

THE AIR FORCE LAW REVIEW



ARTICLES

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*LIEUTENANT COLONEL ADAM P. FELLER**

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I. INTRODUCTION

About 60,000 lawful permanent resident aliens, commonly known as green card holders, currently serve in all branches of our armed forces.¹ About 5,000 aliens join the military each year.² Unlike United States citizens, they are subject to losing their resident status and being deported or removed³ from the United States if convicted of a crime involving moral turpitude (CIMT) as set forth in the Immigration and Nationality Act (INA) of 1952, as amended.⁴ Aliens who naturalize pursuant to section 329 of the INA through active duty service during certain periods of military hostilities, including from September 11, 2001 to the present, may have their citizenship revoked and be deported from the United States if convicted of certain CIMTs resulting in an other than honorable separation before aggregating five years of honorable service.⁵

¹ Jeanne Batalova, *Immigrants in the U.S. Armed Forces*, MIGRATION POL'Y INST. (May 15, 2008), <http://www.migrationpolicy.org/article/immigrants-us-armed-forces> (citing data from the Department of Defense (DoD)).

² See Andrew Tilghman, *DoD Policy Will Allow Some Immigrants in U.S. Illegally to Serve*, MIL. TIMES (Sept. 25, 2014), <http://www.militarytimes.com/story/military/capitol-hill/2014/09/25/dod-policy-will-allow-some-immigrants-in-us-illegally-to-serve/16221765/>.

³ “Deportation” was the proper term until the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 when the removal process superseded the deportation process. For purposes of this article, these terms shall be used interchangeably.

⁴ Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.) [hereinafter INA]. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2014). The INA contains many other grounds upon which a conviction can be used to deport an alien, including convictions for an aggravated felony, controlled substance offense, child abuse, and threat to national security. For more information on courts-martial convictions and immigration consequences based on these other grounds, see generally Major Takashi Kagawa, *The Judge Advocate's Guide to Immigration Consequences for Military Adverse Actions*, ARMY LAW., Oct. 2014, at 6; Major Richard D. Belliss, *Consequences of a Court-Martial Conviction for United States Service Members Who Are Not United States Citizens*, 51 NAVAL L. REV. 53 (2005); Major Michael Kent Herring, *A Soldier's Road to U.S. Citizenship-Is a Conviction a Speed Bump or a Stop Sign?*, ARMY LAW., June 2004, at 20; Gregory E. Fehlings, *Deportation as a Consequence of a Court-Martial Conviction*, 7 GEO. IMMIGR L.J. 295 (1993); Captain Samuel Bettwy, *Assisting Soldiers in Immigration Matters*, ARMY LAW., Apr. 1992, at 3; and Ira L. Frank, *Deportation of Alien Military Personnel*, 13 U. HAW. L. REV. 111 (1991).

⁵ INA § 329(c), 8 U.S.C. § 1440(c) (2004); Exec. Order No. 13,269, 67 Fed. Reg. 45,287 (July 8, 2002) (for purposes of implementing section 329, the current period of hostilities during the war on terrorism began on Sept. 11, 2001 and terminates on a date not yet designated).

Essentially, a CIMT is an offense that consists of either a fraudulent act, or conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.⁶ To be deemed morally turpitudinous under the INA, a crime requires two essential elements: a culpable mental state and reprehensible conduct.⁷ Clear examples of such CIMTs are larceny, rape and robbery, all of which contain an element of intent in order to convict and are reprehensible acts in our society.⁸ As with civilian crimes, a conviction for a CIMT under the Uniform Code of Military Justice (UCMJ) may render a service member alien removable from the United States.⁹

Defense counsel are obliged to competently and effectively advise their clients of the potential immigration consequences of pleading guilty to a particular offense.¹⁰ Prosecuting counsel should be equally knowledgeable in this area when deciding which charge(s) to prefer or what plea bargain terms to offer or accept. However, the definition of CIMT under the INA is nebulous,¹¹ and the case law is inconsistent.¹² Compounding this lack of clarity

⁶ *Jordan v. De George*, 341 U.S. 223 (1951); *see also* *Tobar-Lobo*, 24 I. & N. Dec. 143, 145 (B.I.A. 2007); *Short*, 20 I. & N. Dec. 136, 139 (B.I.A. 1989); *Flores*, 17 I. & N. Dec. 225, 227-28 (B.I.A. 1980).

⁷ *Silva-Trevino*, 26 I. & N. Dec. 826, 834 (B.I.A. 2016); *Louissant*, 24 I. & N. Dec. 754, 756-57 (B.I.A. 2009).

⁸ For larceny *see, e.g.*, *Alarcon*, 20 I. & N. Dec. 557 (B.I.A. 1992), *Kochlani*, 24 I. & N. Dec. 128 (B.I.A. 2007), and *Jurado*, 24 I. & N. Dec. 29 (B.I.A. 2006). For rape *see, e.g.*, *Beato*, 10 I. & N. Dec. 730 (B.I.A. 1964) (attempted rape). For robbery *see, e.g.*, *Martin*, 18 I. & N. Dec. 226 (B.I.A. 1982).

⁹ For purposes of removal, a court-martial conviction is considered a “conviction” under INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(a). *Gourzong v. Att’y Gen.*, No. 15-2645, 2016 U.S. App. LEXIS 10741 (3d Cir. June 14, 2016); *Castillo v. Att’y Gen.*, 729 F.3d 296, 301 (3d Cir. 2013); *Rivera-Valencia*, 24 I. & N. Dec. 484 (B.I.A. 2008). Also for immigration purposes, an “element” listed in a specification as set forth in the *MANUAL FOR COURTS-MARTIAL*, which must be pled and proved beyond a reasonable doubt, is the functional equivalent of an “element” of a civilian-based criminal offense. *Chavez-Alvarez*, 26 I. & N. Dec. 274, 274 (B.I.A. 2014).

¹⁰ *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010); *United States v. Denedo*, 69 M.J. 262 (C.A.A.F. 2010).

¹¹ *De George*, 341 U.S. at 229; *Marmolejo-Campos v. Gonzales*, 503 F.3d 922, 927 (9th Cir. 2007) (Nelson, C.J., dissenting) (citing *Flores*, 17 I. & N. Dec. 225, 227 (B.I.A. 1980)); *Lopez-Mesa*, 22 I. & N. Dec. 1188, 1191-92 (B.I.A. 1999); *Ajami*, 22 I. & N. Dec. 949, 950 (B.I.A. 1999); *Perez-Contreras*, 20 I. & N. Dec. 615, 617-20 (B.I.A. 1992).

¹² For example, the Supreme Court helped solidify the centrality of scienter in modern moral turpitude jurisprudence, yet the courts continue to recognize statutory rape, an offense containing no scienter element, as a CIMT. *Julia Ann Simon-Kerr, Moral*

is the fact that there exists only three published cases—a district court case and two Board of Immigration Appeals (BIA or Board) decisions—addressing whether a military offense qualifies as a CIMT for immigration purposes. Even those three cases were published long ago: in 1930, *United States ex rel. Parenti v Martineau*;¹³ in 1952, *Matter of S—B—*;¹⁴ and in 1956, *Matter of N—*.¹⁵ Thus, a call for clarity is warranted on how to properly examine a military offense to determine which qualify as CIMTs under today’s INA jurisprudence and why.

To that end, this article introduces and eases the reader through the complex analysis the Board of Immigration Appeals and the federal courts have developed on how to examine a criminal statute in order to determine if it qualifies as an INA CIMT. This article applies that analysis to every offense in the current military code and explains why it does, does not, may or may not so qualify. Further, this article examines and discusses the six primary errors behind the BIA’s decisions finding that purely military offenses—military crimes unknown to the common law, such as desertion—cannot constitute CIMTs under the INA. By exposing these errors, this article intends to make military justice trial practitioners aware that a conviction for such purely military offenses may render a defendant deportable, even though old case law may indicate otherwise.

In order to orient the reader to the deportation process, Section II of this article provides an overview of the substantive CIMT law under the INA. Section III examines the sparse INA CIMT case law regarding military offenses, focusing on why those decisions holding that purely military offenses do not qualify as CIMTs under the INA are erroneous and should

Turpitude, 2012 UTAH L. REV. 1001, 1061-62 (2012). See *Marmolejo-Campos*, 503 F.3d at 927 (Nelson, C.J., dissenting) (finding that B.I.A. case law defining the scienter requirement is inconsistent), *reh’g en banc granted*, 519 F.3d 907 (9th Cir. 2008), *Marmolejo-Campos v. Gonzales*, 558 F.3d 903 (9th Cir. 2009); *Mei v. Ashcroft*, 393 F.3d 737, 741 (7th Cir. 2005) (stating that some Board holdings vary widely on whether an offense is a CIMT).

¹³ *United States ex rel. Parenti v. Martineau*, 50 F.2d 902 (D. Conn. 1930).

¹⁴ 4 I. & N. Dec. 682 (B.I.A. 1952).

¹⁵ 7 I. & N. Dec. 356 (B.I.A. 1956). The only other cases found were two unpublished BIA decisions. One held that absence without leave in violation of Article 86 of the UCMJ is not a CIMT. *Garza-Garcia*, No. A077-697-333, 2007 Immig. Rptr. LEXIS 10227 (B.I.A. Oct. 2, 2007). The other held that forcible sodomy in violation of Article 125 of the UCMJ is a CIMT. *Chavez-Alvarez*, No. A092-167-374, 2016 WL 1357928 (B.I.A. March 18, 2016).

be overturned. In Section IV, this article proposes the creation of two novel CIMT categories pertaining exclusively to certain purely military offenses, and argues that judicial acceptance of such categories are necessary in order for adjudicators to act in accordance with the congressional intent behind the INA when examining these unique offenses. Section V examines all the current UCMJ offenses under the relevant established or proposed judicial analysis and explains why they do, do not, may or may not qualify as CIMTs under the INA.

II. OVERVIEW OF THE SUBSTANTIVE CIMT LAW UNDER THE IMMIGRATION AND NATIONALITY ACT

An alien is any person not a citizen or national of the United States.¹⁶ All aliens are potentially subject to removal under the INA due to commission of a deportable offense.¹⁷ For example, a non-immigrant visitor alien is removable for overstaying the authorized time permitted to remain in this country.¹⁸ An alien is also removable for undesirability based upon certain convictions, such as for a drug related offense, an aggravated felony, abuse of a child, or a CIMT.¹⁹

The INA neither defines “crime of moral turpitude” nor provides a comprehensive list of the federal, state, local, or foreign convictions that constitute such a crime. Rather, Congress left it to the immigration officials and the federal courts to decide on a case by case basis whether the criminal offense of which an alien was convicted qualifies as a CIMT.²⁰ The law is settled that a CIMT includes offenses related to fraud.²¹ All other types of CIMTs have been termed “peripheral cases” by the United States Supreme Court.²²

Traditionally included in this peripheral category are acts that are base, vile, or depraved such as causing death or physical injury to another combined with some degree of scienter such as specific intent, deliberate-

¹⁶ INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2014).

¹⁷ *See generally* INA § 212, 8 U.S.C. § 1182 (2014) (applicable to arriving aliens); INA § 237, 8 U.S.C. § 1227 (2014) (applicable to aliens already admitted to the United States).

¹⁸ INA § 237(a)(1)(C), 8 U.S.C. § 1227 (2014).

¹⁹ *See generally* INA § 212, 8 U.S.C. § 1182 (2014) (applicable to arriving aliens); INA § 237, 8 U.S.C. § 1227 (2014) (applicable to aliens already admitted to the United States).

²⁰ Simon-Kerr, *supra* note 12, at 1046.

²¹ *De George*, 341 U.S. at 229; Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980).

²² *De George*, 341 U.S. at 231.

ness, willfulness, or recklessness.²³ Knowingly committing a reprehensible offense also qualifies.²⁴ If the element of intent is implicit in the nature of the offense, such will serve as a sufficient scienter for INA CIMT purposes, as well.²⁵ Almost all INA CIMT crimes emanate from the common law *malum in se*-type offenses (offenses that are inherently wrong by nature).²⁶ But the Board of Immigration Appeals also categorizes as INA CIMTs some statutory offenses that are either unknown to the common law, or do not contain the required scienter, such as statutory rape-type offenses,²⁷ knowingly leaving the scene of a motor vehicle accident,²⁸ animal fighting ventures,²⁹ and promoting a criminal street gang.³⁰

To determine if a particular offense is a CIMT, the courts and the Board utilize the “categorical approach” by looking to the inherent nature of the crime as described by the elements of the statute.³¹ The facts and circumstances behind the alien’s commission of the offense are irrelevant to this analysis.³² Nor is the seriousness of the offense or the severity of the

²³ Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016); Leal, 26 I. & N. Dec. 20, 21 (B.I.A. 2012).

²⁴ Gill v. INS, 420 F.3d 82, 89 (2d Cir. 2005) (crimes committed knowingly generally have been found, on the categorical approach, to be CIMTs).

²⁵ See, e.g., Khourn, 21 I. & N. Dec. 1041, 1047 (B.I.A. 1997) (21 U.S.C. § 841(a)(1) (1988), evil intent is inherent in the crime of distribution of a controlled substance).

²⁶ See *infra* pp. 6-10 (listing of CIMT offenses).

²⁷ An oft cited case by the Eighth Circuit held that statutory rape, an offense absent a mens rea element, is a CIMT under the INA because the Board and the federal courts have consistently found it to be a CIMT. Simon-Kerr, *supra* note 12, at 1065-1066 (citing Marciano v. INS, 450 F.2d 1022, 1023, 1025 (8th Cir. 1971)); Dingena, 11 I. & N. Dec. 723, 727-28 (B.I.A. 1966) (statutory rape is a CIMT despite the lack of a scienter requirement).

²⁸ Garcia-Maldonado v. Gonzales, 491 F.3d 284, 290 (5th Cir. 2007) (Court and Board agreed that statute proscribing leaving the scene of accident is intrinsically turpitudinous because the driver necessarily knows it is wrong to leave).

²⁹ Ortega-Lopez, 26 I. & N. Dec. 99 (B.I.A. 2013) (7 U.S.C. § 2156(a)(1) (2006) (animal fighting venture is a CIMT)).

³⁰ Hernandez, 26 I. & N. Dec. 397 (B.I.A. 2014) (California gang enhancement statute, destroying property for the benefit of a criminal street gang is inherently reprehensible).

³¹ Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989); 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05[1][d][i] n.231 (rev. ed. 2016).

³² Torres-Varela, 23 I. & N. Dec. 78, 84 (B.I.A. 2001) (citing Goldeshtein v. INS, 8 F.3d 645, 647 (9th Cir. 1993)).

sentence imposed a determining factor.³³ Rather, the statute by its terms must “necessarily” involve moral turpitude.³⁴

There are two approaches most used by adjudicators to determine if a statute necessarily involves moral turpitude: the “realistic probability approach” and the “least culpable conduct approach.”³⁵ The former requires the adjudicator to determine if there is a realistic probability, not just a hypothetical possibility, that the criminal statute in question could be applied to conduct that does not involve moral turpitude.³⁶ The adjudicator looks to the case law to determine if the statute was applied to non-morally turpitudinous conduct.³⁷ If it was, then it is not a categorical CIMT. The latter approach considers whether moral turpitude would inhere in the minimum conduct sufficient to satisfy the elements of the offense.³⁸ If it does, it is a CIMT. A hypothetical scenario that could sustain a conviction under the statute without involving moral turpitude is sufficient to disqualify it as an INA CIMT.³⁹

If the categorical approach fails to determine whether the alien’s conviction qualifies as a CIMT because the statute is “divisible” in that it consists of elements to convict that do and do not involve moral turpitude, then the “modified categorical approach” is to be applied. A criminal statute is permissibly divisible, so as to warrant a modified categorical inquiry, only if: (1) it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to a disjunctive set of elements, more than one combination of which would support a conviction; and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a categorical match to the relevant “generic” federal standard.⁴⁰ If the statute

³³ Serna, 20 I. & N. Dec. 579, 581 (B.I.A. 1992).
³⁴ Ortega-Lopez, 26 I. & N. Dec. 99, 100 (B.I.A. 2013); Short, 20 I. & N. Dec. 136, 137 (B.I.A. 1989).
³⁵ Pooja R. Dadhania, Note, *The Categorical Approach for Crimes Involving Moral Turpitude After Silva-Trevino*, 111 COLUM. L. REV. 313, 326 (2011).
³⁶ *Id.* at 326-27.
³⁷ *Id.*
³⁸ *Id.*
³⁹ *Id.*
⁴⁰ *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The approach to divisibility outlined in *Descamps* is applicable to removal proceedings based on convictions for crimes involving moral turpitude. *Silva-Trevino*, 26 I. & N. Dec. 826, 837-8 (B.I.A. 2016). For example, if a larceny statute contains alternative elements—subsection *A*: a permanent taking, and subsection *B*: a temporary taking—in order to convict, the statute is properly divisible, since subsections *A* and *B* are multiple and enumerated discrete

is properly divisible, the adjudicator may then look to certain records of the alien's conviction to determine if the elements proven in order to convict are a categorical match to a generic federal CIMT standard.⁴¹ If they are a match, the offense is a CIMT under the INA; otherwise, it does not qualify as a CIMT and the analysis ends.

In 2016, the Board of Immigration Appeals declared in the immigration court case of *Matter of Silva-Trevino* that, except where controlling circuit law dictates otherwise, the immigration courts and the Board shall utilize the realistic probability approach and that to qualify as an INA CIMT the statute must involve some form of scienter combined with reprehensible conduct.⁴² The scienter includes specific intent, deliberateness, willfulness, or recklessness.⁴³ Knowingly committing an offense also satisfies the scienter requirement.⁴⁴ "Reprehensible" conduct is a term encapsulating the traditional definition of a CIMT: that which is base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.⁴⁵

An example of a military offense that satisfies *Silva-Trevino* is a conviction for murder under UCMJ Article 118(2), a specific intent crime. This *malum in se* offense involves the element of an intent to kill another human being, which must be proven by the prosecution beyond a reasonable

alternative offenses. Thus, the court or Board may look to the conviction record to determine under which subsection the alien was convicted. If under subsection *A*, the respondent is removable for a CIMT, if under subsection *B*, he is not.

⁴¹ These records include, among others, the indictment, plea, verdict, and sentence. *Ajami*, 22 I. & N. Dec. 949, 950 (B.I.A. 1999).

⁴² *Silva-Trevino*, 26 I. & N. Dec. 826, 832, 834 (B.I.A. 2016).

⁴³ *Silva-Trevino*, 24 I. & N. Dec. 687 (A.G.2008). rev'd, *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014, vacated, *Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015).

⁴⁴ *Ortega-Lopez*, 26 I. & N. Dec. 99, 101 (B.I.A. 2013); *Marmolejo-Campos*, 558 F.3d at 917 (California statute, DUI offenses committed with the knowledge that one's driver's license has been suspended or restricted are crimes involving moral turpitude); *Gill*, 420 F.3d at 89 (crimes committed knowingly generally have been found, on the categorical approach, to be CIMTs); *Perez-Contreras*, 20 I. & N. Dec. 615, 618 (B.I.A. 1992) (where knowing conduct is an element of an offense, the Board has found moral turpitude to be present).

⁴⁵ *Cortes Medina*, 26 I. & N. Dec. 79, 82 (B.I.A. 2013) ("Moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Beyond these parameters, there is not a single comprehensive definition of a crime involving moral turpitude.").

doubt in order to convict.⁴⁶ The intent element meets the scienter requirement to be deemed a CIMT under the INA, and the unlawful and intentional killing of another is certainly an inherently reprehensible act, meaning it is base, vile, depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.⁴⁷ Moreover, there is no realistic probability (or a hypothetical possibility) that one can be convicted under this offense for a non-CIMT act of murder, since an intentional and unlawful killing of another is categorically a CIMT.

In contrast, a general intent offense such as simple assault via negligent conduct pursuant to UCMJ Article 128(a) could never qualify as a CIMT since it lacks a sufficient scienter element and thus there is a realistic probability that this statute could be applied to reach conduct that does not involve moral turpitude. Therefore, a conviction under such a statute based upon a mere unwanted touching is not considered reprehensible conduct under the INA.⁴⁸

CIMTs can be divided into four categories: crimes against the person, sexual offenses, crimes against property, and crimes against government. Note that many of the offenses named in these categories are present in both the CIMT and non-CIMT sections below. This is because the *name* of the offense is irrelevant to a CIMT analysis. Rather, adjudicators look to the *elements* of the offense in question to determine if it qualifies as reprehensible along with sufficient scienter, and to determine if it passes the categorical or modified categorical tests.

For example, a “larceny” offense in one state will qualify as a CIMT if the elements of *intent* to *permanently* deprive the owner of the property are required to be proved by the government beyond a reasonable doubt in order to convict.⁴⁹ But a “larceny” offense in another state will not qualify if it lacks a sufficient scienter element. Nor would it qualify under the categorical analysis if an element required to convict is a “taking” but the *means* of the taking in order to convict could be by *either* a permanent or temporary

⁴⁶ See, e.g., *United States v. Anderson*, 21 M.J. 751, 756 (N.M.C.M.R. 1985) (government proved intent to murder beyond a reasonable doubt).

⁴⁷ *Asencio v. INS*, 37 F.3d 614 (11th Cir. 1994) (attempted murder); *Lopez-Amaro*, 20 I. & N. Dec. 668 (B.I.A. 1993) (murder with firearm); *Awajjane*, 14 I. & N. Dec. 117 (B.I.A. 1972) (attempted murder); CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05[1][d] n.244 (rev. ed. May 2015) [hereinafter GORDON ET AL.].

⁴⁸ *Solon*, 24 I. & N. Dec. 239, 241 (B.I.A. 2007) (simple assaults are not CIMTs).

