.

¹²⁸ *Id.* at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1953)).

¹²⁹ Ltr. from Paul Wolfowitz, Dep. Secretary of Defense, to Gordon R. England, Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004) (available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>).

¹³⁰ Detainee Treatment Act of 2005, Pub. L. No. 109-148, Div. A, Tit. X, 119 Stat. 2739 (codified as amended at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), 42 U.S.C. § 2000dd (2006)).

¹³¹ *Id.*

¹³² *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

¹³³ *Hamdan*, 548 U.S. at 624.

Guantanamo Bay, and charged with the crime of conspiracy only after several years of detention for unspecified crimes.¹³⁴ In his petition, Hamdan claimed that the military commission set to try his offense lacked authority for two reasons: (1) neither congressional act nor the common law of war supported a trial for the charge of conspiracy, because such an offense is not considered a violation of the law of war and (2) “the procedures adopted to try him violate[d] basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.”¹³⁵

In addressing Hamdan’s case, the majority began by concluding that the DTA did not preclude Hamdan’s case from proceeding.¹³⁶ Although the DTA denied federal courts the ability to hear habeas corpus claims submitted by Guantanamo detainees, the language within the statute did not include retroactive language to suspend habeas petitions previously filed.¹³⁷ As a result, the Court was entitled to consider Hamdan’s petition.¹³⁸

The Court next turned to the use of military commissions at Guantanamo Bay.¹³⁹ In an attempt to classify the appropriate nature of military commissions, the majority identified three instances that allow for military commissions: 1) when martial law is declared, 2) when civilians are tried in enemy territory because local governments are not capable of taking action, and 3) when incidents of enemy conduct violate laws of war.¹⁴⁰ Because the first two scenarios did not apply, the final option represented the only possible rationale; however, the Court found that the conspiracy charge alleged by the United States did not violate any law of war.¹⁴¹ As a result, the use of a military commission was found inappropriate as to Hamdan.¹⁴²

The Court next considered the conditions required to exercise jurisdiction over the petitioner through a military tribunal.¹⁴³ To address this issue, the Court turned to the 19th Century treatise penned by Colonel William Winthrop, *Military Law and Precedents*, and found four eligible categories: 1) offenses committed in the theatre of war, 2) offenses committed within the period of war, 3) offenses triable under the laws of war, or 4) offenses cognizable by military tribunals only or not otherwise capable of being tried by court-martial under the laws of

¹³⁴ *Hamdan*, 548 U.S. at 569.

¹³⁵ *Id.*

¹³⁶ *Id.* at 575-576.

¹³⁷ *Id.* at 576.

¹³⁸ *Id.*

¹³⁹ *Id.* at 593.

¹⁴⁰ *Id.* at 595-96.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 596.

war.¹⁴⁴ All of which, the Court concluded, did not apply to the present case.¹⁴⁵ Hamdan's alleged conspiracy actions pre-dated the war in Afghanistan, and such conspiracy charges, again, did not amount to a violation of the laws of war.¹⁴⁶ As a result, use of trial by military commission was not appropriate in Hamdan's case.

Rather, the majority held that the petitioner was entitled to trial by general court-martial under Article 36(b) of the Uniform Code of Military Justice.¹⁴⁷ Although the government objected to its use as imposing an undue burden, the Court found that the government's position, "ignore[d] the plain meaning of Article 36(b) and [misunderstood] the purpose and the history of military commissions."¹⁴⁸ Because the Court determined that no true exigency that would justify avoidance of the full court-martial process existed, the military commission process under the DTA was an unlawful and inappropriate alternative.¹⁴⁹

In response to the Court's *Hamdan* decision, Congress passed the Military Commission Act of 2006 (MCA).¹⁵⁰ The MCA expressly codified use of the military commission process previously articulated in the DTA.¹⁵¹ In addition, §7 of the MCA served as a suspension of the writ for past and present habeas corpus applications, thus directly responding to the Court's concern with the DTA.¹⁵²

Congress justified suspension of the writ by emphasizing the robust combatant status review tribunal (CSRT) process within the MCA, which granted the following rights to individuals detained at Guantanamo Bay:

- [1] The right to hear the bases of the charges against them, including a summary of any classified evidence.
- [2] The ability to challenge the bases of their detention

¹⁴⁴ *Hamdan*, 548 U.S. at 597-98.