⁴⁹ *Grazley*, 14 I. & N. Dec. 330, 333 (B.I.A. 1973).

taking. This is because a jury, for example, need not agree unanimously on which means of taking occurred in order to convict, just that there was found by unanimity a taking of some sort, in fact.⁵⁰

Turpitudinous crimes against the person include: assault cases involving an aggravating factor such as use of a deadly weapon,⁵¹ causing grievous bodily injury,⁵² or injury to a protected class such as children,⁵³ domestic partners⁵⁴ and law enforcement officers;⁵⁵ involuntary manslaughter;⁵⁶ failure to stop and render aid;⁵⁷ aggravated drunk driving;⁵⁸ leaving the scene of an accident;⁵⁹ discharging a firearm and possession of a firearm with intent

⁵⁰ See *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (a criminal statute is not divisible where that statute lists alternative means of committing an offense, rather than alternative elements upon which a jury must agree in order to convict); see also *Descamps*, 133 S. Ct. 2276 (a statute is properly divisible—that is, if it sets out multiple elements in the alternative, e.g., in separate subsections or a disjunctive list—and when one or more alternate offenses is not a categorical match).

⁵¹ *G—R—*, 2 I. & N. Dec. 733 (B.I.A. 1946); *Immigration Laws – Offense Involving Moral Turpitude*, 39 Op. Att’y Gen. 95, 98 (1937); *Fualaau*, 21 I. & N. Dec. 475 (B.I.A. 1996); *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006); *Nguyen v. Reno*, 211 F.3d 692, 695 (1st Cir. 2000); *Yousefi v. INS*, 260 F.3d 318, 326-27 (4th Cir. 2001).

⁵² *Franklin*, 20 I. & N. Dec. 867 (B.I.A. 1994); *Medina*, 15 I. & N. Dec. 611 (B.I.A. 1976), *aff’d sub nom. Medina-Luna v. INS*, 547 F.2d 1171 (7th Cir. 1977).

⁵³ *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006); *Tran*, 21 I. & N. Dec. 291 (B.I.A. 1996); *Nunez v. Holder*, 594 F.3d 1124, 1131 (9th Cir. 2010).

⁵⁴ *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006); *Tran*, 21 I. & N. Dec. 291 (B.I.A. 1996); *Nunez*, 594 F.3d at 1131.

⁵⁵ *Garcia-Ocelotl*, No. A205-710-645, 2013 Immig. Rptr. LEXIS 4963 (B.I.A. Dec. 10, 2013); *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006); *Danesh*, 19 I. & N. Dec. 669 (B.I.A. 1998).

⁵⁶ *Solon*, 24 I. & N. Dec. 239, 240-41 (B.I.A. 2007); *Franklin*, 20 I. & N. Dec. 867 (B.I.A. 1994).

⁵⁷ *Garcia-Maldonado*, 491 F.3d 284 (Texas statute, failure to stop and render aid after being involved in an automobile accident reflected an intentional attempt to evade responsibility and was intrinsically wrong).

⁵⁸ *Marmolejo-Campos*, 558 F.3d 903; *Lopez-Meza*, 22 I. & N. Dec. 1188 (B.I.A. 1999).

⁵⁹ *Garcia-Maldonado*, 491 F.3d 284 (Texas statute, failure to stop and render aid after being involved in an automobile accident).

to use;⁶⁰ kidnapping;⁶¹ mayhem;⁶² murder and voluntary manslaughter;⁶³ unlawful restraint and false imprisonment;⁶⁴ robbery;⁶⁵ and stalking, menacing, placing a person in fear of bodily harm, threats and terrorist threats.⁶⁶

⁶⁰ Recio-Prado v. Gonzales, 456 F.3d 819 (8th Cir. 2006); Todd, No. A046-845-194, 2006 Immig. Rptr. LEXIS 5042 (B.I.A. Oct. 26, 2006).

⁶¹ Nakoi, 14 I. & N. Dec. 208 (B.I.A. 1972); C—M—, 9 I. & N. Dec. 487 (B.I.A. 1961); Choenum v. INS, 129 F.3d 29 (1st Cir. 1997); P—, 5 I. & N. Dec. 444 (B.I.A. 1953) (conspiracy to violate the Federal Kidnapping Act is a CIMT because the underlying substantive offense is a CIMT).

⁶² Santoro, 11 I. & N. Dec. 607 (B.I.A. 1966).

⁶³ Judulang v. Holder, 565 U.S. 42, 54 (2011) (voluntary manslaughter); Lopez-Amaro, 20 I. & N. Dec. 668 (B.I.A. 1993) (murder with a firearm); Pataki, 15 I. & N. Dec. 324 (B.I.A. 1975) (deliberate and willful killing); Awaijane, 14 I. & N. Dec. 117 (B.I.A. 1972) (Lebanon, attempted murder); Sanchez-Marin et al., 11 I. & N. Dec. 264 (B.I.A. 1965) (voluntary manslaughter); Abi-Rached, 10 I. & N. Dec. 551 (B.I.A. 1964) (Illinois statute, voluntary manslaughter).

⁶⁴ Sharpe v. Riley, 271 F. Supp. 2d 631, 635-36 (E.D. Pa. 2003); Martinez-Gomez, No. A205-284-542 (B.I.A. 2012) (Minnesota statute, false imprisonment statute qualifies as a CIMT since it is inherently reprehensible in that it requires a deprivation of freedom of another by means of force or intimidation) (on file with the author); Ramos, No. A047-797-933, 2010 Immig. Rptr. LEXIS 5034 (B.I.A. Sept. 3, 2010); Singh, No. A072-966-539, 2007 Immig. Rptr. LEXIS 9251 (B.I.A. Sept. 13, 2007).

⁶⁵ Matos-Santana v. Holder, 660 F.3d 91 (1st Cir. 2011); Mendoza v. Holder, 623 F.3d 1299 (9th Cir. 2010); Lopez-Meza, 22 I. & N. Dec. 1188 (B.I.A. 1999); Martin, 18 I. & N. Dec. 226 (B.I.A. 1982); Kim, 17 I. & N. Dec. 144, 145 (B.I.A. 1979); M—, 2 I. & N. Dec. 721, 723 (A.G./B.I.A. 1946) (if the crime intended to be committed at the time of entry or prior to the breaking out involves moral turpitude); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.316.

⁶⁶ Raya-Moreno v. Holder, 504 F. App'x. 589 (9th Cir. 2013) (California stalking statute requiring placing victim in fear for safety and containing a mens rea element of a vicious motive or corrupt mind is a CIMT); Hernandez, 26 I. & N. Dec. 464 (B.I.A. 2015) (Texas statute punishing person who recklessly engages in conduct that places another in imminent danger of serious bodily injury is a CIMT); Flores, No. A205-506-843, 2013 Immig. Rptr. LEXIS 4421 (B.I.A. July 15, 2013) (Minnesota statutes deemed CIMTs since they involve placing an individual in fear of bodily harm); Chicas, No. A094-460-763, 2008 Immig. Rptr. LEXIS 6874 (B.I.A. Feb. 27, 2008) (California statute prohibiting intentional transmission of threats that causes another to feel sustained fear is a CIMT); Latter-Singh v. Holder, 668 F.3d 1156 (9th Cir. 2012) (California statute prohibiting threats with intent to terrorize is a CIMT); Baczewski, No. A95-946-453, 2007 Immig. Rptr. LEXIS 334 (B.I.A. Jan. 12, 2007) (New York statute prohibiting intentionally placing another in fear of physical injury or death is a CIMT); Valles-Moreno, No. A076-700-382, 2006 Immig. Rptr. LEXIS 10025 (B.I.A. Dec. 27, 2006); Ajami, 22 I. & N. Dec. 949 (B.I.A. 1999) (Michigan aggravated stalking statute is a CIMT).

Crimes against the person that do not involve moral turpitude include: simple assault;⁶⁷ child abandonment;⁶⁸ contributing to the delinquency of a minor;⁶⁹ domestic violence without willful action or substantial injury;⁷⁰ attempted suicide;⁷¹ failure to stop and render aid;⁷² false imprisonment;⁷³ simple kidnapping;⁷⁴ involuntary manslaughter resulting from grossly negligent conduct;⁷⁵ attempted reckless endangerment;⁷⁶ and weapons possession with no element of intent to use.⁷⁷

⁶⁷ *Nguyen*, 211 F.3d at 695 (aggravating factor required); *Solon*, 24 I. & N. Dec. 239 (B.I.A. 2007); *Fualaau*, 21 I. & N. Dec. 475 (B.I.A. 1996); *Perez-Contreras*, 20 I. & N. Dec. 615 (B.I.A. 1992); *G—R—*, 2 I. & N. Dec. 733 (B.I.A. 1947); *GORDON ET AL.*, *supra* note 47, § 71.05[1][d] nn.265-66.

⁶⁸ *Rodriguez-Castro v. Gonzales*, 427 F.3d 316, 321-24 (5th Cir. 2005) (Texas statute, no element of intent to abandon child required to convict); *E-*, 2 I. & N. Dec. 134, 135 (B.I.A. 1944) (Ohio statute violated even if defendant believed he was acting in best interest of child, thus not necessarily a CIMT); *GORDON ET AL.*, *supra* note 47, § 71.05[1][d] n.301.

⁶⁹ *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012) (Virginia delinquency statute fails categorical analysis).

⁷⁰ *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1163-69 (9th Cir. 2006) (Arizona statute, reckless commission of simple assault is not a CIMT); *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006) (California, domestic battery violation does not qualify categorically as a CIMT).

⁷¹ *D—*, 4 I. & N. Dec. 149 (B.I.A. 1950) (Canadian attempted suicide statute not deemed a CIMT, based on standards prevailing in the United States).

⁷² *Cerezo v. Mukasey*, 512 F.3d 1163 (9th Cir. 2008) (California statute, violation involving leaving the scene of an accident causing injury or death is not categorically a CIMT); *Latu v. Mukasey*, 547 F.3d 1070, 1072-76 (9th Cir. 2008) (Hawaii statute, violation for being involved in auto accident involving bodily injury and failing to remain to provide information is not categorically a CIMT).

⁷³ *Turijan v. Holder*, 744 F.3d 617 (9th Cir. 2014) (California felony false imprisonment statutes are not categorically CIMTs); *Saavedra-Figueroa v. Holder*, 625 F.3d 621 (9th Cir. 2010) (California misdemeanor false imprisonment statute not a categorical CIMT).

⁷⁴ *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1211 (9th Cir. 2013), *overruled in part by Ceron v. Holder*, 747 F.3d 773 (9th Cir. 2014) (California simple kidnapping statute is not a CIMT since it does not necessarily involve intent to harm, actual harm, or an action affecting a protected class of victim); *GORDON ET AL.*, *supra* note 47, § 71.05[1][d] n.248.

⁷⁵ *Szegedi*, 10 I&N Dec. 28, 34 (B.I.A. 1962) (Wisconsin statute, finding that involuntary manslaughter resulting from grossly negligent conduct does not involve moral turpitude because the intent element is not present).

⁷⁶ *Knapik v. Ashcroft*, 384 F.3d 84, 89 (3d Cir. 2004) (New York statute, attempted recklessness conviction is not a CIMT).

⁷⁷ *Granados*, 16 I. & N. Dec. 726 (B.I.A. 1979) (possession of a sawed off shotgun in violation of 26 U.S.C. §§ 5861(d) and 5871 (1976) is not a CIMT); *GORDON ET AL.*, *supra* note 47, § 71.05[1][d].

Sexual offenses deemed morally turpitudinous include: Adultery;⁷⁸ bigamy;⁷⁹ sex with a child and statutory rape;⁸⁰ contributing to the delinquency of a minor;⁸¹ incest;⁸² indecent assault;⁸³ indecent exposure;⁸⁴ lewdness;⁸⁵ prostitution;⁸⁶ rape;⁸⁷ and failure to register as a sex offender.⁸⁸

Sexual offenses held not to involve moral turpitude include: bastardy;⁸⁹ bigamy;⁹⁰ mailing an obscene letter;⁹¹ contributing to the delin-

⁷⁸ H—, 7 I. & N. Dec. 616 (B.I.A. 1957) (adultery “clearly” involves moral turpitude); A—, 3 I. & N. Dec. 168 (B.I.A. 1948).

⁷⁹ *Whitty v. Weedon*, 68 F.2d 127 (9th Cir. 1933) (Canadian bigamy statute is a CIMT).

⁸⁰ *Marciano*, 450 F.2d at 1025; *Pino v. Nicolls*, 215 F.2d 237 (1st Cir. 1954), *rev’d on other grounds sub nom.* *Pino v. Landon*, 349 U.S. 901 (1955) (per curiam) (Massachusetts statute, child rape is a CIMT); *Digena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

⁸¹ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.292.

⁸² *Gonzalez-Alvarado v. INS*, 39 F.3d 245 (9th Cir. 1994) (Washington incest statute is a CIMT); Y—, 3 I. & N. Dec. 544 (B.I.A. 1949) (Ohio incest statute regarding step father-step child incestuous relationship is a CIMT even though relationship was based on affinity, not consanguinity).

⁸³ *Maghsoudi v. INS*, 181 F.3d 8 (1st Cir. 1999) (Massachusetts statute, indecent assault and battery on a person older than fourteen years old); Z—, 7 I. & N. Dec. 253 (B.I.A. 1956) (Connecticut statute prohibiting indecent touching regardless of consent was a CIMT); S—, 5 I. & N. Dec. 686 (B.I.A. 1954) (Canadian indecent assault statute involving gaining intimacy through fraudulent consent or without consent by person fourteen years or older was a CIMT).

⁸⁴ *Cortes Medina*, 26 I. & N. Dec. 79 (B.I.A. 2013) (California indecent exposure statute is categorically a CIMT).

⁸⁵ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.290.

⁸⁶ *Id.* § 71.05[1][d] n.287.

⁸⁷ P—, 2 I. & N. Dec. 117 (B.I.A. 1944) (Montana statute, attempted rape is “clearly” a CIMT); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.280-81.

⁸⁸ *Bushra v. Holder*, 529 F. App’x. 659 (6th Cir. 2013) (the Board did not err when it relied on *Tobar-Lobo* to conclude that the Michigan sex registry statute qualified as a CIMT); *Tobar-Lobo*, 24 I. & N. Dec. 143 (B.I.A. 2007) (California failure to register statute when apprised of obligation to do so is a CIMT).

⁸⁹ D—, 1 I. & N. Dec. 186 (B.I.A. 1941) (Massachusetts bastardy statute is seen as only a quasi-crime).

⁹⁰ E—, 2 I. & N. Dec. 328 (B.I.A. 1945) (New Mexico bigamy statute does not contain acts that are base, vile, or depraved); S—, 1 I. & N. Dec. 314 (B.I.A. 1942) (Massachusetts bigamy law is not a CIMT as the offense is not shocking to the moral sensibilities of the community).

⁹¹ D—, 1 I. & N. Dec. 190 (B.I.A. 1942) (18 U.S.C. § 334 (1941), mailing an obscene letter does not in essence involve moral turpitude).

quency of a minor;⁹² failure to register as a sex offender;⁹³ and incest between uncle and niece not related by blood.⁹⁴

Crimes against property deemed morally turpitudinous include: animal fighting;⁹⁵ arson;⁹⁶ blackmail or extortion;⁹⁷ burglary and breaking and entering;⁹⁸ fraud;⁹⁹ credit card fraud;¹⁰⁰ counterfeit goods;¹⁰¹ destruction

⁹² P—, 2 I. & N. Dec. 117 (B.I.A. 1944) (Washington indecent exposure statute was overly broad to be a CIMT).

⁹³ Mohamed v. Holder, 769 F.3d 885 (4th Cir. 2014) (Virginia sex registry statute was regulatory and the requirement to register was not seen as a moral norm); Totimeh v. Att’y Gen., 666 F.3d 109 (3rd Cir. 2012) (Minnesota sex registry statute not a categorical CIMT because offense could be committed without intent, and such an act was not inherently vile or intentionally malicious); Efagene v. Holder, 642 F.3d 918, 925 (10th Cir. 2011) (Colorado sex offender registry statute is not a CIMT since failing to register is not despicable).

⁹⁴ B—, 2 I. & N. Dec. 617 (B.I.A. 1946) (Washington incest statute involving uncle and niece did not qualify as a CIMT, since, among other reasons, another state recognizes such marriages).

⁹⁵ Ortega-Lopez, 26 I. & N. Dec. 99 (B.I.A. 2013) (violation of 7 U.S.C. § 2156(a) (1) (2006), exhibiting or sponsoring an animal for fighting is categorically a CIMT, so determined after the Board examined the legislative history of the statute and observed that all fifty states and the District of Columbia. have similar animal fighting prohibition laws).

⁹⁶ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.313.

⁹⁷ Lehmann v. United States *ex rel.* Carson, 353 U.S. 685 (1957) (Ohio blackmail statute is a CIMT); F—, 3 I. & N. Dec. 361 (B.I.A. 1949) (Canadian statute, demand with menaces is a CIMT).

⁹⁸ United States *ex rel.* Ventura v. Shaughnessy, 219 F. 2d 249 (2nd Cir. 1955) (Portuguese statute is very similar to what we call burglary or larceny); Louissaint, 24 I. & N. Dec. 754 (B.I.A. 2009) (Florida statute, second degree burglary of an occupied dwelling is a CIMT); Z—, 5 I. & N. Dec. 383 (B.I.A. 1953) (California second degree burglary statute is a CIMT); E—, 2 I. & N. Dec. 134 (B.I.A. 1944) (Ohio housebreaking statute with intent to commit larceny is a CIMT); R—, 1 I. & N. Dec. 540 (B.I.A. 1943) (New York third degree burglary statute is a CIMT).

⁹⁹ *De George*, 341 U.S. at 229; Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.311.

¹⁰⁰ Chouinard, 11 I. & N. Dec. 839 (B.I.A. 1966) (Michigan statute, illegal use of a credit card is a CIMT); Tijani v. Holder, 628 F.3d 1071 (9th Cir. 2010) (California credit card fraud statute is a CIMT); Lauvera v. INS, No. 93-1921, 1994 U.S. App. LEXIS 9191 (1st Cir. Apr. 29, 1994) (Massachusetts, credit card fraud statute is a CIMT).

¹⁰¹ Ye, No. A092-005-728, 2008 Immig. Rptr. LEXIS 6526 (B.I.A. Sept. 4, 2008) (New York counterfeit trademark goods trafficking statute is a CIMT); Kochlani, 24 I. & N. Dec. 128 (B.I.A. 2007) (18 U.S.C. § 2320 (2000), trafficking in counterfeit goods is a CIMT).

of property;¹⁰² embezzlement;¹⁰³ forgery;¹⁰⁴ identity fraud;¹⁰⁵ larceny;¹⁰⁶ possession of stolen property and receiving stolen property;¹⁰⁷ stealing cellular air time;¹⁰⁸ malicious trespass;¹⁰⁹ and disregard for property while eluding a police vehicle.¹¹⁰

Crimes against property not involving moral turpitude include: Breaking and entering or unlawful entry with no intent;¹¹¹ possession of burglary tools;¹¹² larceny lacking an element of permanent taking;¹¹³ passing

¹⁰² GORDON ET AL., *supra* note 47, § 71.05[1][d] n.324.

¹⁰³ United States *ex rel.* Schreiber v. Reimer, 19 F. Supp. 719 (S.D.N.Y. 1937) (Belgian embezzlement statute is a CIMT); Batten, 11 I. & N. Dec. 271 (B.I.A. 1965) (18 U.S.C. § 271 (1964), embezzling statute is a CIMT).

¹⁰⁴ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.315.

¹⁰⁵ United States v. Ndiagu, 591 F. App'x. 632 (9th Cir. 2015); Abuchar v. United States, No. 12-20583-CIV-GRAHAM/GOODMAN, 2014 U.S. Dist. LEXIS 158875 (S.D. Fla. Aug. 28, 2014); Garcia-Prieto, No. A087-913-672, 2010 Immig. Rptr. LEXIS 4507, at *6 (B.I.A. Oct. 26, 2010).

¹⁰⁶ Vargas, No. A046-366-821, 2013 Immig. Rptr. LEXIS 5190, at *6 (B.I.A. Nov. 27, 2013) (New York larceny statute qualifies as a CIMT); Fernandez, No. A046-941-394, 2013 Immig. Rptr. LEXIS 1414, at *7 (B.I.A. May 6, 2013) (Florida statute, when cash is taken, a permanent taking is presumed, hence the offense qualifies as a CIMT); Pinlac-Abraham, No. A044-289-891, 2009 Immig. Rptr. LEXIS 19641, at *8-9 (B.I.A. Jan. 22, 2009) (listing numerous theft-type offenses found to involve moral turpitude); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.321.

¹⁰⁷ Saleh v. Gonzales, 495 F.3d 17, 19 (2d Cir. 2007); Rumirez v. Gonzales, 456 F.3d 31 (1st Cir. 2006); Islam, 25 I. & N. Dec. 637 (B.I.A. 2011) (New York criminal possession of stolen property statute is a CIMT); Machado-Zuniga, No. A058-405-587, 2013 Immig. Rptr. LEXIS 1668 (B.I.A. May 22, 2013); Ahlijah, 2013 Immig. Rptr. LEXIS 2013 (A.A.O. Mar. 11, 2013).

¹⁰⁸ United States v. Qadeer, 953 F. Supp. 1570, 1580-81 (S.D. Ga. 1997) (violation of 18 U.S.C. § 1029(a)(5) (1996), stealing cellular phone air time, is a fraud based CIMT); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.320.

¹⁰⁹ Esfandiary, 16 I. & N. Dec. 659 (B.I.A. 1979) (Florida statute, malicious trespass with intent to commit a petit larceny is a CIMT).

¹¹⁰ Ruiz-Lopez, 25 I. & N. Dec. 551 (B.I.A. 2011), *aff'd*, Ruiz-Lopez v. Holder, 682 F.3d 513, 516-21 (6th Cir. 2012) (Washington statute, driving a vehicle in wanton or willing disregard for the lives or property of others while eluding police after being signaled to stop is a CIMT).

¹¹¹ Matter or M—, 2 I. & N. Dec. 721 (B.I.A./A.G. 1946) (New York statute, there is nothing inherently immoral in this act), G—, 1 I. & N. Dec. 403 (B.I.A. 1943).

¹¹² United States *ex rel.* Guarino v. Uhl, 107 F.2d 399 (2d Cir. 1939); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958); S—, 6 I. & N. Dec. 769 (B.I.A. 1955).

¹¹³ Patel v. Holder, 707 F.3d 77, 82-83 (1st Cir. 2013) (Connecticut statute, proof that taking was permanent failed the categorical analysis test); Wala v. Mukasey, 511 F.3d 102

bad checks where intent is not a necessary element;¹¹⁴ failure to report arson;¹¹⁵ malicious mischief;¹¹⁶ possession of stolen property;¹¹⁷ joyriding;¹¹⁸ rioting;¹¹⁹ and identity theft of a fictitious person.¹²⁰

Crimes against government deemed morally turpitudinous include: bribery;¹²¹ counterfeiting;¹²² narcotics distribution;¹²³ false

(2d Cir. 2007) (Connecticut statute was not a CIMT because the taking could have been temporary); *Fernandez*, 2013 Immig. Rptr. LEXIS 1414, at *7; Hodgson, No. A026-690-070, 2013 Immig. Rptr. LEXIS 4514 (B.I.A. Apr. 11, 2013); Grazley, 14 I. & N. Dec. 330, 333 (B.I.A. 1973).

¹¹⁴ Bart, 20 I. & N. Dec. 436 (B.I.A. 1992); Balao, 20 I. & N. Dec. 440 (B.I.A. 1992); Zangwill, 18 I. & N. Dec. 22, 28 (B.I.A. 1981); Stasinski, 11 I. & N. Dec. 202 (B.I.A. 1965); Bailie, 10 I. & N. Dec. 679 (B.I.A. 1964); Westman, 17 I. & N. Dec. 50 (B.I.A. 1979); F—, 6 I. & N. Dec. 783 (B.I.A. 1955).

¹¹⁵ Gibek, No. A073-150-567, 2011 Immig. Rptr. LEXIS 698 (B.I.A. Apr. 29, 2011) (New Jersey statute, conviction for violation of law requiring person to report a fire need not involve an act of turpitude).

¹¹⁶ *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (Washington statute prohibiting destruction of property contains insufficient scienter to qualify as a CIMT); C—, 2 I. & N. Dec. 716 (B.I.A. 1946) (Canadian statute, willful destruction of property via negligence does not qualify as a CIMT).

¹¹⁷ K—, 2 I. & N. Dec. 90 (B.I.A. 1944) (German statute, negligent receipt of stolen property is not a CIMT); *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1159-61 (9th Cir. 2009) (California statute is overbroad, encompassing conduct not necessarily turpitudinous).

¹¹⁸ *Castillo-Cruz*, 581 F.3d at 1159-61 (California statute is overbroad, encompassing conduct not necessarily turpitudinous); H—, 2 I. & N. Dec. 864 (B.I.A. 1947) (Canada joyriding statute not a CIMT since there is no intent to permanently deprive).

¹¹⁹ O—, 4 I. & N. Dec. 301 (B.I.A. 1951) (German statute, due to lack of knowledge that person assaulted during riot was a police officer, a member of a protected victim class, offense is not a CIMT).

¹²⁰ *Garcia-Prieto*, 2010 Immig. Rptr. LEXIS 4507, at *6 (Arizona statute, the taking of the identity of a fictitious person does not involve moral turpitude).

¹²¹ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.351.

¹²² *Id.* § 71.05[1][d] n.343.

¹²³ *Barragan-Lopez v. Mukasey*, 508 F.3d 899 (9th Cir. 2007) (Arizona statute, solicitation to possess at least four pounds of marijuana for sale constituted a CIMT); Khourn, 21 I. & N. Dec. 1041 (B.I.A. 1997). *But see* R—, 4 I. & N. Dec. 644 (B.I.A. 1952) (Washington statute, selling narcotics unlawfully is not a CIMT because the statute lacks a scienter element).

statements;¹²⁴ fleeing a police officer;¹²⁵ harboring a fugitive;¹²⁶ identification document fraud;¹²⁷ impersonating a federal officer;¹²⁸ influence a witness;¹²⁹ misprision of a felony;¹³⁰ obstruction of government;¹³¹ possession of stolen mail;¹³² mail fraud;¹³³ money laundering;¹³⁴ official misconduct;¹³⁵ perjury;¹³⁶ and tax evasion.¹³⁷

Offenses against government not deemed morally turpitudinous include: alien smuggling;¹³⁸ breaking prison and aiding one to escape from

¹²⁴ GORDON ET AL., *supra* note 47, § 71.05[1][d] nn.332-33, 360-62.

¹²⁵ Murillo, No. A098-390-426, 2012 Immig. Rptr. LEXIS 5497 (B.I.A. Apr. 12, 2012) (California statute, law prohibiting fleeing from police is a CIMT); GORDON ET AL., *supra* note 47, § 71.05[1][d] nn.220, 358.

¹²⁶ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.369.

¹²⁷ Yeremin v. Holder, 738 F.3d 708, 714-19 (6th Cir. 2013) (conspiracy under 18 U.S.C. § 1028(f) (2004) is a CIMT since it requires intent to use or transfer documents unlawfully); Nino v. Holder, 690 F.3d 691, 694-96 (5th Cir. 2012) (Texas statute, possession of fraudulent identification with intent to harm or defraud another is a CIMT).

¹²⁸ B—, 3 I. & N. Dec. 270 (B.I.A. 1948) (18 U.S.C. § 912 (1936), impersonating a federal officer is a CIMT).

¹²⁹ Gonzalez-Diaz, No. A92-849-637, 2007 Immig. Rptr. LEXIS 732 (B.I.A. Jan. 31, 2007) (California statute, conspiracy to influence a witness is a CIMT).

¹³⁰ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.359.

¹³¹ Rodriguez v. Gonzales, 451 F.3d 60 (2d Cir. 2006) (18 U.S.C. § 1542 (2003), false information in passport application is an obstruction of justice and a CIMT); Jurado, 24 I. & N. Dec. 29, 35 (B.I.A. 2006); D—, 9 I. & N. Dec. 605 (B.I.A. 1962); E—, 9 I. & N. Dec. 421 (B.I.A. 1961); S—, 2 I. & N. Dec. 225 (B.I.A. 1944).

¹³² Okoroha v. INS, 715 F.2d 380 (8th Cir. 1983); United States v. Ndiagu, 591 Fed. App'x. 632 (9th Cir. 2015) (18 U.S.C. § 1028A(a)(1), mail theft is a CIMT).

¹³³ Nason v. INS, 394 F.2d 223 (2d Cir. 1968) (18 U.S.C. § 1341, mail fraud is a CIMT); Alarcon, 20 I. & N. Dec. 557 (B.I.A. 1992) (18 U.S.C. § 1341 (1982), mail fraud is a CIMT).

¹³⁴ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.345.

¹³⁵ Bobb, No. A076-493-189, 2008 Immig. Rptr. LEXIS 11543 (B.I.A. May 13, 2008) (New Jersey official misconduct statute is a CIMT).

¹³⁶ S—, 2 I. & N. Dec. 353 (B.I.A. 1945) (for a perjury offense to qualify as a CIMT the elements of intent and materiality must be present); G—, 1 I. & N. Dec. 73 (B.I.A. 1941) (Romanian perjury statute is a CIMT); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.347.

¹³⁷ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.350.

¹³⁸ *Id.* at n.370.

prison;¹³⁹ driving under the influence;¹⁴⁰ contempt of Congress;¹⁴¹ possession of narcotics;¹⁴² false identification to a police officer;¹⁴³ false statements;¹⁴⁴ and use of a false social security card.¹⁴⁵

The general rule with respect to inchoate offenses is that if the underlying offense involves moral turpitude, so too does the inchoate offense.¹⁴⁶

In removal proceedings, the burden of proof falls to the government to prove that the alien is removable by clear and convincing evidence.¹⁴⁷ Under the INA, a lawful permanent resident who has been admitted¹⁴⁸ to the United States is rendered removable based upon one conviction for a CIMT if committed within five years of admission and if a sentence of imprisonment of at least one year may be imposed.¹⁴⁹ Therefore, if a service member alien is convicted under UCMJ Article 128(b) of the CIMT offense of intentional aggravated assault causing grievous bodily injury two years after last being admitted to the United States, that member is subject to removal.¹⁵⁰ However,

¹³⁹ *Id.* at nn.267, 270.

¹⁴⁰ Lopez-Meza, 22 I. & N. Dec. 1188 (Arizona statute, simple DUI offense is not a CIMT).

¹⁴¹ *Id.* at n.376.

¹⁴² Generally, unlawful possession of narcotics is not a CIMT. Abreu-Semino, 12 I. & N. Dec. 775 (B.I.A. 1968).

¹⁴³ Raphael, No. A044-590-497, 2010 Immig. Rptr. LEXIS 3562 (B.I.A. Feb. 26, 2010) (Pennsylvania statute prohibiting providing false identity to a law enforcement officer is not a CIMT since it lacks an element of intent to prevent an officer from performing an official function).

¹⁴⁴ S—, 2 I. & N. Dec. 353 (B.I.A. 1945).

¹⁴⁵ Beltran-Tirado v. INS, 213 F.3d 1179, 1183-85 (9th Cir. 2000) (42 U.S.C. § 408(a)(7) (1988), use of a false social security number is a CIMT).

¹⁴⁶ Feldman, No. A71-205-812, 2007 B.I.A. LEXIS 52 (B.I.A. June 4, 2007); Hou, 20 I. & N. Dec. 513, 520 (B.I.A. 1992) (there is no distinction for deportation purposes between an attempt to commit and the actual commission of a CIMT); M—, 8 I. & N. Dec. 535 (B.I.A. 1960); G—, 7 I. & N. Dec. 114 (B.I.A. 1956); P—, 5 I. & N. Dec. 444 (B.I.A. 1953) (conspiracy to commit a certain crime involves moral turpitude if the basic crime involves moral turpitude); S—, 2 I. & N. Dec. 225 (B.I.A. 1944).

¹⁴⁷ INA § 240(c)(3), 8 U.S.C. § 1229a (2014).

¹⁴⁸ Admission is defined under the INA as the lawful entry of the alien into the United States after inspection and authorization by an immigration officer. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2014).

¹⁴⁹ INA § 237(a)(2)(A), 8 U.S.C. § 1227 (2014).

¹⁵⁰ Aggravated assault is a CIMT. *See infra* Section V and note 445 (discussing UCMJ art. 128(4) (2012)). The maximum confinement authorized for such an offense is Three

if that is the only conviction, and if the offense occurred more than five years after admission, it cannot serve as a CIMT to remove the alien. But, if the military member alien is convicted of two or more CIMTs after admission that did not arise from a single act or scheme, then the alien is rendered removable no matter when the offenses were committed, how long ago the offenses occurred, or when the convictions were handed down.¹⁵¹

III. REVIEW OF MILITARY OFFENSES AND WHETHER THEY QUALIFY AS CRIMES INVOLVING MORAL TURPITUDE UNDER THE INA

A. The Case Law is Sparse as to Whether a Military Offense Constitutes a CIMT Under the INA

Military offenses can be divided into two categories, those that are rooted in the common law, e.g., larceny, rape, or assault, and those that are purely military offenses (PMOs), e.g., desertion, failure to obey an order, or missing movement. Only five cases, two involving PMOs and three involving common law-type offenses, were found discussing whether a military offense is a CIMT under the INA.

There are several likely reasons for this paucity of case law over the decades. First, a very small percentage of service members are aliens who thus could be subject to such case law.¹⁵² Second, the military process for reporting convicted alien service members to the immigration authorities was selective¹⁵³ and flawed.¹⁵⁴ Third, until 1990, military convictions were not believed to qualify as convictions within the meaning of the INA.¹⁵⁵ Fourth,

years, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 54e(8)(c) (2012) [hereinafter MCM], thus meeting the one year minimum imprisonment requirement under INA § 237(a)(2)(A)(i)(II), 8 U.S.C. § 1227(a)(2)(A)(i)(II) (2014).

¹⁵¹ INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2014).

¹⁵² An indicator that this number is quite small today is the number of alien accessions to all branches of the military between Fiscal Year 2000 and Fiscal Year 2010: 75, 176, 3.8% of all accessions during this period. Huseyin Yalcinkaya & Melih Can, *The Effect of Executive Order 13269 on Noncitizen Enlisted Accessions in the U.S. Military* 21 (March 2013) (unpublished Master's Thesis, Naval Postgraduate School), <http://www.dtic.mil/dtic/tr/fulltext/u2/a579792.pdf>.

¹⁵³ See Belliss, *supra* note 4, at 64 (only traditional common law offenses are reported; military specific offenses like absence offenses, disrespect, or disobedience offenses do not require reporting).

¹⁵⁴ *Id.* at 66 (if local command initiates a criminal investigation, it is possible that the reporting requirements to the FBI may simply fall by the wayside).

¹⁵⁵ See *Gubbels v. Hoy*, 261 F.2d 952 (9th Cir. 1958) (convictions at courts-martial are

as a matter of policy, the immigration authorities have exercised favorable prosecutorial discretion when determining whether to subject an alien with prior U.S. military service to deportation even if convicted of a deportable offense.¹⁵⁶

In the 1930 district court case *United States ex rel. Parenti v. Martineau*,¹⁵⁷ and in the Board decision of *Matter of N—*,¹⁵⁸ the common law offense of larceny as proscribed under military law was deemed to constitute a CIMT. In *Matter of S—B—*,¹⁵⁹ a case decided during the Korean War, the Board found that the PMO of desertion in time of war was not a CIMT. The fourth case is the unpublished 2007 Board decision of *Matter of Garza-Garcia*,¹⁶⁰ wherein the PMO of absence without leave in violation of UCMJ Article 86 was found not to qualify as a CIMT because, like in *Matter of S—B—*, it “simply” does not reach the level of conduct contemplated by the immigration law as turpitudinous. Lastly, the Board issued an unpublished decision, *Matter of Chavez-Alvarez*,¹⁶¹ finding forcible sodomy in violation of UCMJ Article 125 to be a CIMT under the INA.

In all five INA CIMT/military law cases, the court or the Board applied a traditional judicial analysis by looking to both the common law as

not “convictions” within the meaning of the immigration law because the military courts cannot issue a judicial recommendation against deportation (JRAD), an important right or privilege of the alien under the law). However, the Immigration Act of 1990 deleted the JRAD consideration from the immigration law, thereby foreclosing its future use as a shield from a CIMT removal ground based on a conviction under the UCMJ. *See* Frank, *supra* note 4, at 133 n.150.

¹⁵⁶ *See* Memorandum from DHS Sec’y Jeh Johnson, Policies for the Apprehension, Det. & Removal of Undocumented Immigrants 6 (November 20, 2014) (on file with author); Memorandum from Assistant DHS Sec’y for Immigration and Customs Enforcement, John Morton on Prosecutorial Discretion (June 17, 2011) (on file with author); Memorandum from Victor X. Cerda, Acting Dir., Issuances of Notices to Appear, Admin. Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Serv. (undated) (on file with author); Memorandum from Marcy M. Forman, Acting Dir., Office of Investigations, Issuances of Notices to Appear, Administrative Orders of Removal, or Reinstatement of a Final Removal Order on Aliens with United States Military Service (June 21, 2004) (on file with author).

¹⁵⁷ *United States ex rel. Parenti v. Martineau*, 50 F.2d 902.

¹⁵⁸ N—7 I. & N. Dec. 356 (B.I.A. 1956) (violation of UCMJ art. 121, stealing with intent to permanently deprive, is a CIMT).

¹⁵⁹ S—B—, 4 I. & N. Dec. 682 (B.I.A. 1952).

¹⁶⁰ 2007 Immig. Rptr. LEXIS 10227.

¹⁶¹ No. A092-167-374, 2016 Immig. Rptr. LEXIS 3773 (B.I.A. March 18, 2016).

to what offenses are *malum in se* and long standing precedent, examining whether the military offense involved fraud or an evil act violative of general societal standards or social obligations between persons.¹⁶² Though this traditional approach is largely adequate for examination of common law-based military offenses such as larceny or forcible sodomy, it is wholly inadequate for examination of PMOs, thereby necessitating the creation of a properly fitting judicial analysis. But looking for a workable INA CIMT analysis for PMOs presumes in the first place that statutes from this unique category can in fact qualify as INA CIMTs. Since certain PMOs proscribe intentional, willful, purposeful or reckless acts that are base, vile and depraved under American community standards, this article asserts that they properly fall into that “peripheral” class of CIMT cases the Supreme Court characterized in *Jordan v. De George*.¹⁶³ Therefore, certain PMOs rightly merit consideration by the Board and courts as to whether they qualify as CIMTs within the meaning and intent of the INA.¹⁶⁴

As will be discussed below, though some civilian courts have summarily concluded that PMOs cannot qualify merely because these offenses are unknown to the common law,¹⁶⁵ it cannot reasonably be said that no PMO meets the *Silva-Trevino* standard. That is to say, it cannot rationally be said that no PMO ever involves an act that is reprehensible enough to qualify as a CIMT under the INA. For example, it cannot reasonably be argued that an attempt to provide aid to the enemy with certain arms, ammunition, supplies, money, or other things, and engaging in an overt act toward providing such aid in violation of UCMJ Article 104 is not reprehensible; no doubt, this is a crime involving moral turpitude. However, the traditional analysis binds the INA adjudicator from so declaring, since this PMO is unknown to the common law. Therefore, a more workable analysis is needed.

¹⁶² *Franklin v. INS*, 72 F.3d 571, 585 (8th Cir. 1995) (Bennett, J., dissenting) (Board has relied heavily on prior precedent to decide the reasonableness of including any category of crimes within the definition of CIMT); *Id.* at 587 (courts have approached the problem of defining the phrase “crime involving moral turpitude” in anecdotal fashion).

¹⁶³ *Jordan v. De George*, 341 U.S. 223, 231 (1951) (“Whatever else the phrase [CIMT] may mean in peripheral cases...crimes in which fraud was an ingredient have always been regarded as involving moral turpitude.”).

¹⁶⁴ See discussion *infra* Section III.B-D.

¹⁶⁵ See *infra* Section III.B.

B. The Traditional Proxies Used to Determine What is Reprehensible is Unworkable for Purely Military Offenses

The only published case discussing whether a PMO constitutes a CIMT under the INA ideally exemplifies how unsuitable and outdated the traditional CIMT analysis is when examining this category of military offenses. *Matter of S—B*—involves the issue of whether the PMO of desertion in time of war qualifies as a CIMT under the INA.¹⁶⁶ Without any analysis, the Board summarily concluded that it does not. Dismissively, it merely stated that because no court cases have dealt with the question, it had to resort to what “we believe” would be the “common view of our people” concerning its moral character.¹⁶⁷ The Board also summarily discarded any consideration of the severity of the maximum penalty that may be imposed—death—as not being relevant to the CIMT analysis. This 1952 decision is flawed and outdated in six material respects.¹⁶⁸ Courts-martial practitioners should not consider the law settled that no PMO conviction can qualify as a CIMT.

1. The Board’s decision is unduly restrictive, violative of Congressional intent, and out of date

First, neither the courts nor the Board actually review evidence such as public opinion polls or newspaper editorials to assess the “common view of our people” as to what constitutes a morally turpitudinous act. Nor can they define just which American community’s views they are assessing.¹⁶⁹ Instead, they look to the common law and judicial precedent as proxies to assess the community’s feelings.¹⁷⁰ For example, the common law generic offense of larceny, a *malum in se* offense, requires a permanent taking; therefore, if a state larceny statute requires only a temporary taking in order to convict, it will not qualify as a CIMT. Since PMOs are *per se* unknown to the common law, and the court-imposed proxies are *per se* constructs befitting only com-

¹⁶⁶ The alien was convicted of desertion in 1943, during World War II.

¹⁶⁷ *S—B—*, 4 I. & N. Dec. 682, 683 (B.I.A. 1952).

¹⁶⁸ When a Board decision is unpersuasive, provides little reasoning, and consists of only conclusory statements lacking analysis, it is to be afforded no deference. *Castrijon-Garcia*, 704 F.3d at 1211, *overruled in part by Ceron*, 747 F.3d 773.

¹⁶⁹ *See De George*, 341 U.S. at 237–38 and n.11 (Jackson, J., dissenting).

¹⁷⁰ *Id.* at 227 (“...we look to the manner in which the term “moral turpitude” has been applied by judicial decision.”); *see also* Simon-Kerr, *supra* note 12 at 1060–1061 (instead of determining how people of a community feel, the courts took refuge in a substitute by looking to and creating a line of precedent in determining whether an offense is morally turpitudinous).

mon law or common law based crimes, the Board and courts will therefore always and necessarily determine that a PMO does not qualify as a CIMT, precisely as it did in *Matter of S—B—*, and *Matter of Garza-Garcia*.

Such an unduly discriminatory form of judicial review that excludes a whole category of federal criminal offenses from CIMT consideration violates Congress's intent that the courts and the Board actually examine criminal offenses to determine which qualify as INA CIMTs. Nowhere does Congress state or imply that the task is limited only to common law civilian offenses, nor does there exist any indications that Congress intended to exempt PMOs from INA CIMT consideration simply because they are not animals of the common law. Rather, the Supreme Court observed that the "general legislative purpose" of the predecessor to the current CIMT statute was to "broaden the provisions governing deportation, 'particularly those referring to criminal and subversive aliens.'"¹⁷¹ Moreover, Congress contemplated that the administrative agency charged with defining the term "crime involving moral turpitude" specifically tailor the definition to the policies embodied in the immigration statutes;¹⁷² the Board's unjustifiably self-restrictive common law-only rule defeats that Congressional broadening policy with respect to criminal and subversive alien service members. Moreover, the Board's decision to essentially preempt a review of the military statute violates its own rule that it must actually and objectively examine the statute itself to determine if it inherently involves moral turpitude.¹⁷³

Also, since *Matter of S—B—* was published in 1952, INA adjudicators have loosened the reins a bit and held that certain statutory crimes are CIMTs even though they are unknown to the common law: statutory rape-

¹⁷¹ *Franklin*, 72 F.3d at 585 (Bennett, J., dissenting) (citing *Costello v. INS*, 376 U.S. 120, 128 (1964)).

¹⁷² *Marmolejo-Campos*, 558 F.3d at 935 (Bybee, J., concurring in part and dissenting in part).