¹⁴⁵ *Id.* at 598-600.

¹⁴⁶ *Id.* at 600.

¹⁴⁷ 10 U.S.C. § 836 (2006). Article 36 of the Uniform Code of Military Justice provides: "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform insofar as practicable."

¹⁴⁸ *Hamdan*, 548 U.S. at 624.

¹⁴⁹ *Id.*

¹⁵⁰ Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 USC § 948a (2006)).

¹⁵¹ *Boumediene v. Bush*, 128 S. Ct. 2229, 2243, 171 L. Ed. 2d 41, 114-15 (2008).

¹⁵² *See* 28 U.S.C. § 2241(e)(1) (2008).

before military tribunals modeled after Geneva Convention procedures [3] The right, before the CSRT, to testify, introduce evidence, call witnesses, question those the Government calls, and secure release, if and when appropriate. [4] The right to the aid of a personal representative in arranging and presenting their cases before a CSRT. [5] Before the D.C. Circuit, the right to employ counsel, challenge the factual record, contest the lower tribunal's legal determinations, ensure compliance with the Constitution and laws, and secure release, if any errors below establish their entitlement to such relief.¹⁵³

The CSRT process operated much like the military's general court-martial process and provided a procedural avenue for detainees that alleviated the concerns generally addressed in *Hamdi*.¹⁵⁴ Although the MCA clearly did not guarantee the full constitutional rights of an American citizen for Guantanamo detainees, the military commission process did ensure trial-like proceedings and an opportunity to be heard.¹⁵⁵

Despite Congress's attempt to provide due process to enemy detainees through the MCA, the act endured much criticism.¹⁵⁶ Several controversial areas of the DTA remained intact, to include other aspects of the CSRT system.¹⁵⁷ Tribunals accepted and considered hearsay evidence, did not allow detainees an opportunity to review and respond to any classified evidence against them, and accepted evidence extracted by using unlawful interrogation techniques prior to the DTA's enactment.¹⁵⁸ With the creation of the MCA, Congress addressed each of the concerns expressed by the Court's prior decisions, thus erasing prior error and leaving the Court with one final unanswered question to be revealed in the next act.

Cue the crescendo of crashing symbols. End Act III.

ACT IV: THE UNRAVELING

Individual scenes within the dramatic performance presented thus far, the individual scenes depict ever-increasing turbulence on the

¹⁵³ *Boumediene*, 128 S. Ct. at 2293, 171 L. Ed. 2d at 114.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See e.g. *Guantanamo Follies*, N.Y. TIMES, Apr. 6, 2007, at A16; *The Democrats' Pledge*, N.Y. TIMES, MAY 9, 2007, at A24; Mark Mazzetti, *Pentagon Revises Its Rules on Prosecution of Terrorists*, N.Y. TIMES, Jan. 19, 2007, at A18.

¹⁵⁷ *Boumediene*, 128 S. Ct. at 2262, 171 L. Ed. 2d at 81.

¹⁵⁸ *Id.* at 2260, 171 L. Ed. 2d at 78.

issue of habeas corpus in the Global War on Terror. The faint beat of the drum that once existed has now grown to a considerable pounding rhythm. In *Rasul*, the Court expressed the statutory right of foreign nationals detained at Guantanamo Bay to file habeas corpus claims in federal courts regardless of the geographic location of their detention.¹⁵⁹ The Court's holding in *Hamdi* solidified the rights of American citizens despite their classification as enemies of the state.¹⁶⁰ *Hamdan* further illustrated the statutory lengths to which Congress must travel to suspend the "Great Writ" and ensure a proper level of procedural protection is afforded to all enemy combatants.¹⁶¹ The falling action ("unraveling") of any dramatic performance resolves the final conflict leading to the resolution.¹⁶²