¹⁷³ The Board acknowledged that it must examine the statute itself to determine if it inherently involves moral turpitude. *Tobar-Lobo*, 24 I. & N. Dec. 143, 144 (B.I.A. 2007) (citing *Rodriguez-Herrera*, 52 F.3d 238); *Solon*, 24 I. & N. Dec. 239, 241 (B.I.A. 2007) (a determination that an offense is a CIMT requires an objective analysis of the elements necessary to convict under the statute); *Short*, 20 I. & N. Dec. 136, 139 (B.I.A. 1989); *Esfandiary*, 16 I. & N. Dec. 659, 660 (B.I.A. 1979).

type offenses,¹⁷⁴ knowingly leaving the scene of a motor vehicle accident,¹⁷⁵ animal fighting ventures,¹⁷⁶ and promoting a criminal street gang.¹⁷⁷ Many PMOs deserve a similar exception, as they meet the *Silva-Trevino* standard of a reprehensible act combined with a sufficient scienter.¹⁷⁸

Moreover, considering that the Board examines foreign crimes for moral turpitude,¹⁷⁹ it would be anomalous to conclude that neither it nor the courts will review an entire category of American federal criminal law offenses—PMOs—just because they did not emanate from the common law.

2. The Board erred in claiming that no case law existed finding that desertion is a CIMT

Second, the Board erred in finding that no court cases existed addressing the question of whether turpitude inheres in the offense of desertion in time of war. Though no precedent could be found prior to 1952 discussing whether a PMO qualifies as a CIMT *under the INA*, state court cases have held that desertion qualifies as a CIMT.¹⁸⁰ Prior to and after the Board published *Matter of S—B—*, both the Board and the courts have looked to state court decisions as persuasive authority when determining if a criminal offense qualifies as an INA CIMT.¹⁸¹ There is no reason why the Board could not have

¹⁷⁴ An oft cited case by the Eighth Circuit held that statutory rape, an offense absent a mens rea element, is a CIMT under the INA because the Board and the federal courts have consistently found it to be a CIMT. Simon-Kerr, *supra* note 12, at 1065–1066 (citing *Marciano*, 450 F.2d at 1023, 1025; *Dingena*, 11 I. & N. Dec. 723, 727-28 (B.I.A. 1966) (statutory rape is a CIMT despite the lack of a scienter requirement).

¹⁷⁵ *Garcia-Maldonado*, 491 F.3d at 290 (Board and Court agreed that statute proscribing leaving the scene of accident is intrinsically turpitudinous because the driver necessarily knows it is wrong to leave).

¹⁷⁶ *Ortega-Lopez*, 26 I. & N. Dec. 99 (B.I.A. 2013) (7 U.S.C. § 2156(a)(1) (2006), animal fighting venture is a CIMT).

¹⁷⁷ *Hernandez*, 26 I. & N. Dec. 397 (B.I.A. 2014) (California gang enhancement statute, destroying property for the benefit of a criminal street gang is inherently reprehensible).

¹⁷⁸ *See infra* section IV.B.

¹⁷⁹ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.206.

¹⁸⁰ *See Nelson v. State*, 44 So. 2d 802, 805 (Ala. Ct. App. 1950); *Jordan v. State*, 217 S.W. 788 (Ark. 1920); *State v. Symonds*, 57 Me. 148 (Me. 1869).

¹⁸¹ *See Mei*, 393 F.3d at 740 (writing for the Court, Judge Posner found it curious that neither party cited to existing state criminal law cases defining the meaning of moral turpitude as the term bears the same meaning in immigration law as in the criminal law); *Murillo*, 2012 Immig. Rptr. LEXIS 5497 (Board relied in part on California’s jurisprudence that the offense in question was a CIMT in determining whether offense

done so here. State courts in Maine,¹⁸² Alabama,¹⁸³ California,¹⁸⁴ Arkansas,¹⁸⁵ Arizona,¹⁸⁶ and Maryland¹⁸⁷ have found that a conviction for desertion is a CIMT and thus admissible in state court for purposes of impeachment. In fact, just two years before *Matter of S—B—*, the Court of Appeals of Alabama squarely dealt with this question and outright rejected the notion that PMOs are mutually exclusive from CIMTs.¹⁸⁸

It is true that other courts have declined to find that PMOs constitute CIMTs in non-immigration- related cases; however, none of them examined a PMO on the merits for turpitude. Rather, they all committed the same error the Board did by conclusively presuming that judicial review of a PMO is obviated since it is unknown to the common law,¹⁸⁹ as if no PMO can possibly proscribe acts that qualify as a CIMT.

3. The Board failed to recognize that it must construct a new CIMT analysis tailored to PMOs because the traditional CIMT analysis is inapplicable

Third, like any other criminal statute, the Board is required to adhere to congressional intent to actually examine it to determine if it qualifies as

is a CIMT under the INA); Gonzalez-Cervantes, No. A078-468-051, 2010 Immig. Rptr. LEXIS 4543 (B.I.A. Sept. 7, 2010) (Board relied in part on California's jurisprudence that the offense in question was a CIMT in determining whether offense is a CIMT under the INA). G—R—, 2 I. & N. Dec. 733 (B.I.A. 1947) (Board relied in part on California's jurisprudence that the offense in question was a CIMT in determining whether offense is a CIMT under the INA).

¹⁸² *Symonds*, 57 Me. 148.

¹⁸³ *Nelson*, 44 So. 2d 802.

¹⁸⁴ *People v Mathews*, 329 P.2d 795 (Cal. Ct. App. 1958).

¹⁸⁵ *Jordan*, 217 S.W. 788.

¹⁸⁶ *State v. Ferguson*, 717 P.2d 879 (Ariz. 1986).

¹⁸⁷ *Muir v State*, 517 A.2d 1105 (Md. 1986).

¹⁸⁸ *Nelson*, 44 So. 2d at 805 (“We do not agree with the view expressed in [*Midkiff v. State*, 243 P. 601 (Ariz. 1926)], that because an offense is purely military in character, such fact in itself negatives the existence of moral turpitude.”).

¹⁸⁹ See *United States v. Tomaiolo*, 249 F.2d 683, 692 (2d Cir. 1957); *Cox v. State*, 279 So. 2d 143 (Ala. Crim. App. 1973); *Huber v. State*, 234 A.2d 264, 269 (Md. Ct. Spec. App. 1967); *Rhea v. State*, 347 S.W.2d 486, 487 (Tenn. 1961); *Midkiff*, 243 P. at 606. Military courts too have made the same unreasoned supposition. See *U.S. v. Gibson*, 18 C.M.R. 323 (C.M.A. 1955); *United States v. Ruiz*, 30 M.J. 867 (N.M.C.M.R. 1990); *United States v. Holzhuter*, 27 C.M.R. 546 (A.B.R. 1958).

a CIMT under the INA.¹⁹⁰ The Board failed to recognize that its traditional common law examination is *per se* unworkable for PMOs such as desertion in time of war. Thus it also failed to consider and create a proper judicial construct in order to comply with the Congressional mandate.

4. The Board failed to properly consider the severity of the maximum penalty for desertion when determining if this PMO is a CIMT

Fourth, the Board erred in discarding the severity of the maximum penalties authorized for desertion in time of war when assessing whether this PMO is turpitudinous: death or life imprisonment and a dishonorable discharge. Though not a determinative factor when deciding if a crime is a CIMT,¹⁹¹ the maximum authorized sentence imposable nonetheless may be a factor in determining the seriousness the community believes the offense to be.¹⁹² The option of capital punishment authorized for this offense strongly suggests the military community's view of how heinous it believes this offense to be.

5. Because the Board erroneously presumed what the sole purpose was behind the maximum penalty for desertion, it failed to properly determine if this PMO is a CIMT

Fifth, the Board provided neither authority nor rationale for its conclusion that the severity of the penalty of death for desertion in time of war was due *only to* the timing and urgency of the crime and not to any "heinousness inherent in the act itself."¹⁹³ Intuitively, urgency and timing would certainly be factors behind authorizing capital punishment for this PMO, but there is evidence of other reasons the Board failed to consider. The Second Continental Congress would strongly disagree with the Board's inexplicably narrow view, as it declared in 1777 that it considered desertion to be a crime "most atrocious and detestable."¹⁹⁴ Nor would General Anthony Wayne, a

¹⁹⁰ See *supra* notes 171-172 and accompanying text.

¹⁹¹ Serna, 20 I. & N. Dec. 579 (B.I.A. 1992).

¹⁹² G—R—, 2 I. & N. Dec. 733 (B.I.A. 1947) (while the punishment provided is not always a guide as to whether a crime involves moral turpitude, it is certainly an indication of the seriousness with which the legislature regards an offense).

¹⁹³ S—B—, 4 I. & N. Dec. 682, 683 (B.I.A. 1952) ("Although the death penalty may be imposed..., the determinative factor in the imposition of the penalty is the urgency of the situation at the time of the commission of the offense, and not the heinousness inherent in the act itself.").

¹⁹⁴ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 645 fn.85 (2d ed. 1920).

revolutionary war general and later the Commander-in-Chief of the American Legion Army during the Indian wars in the northwestern frontier from 1792 to 1796, agree. He characterized the crime as “cowardly and heinous” and “atrocious,” which discovers in the deserter “a *base* mind, and a *cravenly* heart....”¹⁹⁵

Not surprisingly, this sentiment from the days of the early republic appears to have gone unchanged into the modern era. In a 1961 law review article on desertion, the author characterized the crime as “despicable” before quoting from a World War II military board of review case. The board of review stated:

Military desertion has traditionally been regarded as a most heinous species of military offense. To desert the service of one’s country is considered the ultimate in neglect of a soldier’s duties.

Of all the categories of desertion, shirking vital or hazardous duty, which usually occurs in time of war, is probably foremost in the catalogue of a soldier’s crimes. The performance of duty hazardous in itself and vital to the national welfare is the very reason for maintaining an armed force. Hence, the dereliction of deliberately avoiding it is punished with severity.¹⁹⁶

Corroborating the American military community’s view on desertion, civilian state courts have likewise opined as to their communities’ views on the subject when they characterized commission of such an offense in time of war to be “turpitudinous,”¹⁹⁷ “a reflection upon integrity,”¹⁹⁸ and “ignoble.”¹⁹⁹ The BIA never seemed to consider the fact that deserting during a time of urgency—such as wartime—could be deemed morally repugnant in and of itself, thus qualifying as an INA CIMT.²⁰⁰

¹⁹⁵ Bradley J. Nicholson, *Courts-Martial in the Legion Army: American Military Law in the Early Republic, 1792-1796*, 144 MIL. L. REV. 77, 86, 86 n.80 (1994).

¹⁹⁶ Alfred Avins, *Avoiding Dangerous or Vital Military Service: Intent in Short Desertion*, 36 NOTRE DAME L. REV. 474, 474 n.1 (1961).

¹⁹⁷ See *supra* notes 182-87 and accompanying text.

¹⁹⁸ *Braswell v. State*, 306 So. 2d 609, 611 (Fla. Dist. Ct. App. 1975) (citing *Jordan*, 217 S.W. 788).

¹⁹⁹ *Nelson*, 44 So. 2d at 805-06.

²⁰⁰ Though not determinative, the severity of the punishment impossible helps determine whether an offense violates the community’s standards when looking through the framers’

Also, after *Matter of S—B*—the Board and courts have recognized that a vehicle operator who leaves the scene of an accident resulting in injury, an offense not known to the common law, is a CIMT because that operator knows it is inherently wrong to evade responsibility.²⁰¹ By analogy, a service member who intentionally leaves his or her unit during wartime in violation of Article 85 of the UCMJ, an offense also unknown to the common law, inherently knows it is wrong to evade one’s military responsibility to be present with one’s unit during a time of urgency, such as wartime.

6. The Board’s decision is not worthy of deference by the courts

Sixth, in light of the above discussed errors, the Board’s finding that desertion in time of war was not an INA CIMT was unduly brief, presumptuous, unpersuasive and conclusory. Such unsupported conclusions by the Board are not to be accorded deference by the courts.²⁰²

A more workable judicial analysis is needed that is not dependent on the common law as a proxy for what the community believes regarding whether turpitude inheres in a crime. For certain PMOs the analysis must factor in the uniqueness and high moral standards of the military community. This is particularly true because the military community was uniquely and affirmatively created and maintained by the U.S. government to serve a

lens. *See G—R—*, 2 I. & N. Dec. 733, 736 (B.I.A. 1947) (“While the punishment provided is not always a guide as to whether a crime involves moral turpitude, it is certainly an indication of the seriousness with which the California legislature regarded the two offenses.”). Death or life imprisonment for desertion in time of war is authorized as a maximum punishment, and two years’ confinement is the authorized maximum punishment for the least culpable type of desertion under the UCMJ. *See MCM, supra* note 150, pt. IV, ¶ 9.e.(2)(b). This serves to underscore the heightened level of reprehension the military community deems this offense to contain. Also, the Board failed to but could have properly examined and considered the legislative intent behind the offense of desertion in time of war to determine if it is a reprehensible act. *See Ortega-Lopez*, 26 I. & N. Dec. 99, 102–03 (B.I.A. 2013) (Board relied in part on the intent of Congress and the state legislatures in determining that animal fighting is morally reprehensible under the INA).

²⁰¹ *Garcia-Maldonado*, 491 F.3d at 290 (Both the Court and the Board below agreed with this view).

²⁰² *See, e.g., Efigene*, 642 F.3d at 922 (Court refused to defer to Board’s determination that Colorado sex offender registration law constituted a CIMT because it was not supported by cases cited by the BIA, was at odds with its own precedent, and was not a reasonable policy choice); *Herrera v. Holder*, 575 F. App’x. 781, 783 (9th Cir. 2014) (Ninth Circuit did not give deference to Board determination that offense was a CIMT because it provided only a brief analysis that the appellate court did not deem persuasive).

particular purpose, to execute orders²⁰³ and win wars.²⁰⁴ A community created for a specific purpose naturally contains or develops its own moral standards; that which seriously detracts from the community or materially threatens its preservation or the individuals within it is inherently turpitudinous.

For certain PMOs unknown to the common law and for which no INA CIMT case law exists, this article proposes that adjudicators look to the moral beliefs of that community—either in and of itself or as an acknowledged component of American society subject to special consideration or deference by the federal courts and the Board—when examining such offenses for moral turpitude. Granted, like all other American communities, neither the Board nor the courts are going to poll military community members on just which offenses those members believe to be morally turpitudinous. Nor are they going to let those members determine which UCMJ offenses are CIMTs under the INA as that is a question of federal law entrusted by the Congress to the courts and the relevant federal agencies to answer. But unlike the American civilian population and its virtually infinite community permutations, the United States military is an established, discrete and well-defined community, created under the United States Constitution, controlled by the Legislative²⁰⁵ and Executive branches,²⁰⁶ and recognized as a special community by the Supreme Court.²⁰⁷ Therefore, the Board and courts have ready access to certain military based proxies as vectors or lenses of insight into what the American military community’s sense of moral turpitude is in much the same way that they look to civilian legal proxies (common law and long-standing precedent) in order to determine what that community’s moral standards are.

²⁰³ *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972).

²⁰⁴ *Thomasson v. Perry*, 80 F.3d 915, 929 (4th Cir. 1996); *Mendrano v. Smith*, 797 F.2d 1538, 1546 (10th Cir. 1986).

²⁰⁵ U.S. CONST. art. I, § 8, cl. 12-14.

²⁰⁶ U.S. CONST. art. II, § 2, cl. 1.

²⁰⁷ *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.’”).

C. The American Military Community is a Discrete And Well-Defined Community

Members of our military are a part of a discrete and well-defined American community. Its *raison d'être* is to protect the United States and fight its wars. It is a self-disciplined community that contains a hierarchical social and leadership structure based on a well-established ranking system. At least when on duty, service members are easily recognizable based on their clothing, bearing, and unique customs.

The military is selective as to who may join its community. To be eligible, the applicant must pass certain physical examinations, not possess a criminal background of immoral behavior, and agree to be bound to the military community for a number of years.²⁰⁸ If the applicant passes those hurdles, a military officer administers the oath of recruitment wherein the applicant does “solemnly swear” to protect the United States, and to obey the orders of the President and other military superiors, “so help me God.”²⁰⁹ After enlisting, the civilian must be acclimated to the expectations and customs of his or her newly adopted community, which begins with basic training and orientation on the ways of the military environment.

Upon exit from military service, a member’s discharge is characterized for the general community to see and judge, with discharge characterizations ranging from honorable to punitive characterizations adjudged through the court-martial process.²¹⁰ Generally, as the quality of the discharge decreases, so too do the benefits accorded to the veteran, and the greater the stigma will be in general society, both socially and economically.²¹¹

²⁰⁸ See generally www.military.com/join-armed-forces/disqualifiers-law.html and www.todaysmilitary.com/joining/entrance-requirements.

²⁰⁹ 10 U.S.C. § 502 (2015). The oath administered to commissioned officers is prescribed at 5 U.S.C. § 3331 (2015). Though the officer oath does not explicitly require obedience to the orders of military superiors, such requirement is inferred in that part of the oath requiring well and faithful discharge of the duties of the office.

²¹⁰ See *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989) (Court discusses the reasons behind a punitive discharge being the military community’s mark upon the recipient to make it difficult for him to reenter the civilian society and economy). See also U.S. DEP’T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 30 (27 Jan. 2014) (C1, 4 Dec. 2014).

²¹¹ P.J. BUDAHN, *VETERAN’S GUIDE TO BENEFITS* 14–16 (5th ed. 2011).

The civilian courts are well aware of the existence and special status of this community. The Supreme Court has unequivocally recognized that the military is, by necessity, a specialized society separate from civilian society, with its own laws and traditions.²¹² For example, military law criminalizes conduct prejudicial to good order and discipline, as well as conduct unbecoming an officer, standards that cannot be measured by a non-military court's innate sensibilities but that actual knowledge and experience of military life help frame.²¹³ As the Court recognized, these type of offenses must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.²¹⁴ Under this standard, members of the military community do not enjoy the same application of the protections of constitutional rights that civilians enjoy.²¹⁵ Numerous other judicial decisions acknowledge the material distinctions between military and civilian communities, allowing service members' Constitutional rights to be somewhat more attenuated than civilians' rights.²¹⁶

State and local governments too have recognized the existence of the military community. This is reflected in veterans' hiring preference laws²¹⁷ and

²¹² *Levy*, 417 U.S. at 743.

²¹³ *Id.* at 748-49. This is exactly what the Board did in *S—B—* and *Garza-Garcia*; it discordantly used the civilian community sense of right and wrong to determine whether the PMO offenses of desertion and AWOL are CIMTs under the INA. That is to say, because the civilian community had no notion of the wrongness of desertion in time of war, it was thus sufficient enough for the Board to conclude that the offense cannot be deemed a CIMT.

²¹⁴ *Id.* at 754.

²¹⁵ *Id.* at 758.

²¹⁶ *See, e.g.*, *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008) (the sweep of First Amendment protection is less comprehensive in the military context, given the different character of the military community and mission); *Priest*, 45 C.M.R. at 344 (in the armed forces, restrictions of First Amendment rights exist for reasons that have no counterpart in the civilian community); *Murray v. Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983) (compulsory urinalysis of service- members do not violate the Fourth or Fifth Amendments due to exigencies of military necessity); *United States v. Mack*, 9 M.J. 300, 328 (C.M.A. 1980) (there is no Sixth Amendment right to counsel at a Summary Court-Martial (Cook, J., concurring in part and dissenting in part); *id.* (“...standards of constitutional law applicable in the civilian community are not *per se* applicable to the military community and some variations are required.”).

²¹⁷ *See* Joy Waltemath, *State Voluntary Veterans' Preference Laws Keep Marching Along*, KLUWER L. & BUS. BLOG, (Apr. 23, 2015), <http://www.employmentlawdaily.com/index.php/2015/04/23/state-voluntary-veterans-preference-laws-keep-marching-along/> (citing

veterans' tax breaks²¹⁸ in most states. Also, every state has a National Guard, its members being reserve members of the United States Army or Air Force, as well as military members of their state. Almost all of these states have their own disciplinary code for this community, which resembles the UCMJ in one form or another.²¹⁹ These states also recognize their National Guard members with certain benefits and privileges of National Guard service.²²⁰

The general public and courts have recognized the existence, distinction and purpose of the unique American military community. Two proxies supply INA adjudicators with information they could use to reliably determine if a PMO is deemed reprehensible within the American military community.

D. The Moral Sense of the American Military Community Can Be Gauged by Long Standing Military Case Law

The military justice system is the sole venue for trying and convicting military members for violations of the UCMJ.²²¹ Since 1950, the military appellate courts have published their decisions, in essence creating their own common law. This common law includes an abundance of cases declaring or strongly reflecting the sense of the military community as to which UCMJ offenses it believes are reprehensible. First, the military courts have developed their own aged jurisprudence as to which UCMJ offenses constitute CIMTs. Second, the highest military appellate court set forth a rule of thumb based on the intent of the drafters of the MCM as to which UCMJ offenses military authorities consider morally turpitudinous.

veterans preference bills or laws in hiring in: Alabama, Arizona, Arkansas, California, Florida, Georgia, Indiana, Idaho, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Oklahoma, Oregon, South Carolina, Texas, Virginia, and Washington).

²¹⁸ See, e.g., a full list of property tax exemptions by each State at www.veteransUnited.com/.../veteran-property-tax-exemptions-by-state/.

²¹⁹ See Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAW., Dec. 2007, at 30, 36. Tennessee does not have a military code.

²²⁰ See, e.g., N.Y. MIL. LAW §§ 235-54 and 300-328 (McKinney 2015) (privileges and benefits of National Guard service). For a list of National Guard benefits laws of the States see <http://www.roastateoftexas.org/Home/Law-Reviews/National-Guard-State-Law-Reviews/>.

²²¹ See U.S. CONST. art. I, § 8, cl. 14 (Congress shall have power to make rules for the government and regulation of the land and naval forces) and art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

1. CIMT case law in the military justice system

Deciding whether a UCMJ offense is a CIMT has long been a recognized legal issue in military law. Like the Federal Rules of Evidence, for over half a century the Military Rules of Evidence permitted use of a conviction for a CIMT as an impeachment tool at courts-martial.²²² Also, like the federal civilian courts and the Board, the military courts relied on the same Supreme Court decision, *Jordan v. De George*, when defining a CIMT as essentially requiring either a fraudulent act, or conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.²²³

The following UCMJ offenses have been held by the military courts to involve moral turpitude: unauthorized absence for which one year imprisonment is authorized;²²⁴ assault of a non-commissioned officer;²²⁵ adultery;²²⁶ bad check offense;²²⁷ bribery;²²⁸ burglary;²²⁹ conduct unbecoming an officer by cheating on an exam;²³⁰ destruction of property;²³¹ false swearing;²³² forgery;²³³ fraudulently making and uttering bad checks with intent to defraud;²³⁴ felonies containing an intent to deceive;²³⁵ attempted

²²² See MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XXVII, § 153b(2)(b) (1951) [hereinafter 1951 MCM]; MANUAL FOR COURTS-MARTIAL, UNITED STATES § 124 (1928). This practice ended on 1 September 1980. See *United States v. Jacobs*, 9 M.J. 794, 798 (N.M.C.M.R. 1978).

²²³ *United States v. Moore*, 18 C.M.R. 311, 315-16 (C.M.A. 1955) (citing *De George*, 341 U.S. 223); *Flores*, 17 I. & N. Dec. 225, 227-28 (B.I.A. 1980); *Short*, 20 I. & N. Dec. 136, 139 (B.I.A. 1989); *Tobar-Lobo*, 24 I. & N. Dec. 143, 145 (B.I.A. 2007).

²²⁴ *United States v. Johnson*, 50 C.M.R. 705 (C.M.A. 1975).

²²⁵ *United States v. Hite*, 34 C.M.R. 631, 638 (A.B.R. 1964).

²²⁶ *Jacobs*, 9 M.J. 794.

²²⁷ *United States v. Morrison*, 11 M.J. 852 (A.C.M.R. 1981); *United States v. Hutchins*, 19 C.M.R. 143, 145 (C.M.A. 1955).

²²⁸ *United States v. Light*, 36 C.M.R. 579 (A.B.R. 1965), 1965 WL 4803 (A.B.R. 1965).

²²⁹ *United States v. Weaver*, 1 M.J. 111 (C.M.A. 1975).

²³⁰ *Light*, 36 C.M.R. 579, 1965 WL 4803 (A.B.R. 1965).

²³¹ *United States v. Robertson*, 33 C.M.R. 828 (A.F.B.R. 1963).

²³² *United States v. Greene*, 34 M.J. 713 (A.C.M.R. 1992).

²³³ *United States v. Harding*, 29 C.M.R. 490 (C.M.A. 1960).

²³⁴ *United States v. Margelony*, 33 C.M.R. 267 (C.M.A. 1963).

²³⁵ *Casa-Garcia v. United States*, 71 M.J. 586 (A. Ct. Crim. App. 2012).

housebreaking;²³⁶ misappropriation;²³⁷ indecent liberties with a child;²³⁸ larceny;²³⁹ maiming;²⁴⁰ robbery;²⁴¹ rigging a game;²⁴² sodomy;²⁴³ striking a superior NCO;²⁴⁴ wrongful appropriation;²⁴⁵ dereliction of duty via breach of trust;²⁴⁶ possession of child pornography;²⁴⁷ and using a military pass with intent to deceive.²⁴⁸

The following have been found not to involve moral turpitude by the military courts: absence without leave and failure to repair;²⁴⁹ breach of arrest;²⁵⁰ carrying a concealed weapon;²⁵¹ disrespect and failure to obey;²⁵² dereliction via negligent homicide;²⁵³ disrespectful language;²⁵⁴ disrespect to an officer;²⁵⁵ drunk and disorderly;²⁵⁶ escape from confinement;²⁵⁷ false

²³⁶ *Robertson*, 33 C.M.R. 828.

²³⁷ *Light*, 36 C.M.R. 579, 1965 WL 4803 (A.B.R. 1965).

²³⁸ *United States v. Emerson*, 20 C.M.R. 434 (A.B.R. 1955).

²³⁹ *United States v. Lacey*, 49 C.M.R. 738 (C.M.A. 1975); *United States v. Berthiaume*, 18 C.M.R. 293, 302 (C.M.A. 1955); *United States v. Rinehart*, 26 C.M.R. 815 (C.G.B.R. 1958).

²⁴⁰ *United States v. Weeks*, 36 C.M.R. 81 (C.M.A. 1966); *United States v. Moore*, 18 C.M.R. 311 (C.M.A. 1955) (citing 1951 MCM, *supra* note 222, ch. XXVII, § 128(b) (1951)).

²⁴¹ *Weaver*, 1 M.J. 111.

²⁴² *Light*, 36 C.M.R. 579, 1965 WL 4803 (A.B.R. 1965).

²⁴³ *United States v. Phillips*, 11 C.M.R. 137 (C.M.A. 1953); *United States v. O'Connell*, 18 C.M.R. 881 (A.F.B.R. 1955).

²⁴⁴ *Hite*, 34 C.M.R. 631.

²⁴⁵ *United States v. Keleher*, 33 C.M.R. 337 (C.M.A. 1963); *United States v. Baker*, 34 C.M.R. 833 (A.F.B.R. 1964), 1964 WL 5113 (A.F.B.R. 1964).

²⁴⁶ *United States v. Smith*, 39 C.M.R. 763 (A.B.R. 1968).

²⁴⁷ *United States v. Brisbane*, 63 M.J. 106 (C.A.A.F. 2006).

²⁴⁸ *Moore*, 18 C.M.R. 311.

²⁴⁹ *Gibson*, 18 C.M.R. 323; *United States v. Girardin*, 43 C.M.R. 895 (C.G.C.M.R. 1971).

²⁵⁰ *United States v. Edwards*, 37 C.M.R. 649 (A.B.R. 1967).

²⁵¹ *United States v. Green*, 20 C.M.R. 606 (A.F.B.R. 1955).

²⁵² *Gibson*, 18 C.M.R. 323.

²⁵³ *United States v. Hunt*, 27 C.M.R. 557 (A.B.R. 1958), 1958 WL 3552 (A.B.R. 1958).

²⁵⁴ *Gibson*, 18 C.M.R. 323.

²⁵⁵ *Edwards*, 37 C.M.R. 649.

²⁵⁶ *United States v. Gambill*, 11 C.M.R. 934, 936 (A.F.B.R. 1953).

²⁵⁷ *United States v. Dyche*, 23 C.M.R. 723 (A.F.B.R. 1956).

statement that is not official;²⁵⁸ possession of marijuana;²⁵⁹ mere possession of a false pass;²⁶⁰ and simple assault.²⁶¹

2. United States v. Moore rule of thumb

The seminal military case guiding military courts as to which UCMJ offenses are CIMTs under its law is *United States v. Moore*.²⁶² In 1955, the highest military court announced a rule that if punishment for a UCMJ offense authorizes confinement of at least one year and a dishonorable discharge, it is a crime involving moral turpitude.²⁶³ The Court of Military Appeals articulated its certainty that such punishment was authorized by the drafters of the military's Table of Maximum Punishments only for *malum in se*-type crimes.²⁶⁴ As the civilian INA adjudicators use *malum in se* crimes as a proxy to determine which common law based offenses qualify as a CIMT under the immigration law, so too did the military courts use the same proxy to determine which UCMJ offenses qualify under the military law. Moreover, the Court explicitly stated that PMOs meeting this rule also qualify as CIMTs.²⁶⁵ Therefore, this rule that has lain dormant since 1980 when the military ceased the practice of using CIMTs for impeachment purposes serves as a relatively straight-forward proxy representative of the military community's view as to which offenses it deems to be reprehensible.²⁶⁶

These proxies cannot serve as wholesale substitutes for the traditional CIMT case law/common law analysis in determining which UCMJ offenses qualify as CIMTs under the INA. These military court methods of determining what is or is not a CIMT are obviously quite different from the methods used by the Board and Article III courts for immigration purposes. For example, the military courts do not engage in a categorical analysis or apply a reasonable probability standard in determining whether an offense qualifies as a CIMT. Also, as will be seen in Section V, some UCMJ offenses not considered CIMTs by the military would be considered CIMTs by the Board and federal

²⁵⁸ *United States v. Johnson*, 39 M.J. 1033 (A.C.M.R. 1994).

²⁵⁹ *United States v. Glenn*, 4 M.J. 706 (N.M.C.M.R. 1977).

²⁶⁰ *United States v. Harvey*, 7 C.M.R. 195 (A.B.R. 1952).

²⁶¹ *United States v. Buchanan*, 37 C.M.R. 927, 930 (A.F.B.R. 1967).

²⁶² *Moore*, 18 C.M.R. 311.

²⁶³ *Id.* at 318-20.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ This practice ended on 1 September 1980. See *Jacobs*, 9 M.J. at 798.

courts, and vice-versa. Rather, these military proxies and the supplemental analytical tools this article suggests serve as a military lens and fine-tuner to provide the INA adjudicators with insight that its common law-skewed analytical toolkit cannot: a qualitative and rational method to determine what the American military community believes to be “reprehensible” criminal behavior within the meaning of *Silva-Trevino* in particular, and the INA in general. It is then for the Board and federal courts to determine if the other INA CIMT requirements are met in order to find whether a UCMJ offense qualifies under all of the other INA standards.

IV. CATEGORIZING UCMJ OFFENSES FOR PURPOSES OF DETERMINING IF THEY QUALIFY AS CIMTs UNDER THE INA

UCMJ offenses can be categorized into three sections for INA CIMT analysis purposes: I. UCMJ offenses based in the common law; II. Certain purely military offenses inherently reprehensible to the military community because of the high degree of breach of inherent duty owed to fellow military members or to the military establishment, and; III. UCMJ offenses that may not or do not qualify as CIMTs under the INA, either because they are not inherently reprehensible or fail to otherwise meet the *Silva-Trevino* standards.²⁶⁷

A. Category I: Offenses Substantially Equivalent to Civilian Common Law

Many UCMJ offenses are based on the common law analogous to many state and civilian federal laws; thus, there is persuasive authority to determine if they qualify as CIMTs under the INA. Two examples are *United States ex rel. Parenti v Martineau*²⁶⁸ and *Matter of N—*,²⁶⁹ discussed above, wherein a district court and the Board respectively found that the military offense of larceny constitutes a CIMT under the immigration laws. Therefore, use of the standard INA CIMT analysis via common law proxy is functional and appropriate with respect to these offenses. This category also covers those military offenses based in common law that additionally contain PMO

²⁶⁷ See *infra* Section V (providing the author’s rationale as to whether the offense qualifies as a CIMT under the immigration laws).

²⁶⁸ *United States ex rel. Parenti v. Martineau*, 50 F.2d 902 (court-martial conviction for larceny is a CIMT).

²⁶⁹ 7 I. & N. Dec. 356 (B.I.A. 1956) (violation of UCMJ art. 121, stealing with intent to permanently deprive, is a CIMT).

elements, making them under-inclusive statutes for INA CIMT purposes. For example, assaulting a military officer in violation of UCMJ Article 90(1) is a PMO, but the offense incorporates elements of assault, which is amenable to the common law proxy analysis to determine if it is an INA CIMT.

B. Category II: Purely Military Offenses Highly Reprehensible Within the United States military community because of the inherently vile nature of the act and breach of inherent duty owed to fellow service members or to the military establishment

Congress charged the courts and Board to serve as interpreters of the nebulous INA term “crime involving moral turpitude.” To apply an unworkable judicial civilian law-based analysis to PMOs, as the Board did in *Matter of S—B—*, subverts congressional intent that they actually examine the crimes charged as the basis of removal to determine whether they qualify as CIMTs.

A more workable approach is necessary, one that calls for courts and the Board to determine which PMOs the American military community find reprehensible. Applying this new analysis to PMOs, two general categories of military offenses emerge whose crimes meet the INA CIMT standards: (1) certain military crimes committed before the enemy, or for the enemy, or committed during a time of war that inherently and wrongfully increases the likelihood of harm to fellow service members from that enemy, and (2) certain military crimes committed at any time related to failing to obey an officer or wrongfully failing to perform duty, because such crimes basely undermine the fundamental nature, customs, tradition, training, and expectations of the military community to fight and win wars.

1. Category (II)(1)—certain offenses involving misconduct before the enemy or for the enemy, or committed in time of war

The primary purpose of the armed forces necessarily involves some increased level of risk to life and limb to those members. Few things can be considered more inherently offensive between service members than one who assists the enemy or misbehaves before it, such as wrongfully running away or unjustifiably maltreating a fellow prisoner of war. Such acts necessarily increase the likelihood of serious harm or death to fellow service members and imperil the military’s ability to win.

To a lesser extent, commission of certain acts during wartime, such as desertion with intent to avoid hazardous duty or failure to obey an order by

a superior officer, also tend to jeopardize the military's mission and imperil fellow service members. Hence, these offenses are also reprehensible. Such acts also patently violate the solemn oath all recruits take to essentially obey and defend the United States, and rub completely against the grain of the training, indoctrination, customs, traditions, and above all the heightened sense of honor expected by and within the military community.

2. Category II(2)—certain disobedience and duty performance failure offenses reprehensible to the military community because they fundamentally undermine the ability of the armed forces to serve its purpose

If service members decide to stop showing up for duty, there would be no military force. If they did show up for duty but refused to follow orders of their superior officers, then there would be no effective military force. Offenses related to these two particular forms of misconduct apply broadly across military service, and all service members know it. Other offenses are situational or dependent upon the place of violation. For example, falling asleep on guard duty is an act that could only occur in a limited situation—when assigned to guard duty. Breaking restriction is dependent upon movement from one particular place, the place of restriction, to another place. In contrast, the most basic concept bred into all service members from day one in the military community is obedience to lawful orders issued by superior officers, which necessarily includes being present for duty when expected. Ingrained in the psyche of every service member is the fundamental notion that to willfully violate an order or to desert is inherently wrong and repugnant in the eyes of those fellow service members who continue to obey and report for duty. Therefore, a willful or intentional act in violation of such a basic community expectation in this specialized community with purpose is highly repugnant and would most justifiably meet the reprehension requirement under the INA.

C. Category III: UCMJ Offenses that Do Not or Probably Do Not Constitute CIMTs Under the INA

These offenses do not or probably do not qualify as INA CIMTs either because the act is not or may not be reprehensible, the requisite scienter is or may be absent, or the statute is or may be indivisible and not a categorical match with the generic definition of CIMT under the INA.

V. ANALYSIS OF ALL UCMJ OFFENSES TO DETERMINE IF THEY QUALIFY AS CIMTs UNDER THE IMMIGRATION AND NATIONALITY ACT

This section examines each UCMJ offense to determine if it, or permissibly divisible portions of it, qualifies as a CIMT under the INA. In accordance with current INA CIMT case law, this section examines each UCMJ article using the categorical approach and divisibility analysis. Where appropriate, it examines whether the offense is reprehensible by utilizing the military proxies this article proposes, and it examines whether the requisite scienter exists as required by the standard set forth in *Matter of Silva-Trevino*.

Note that this analysis is limited only to the CIMT ground of removability under the INA. Though a particular conviction under the UCMJ may not meet the INA CIMT standard, it very well may meet an alternate ground of removability under the INA, such as an aggravated felony ground, a threat to national security ground, or a drug-related offense ground. Counsel are urged to consult other relevant sources to determine if a particular military conviction renders a military member alien removable upon one or more of the other grounds enumerated in the INA.

Note also that it is beyond the scope of this article to examine each offense under the applicable law of each circuit court of appeals. Aside from potentially being a most lengthy exposition well beyond the limits of a law review article, doing so would not serve this article's purpose of assisting military court practitioners. This is because at the time of preferral of charges, plea negotiations, trial, or plea agreement providence inquiry Judge Advocates cannot know in which circuit's jurisdiction the eventual immigration court hearing will take place, and thus which circuit's law will apply. That will be up to the discretion of the Department of Homeland Security. Nevertheless, this article arms the advocates with sufficient knowledge of INA CIMT basic jurisprudence to rationally and competently argue the likelihood that an accused foreign-born service member may or may not be subject to removal thereon based upon a particular conviction under the UCMJ.

CIMT BREAKDOWN OF UCMJ OFFENSES²⁷⁰

Article 78: Accessory after the fact—*Depends on whether the underlying offense is a CIMT*

If the basic crime is one of moral turpitude, so too is this offense.²⁷¹

Article 80: Attempts—*Depends on whether the underlying offense is a CIMT*

If the basic crime is one of moral turpitude, so is the attempt to commit that crime.²⁷² However, the statute must be legally coherent to constitute a CIMT. For example, attempted reckless assault is legally incoherent, since one cannot logically attempt to be reckless.²⁷³

Article 81: Conspiracy—*Depends on whether the underlying offense is a CIMT*

If the basic crime is one of moral turpitude, so is conspiracy to commit that crime.²⁷⁴

Article 82: Solicitation of desertion, mutiny, misbehavior before the enemy, and sedition—*Depends on whether the underlying offense is a CIMT*

If the basic crime is one of moral turpitude, so too is this offense.²⁷⁵

²⁷⁰ The analysis used and determination made as to whether the offense qualifies as a CIMT is solely the opinion of the author. Reasonable minds can disagree on issues of divisibility and what constitutes a reprehensible act.

²⁷¹ Rivens, 25 I. & N. Dec. 623 (B.I.A. 2011); *Feldman*, 2007 B.I.A. LEXIS 52, at *6 (Board held that there is no distinction, with respect to the morally turpitudinous nature of a crime, between an inchoate offense and the completed crime).

²⁷² Katsanis, 14 I. & N. Dec. 266 (B.I.A. 1973); Awaijane, 14 I. & N. Dec. 117 (B.I.A. 1972).

²⁷³ See *Gill*, 420 F.3d at 89-91 (New York attempted reckless assault under N.Y. PENAL LAW 120.05(4) is not a CIMT because it is legally incoherent).

²⁷⁴ Short, 20 I. & N. Dec. 136 (B.I.A. 1989); S—, 9 I. & N. Dec. 688 (B.I.A. 1962); *Feldman*, 2007 B.I.A. LEXIS 52, *6 (Board holding that there is no distinction, with respect to the morally turpitudinous nature of a crime, between an inchoate offense and the completed crime).

²⁷⁵ Rohit v. Holder, 670 F.3d 1085, 1089–90 (9th Cir. 2012); *Feldman*, 2007 B.I.A. LEXIS 52, at *6 (Board holding that there is no distinction, with respect to the morally turpitudinous nature of a crime, between an inchoate offense and the completed crime).

Article 83: Fraudulent enlistment, appointment or separation—*Category I CIMT*

Like in *Matter of Flores*, the underlying purpose of this statute is to proscribe fraud. The *Silva-Trevino* scienter requirement is met as both subsections 1 and 2 require proving knowingly false representation or deliberate concealment in order to convict. The military courts have characterized these offenses as fraud offenses, as well.²⁷⁶ Military courts appear to have found that each subsection in this statute is a CIMT.²⁷⁷

Article 84: Effecting unlawful enlistment, appointment, or separation—*Category I CIMT*

Recruiting a person knowing that he is ineligible for enlistment, appointment or separation appears to inherently involve fraud.²⁷⁸ The scienter requirement under *Silva-Trevino* is met via the knowing element. Further supporting the contention that this is properly categorized as a fraud offense under the INA, the military courts have called this UCMJ offense “the fraudulent enlistment statute.”²⁷⁹

Article 85: Desertion—*PMO—Category II(1 and 2) CIMTs*

Contrary to the position of the Board in *Matter of S-B-*, all types of desertion proscribed in the UCMJ constitute reprehensible conduct within the view of the American military and civilian communities.²⁸⁰ Deserting with an intent to permanently remain away, the most common form of desertion, qualifies as a CIMT under Category II(2) because intending to never show up for obligated military duty undermines the most fundamental need of the armed forces—that military personnel be present in order to protect the national security of the United States. Moreover, it is self-evident that members of the military community abhor deserters who avoid their sworn

²⁷⁶ See *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981).

²⁷⁷ See *Weaver*, 1 M.J. 111; DAVID A. SCHLUETER ET AL., *MILITARY CRIMES AND DEFENSES* § 5.2 (2d ed. 2014).

²⁷⁸ SCHLUETER ET AL., *supra* note 277, § 5.3.

²⁷⁹ *United States v Harrison*, 5 M.J. 476 (C.M.A. 1978); *United States v Valdez*, 5 M.J. 470 (C.M.A. 1978); *United States v Robbins*, 7 M.J. 618 (N.M.C.M.R. 1978); *United States v Locke*, 4 M.J. 714 (N.M.C.M.R. 1977).

²⁸⁰ See *supra* Sections III.B and IV.B.1, B.2.

responsibilities and likely leave their tasks to be performed by others who neither deserted nor violated their oaths.

The crime of desertion is that much more reprehensible when committed during wartime, to avoid hazardous duty, or to shirk important service, thereby constituting CIMTs under Category II(1). The following reported exchange as reported in *United States v. Bell* between the Army Court of Criminal Appeals and the appellant who was convicted of desertion by a general court-martial with members²⁸¹ aptly sums up the sentiment of the military community with respect to desertion for the purpose of shirking important service; it finds it to be a more reprehensible offense than the unquestionably turpitudinous crime of larceny:

Defendant: Can I please ask one question and get back an honest straight answer, how can someone in the military steal some money/merchandise from the government and get less than a year in jail? Sometimes they only do half their sentence because [they] get out on parole. Is my mistake that bad [that] I get more time than a [thief], or a drug dealer?

Court: Yes, appellant, deserting to shirk important service is *one of the very worst things a soldier could do*. Soldiers voluntarily swear an oath to defend and obey and the nation must be able to rely upon them to do their duty. As despicable as thieves and drug dealers may be, soldiers who violate their oaths for personal reasons may properly be considered guilty of *a more heinous crime*. We should also point out that your crime was not a mistake, like putting on a blue sock instead of a black sock in the dark. Your crime was the product of a specific intent. You deliberately chose to avoid the deployment. Every adjudged sentence is individualized for the offender and the offense and in many cases the theft of money or property, even by a soldier, reasonably could be punished by much less than a year in jail.²⁸²

²⁸¹ “Members” is the military version of a jury, consisting only of military personnel as the triers of fact.