As the lights hit center stage, we find Justice Kennedy, joined by Justices Stevens, Souter, Ginsberg, and Breyer; all poised to remedy the final conflict of this climactic performance in *Boumediene v. Bush*.¹⁶³ Justice Kennedy states the final issue in the opening words of this act. "Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2."¹⁶⁴

The petitioners consisted of several foreign nationals captured in Afghanistan and abroad, all of whom were detained at Guantanamo Bay.¹⁶⁵ Although they denied any connection to the war, the CSRT process designated each detainee an "enemy combatant."¹⁶⁶ Petitioners' claims were pending federal review at the time the MCA was enacted.¹⁶⁷

Unlike *Rasul v. Bush*, the statutory nature of habeas corpus was not the focus.¹⁶⁸ Rather, the issue revolved around the viability of the MCA, which required resolution of two concise questions.¹⁶⁹ First, does section 7 of the MCA deny federal courts the ability to hear habeas corpus claims pending at the time of its enactment?¹⁷⁰ Second, if so, is the statute valid under the U.S. Constitution?¹⁷¹

¹⁵⁹ *Rasul v. Bush*, 542 U.S. 466, 479 (2004).

¹⁶⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

¹⁶¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 622 (2006).

¹⁶² FREYTAG, *supra* note 4, at 115.

¹⁶³ 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

¹⁶⁴ *Id.* at 2240, 171 L. Ed. 2d at 56 (emphasis added).

¹⁶⁵ *Id.* at 2233, 171 L. Ed. 2d at 50.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 2234.

¹⁶⁸ *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

¹⁶⁹ *Boumediene*, 128 S. Ct. at 2242, 171 L. Ed. 2d at 59.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

The Court quickly answered the former question in the affirmative, finding that the MCA did deprive federal courts of jurisdiction to hear habeas claims.¹⁷² After dispensing of this issue, the Court focused on the latter, more complicated question: “whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ and seek its assistance.”¹⁷³

Justice Kennedy began the search for a constitutional right to habeas corpus for enemy detainees by providing a lengthy history of the writ, beginning with the Magna Carta and ending in present day.¹⁷⁴

The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom. Experience taught, however, that the common-law writ all too often had been insufficient to guard against the abuse of monarchical power. That history counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system.¹⁷⁵

After affirming the basic constitutional right to habeas corpus under the constitution, the Court moved to the more pressing issue of whether the constitutional right extended to enemy detainees. As in previous decisions, answering this question required the Court to return to the relationship between Guantanamo Bay and the United States.¹⁷⁶ Justice Kennedy concluded that, although the United States does not maintain *de facto* sovereignty over Guantanamo Bay, the *de jure* control exercised over this territory rendered habeas corpus rights a necessity.¹⁷⁷

Next, the majority turned to the foreign status of enemy combatants, and once again returned to the “ascending scale” analysis articulated in the *Eisentrager* decision.¹⁷⁸ Justice Kennedy distinguished the present case from *Eisentrager* by focusing on three factors: 1) the citizenship of the individual and the adequacy of the process afforded them in determining their status, 2) the nature of the sites where apprehension was made, and 3) the practical obstacles present in determining entitlement to habeas corpus.¹⁷⁹

¹⁷² *Boumediene*, 128 S. Ct. at 2242-2244, 171 L. Ed. 2d at 60.

¹⁷³ *Id.* at 2248, 171 L. Ed. 2d at 65.

¹⁷⁴ *Id.* at 2244-2251, 171 L. Ed. 2d at 61.

¹⁷⁵ *Id.* at 2244, 171 L. Ed. 2d at 61.

¹⁷⁶ *Id.* at 2253, 171 L. Ed. 2d at 70.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2259, 171 L. Ed. 2d at 77 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)).