²⁸² No. 20030878, 2005 CCA LEXIS 601, at *13 n.10 (A. Ct. Crim. App. Apr. 27, 2005) (unpublished) (emphasis added); *see also Gibson*, 18 C.M.R. 323; *Girardin*, 43 C.M.R. 895.

Article 86: Absence without leave—PMO—Category III; Not a CIMT, but an aggravated AWOL may be a Category II (2) CIMT

The military courts have held that absence without leave (AWOL), generally, is not a CIMT.²⁸³ Even if AWOL were considered to be a reprehensible act, it lacks a scienter requirement in order to convict;²⁸⁴ therefore, it cannot qualify as an INA CIMT.

Aggravated AWOL offenses, however, do require a specific intent which accompanies the absence,²⁸⁵ and may be said to be turpitudinous if the INA adjudicators find adequate scienter to be present and that the act is sufficiently reprehensible to qualify as a CIMT. The military community would conclude that aggravated AWOL constitutes a CIMT, because the offense meets the *Moore* CIMT rule of one year's imprisonment and a dishonorable discharge. Additionally, the Court of Military Appeals has opined that an aggravated AWOL is turpitudinous.²⁸⁶

The Board did not find AWOL (non-aggravated version) to be base, vile or depraved in its unpublished decision of *Matter of Garza-Garcia*.²⁸⁷ Though the Board's holding in that case is correct that a simple AWOL is not a CIMT under the INA, it followed the same erroneous reasoning in *Matter of S—B—*. As with desertion in time of war, the Board asserted that, absent any authority in the common law, AWOL cannot be deemed to be a CIMT.²⁸⁸ The Board also stated that before it could consider whether AWOL is a CIMT under the INA, the government would have to provide some insight to guide it in that direction.²⁸⁹ Aside from asserting that the Board no longer requires such guidance in order to recognize that certain PMOs are inherently CIMTs,²⁹⁰ this article proposes the very type of guidance the

²⁸³ See *Garza-Garcia*, 2007 Immig. Rptr. LEXIS 10227; *United States v. Anderson*, 13 C.M.R. 829, 842 (A.F.B.R. 1953); *United States v. Grant*, 29 C.M.R. 544 (C.M.A. 1960); *Girardin*, 43 C.M.R. 895.

²⁸⁴ MCM, *supra* note 150, pt. IV, ¶ 10.c.(3).

²⁸⁵ *Id.* ¶ 10.c.(4). These are more serious offenses because they involve aggravating circumstances such as duration of absence, a special type of duty, and a particular specific intent which accompanies the absence.

²⁸⁶ *Johnson*, 50 C.M.R. 705.

²⁸⁷ 2007 Immig. Rptr. LEXIS 10227.

²⁸⁸ *Id.* at 6.

²⁸⁹ *Id.*

²⁹⁰ The Board categorized as INA CIMTs some statutory offenses that are either alien to the common law, or do not contain the required scienter, such as statutory rape-type

Board was looking for. Applying such guidance to a simple AWOL offense, no moral turpitude attaches, but certain aggravated AWOL offenses may qualify as INA CIMTs.

Article 87: Missing movement—*PMO—Divisible statute*

By neglect—***Category III; Not a CIMT***

This statute is divisible in that a service member may be convicted of missing movement via neglect or design. An offense committed as a matter of neglect fails the *Silva-Trevino* scienter standard.

By design—***Category II(2) CIMT***

Missing movement by design requires specific intent to miss the movement, and actual knowledge of the prospective movement.²⁹¹ The offense contains a sufficient scienter and it also qualifies as reprehensible. To convict, the missing movement must be substantial in terms of duration, distance and mission.²⁹² Some military courts have held that Article 87 does not reach every instance in which a service member misses movement but is applicable only when the accused has an essential mission related to the movement, *e.g.*, is an integral member of the unit or crew whose absence would potentially disrupt the mission.²⁹³

offenses, knowingly leaving the scene of a motor vehicle accident, animal fighting ventures, and promoting a criminal street gang. *See supra* pp. 3-4.

²⁹¹ MCM, *supra* note 150, pt. IV, ¶ 11.c.(3), (5).

²⁹² *United States v. Blair*, 24 M.J. 879 (A.C.M.R. 1987) *aff'd*, 27 M.J. 438 (C.M.A. 1988); *United States v. Graham*, 16 M.J. 460 (C.M.A. 1983).

²⁹³ *Compare United States v. Gillchrest*, 50 C.M.R. 832 (A.F.C.M.R. 1975) (finding that service member missing a commercial aircraft to Turkey as part of PCS did not meet Congressional intent behind the missing movement offense), *and United States v. Smith*, 2 M.J. 566, 568 (A.C.M.R. 1976) (“Hard and fast rules relating to the duration, distance and mission of the ‘movement’ are not appropriate but rather those factors plus any other concomitant circumstances must be considered collectively, in order to evaluate the potential disruption of the unit caused by a soldier’s absence.”) *aff'd*, 4 M.J. 210 (C.M.A. 1978) (holding that missing movement to site of two-day bivouac 12 miles downrange did not constitute missing movement), *with United States v. Lemley*, 2 M.J. 1196 (N.M.C.M.R. 1976) (holding that accused, who was being escorted from brig and missed specific Pan Am flight listed on orders, did miss “movement”); *United States v. St. Ann*, 6 M.J. 563 (N.M.C.M.R. 1978) (holding that missing a commercial flight while on orders constitutes missing movement even when the accused is not a member of the crew or traveling with his unit).

Indicating the military community's view that this offense is *malum in se*, imprisonment for two years and a dishonorable discharge are authorized for missing movement by design, thus it qualifies as a CIMT under the *Moore* rule. Moreover, missing movement is inherently reprehensible as it means one fewer service member present to perform the mission, resulting in a diminution of the unit's ability to accomplish its task and placing an increased burden on a replacement or on fellow service members who did not miss movement.

Article 88: Contempt toward officials—*PMO*—*Category III; Not a CIMT*

It is doubtful any court would deem an idly contemptuous statement about one of the enumerated officials as being inherently base, vile or depraved within the meaning of the INA. The offense neither physically harms nor threatens anyone or otherwise constitutes a reprehensible act within the meaning of the INA. Only one rather old Vietnam era case could be found wherein a service member was convicted of this offense.²⁹⁴

Article 89: Disrespect toward a superior commissioned officer—*PMO*—*Category III; Not a CIMT*

Disrespectful behavior for which a service member could be convicted under this offense includes “neglecting a customary salute.”²⁹⁵ A neglectful act or omission is insufficient to meet the scienter requirement to label an offense a CIMT under the INA.²⁹⁶ Other acts deemed disrespectful include marked disdain, insolence, impertinence, undue familiarity, or other rudeness.²⁹⁷ It is highly unlikely that an adjudicator of cases arising under INA law would consider such relatively minor behavior toward a superior officer to be base, vile or depraved, albeit prejudicial to good order and discipline. Moreover, reflecting the military community sentiment on the matter, a military court held that this offense is not a CIMT,²⁹⁸ and it does not meet the *Moore* test

²⁹⁴ United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967).

²⁹⁵ MCM, *supra* note 150, pt. IV, ¶ 13.c.(3).

²⁹⁶ Silva-Trevino, 24 I. & N. Dec. 687, 706 n. 5 (A.G.2008). rev'd, Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014, vacated, Silva-Trevino, 26 I. & N. Dec. 550 (A.G. 2015).

²⁹⁷ MCM, *supra* note 150 pt. IV, ¶ 13.c.(3).

²⁹⁸ See *Edwards*, 37 C.M.R. 649. Since *Edwards* was published, the maximum period of confinement authorized under the MCM was extended from 6 months to one year, but it still would not be considered a CIMT under the *Moore* rule, since a dishonorable discharge is still not authorized for this offense.

to qualify as a CIMT, as a dishonorable discharge is not authorized for this offense.

Article 90: Assaulting or willfully disobeying superior commissioned officer—*PMO—Divisible statute*

Striking or assaulting superior commissioned officer—**Category III; Not a CIMT**

The *mens rea* of intent to assault is present to meet the scienter requirement for an INA CIMT. Also, case law and the *Moore* rule indicate that the military views the offense as a CIMT.²⁹⁹ However, the statute indivisibly includes non-turpitudinous conduct, rendering it ineligible for the INA CIMT category. The MCM defines “striking” as including any offensive touching of the person of the officer, however slight.³⁰⁰ Absent an aggravating factor, such simple assaults are not considered to be CIMTs within the meaning of the INA.³⁰¹ Because this subsection of the statute regarding the means of the strike is not divisible, a court may not look behind the elements of the offense, to the conviction records, to determine whether the “strike” was of the simple assault type (not a CIMT act) or aggravated assault type (CIMT act).³⁰²

Drawing or lifting up a weapon against a superior officer—**Category III; Not a CIMT**

This subsection includes any simple assault committed in the manner stated. Therefore, a service member can be convicted under this subsection if he commits an offer type assault with culpable negligence. MCM Paragraph 44.c.(2)(a)(i) defines culpable negligence as a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission. This standard falls below the minimum reckless scienter required in *Silva-Trevino*, because the article does not require that the accused be aware of the substantial risk he is creating, but only that a

²⁹⁹ *Hite*, 34 C.M.R. at 638 (assault of non-commissioned officer is a CIMT).

³⁰⁰ MCM, *supra* note 150, pt. IV, ¶ 14.c.(1)(ii).

³⁰¹ *See Solon*, 24 I. & N. Dec. 239, 241 (B.I.A. 2007).

³⁰² *See Fernandez*, 2014 WL 4966372 (B.I.A.) (citing *Descamps*, 133 S. Ct. 2276 (a statute is properly divisible—that is, if it sets out multiple elements in the alternative, e.g., in separate subsections or a disjunctive list—and when one or more alternate offenses is not a categorical match)).

reasonable person would have realized the risk:³⁰³ The former contemplates the reckless standard required under the INA, the latter does not.³⁰⁴ However, under the MCM, the minimum level of scienter sufficient for INA CIMT purposes appears to be present in the definition of wanton recklessness.³⁰⁵ Because this subsection is not divisible, and because the minimum conduct necessary to convict is not a CIMT, this subsection cannot qualify as a CIMT.

Offering violence to a superior officer—*Category III; Not a CIMT*

This offense includes any form of battery, including those that have a culpable negligence basis.³⁰⁶ The minimum scienter required for an assault type offense to be deemed turpitudinous must be at least recklessness, defined as a conscious disregard of a substantial risk of injury.³⁰⁷ Because this subsection of the statute is indivisible, the Board will not look behind the elements to determine if it includes a form of battery that would be considered a CIMT.³⁰⁸ Therefore, it cannot qualify as a CIMT under the INA.

Willfully disobeys a lawful command of superior officer—*Category II(1 and 2) CIMT*

This offense involves the scienter of willful disobedience and intentional defiance of authority.³⁰⁹ The order must be a specific mandate to do or not to do a specific act.³¹⁰ The order must be lawful.³¹¹ The prosecution must prove actual knowledge of the order³¹² and status of the victim.³¹³ The

³⁰³ For more information on “culpable negligence,” see *United States v Dominguez-Ochoa*, 386 F.3d 639 (5th Cir. 2004).

³⁰⁴ See *Perez-Contreras*, 20 I. & N. Dec. 615, 618 (B.I.A. 1992).

³⁰⁵ MCM, *supra* note 150, pt. IV, ¶ 100a.c.(4) (“‘Wanton’ includes ‘Reckless’ but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.”).

³⁰⁶ See MCM, *supra* note 150, pt. IV, ¶ 14.c.(1)(a)(iii); see also *SCHLUETER ET AL.*, *supra* note 277.

³⁰⁷ *Solon*, 24 I. & N. Dec. 239, 240–41 (B.I.A. 2007).

³⁰⁸ See *supra* note 302.

³⁰⁹ *SCHLUETER ET AL.*, *supra* note 277, at 5.9.

³¹⁰ MCM, *supra* note 150, pt. IV, ¶ 14.c.(2)(b).

³¹¹ *Id.* ¶ 14.c.(2)(a).

³¹² *United States v. Shelly*, 19 M.J. 325 (C.M.A. 1985).

³¹³ MCM, *supra* note 150, pt. IV, ¶ 14.c.(2)(e).

question then becomes whether such disobedience is reprehensible within the American military community.

The Board has never addressed whether a PMO such as this qualifies as an INA CIMT. The military courts would conclude under the *Moore* rule that the offense is a CIMT given that confinement of at least one year and a dishonorable discharge are authorized punishments. Also, obedience to a superior officer's orders is perhaps the most basic requirement for a military force to accomplish its mission. Obedience to orders is one of the highest expectations in the military community, and an intentional deviation from this expectation constitutes an inherent wrong in the minds of members of this community. This is even more so for disobedience during wartime. All military members swear an oath either explicitly or implicitly to obey the orders of their superiors upon entry into this community, and are immersed via training and custom to follow this dictate. Therefore, deviation from this most basic and crucial of military requirements is inherently reprehensible in the military community and thus should be recognized as a CIMT under the INA.

One may argue that failing to obey an overtly minor order, such as willfully disobeying an officer's command to button up a coat, cannot reasonably be said to be reprehensible. However, there are two counter arguments to this. First, in courts that use the reasonable probability approach for CIMT determinations, it may be argued that subjecting a service member to a court martial for such a petty violation is unlikely given the lesser forms of alternative disciplinary action available to punish the offender, such as non-judicial punishment or a letter of reprimand. Second, regardless of the jurisdiction, it may also be argued that, like the CIMT of larceny, the issue is not whether the order violated was petty or grand, but whether the underlying nature of the proscribed statutory act itself, disobedience to an officer, was inherently immoral. Therefore, arguing that a willful violation of an officer's lawful order was just a petty crime and thus not reprehensible would be no more persuasive than arguing that a conviction for shoplifting a twenty dollar item should not be considered turpitudinous merely because of the low cost of the item stolen.

Article 91: Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer—*PMO—Divisible statute*

For subsection (1), see Article 90 discussion *Category III; Not a CIMT*

Willfully disobeys warrant officer, noncommissioned officer or petty officer—*Divisible statute*

Willfully disobeys warrant officer—*Category II (2) CIMT*

Willfully disobeys noncommissioned officer or petty officer—*Category III; Not a CIMT*

Neither military case law nor the *Moore* rule indicate that the military finds this offense to be morally turpitudinous.³¹⁴

Contempt or disrespect—*Category III; Not a CIMT*

The minimum conduct necessary to convict under this subsection is mere rudeness or neglecting the customary salute, thus it fails the scienter requirement.³¹⁵ Regarding reprehension, the offense fails the *Moore* test as the maximum punishment authorizes neither at least one year’s confinement nor a dishonorable discharge.³¹⁶ Also the highest military court declined to find the offense to be turpitudinous.³¹⁷ Therefore, this offense fails to qualify as an INA CIMT.

Article 92: Failure to obey order or regulation—*PMO—Category III; Not a CIMT*

Violates or fails to obey any lawful general order or regulation—*Category III; Not a CIMT*

An element of scienter is required for an offense to qualify as a CIMT, but this subsection fails to contain one. The MCM specifically provides that

³¹⁴ A dishonorable discharge is not authorized for violation of this offense. See MCM, *supra* note 150, pt. IV, ¶15.e.

³¹⁵ See MCM, *supra* note 150, pt. IV, ¶ 15.c.(5).

³¹⁶ See *id.* ¶ 15.e.(6)-(8).

³¹⁷ *Gibson*, 18 C.M.R. at 327.

knowledge of the order need not be proven and is not an element of the offense.³¹⁸ Therefore, it cannot qualify as an INA CIMT.

Having knowledge of any other order which it is his duty to obey, fails to obey—***Category III; not a CIMT***

The scienter of knowledge is an element for this offense, along with the requirements that the order be obeyed, and that the accused failed to so obey. Therefore, the scienter element requirement for a CIMT is present. However, the military community does not consider this offense to be turpitudinous since this subsection fails the *Moore* rule in that it does not authorize at least one year's confinement. Moreover, the highest military court declined to find this offense to be turpitudinous.³¹⁹

Dereliction of duty—***Category III; not a CIMT***

A service member may be convicted for this offense based on design (willfulness) or neglect.³²⁰ Dereliction by neglect cannot be a CIMT since it lacks the requisite scienter.

Dereliction by design contains the scienter of willfulness in failing to perform a duty he knew he was obligated to perform.³²¹ However, the military has not considered such offense to be reprehensible, as indicated by the *Moore* rule and military case law.³²²

Article 93: Cruelty and maltreatment—*Category III; Not a CIMT*

The definitions of cruelty, oppression or maltreatment are indivisible in this statute and include conduct that does not necessarily involve moral turpitude. One may be convicted for merely offensive comments to the victim, or for other acts not necessarily physical.³²³ Though the military court would find that this offense meets the *Moore* CIMT test as the punishment authorized

³¹⁸ MCM, *supra* note 150, pt. IV, ¶ 16.c.(2)(b).

³¹⁹ *Gibson*, 18 C.M.R. at 327.

³²⁰ MCM, *supra* note 150, pt. IV, ¶ 16.b.(3)(c) and 16.c.(1)(3)(c); *id.* ¶ 14.c.(2)(f); *United States v. Jordan*, 21 C.M.R. 627 (A.F.B.R. 1955) (negligent disobedience is sufficient for guilt).

³²¹ *United States v. Ferguson*, 40 M.J. 823, 833-34 (N.M.C.M.R. 1994).

³²² *See Gibson*, 18 C.M.R. at 327.

³²³ MCM, *supra* note 150, pt. IV, ¶ 17.c.(2).

includes confinement for one year and a dishonorable discharge, it is highly unlikely that an INA adjudicator would find the elements of the offense to necessarily involve moral turpitude, since it fails to require substantial harm to the victim.³²⁴

Article 94: Mutiny and sedition—*Divisible statute*

Mutiny—*Most likely a Category I or II (2) CIMT*

This subsection contains an intent to usurp lawful military authority in concert with another who also possesses the same intent by refusing to obey orders or do his or her duty.³²⁵ Therefore the scienter requirement under *Silva-Trevino* is met. There is neither federal civilian nor military case law determining whether this offense contains the requisite reprehension to be deemed a CIMT under the INA, however, a strong case can be made that it is.

The *Moore* rule indicates the offense is a CIMT in the eyes of the military community, as life imprisonment or death may be imposed.³²⁶ Mutiny is “the gravest and most criminal of the offences known to the military code,”³²⁷ and Congress recognizes this by authorizing the sanction of the death penalty.³²⁸ Moreover, state courts have found mutinous conduct to be morally turpitudinous.³²⁹ Given the nature of the offense in overthrowing lawful military authority via concerted action and intent to mutiny with another, and combining that with the requisite scienter along with the fact that there is no case law indicating that the minimum conduct necessary to convict is not turpitudinous, it is difficult to see how the Board or a federal court would not conclude that this offense constitutes a CIMT for INA purposes.

³²⁴ For example, telephoning a bomb threat is not a CIMT because the offense does not contain an attendant physical harm or intent to harm someone. *Abpikar v. Holder*, 544 F. App’x 719 (9th Cir. 2013).

³²⁵ *United States v. Woolbright*, 31 [12] C.M.R. 36, 38 (C.M.A. 1961).

³²⁶ MCM, *supra* note 150, pt. IV, ¶ 18.e.

³²⁷ WINTHROP, *supra* note 194, at 578.

³²⁸ MCM, *supra* note 150, pt. IV, ¶ 18.e.

³²⁹ *See In re Kerl*, 188 P. 40, 41 (Idaho 1920); *In re Pontarelli*, 66 N.E.2d 83 (Ill. 1946) (in disbarment proceedings, one who willfully attempts to cause mutiny has engaged in a CIMT).

Sedition—***Most likely a Category I CIMT***

Like mutiny, sedition requires an intent with another person to cause the overthrow of lawful authority, in this case civilian authority, thus the scienter element to qualify as a CIMT is present. Also like mutiny, an intent to overthrow civil authority appears to be reprehensible per se.

Fails to suppress a mutiny or sedition—***Category III; Not a CIMT***

This law requires an affirmative act by a military member to stop or report a sedition or mutiny. For affirmative act statutes, the BIA has required that there be something more than a mere failure to report an offense in order for it to qualify as a CIMT.³³⁰ For example, *Matter of Robles-Urrea* involved a misprision statute requiring the government to prove not only failure to report a felony but also an affirmative act of concealment of the felony.³³¹ Article 94 fails to contain any such proscription; therefore, it would not qualify as an INA CIMT.

Article 95: Resistance, flight, breach of arrest, and escape—*Category III; Not a CIMT*

Resists apprehension—***Category III; Not a CIMT***

An offense cannot qualify as a CIMT for purposes of the INA if the actus reus involves only a simple assault.³³² This offense only requires some form of active resistance, which may be in the form of a simple assault.³³³ There is no element requiring harm to the apprehender in order to convict, nor is there any other aggravating factor. Even if it is argued that the apprehender holds a special protected status because of his or her lawful authority to apprehend under military law, without an element requiring an aggravating factor like serious harm inflicted on the victim or use of a deadly weapon, it is highly unlikely any court would deem this act inherently reprehensible.

³³⁰ See *Robles*, 24 I. & N. Dec. 22, 25-26 (B.I.A. 2006) (holding that misprision of a felony in violation of 18 U.S.C. § 4 (2000) is a CIMT because it requires more than a mere failure to report an offense, but instead an affirmative act of concealment).

³³¹ *Id.*

³³² *Solon*, 24 I. & N. Dec. 239, 241 (B.I.A. 2007).

³³³ See MCM, *supra* note 150, pt. IV, ¶ 19.c.(1)(c).

As indicated by application of the *Moore* rule, the military courts would seem to agree that this is not a reprehensible offense because the maximum punitive discharge authorized is only a bad conduct discharge.

Flees from attempted apprehension—***Category III; Not a CIMT***

This offense does not necessarily involve any kind of physical contact with the apprehender, and no other aggravating element is present that would render this offense as being reprehensible, such as engaging in a reckless act like fleeing in a vehicle at high speed from a police officer.³³⁴ As indicated by application of the *Moore* rule, the military courts would seem to agree that this is not a reprehensible offense since the maximum punitive discharge authorized is only a bad conduct discharge.

Breaks arrest—***Category III; Not a CIMT***

As with Flees from attempted apprehension above, neither physical contact nor an aggravating factor is necessary in order to convict; therefore, it cannot qualify as an INA CIMT.

Escapes from custody or confinement—***Category III; Not a CIMT***

No element in this subsection requires proving that the accused engaged in force, violence or threat in order to escape. Therefore, there is a realistic probability that one may be convicted of this offense based upon a non-turpitudinous act.³³⁵ Moreover, though the punishment authorized for escaping confinement includes one year's confinement and a dishonorable discharge, one military court indicated in 1956 that this offense is not a CIMT under its law.³³⁶

³³⁴ See, e.g., *Garcia-Maldonado*, 491 F.3d 284 (knowingly fleeing a police officer in a vehicle that may cause risk of harm to others is a CIMT).

³³⁵ See *United States ex rel. Manzella v. Zimmerman*, 71 F. Supp. 534, 537 (E.D. Pa. 1947) (Pennsylvania statute, common law escape of prison involves no element of force or fraud, thus the offense does not necessarily involve moral turpitude); J—, 4 I. & N. Dec. 512, 513 (B.I.A. 1951) (Massachusetts statute, attempted escape involves no intent element, thus it is not a CIMT).

³³⁶ See *Dyche*, 23 C.M.R. at 731 (implying that escape from confinement is not a CIMT when the Court excluded escape from its enumeration of CIMT offenses committed by the defendant, but discussed escape separately as constituting only a serious violation of military discipline).

Article 96: Releasing prisoner without authority—*Divisible statute*

Releasing a prisoner without proper authority is a general intent crime in which no scienter attaches; therefore, it cannot be said to be a CIMT.³³⁷ (*Category III; Not a CIMT*)

Suffering a prisoner to escape through neglect also lacks the requisite scienter to be a CIMT within the meaning of the INA.³³⁸ (*Category III; Not a CIMT*)

Suffering a prisoner to escape through design involves intent.³³⁹ Therefore, the requisite scienter is present in the statute that the government must prove beyond a reasonable doubt. Intentionally allowing a prisoner to escape is arguably a CIMT.³⁴⁰ Moreover, the offense would qualify under the *Moore* rule as a CIMT within the military community, because the authorized punishment for this offense includes one year's confinement and a dishonorable discharge. (*Category I CIMT*)

Article 97: Unlawful detention—*Category III; Not a CIMT*

The minimum conduct necessary to convict under this UCMJ Article requires neither an element of force nor an evil intent.³⁴¹ Therefore, even though the *Moore* rule indicates that the military courts would treat this offense as a CIMT, it would not qualify under the INA meaning of the term.

Article 98: Noncompliance with procedural rules—*Divisible statute*

Responsible for unnecessary delay—*Category III; not a CIMT*

This subsection is a general intent crime without a scienter element; thus, it cannot qualify as a CIMT under the INA.

³³⁷ Silva-Trevino, 24 I. & N. Dec. 687(A.G.2008). rev'd, Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014, vacated, Silva-Trevino, 26 I. & N. Dec. 550 (A.G. 2015).

³³⁸ *Id.*

³³⁹ MCM, *supra* note 150, pt. IV, ¶ 20.c.(3).

³⁴⁰ B—, 5 I. & N. Dec. 538, 541 (B.I.A. 1953) (Massachusetts statute, aiding a prisoner to escape from jail is not a CIMT because the statute does not require any evil intent).

³⁴¹ See MCM, *supra* note 150, pt. IV, ¶ 21.c.(2). See generally Fualaau, 21 I. & N. Dec. 475, 477 (B.I.A. 1996).

Failing to comply with rules—*Category I CIMT*

Sufficient scienter is present in this subsection as intent and knowledge in failing to comply with the procedural rules for courts-martial in bad faith is required in order to convict.³⁴² A crime that impairs and obstructs a function of a department of government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means is a CIMT.³⁴³

Article 99: Misbehavior before the enemy—*PMO—Divisible statute*

Running away—*Category II(1) CIMT*

Sufficient scienter is present as this offense involves an intention to misbehave by running away without authorization in order to avoid actual or impending combat with the enemy.³⁴⁴

The offense also qualifies as reprehensible. Misbehavior before the enemy is an ancient offense that has been condemned by military men of all races.³⁴⁵ Deemed “heinous” by a military court,³⁴⁶ the maximum punishment authorized for this offense is death thus qualifying it as a CIMT under military law, pursuant to the *Moore* rule.³⁴⁷ Further, such an act fundamentally undermines the military mission and inherently increases the likelihood of harm to other service members. Therefore, this subsection meets the requirements to qualify as an INA CIMT.

³⁴² MCM, *supra* note 150, pt. IV, ¶ 22.b.(2).

³⁴³ See Jurado, 24 I. & N. Dec. 29, 35 (B.I.A. 2006) (citing Flores, 17 I. & N. Dec. 225, 229 (B.I.A. 1980); see also *Rodriguez*, 451 F.3d at 64; *Notash v. Gonzales*, 427 F.3d 693, 698-99 (9th Cir. 2005).

³⁴⁴ MCM, *supra* note 150, pt. IV, ¶ 23.b.(1) and c.(1)(a); Captain Robert M. Lucy, *Misbehavior Before the Enemy*, JAG J., Sept. 1955, n.7 (citing *United States v. Sperland*, 5 C.M.R. 89, 92 (C.M.A. 1952) (the principle adopted by the Court of Military Appeals is that the phrase “runs away” is “an absence under conditions from which it may be reasonably inferred that the leaving was with intent to avoid some form of combat action by or with the enemy.”)).

³⁴⁵ Lucy, *supra* note 344, at 3.

³⁴⁶ *United States v. Noyd*, 39 C.M.R. 937 (A.F.B.R. 1968). 1968 WL 5228 (A.F.B.R. 1968) (referring to cowardice before the enemy in violation of UCMJ art. 99).

³⁴⁷ MCM, *supra* note 150, pt. IV, ¶ 23.e.

Shamefully abandoning, surrendering, or delivering up command—
Divisible statute

Shamefully abandoning—Category II (1) CIMT

Though not addressed in the MCM, the Court of Military Appeals held that “abandoning” a command or unit necessarily implies an intent to avoid combat.³⁴⁸ Intent is sufficient scienter under the *Silva-Trevino* standard.

The offense also meets the reprehension requirement under the INA. Judge Learned Hand stated that an INA CIMT includes shamefully immoral conduct.³⁴⁹ Also, since the death penalty is authorized for this offense, the statute meets the *Moore* rule to qualify as a CIMT in the military community. Moreover, the offense of shamefully abandoning one’s command while before the enemy is inherently turpitudinous in and of itself because it necessarily increases the risk of harm to the remaining members of the command or unit.

Shamefully surrendering or delivering up command—Category II(1) CIMT

Unlike the offense of shameful abandonment, neither the MCM nor the case law indicate whether intent to surrender is an inherent element required to be proven beyond a reasonable doubt in order to convict an accused. However, qualifying the surrender as “shameful” requires that the prosecution prove a lack of justification as an essential element of the offense.³⁵⁰ “Shame” is defined as a painful emotion brought about by consciousness of guilt, and “shameful” is defined as bringing shame, disgraceful, arousing the feeling of shame, and indecent.³⁵¹ Therefore, it may be argued that shamefully surrendering or delivering up a command or unit to the enemy contains a sufficient scienter for this subsection to qualify as a CIMT under the INA.

Even if an adjudicator found the scienter of shamefulness to be insufficient to meet the *Silva-Trevino* standard, it could arguably still qualify as a strict liability type of morality offense due to the pernicious nature of the act

³⁴⁸ United States v. Gross, 38 C.M.R. 408, 412 (C.M.A. 1968).

³⁴⁹ United States *ex rel.* Iorio v. Day, 34 F.2d 920, 921 (2d Cir. 1929).

³⁵⁰ MCM, *supra* note 150, pt. IV, ¶ 23.b.(2)(b).

³⁵¹ WEBSTER’S NEW COLLEGIATE DICTIONARY 1081 (9th ed. 1991).

that is so manifestly contrary to the mores of the military community.³⁵² This would be a most novel argument as only statutory rape-type offenses have been found by the federal courts and the Board to constitute strict liability CIMTs under the INA.³⁵³

This subsection also meets the reprehension requirement under the INA. Since death is the authorized maximum punishment, the military courts would deem this offense to be a CIMT in light of the *Moore* rule. Also, unjustifiable surrender before the enemy inherently involves moral turpitude because it would be anathema to the military's purpose to complete missions successfully, and would inherently increase the risk of harm to the members subject to the surrender since they would be put at the mercy of the enemy.

Endangering safety of a command or military property—*Divisible statute*

This subsection may be violated by disobedience, neglect, or intentional misconduct.³⁵⁴ Intentional misconduct meets the scienter requirement but neglect does not. Regarding the element of disobedience, as discussed above at Article 90(2), disobedience of an officer is turpitudinous. It follows then that the under-inclusive offense of endangering a command via such disobedience would likewise qualify as a Category II(2) CIMT. However, this Article fails to divisibly distinguish between disobedience to an officer (CIMT) and disobedience to a noncommissioned officer or petty officer (not a CIMT),³⁵⁵ therefore such a conviction is *not a CIMT; category III*.

Concerning the element of reprehensible conduct, endangering the safety of property is not inherently turpitudinous and thus would not qualify as a CIMT.³⁵⁶ But endangering the safety of a command while before the enemy by intentional misconduct is inherently base, vile and depraved and qualifies as a *Category II (1) CIMT*.

³⁵² See *Mehboob v. Att'y Gen.*, 549 F.3d 272, 276-77 (3rd Cir. 2008) (it is not unreasonable for the Board to find that strict liability morality offenses, so manifestly contrary to community mores that they are subject to a presumption of culpability absent a mens rea element, qualify as CIMTs under the INA).

³⁵³ See *Marciano*, 450 F.2d at 1025; *Digena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

³⁵⁴ See MCM, *supra* note 150, pt. IV, ¶ 23.b.(3)(b).

³⁵⁵ *Id.* (“That the accused committed certain disobedience, neglect, or intentional misconduct.”).

³⁵⁶ See discussion Section V, Article 110(1), *hazarding a vessel, infra*.

Casting away his arms or ammunition—***Category III; May be a CIMT***

This general intent crime does not contain the proper scienter to be considered a CIMT under the INA as required by the *Matter of Silva-Trevino* standard. Arguably, such an act committed while before the enemy may qualify as a strict liability type of morality offense due to the pernicious nature of the act that is so manifestly contrary to the mores of the military community.³⁵⁷ This would be a most novel argument as only statutory rape-type offenses have been found by the federal courts and the Board to constitute strict liability CIMTs under the INA.³⁵⁸

Cowardly conduct—***Category II (1) CIMT***

This offense is committed when, due to fear, a service member refuses to perform a duty, or abandons the performance of duty, while in the presence of the enemy.³⁵⁹ It appears that the refusal must be intentional.³⁶⁰ Such an act is inherently anathema to military purpose and acceptability in the military community and increases the likelihood of harm to fellow service members who continue to do their duty while before that enemy.

Quitting place of duty to pillage and plunder—***Category I or Category II(1) CIMT***

An element of this offense is the intent to quit in order to plunder or pillage property. Plunder or pillage means to seize or appropriate property unlawfully.³⁶¹ This act appears to inherently involve theft, a common law offense. Theft is clearly a Category I CIMT; therefore, this PMO would also likely qualify as a theft-type ***Category I CIMT***, as well. Moreover, quitting place of duty while before the enemy inherently increases the risk of potential harm to fellow service members who continue to remain before that enemy, thus the act is reprehensible and contains a sufficient scienter to also qualify as ***Category II (1) CIMT***.

³⁵⁷ See *supra* note 352.

³⁵⁸ See *Marciano*, 450 F.2d at 1025; *Dingena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

³⁵⁹ *United States v. Yarborough*, 5 C.M.R. 106 (C.M.A. 1952).

³⁶⁰ *Id.* at 115 (court states that fear is one form of mental intent). See also *Lucy*, *supra* note 345, at 5 (to convict under this section, the intent to avoid combat must be motivated by fear).

³⁶¹ MCM, *supra* note 150, pt. IV, ¶ 23.c.(6)(b).

Causing false alarms—*Category III; Not a CIMT*

This is a general intent crime which does not appear to be inherently reprehensible. It appears the minimum conduct necessary to convict could be by causing a false alarm through a negligent act, which is an insufficient scienter under the *Silva-Trevino* standard to qualify this offense as a CIMT under the INA.

Willfully failing to do utmost to encounter enemy—*Category II (1) CIMT*

The offense requires the prosecution to prove that the service member had a duty to encounter the enemy, but was willfully derelict in performing it. This particular type of willful violation is inherently vile as such an act directly defeats the purpose of the military to defeat the enemy, and increases the likelihood of harm to fellow service members as one fewer member is doing his or her duty while before that enemy. Moreover, at least one year's confinement and dishonorable discharge are authorized for this offense, thus qualifying it as reprehensible in the eyes of the military community, per the *Moore* rule.

Failing to afford relief and assistance in battle—*May be a Category II (1) CIMT*

This section lacks the scienter required to qualify as a CIMT under the INA. However, strict liability morality offenses so manifestly contrary to community mores that they are subject to a presumption of culpability absent a mens rea element qualify as INA CIMTs.³⁶² Statutory rape-type offenses have been found by the federal courts and the Board to constitute strict liability CIMTs under the INA.³⁶³ It may be argued that this section proscribes just such an offense as it is inherent that failing to afford all practicable relief to fellow service members requiring such relief in battle is unconscionable and unacceptable in the military community. Further, since this is a capital offense, the military has thus indicated that this is a reprehensible act under the *Moore* rule.

³⁶² See *Mehboob*, 549 F.3d at 276-77.

³⁶³ See *Marciano*, 450 F.2d at 1025; *Dingena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

Article 100: Subordinate compelling surrender—*PMO*—*Category II (1)*
CIMT

This offense requires the scienter of intent to compel a commander by acts to surrender to the enemy without proper authority. This offense meets the *Moore* rule to qualify as a CIMT for military purposes. Additionally, such an act is reprehensible because it is anathema to the very purpose of the military when in combat, and necessarily increases the potential for harm to the surrendering service- members who would be at the mercy of the enemy. Therefore, it may be argued that this offense contains a sufficient scienter and reprehensible act to qualify as an INA CIMT.

Article 101: Improper use of a countersign—*PMO*—*Category III; Not a CIMT*

Though this offense meets the *Moore* rule to qualify as a CIMT for military purposes, it does not require a sufficient scienter to disclose the countersign to one not authorized to receive it. Rather, one can be convicted for negligently disclosing the countersign.³⁶⁴ Therefore, the minimum conduct necessary to convict could not be deemed morally turpitudinous, rendering it ineligible under the INA as a CIMT.³⁶⁵

Article 102: Forcing a safeguard—*PMO*—*Category III; Not a CIMT*

The minimum conduct required to convict is that the service member should have known the safeguard forced existed. Even if there were a sufficient scienter for INA purposes, there is no basis to conclude that such an act is reprehensible. Because this offense authorizes punishment of at least one year’s confinement and a dishonorable discharge the *Moore* rule indicates the military’s view that this is a reprehensible act. However, the purpose of the statute, in part, is to serve as a pledge of the nation to others that property shall be respected.³⁶⁶ Therefore, the intention of the statute does not proscribe an act that necessarily places in danger the lives of other service members, a touchstone factor which this article asserts largely determines whether a PMO constitutes a CIMT under the INA.

³⁶⁴ See MCM, *supra* note 150, pt. IV, ¶ 25.c.4 (“Intent or motive in disclosing the countersign...is immaterial to the issue of guilt.”).

³⁶⁵ Silva-Trevino, 24 I. & N. Dec. 687 (A.G.2008). rev’d, *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014, vacated, *Silva-Trevino*, 26 I. & N. Dec. 550 (A.G. 2015).

³⁶⁶ MCM, *supra* note 150, pt. IV, ¶ 26.c.

Article 103: Captured or abandoned property—*Divisible statute*

Failing to secure public property taken from the enemy—***Category III; Not a CIMT***

No scienter is present in this subsection in order to convict.

Failing to report or turn over captured property—***PMO—Category III; Not a CIMT***

No scienter is present in the offense, nor can it qualify as a common law theft offense because it neither requires nor implies a permanent taking in order to convict.³⁶⁷

Dealing in captured or abandoned property—***Category III; Not a CIMT***

No scienter is present in this subsection.

Looting or pillaging—***Category I CIMT***

This subsection appears to be a theft-type offense as it necessarily involves the seizing or appropriating of property while in enemy or occupied territory. Under the circumstances, appropriating such property unlawfully can fairly be implied to be a permanent taking;³⁶⁸ thus, this offense qualifies as a CIMT under the INA if the value of the item(s) taken is more than \$500.³⁶⁹

³⁶⁷ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.321; *Vargas*, 2013 Immig. Rptr. LEXIS 5190, at *6 (New York larceny statute qualifies as a CIMT); *Fernandez*, 2013 Immig. Rptr. LEXIS 1414, at *7 (Florida, when cash is taken, a permanent taking is presumed, hence the offense qualifies as a CIMT); *Pinlac-Abraham*, 2009 Immig. Rptr. LEXIS 19641, at *8-9 (listing numerous theft-type offenses found to involve moral turpitude).

³⁶⁸ *Grazley*, 14 I. & N. Dec. 330, 333 (B.I.A. 1973) (conviction for unlawfully using money permits the reasonable assumption that the offense was carried out with the intention to permanently deprive the owner of it); *Jurado*, 24 I. & N. Dec. 29, 33 (B.I.A. 2006) (the nature of the theft offense is sufficient to conclude whether the taking of the merchandise was permanent); *Vega*, No. A077-982-693, 2013 WL 3899714 (B.I.A.) (conviction for conspiracy to unlawfully use money permits reasonable assumption that the offense was carried out with the intention to permanently deprive the owner of it).

³⁶⁹ MCM, *supra* note 150, pt. IV, ¶ 27.e.(1)(b) authorizes confinement in excess of one year and dishonorable discharge for this offense, therefore it qualifies as a CIMT under § 237(a)(2) of the INA.

Article 104: Aiding the enemy—*PMO—Divisible statute*

Aiding the enemy—*May be a Category II (1) CIMT*

The nature of this offense inherently imperils the safety of service members and inhibits its mission, therefore it is reprehensible within the meaning of the INA. However, though the military would deem this capital offense a CIMT under the *Moore* rule, it fails the INA scienter requirement because this is a general intent crime.³⁷⁰ Nevertheless, offenses so manifestly contrary to community mores that they are subject to a presumption of culpability absent a mens rea element qualify as INA CIMTs.³⁷¹ Given the nature of reprehension, it may be argued that this is just such an offense. This would be a most novel argument as only statutory rape-type offenses have been found by the federal courts and the Board to constitute strict liability CIMTs under the INA.³⁷²

Attempting to aid the enemy—*Category II (1) CIMT*

This offense requires the government to prove that an act amounting to more than mere preparation was done with the intent to, and tendency to bring about, aid to the enemy with certain arms, ammunition, etc.³⁷³ Clearly, attempting to provide aid to the enemy has a direct effect on the safety of our forces and the ability to accomplish the mission. Such an intentional act would be considered a CIMT by the military as it is a capital offense thus meeting the *Moore* rule, and one military court has called the actual aiding of the enemy to be heinous.³⁷⁴

Harboring or protecting the enemy—*Category I and II (1) CIMT*

This offense prohibits service members from knowingly shielding an enemy from any injury or misfortune which may occur in war.³⁷⁵ This offense appears to be akin to a harboring statute, which may qualify as a

³⁷⁰ SCHLUETER ET AL., ET AL., *supra* note 277, § 5.23 (citing United States v. Batchelor, 22 C.M.R. 144 (C.M.A. 1956)). But knowing intention to aid goes to disprove coercion. *Id.*

³⁷¹ See *Mehboob*, 549 F.3d at 276-77.

³⁷² See *Marciano*, 450 F.2d at 1025; *Dingena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

³⁷³ MCM, *supra* note 150, pt. IV, ¶ 28.b.(2).

³⁷⁴ United States v. Noyd, 39 C.M.R. 937 (A.F.C.M.R. 1968).

³⁷⁵ MCM, *supra* note 150, pt. IV, ¶ 28.b.(3)(c) and c.(4)(a).

CIMT under the INA if there is an affirmative act beyond concealment.³⁷⁶ This offense provides that affirmative act element: shielding the enemy from harm or misfortune during hostilities.

Also, the military community believes this offense to be reprehensible as this act inherently places other service members at unnecessary risk of harm from the enemy, and this capital offense qualifies as a CIMT under the *Moore* rule.

Giving intelligence to the enemy—*Category II (1) CIMT*

To convict, the service member must have knowingly and without authority given true intelligence information to the enemy that may be valuable to it. Such direct and knowing assistance to the enemy may very likely have a direct impact on our national security and increase the likelihood of harm to our troops to which they otherwise may not have been subject. Moreover, this capital offense would qualify as a CIMT for military purposes under the *Moore* rule.

Communicating with the enemy—*Category III; Not a CIMT*

The service member must know that he communicated with the enemy, and the nature or intent of the communication is irrelevant when determining guilt.³⁷⁷ Though there is a scienter element of knowledge of unauthorized communication with the enemy, the offense is not necessarily turpitudinous, as there is no indication that such a communication could result in bodily harm to fellow service members or jeopardize the military mission against that enemy. A famous example of communicating with the enemy that could not reasonably be deemed morally turpitudinous was the 1914 Christmas truces between Allied and German forces on the Western Front during World War I. Members from both sides left their trenches to gather in no-man's-land between the armies to celebrate Christmas, express good will toward each other, play soccer and exchange gifts.³⁷⁸

Article 105: Misconduct as a prisoner of war—*PMO—Divisible statute*

³⁷⁶ GORDON ET AL., *supra* note 47, at 71.05[1][d] n.369.