¹⁷⁹ *Id.*

Application of these factors yielded the conclusion that *Eisentrager* did not apply. First, the majority determined that the CSRT procedure received by detainees at Guantanamo Bay offered less due process than that received by prisoners in *Eisentrager*.¹⁸⁰ Second, the absolute and indefinite control exercised by the United States over Guantanamo Bay through the 1903 lease far outweighed the relatively insignificant relationship between the United States and the German prison in *Eisentrager*.¹⁸¹ Third, the practical danger of releasing individuals at Guantanamo Bay did not reach the level of danger facing Germany during *Eisentrager*.¹⁸²

Because the Court concluded that the divergent facts of both cases removed *Eisentrager*'s control, foreign nationals located under the *de jure* sovereignty of Guantanamo Bay possessed a constitutional right to habeas corpus review. As held by Justice Kennedy, "Petitioners have the constitutional privilege of habeas corpus. They are not barred from seeking the writ or invoking the Suspension Clause's protections because they have been designated as enemy combatants or because of their presence at Guantanamo."¹⁸³

The majority acknowledged the magnitude of this claim and justified its actions based on the remarkable situation currently facing our nation.

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history.¹⁸⁴

Next, the Court transferred topics to address the procedural rights afforded to detainees within the MCA and concluded that, "the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."¹⁸⁵ Namely, the DTA did not provide the court of appeals with authority to make findings of fact, correct CSRTs factual

¹⁸⁰ *Boumediene*, 128 S. Ct. at 2259-60, 171 L. Ed. 2d at 77-78.

¹⁸¹ *Id.* at 2260, 171 L. Ed. 2d at 78.

¹⁸² *Id.* at 2260-62, 171 L. Ed. 2d at 80.

¹⁸³ *Id.* at 2234, 171 L. Ed. 2d at 51.

¹⁸⁴ *Id.* at 2262, 171 L. Ed. 2d at 80.

¹⁸⁵ *Id.* at 2260, 171 L. Ed. 2d at 78.

findings, or provide the remedy of detainee release.¹⁸⁶ Additionally, the DTA did not provide detainees the opportunity to provide exculpatory evidence during their hearing.¹⁸⁷ Despite the list of procedural rights provided through the DTA, the Court concluded that the statute did not provide the level of protection required to override a suspension of habeas corpus.¹⁸⁸

On the other side of the stage, the dissent stood ready for battle as it declared its opposition to the Court's holding. Chief Justice Roberts delivered the first blow:

Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants And to what effect? The majority merely replaces a review system designed by the people's representatives with a set of shapeless procedures to be defined by federal courts at some future date. One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.¹⁸⁹

Justice Scalia struck next, asserting, once again, that the Court's precedent in *Eisentrager* stands as the appropriate approach to the question at hand.¹⁹⁰ "*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign."¹⁹¹ As both sides lay bloodied and weary, the unraveling complete after years of contentious conflict, Justice Scalia delivered the final words of *Boumediene v. Bush* and Act IV: "This Nation will live to regret what the Court has done today."¹⁹²

ACT V: THE RESOLUTION?

A well-crafted resolution to a dramatic performance succinctly concludes all unsettled issues within the plot, leaving the audience without any additional questions or concerns.¹⁹³ As stated by

¹⁸⁶ *Boumediene*, 128 S. Ct. at 2271-72, 171 L. Ed. 2d at 91-92.

¹⁸⁷ *Id.* at 2272, 171 L. Ed. 2d at 91.

¹⁸⁸ *Id.* at 2275, 171 L. Ed. 2d at 94.

¹⁸⁹ *Id.* at 2279, 171 L. Ed. 2d at 99.

¹⁹⁰ *Id.* at 2294, 171 L. Ed. 2d at 115.

¹⁹¹ *Id.* at 2298-99, 171 L. Ed. 2d at 120-21.

¹⁹² *Id.* at 2307, 171 L. Ed. 2d at 130.

¹⁹³ FREYTAG, *supra* note 4, at 137-38.

Dr. Freytag, “the drama must present an action, including within itself all parts, excluding all else, perfectly complete”¹⁹⁴ Habeas corpus law in the Global War on Terror does not offer such a neat solution.

While the Court silenced much of the debate concerning habeas corpus rights for Guantanamo Bay detainees, many questions remain open for discourse. For example, how much procedure is necessary to restrict an enemy combatant’s right to habeas corpus review? What is the government’s definition of an enemy combatant?¹⁹⁵ To what extent may the government be permitted to rely on undisclosed classified or hearsay evidence in habeas proceedings?¹⁹⁶ What is the appropriate standard of review?¹⁹⁷ On whom does the burden of proof fall?¹⁹⁸

Although many celebrate the Court’s performance in this line of habeas cases, the response has not been entirely positive.¹⁹⁹ One cannot help but notice that certain lines of previous Court precedent have been snubbed or forgotten in the Court’s climactic performance, meriting harsh dissenting responses and potentially placing military commanders in an uncomfortable position on their own world stage.²⁰⁰ The dissenters, seemingly led by Justice Scalia, have greatly criticized the majority for its departure from Supreme Court precedent.

Eisentrager forms a coherent whole with the accepted proposition that aliens abroad have no substantive rights under our Constitution. Since it was announced, no relevant factual premises have changed. It has engendered considerable reliance on the part of our military. And, as the Court acknowledges, text and history do not clearly compel a contrary ruling. It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.²⁰¹

Regardless of the audience member’s particular position on Guantanamo Bay, Justice Scalia’s opinion at least deserves a terse round of applause. The means utilized by the Court in reaching their desired

¹⁹⁴ *Id.*

¹⁹⁵ Hannett, *supra* note 80, at 643.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ See e.g. *Terror Trial in N.Y. Will Put U.S. At Risk*; U.S.A. TODAY, Nov. 18, 2009, at 12A; Kevin Johnson, *NY Top Cop Sees Security Costs of 9/11 Trials Rising Kelly Says City Should Not Bear Financial Burden Alone*, N.Y. TIMES, DEC. 9, 2009, at A1; William K. Rashbaum, *Like Manhattan, Brooklyn May Host Trials for Terror Suspects from Guantanamo*, N.Y. TIMES, Dec. 15, 2009, at A32.

²⁰⁰ *Boumediene v. Bush*, 128 S. Ct. 2229, 2307, 171 L. Ed. 2d 41, 129 (2008).

²⁰¹ *Id.* at 2302, 171 L. Ed. 2d at 125.

end are troubling for several reasons. To begin with, the majority's use of *Eisentrager* within its *Rasul* decision appears fairly chaotic. Certainly, the majority did not reverse *Eisentrager*; however, by holding that a detainee's alien citizenship was not an issue with habeas corpus, it seemed to do just that.²⁰² And yet, despite the hard-line position taken against *Eisentrager*, the majority entertained the "ascending scale" analysis in a manner that seemed to reiterate the test's continued existence.²⁰³ It is as though the majority attempted to enjoy the color of *Eisentrager's* "ascending scale of rights" after clearly declaring that the issue was black and white.

Next, the disparity in treatment of *Braden* and *Eisentrager* within the Court's *Rasul* decision presents another perplexing issue. Painstaking detail was taken by the Court in distinguishing *Rasul* from *Eisentrager* within the body of the opinion.²⁰⁴ The significant differences between *Rasul* and *Braden*, however, appear almost hidden by the Court in the faintness of a footnote.²⁰⁵ And the *Eisentrager* debate did not stop with *Rasul* but continued with *Boumediene*, where the majority continued to reference its text in like fashion.²⁰⁶ As a consequence, the question still stands as to whether *Eisentrager* remains good law today.²⁰⁷

In addition to their troubling analysis, the majority in *Rasul* and *Boumediene* placed little, if any, emphasis on the inherent risks of providing habeas rights to enemy combatants.²⁰⁸ While pragmatic concerns certainly do not provide our military with unlimited carte blanche to do with detainees as they please, the implications that come with providing unlimited habeas relief to enemy combatants in a time of war should at least be considered under the heat and intensity of the Court's stage lights. In the current line of cases, however, the Court opted for the flickering of a candle.

²⁰² *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

²⁰³ *Id.* at 476.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 479.

²⁰⁶ *Boumediene*, 128 S. Ct. at 2259, 171 L. Ed. 2d at 77-78.

²⁰⁷ Controversial legal scholar and Berkley Law Professor John Yoo argues that "[t]he [C]ourt display[ed] a lack of judicial restraint that would have shocked its predecessors." Yoo, Op-Ed., *The High Court's Hamdan Power Grab*, L.A. TIMES, July 7, 2006.

²⁰⁸ In his book, *War by Other Means*, Professor Yoo outlines several potential concerns originally expressed by the Court in *Eisentrager* that highlight the Court's recent departure from precedent: "The *Eisentrager* Court deferred to the decisions of the political branches because 'trials would hamper the war effort and bring comfort to the enemy.' Judicial proceedings would engender a 'conflict between judicial and military opinion,' interfere with military operations by recalling personnel to testify, and 'diminish the prestige of' a field commander called 'to account to his own civil courts' and 'divert his efforts and attention from the military offensive....'" JOHN YOO, *WAR BY OTHER MEANS* 155 (2006) (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

One cannot help but assume that factors beyond Supreme Court precedent were at play in the past several years, as suggested by Chief Justice Roberts in *Boumediene*.²⁰⁹ After all, the Court decided *Rasul v. Bush* just months after the Abu Ghraib tragedy grabbed the attention of the international media.²¹⁰ The horrific depictions of humiliated prisoners published by newspapers throughout the world sparked global outrage and caused a devastating effect to America's image—one from which the Bush Administration likely never recovered.²¹¹ Justice O'Connor even acknowledged in *Hamdi* that the scenes shown around the world impacted the Court's decision-making process in a "very real" manner.²¹² Many believe that America needed to respond quickly and decisively in order to restore the faith of the international community.²¹³ Perhaps *Rasul v. Bush* and its successors provided the Court with that very opportunity.

Americans are already seeing the effects of the Court's habeas corpus performance. As of 13 November 2009, President Obama announced that five Guantanamo Bay detainees, to include "9/11 mastermind" Khalid Shaikh Mohammed, will be tried in a Manhattan federal courtroom.²¹⁴ Closure of Camp X-Ray is also underway, with its proposed replacement, Thomson Correctional Center, located just 150 miles west of Chicago.²¹⁵ Such changes have set the stage for an entirely new band of performers. Only time will tell how the audience will respond to the change in venue, as that which was once located on a distant island may now be found in their own backyards.

The Supreme Court has provided memorable performances throughout the Global War on Terror. Their presence reached the ends of the earth and helped to restore our country's global image.²¹⁶ Their voice was strong, although far from united. Critics have hailed their performances masterful by staunchly affirming the American guarantee of "justice for all."²¹⁷ And yet, when the lights went out and the final

²⁰⁹ *Boumediene*, 128 S. Ct. at 2302, 171 L. Ed. 2d at 125.

²¹⁰ Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK.

²¹¹ See e.g. Norman J. Ornstein, *Mr. Bush's Gentlemanly Goodbye*, N.Y. TIMES, Jan. 20, 2009, at A33; Joe Klein, *High Crimes*, TIME MAG. 25, 25 (JAN. 19, 2009).

²¹² *Rasul*, 542 U.S. at 530.

²¹³ See e.g. Eric M. Friedman, *Lessons From Past Guide Future*, Newsday, Jun. 17, 2008, at A31; Alberto J. Mora and Thomas R. Pickering, *Extend Legal Rights to Guantanamo*, WASHINGTON POST, MAR. 5, 2007, Bus. Sec.

²¹⁴ Charlie Savage, *Accused U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

²¹⁵ Lynn Sweet, *Obama Budget Includes \$237 Million To Buy Illinois Prison For Guantanamo Detainees*, CHICAGO SUN-TIMES (Feb. 1, 2010) (available at http://blogs.suntimes.com/sweet/2010/02/obama_budget_to_include_237_mi.html).

²¹⁶ See e.g. Friedman, *supra* note 213; Mora, *supra* note 213.

²¹⁷ *Id.*

curtain fell, the Court left the audience in suspense and confusion. The resounding applause has now been replaced with an eager anticipation for the next appearance. For critics of this great American drama, only one thing is certain: when the Supreme Court does provide its encore, regardless of the outcome, one can only hope for a better script.