³⁷⁷ MCM, *supra* note 150, pt. IV, ¶ 28.c.(6)(a).

³⁷⁸ RICHARD RUBIN, *THE LAST OF THE DOUGHBOYS* 77, 183 (2013).

Acting without authority to the detriment of another for the purpose of securing favorable treatment—***Category III; Not a CIMT***

The nature of this offense involves unauthorized conduct by a prisoner of the enemy intended to result in favorable treatment to him and results in the detrimental harm of another prisoner.³⁷⁹ Its plain purpose is to prohibit one prisoner from gaining favor with his or her captors at the expense of another prisoner.³⁸⁰ The maximum punishment authorized is life imprisonment with a dishonorable discharge. Considering the nature of the offense and the severity of punishment authorized, combined with the *Moore* rule, it is highly likely that the military community considers this offense to be reprehensible, and thereby qualifies as a CIMT under the INA. However, there is no scienter present in any element of this offense requiring that the accused intend to, know of or recklessly cause harm to a fellow prisoner while gaining favor from the enemy. Therefore, it appears that this offense cannot qualify as a CIMT under the INA.

Maltreating prisoners while in a position of authority—***May be a Category II (1) CIMT***

A service member in authority while in the hands of the enemy is guilty of this offense when he maltreats another prisoner without justifiable cause. The maltreatment must be real but need not be physical.³⁸¹ Abuse of an inferior via inflammatory language may suffice if it causes mental anguish.³⁸² Given the circumstances, such maltreatment is inherently reprehensible, and the *Moore* rule indicates the military agrees. But this offense does not contain the requisite scienter to qualify as a CIMT under the INA. However, morality offenses so manifestly contrary to community mores that they are subject to a presumption of culpability absent a *mens rea* element qualify as INA CIMTs, such as statutory rape.³⁸³ An argument can be made that due to the extreme and exceptional circumstances of being in captivity by the enemy, any such maltreatment presumes culpability under the INA.

³⁷⁹ MCM, *supra* note 150, pt. IV, ¶ 29.c.(3)(a).

³⁸⁰ United States v Dickenson, 20 C.M.R. 154, 165 (C.M.A. 1955).

³⁸¹ MCM, *supra* note 150, pt. IV, ¶ 29.c.(4)(b).

³⁸² *Id.*

³⁸³ See *Mehboob*, 549 F.3d at 276-77; *Marciano*, 450 F.2d at 1025; *Dingena*, 11 I. & N. Dec. 723 (B.I.A. 1966).

Article 106: Spies—*Category II (1) CIMT*

Intent in time of war to spy and convey to the enemy information about any place, vessel, or aircraft within the control of the armed forces or any manufacturing plant aiding in the prosecution of the war unarguably meets the CIMT scienter requirement, for purposes of the INA. Given that such spying, a capital offense, may harm our national interests and military personnel, and impair the military's ability to complete its mission, an intent to collect and convey information obtained by spying clearly meets the reprehension requirement under *Silva-Trevino*.

Article 106a: Espionage—*Category I CIMT*

Conveying national security information to a foreign government with the intent or reason to believe it will injure the United States or will advantage the foreign nation is inherently reprehensible considering the effect it may have on the safety and welfare of all Americans.

Article 107: False official statements—*Category I CIMT*

This offense involves an intent to deceive when making a false official statement, knowing it to be false. Congress intended this article to protect governmental departments and agencies from the perversion of its official functions which might result from deceptive practices.³⁸⁴ Crimes involving intent to deceive a governmental agency are inherently turpitudinous under the INA.³⁸⁵

Article 108: Military property of the United States—sale, loss, damage, destruction, or wrongful disposition—*Category III; Not a CIMT*

Selling or otherwise disposing of military property—*Category III; Not a CIMT*

Selling military property is not a CIMT, since it is a general intent crime absent the scienter necessary to qualify as such under the INA.

³⁸⁴ United States v. Jackson, 26 M.J. 377 (C.M.A. 1988).

³⁸⁵ Jurado, 24 I & N Dec. 29, 34-5 (B.I.A. 2006) (making misleading statements with an intention to disrupt the performance of a public servant's duties is turpitudinous).

Wrongful disposition of military property—**Category III; Not a CIMT**. The minimum conduct necessary to convict under this subsection only requires giving the military property away, even if it is temporary and without incurring any material gain.³⁸⁶ A temporary taking does not constitute a CIMT under the INA.³⁸⁷

Damaging, destroying, or losing military property—**Category III; Not a CIMT**

To qualify as a CIMT, destruction of property offenses require an element of evil intent such as malice, or a high degree of damage.³⁸⁸ This Article does not contain an element of maliciousness in order to convict. Further, the maximum punishment is authorized if the value of the destroyed property is more than \$500. It is doubtful that destroying property valued at \$500.01 would be deemed something other than minor by INA adjudicators today.³⁸⁹

Suffering military property to be lost, damaged, destroyed, sold, or wrongfully disposed of—**Category III; Not a CIMT**

In addition to the explanation immediately above regarding damaging, destroying, or losing military property, “sufferance” is defined under the MCM as allowing or permitting the property to be damaged, etc, through willful or negligent means.³⁹⁰ This term is not divisible as per the required divisibility analysis set forth by the United States Supreme Court in *Descamps v. United States*.³⁹¹ Therefore, the government cannot prove that the

³⁸⁶ *United States v. Reap*, 43 M.J. 61 (C.A.A.F. 1995).

³⁸⁷ *Patel*, 707 F.3d at 82-83 (Connecticut statute, conspiracy to commit larceny not a CIMT because no proof of intent to deprive person permanently of their property).

³⁸⁸ See *Neto v. Holder*, 680 F.3d 25 (1st Cir. 2012); *Rodriguez-Herrera*, 52 F.3d at 240; R—, 51 I. & N. Dec. 612, 616 (B.I.A. 1954) (crime of wanton and malicious destruction of property is a crime involving moral turpitude); M—, 3 I. & N. Dec 272 (B.I.A. 1948); C—, 2 I. & N. Dec. 716, 719 (B.I.A. 1946) (Canadian statute, destruction of property offense not a CIMT because there is no element of malice involved).

³⁸⁹ In a 1995 case the Ninth Circuit determined \$250 worth of damage was minor for CIMT purposes. *Rodriguez-Herrera*, 52 F.3d at 240. It is unlikely that \$500.01 worth of damage two decades later would not be deemed minor, as well.

³⁹⁰ MCM, *supra* note 150, pt. IV, ¶ 32.c.(2).

³⁹¹ 133 S. Ct. 2276 (a statute is properly divisible—that is, if it sets out multiple elements in the alternative, e.g., in separate subsections or a disjunctive list—and when one or more alternate offenses is not a categorical match), see also *Chairez*, 26 I & N Dec. 349 (B.I.A. 2014) (the approach to divisibility outlined in *Descamps* is applicable to removal proceedings).

sufferance was through a turpitudinous intentional act as opposed to through a non-turpitudinous act of negligence.

Article 109: Property other than property of the United States- waste, spoilage, or destruction—*Category III; Not a CIMT*

See discussion at Article 108(2) above.

Article 110: Improper hazarding of a vessel—*Category III; Not a CIMT*

Willfully hazards a vessel—*Category III; Not a CIMT*

“Hazard” means *to put in danger of loss or injury* a vessel of the armed forces,³⁹² necessarily implying that an accused may be convicted even if there was no actual damage. In other words, this statute prohibits an act that may or may not cause the destruction of military property. To qualify as a CIMT, destruction of property offenses require an element of evil intent such as malice, or a high degree of damage.³⁹³ Neither malice nor the value of the damage are elements of this statute, thus it fails to qualify as an INA CIMT.

Willfully suffers a vessel to be hazarded—*Category III; Not a CIMT*

In addition to the discussion above at Article 110(1), “to suffer” includes the omission of an act to prevent the hazard.³⁹⁴ Thus, this is an affirmative action statute similar to misprision of a felony, which requires not just mere failure to report an offense, but also an affirmative act of its concealment.³⁹⁵ This subsection contains no such affirmative act in order to convict; therefore, it is unlikely an adjudicator of INA cases would find that this offense qualifies as a CIMT.

³⁹² MCM, *supra* note 150, pt. IV, ¶ 34.c.(1).

³⁹³ See *supra* note 388.

³⁹⁴ MCM, *supra* note 150, pt. IV, ¶ 34.c.(4).

³⁹⁵ Robles, 24 I. & N. Dec. 22, 25-26 (B.I.A. 2006) (holding that misprision of a felony in violation of 18 U.S.C. § 4 (2000) is a CIMT because it requires more than a mere failure to report an offense, but instead an affirmative act of concealment).

Negligently hazards or negligently suffers to be hazarded—**Category III; Not a CIMT**

Negligently hazarding a vessel, or negligently suffering a vessel to be hazarded, fails the scienter standard under *Silva-Trevino*, therefore this subsection cannot qualify as an INA CIMT.

Article 111: Drunken or reckless operation of a vehicle, aircraft, or vessel—**Divisible statute**

Reckless or wanton operation—**divisible statute**

Reckless operation—**Category III; Not a CIMT**

The scienter of recklessness is sufficient for INA CIMT purposes if it is defined as a conscious disregard of a substantial risk of injury to another person.³⁹⁶ The MCM defines recklessness with respect to operation of a vehicle, vessel, or aircraft as a culpable disregard of foreseeable consequences to others from the act or omission involved.³⁹⁷ Thus, a showing that the accused was actually aware of and disregarded the substantial and unjustifiable risk of harm to another is not part of the definition. Therefore, this offense fails to meet the requisite scienter to qualify as a CIMT under the INA.

Wanton operation causing injury to another—**Category I CIMT**

An accused may be convicted under this statute for operating a vehicle in a “wanton” manner. The MCM defines this term as including recklessness as well as “willfulness or a disregard of probable consequences.”³⁹⁸ Therefore, sufficient scienter is present for this offense to qualify as an as INA CIMT. Moreover, the statute is properly divisible as the element of wanton behavior is a discrete alternative from the element of recklessness as enumerated in Article 111(b)(2)(a).³⁹⁹

³⁹⁶ *Idy v. Holder*, 674 F.3d 111 (1st Cir. 2012); *Medina*, 15 I. & N. Dec. 611, 613 (B.I.A. 1976), *aff’d sub nom. Medina-Luna*, 547 F.2d 1171.

³⁹⁷ MCM, *supra* note 150, pt. IV, ¶ 35.c.(7).

³⁹⁸ *Id.* ¶ 35.c.(8).

³⁹⁹ *See also* the sample specification at MCM, Part IV, ¶ 35f (providing the option to charge either “reckless” or “wanton”).

In order for a reckless endangerment statute to meet the reprehension standard to qualify as an INA CIMT, it must also contain an aggravating factor element such as death of a person or infliction of bodily injury.⁴⁰⁰ The MCM provides that element at Article 111(b)(2)(c).⁴⁰¹ Therefore, a conviction under this statute for wantonly driving a vehicle that injured another is a CIMT under the INA.

Operation while drunk or impaired (without causing injury)—*Category III; Not a CIMT*

An offense prohibiting driving while under the influence of drugs or alcohol without more is not inherently reprehensible.⁴⁰² Therefore a conviction under this statute for operating a vehicle while drunk or impaired in of itself is not a turpitudinous act under the INA.

Operation while drunk or impaired causing injury—*Category I CIMT*

The MCM defines drunk or impaired as intoxication which is sufficient to impair the rational and full exercise of the mental or physical faculties.⁴⁰³ Self-intoxication that renders one unaware of an obvious and unreasonable risk has engaged in the equivalent of a reckless act that the Board has deemed sufficiently corrupt.⁴⁰⁴ If convicted of that part of the statute requiring injury to another while driving drunk or impaired, the offense is a CIMT under the INA.⁴⁰⁵

Operation with an excess blood or breath to alcohol concentration—*Category III; Not a CIMT*

Conviction under Article 111 based on excess alcohol concentration in the blood or breath with or without causing injury to another does not contain a scienter element; therefore, it does not qualify as a CIMT under the INA.

⁴⁰⁰ Wojtkow, 18 I. & N. Dec. 111 (B.I.A. 1981); Medina, 15 I. & N. Dec. 611, 613 (B.I.A. 1976).

⁴⁰¹ MCM, *supra* note 150, pt. IV, ¶ 35.b.(3) (“That the accused thereby caused the vehicle, aircraft, or vessel to injure a person.”).

⁴⁰² Lopez-Meza, 22 I. & N. Dec. 1188, 1194 (Arizona statute, simple DUI offense is not a CIMT).

⁴⁰³ MCM, *supra* note 150, pt. IV, ¶ 35.c.(6).

⁴⁰⁴ See Leal, 26 I. & N. Dec. 20, 24 (B.I.A. 2012) (voluntary intoxication is deemed morally equivalent to the qualifying scienter of recklessness).

⁴⁰⁵ *Id.* at 25.

Article 112: Drunk on duty—*Category III; Not a CIMT*

Though such offense is undoubtedly prejudicial to good order and discipline, the offense does not require a sufficient scienter nor does it involve any reprehensible conduct rising to the level of turpitudinous behavior. Moreover, under the *Moore* rule the military does not consider the offense to be a reprehensible, since the maximum punishment authorizes neither at least one year's confinement nor a dishonorable discharge.

Article 112a: Wrongful use, possession, etc., of controlled substance—*Divisible statute*

Wrongful use and wrongful possession—*Category III; Probably not CIMTs*

In of themselves these offenses are probably not CIMTs as they likely lack reprehension in contemporary America. The Board has never decided the issue and courts have disagreed on the matter.⁴⁰⁶

Wrongful distribution of a controlled substance—*Category I CIMT*

An accused cannot be convicted under this subsection if the distribution was without knowledge of the contraband nature of the substance.⁴⁰⁷ Therefore, such knowledge is inherent in the offense thus supplying sufficient scienter to qualify as a CIMT under the INA.⁴⁰⁸ Moreover, the law is settled that knowing, willful or intentional distribution of a contraband controlled substance is reprehensible.⁴⁰⁹

⁴⁰⁶ See *Portaluppi v. Shell Oil Co.*, 684 F. Supp. 900, 903-05 (E.D. Va. 1988) (court found mere possession was reprehensible and was thus a CIMT, but acknowledged that other courts have ruled otherwise given the changing moral standards of Americans over time); *Khourn*, 21 I. & N. Dec. 1041, 1046-47 (B.I.A. 1997) (courts disagree on whether mere possession of a controlled substance is a CIMT); *Feldman*, 2007 B.I.A. LEXIS 52, at *6 (Arizona statute, conviction for solicitation to possess a narcotic for sale is a CIMT). Moreover, the issue is virtually moot because the INA provides a firmer ground of deportability for drug related convictions of any type. See INA § 212(a)(2)(A)(i)(II) (inadmissible to United States if convicted of any offense relating to a controlled substance) and INA § 237(a)(2)(B)(i) (deportable at any time after admission if convicted of any offense relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana).

⁴⁰⁷ MCM, *supra* note 150, pt. IV, ¶ 37.c.(5).

⁴⁰⁸ *Khourn*, 21 I. & N. Dec. 1041 (B.I.A. 1997).

⁴⁰⁹ *Id.*

Wrongful introduction of controlled substance on military installation—***Category III; Probably not a CIMT***

Wrongful introduction of a controlled substance onto a vessel, aircraft, installation, etc. controlled by the armed forces is probably not a CIMT. The offense does not involve an intent to distribute or use. Nor does it involve a foreseeable expectation of use or distribution. However, one could argue that the clear implication of “wrongfully” bringing a controlled substance on board is to use it. But as stated above, mere use or possession of a controlled substance are probably not CIMTs. The fact that it was used or possessed on military controlled property does not appear to be inherently base, vile or depraved, in of themselves.

Wrongful manufacture—***Category I CIMT***

Wrongful manufacture of a controlled substance is a CIMT.⁴¹⁰

Intent to distribute—***Category I CIMT***

Wrongful possession, manufacture, or introduction of a controlled substance with intent to distribute is a CIMT.⁴¹¹

Wrongful importation or exportation—***Category I CIMT***

Wrongful importation or exportation of a controlled substance is a CIMT.⁴¹²

Article 113: Misbehavior of sentinel or lookout—*PMO—Probably not a CIMT; Category III*

Though the military would consider the act to be a CIMT according to the *Moore* rule, the offense lacks an adequate scienter to qualify as a CIMT under the INA.

⁴¹⁰ *Id.*; P—G—, 5 I. & N. Dec. 309 (B.I.A. 1953).

⁴¹¹ *Id.*

⁴¹² *Id.*; United States *ex rel.* De Luca v. O’Rourke, 213 F.2d 759, 762 (8th Cir. 1954).

Article 114: Dueling—*Divisible statute*

Dueling—*Category I CIMT*

That the combat was by prior agreement strongly indicates an inferred intent to use a deadly weapon against another. Thus, sufficient scienter is present to meet the INA CIMT standard under *Silva-Trevino*. Intentionally fighting another with deadly weapons, albeit with the consent of each participant, qualifies as a reprehensible act in the American community, military (the *Moore* rule indicates the military's belief that this is a *malum in se* CIMT) or civilian, because the consciously foreseeable result would be the serious injury or death of the participants. It is settled that intentional use of a deadly weapon upon another qualifies as an INA CIMT.⁴¹³

Promoting a duel—*Category I CIMT*

Promoting an act wherein two persons intend to use deadly weapons against each other appears to be inherently reprehensible, for the reasons outlined above. Essentially, conspiring to engage in a morally turpitudinous act is likewise turpitudinous.⁴¹⁴

Conniving at fighting a duel **and** Failure to report a duel—*Category III; Not CIMTs*

This is an affirmative action statute similar to misprision of a felony. Misprision requires not just mere failure to report an offense, but also an affirmative act of its concealment.⁴¹⁵ This subsection contains no such affirmative act in order to convict; therefore, it is unlikely an adjudicator of INA cases would find that this offense qualifies as a CIMT, even though the military apparently would under its *Moore* rule.

⁴¹³ G—R—, 2 I. & N. Dec. 733 (B.I.A. 1946); *Immigr. Laws-Offense Involving Moral Turpitude*, 39 Op. Att'y Gen. 95, 98 (1935); *Fualaau*, 21 I. & N. Dec. 475 (B.I.A. 1996); *Sanudo*, 23 I. & N. Dec. 968 (B.I.A. 2006); *Nguyen*, 211 F.3d at 695; *Yousefi*, 260 F.3d at 326-27.

⁴¹⁴ M—, 8 I. & N. Dec. 535 (B.I.A. 1960); G—, 7 I. & N. Dec. 114 (B.I.A. 1956); S—, 2 I. & N. Dec. 225 (B.I.A. 1944); *Feldman*, 2007 B.I.A. LEXIS 52.

⁴¹⁵ *Robles*, 24 I. & N. Dec. 22, 25-26 (B.I.A. 2006) (holding that misprision of a felony in violation of 18 U.S.C. § 4 (2000) is a CIMT because it requires more than a mere failure to report an offense, but instead an affirmative act of concealment).

Article 115: Malingering—*PMO—Category II (1 or 2) CIMT*

This offense requires the service member to be aware of a prospective military assignment and either feigned illness or physical or mental disability, or intentionally inflicted injury upon himself for the purpose or intent of avoiding the assignment. Knowledge of an impending military assignment and intent to avoid it via feigning disability or intentional infliction of self-injury meets the scienter requirement under *Silva-Trevino*. As for the reprehension requirement, purposely shirking duty fundamentally undermines the ability of the military to serve its purpose and therefore qualifies as a Category II (2) CIMT. Shirking military duty is all the more reprehensible during war time when the breach of the community obligation is that much more impactful, thereby qualifying malingering during war time as a Category II (1) CIMT, as well.

Note that it is not the particular factual circumstances behind a malingering conviction that determines whether an offense qualifies as a CIMT under the INA. Rather, it is the underlying nature of the criminal statute itself that is subject to examination for scienter and reprehension; intentionally shirking duty fundamentally undermines the functional ability of the military to effectively perform its mission to protect the nation's interests. Thus, whether a service member was convicted for malingering for conduct such as avoiding a physical readiness test in peacetime or to avoid combat in wartime is irrelevant to a CIMT analysis under the INA. By analogy, an intent to permanently deprive another of his property is by nature a larceny CIMT regardless of whether the value of the item stolen was a thousand dollars or ten dollars.

Article 116: Riot or breach of peace—*Category I; May be a CIMT*

The Board has held that a German rioting statute is not a CIMT under the INA.⁴¹⁶ It reasoned that the statute was too broad since it appears one could be convicted thereunder for just shouting insulting words at a police officer. In contrast, Article 116 requires an accused to have engaged in violent acts calculated to cause terror,⁴¹⁷ which could be deemed reprehensible.⁴¹⁸

⁴¹⁶ See *Marmolejo-Campos*, 503 F.3d at 927 (Nelson, J., dissenting), *reh'g en banc*, 558 F.3d 903; O—, 4 I. & N. Dec. 301 (B.I.A. 1951).

⁴¹⁷ MCM, *supra* note 150, pt. IV, ¶ 41.c.(1).

⁴¹⁸ *Latter-Singh*, 668 F.3d 1156 (California statute, making threats with intent to terrorize is a CIMT); *Solomon v. Att'y Gen*, 308 F. App'x 644 (3rd Cir. 2009) (Delaware statute,

Article 117: Provoking speeches and gestures—*PMO*—*Category III; Not a CIMT*

This offense requires that such words and gestures must be toward another person subject to the code, must induce a breach of the peace and does not require knowledge that the person provoked was subject to the code. Such would not rise to the level of moral turpitude. The elements do not include harm, or threat of harm, or any other evil act.⁴¹⁹ Nor does the military consider it a CIMT as per the *Moore* rule.

Article 118: Murder—*Category I CIMT*

All offenses under this article are clearly turpitudinous given that the requisite scienter and reprehension are present in each subsection.⁴²⁰

Article 119: Manslaughter—*Divisible statute*

Voluntary manslaughter—*Category I CIMT*.⁴²¹

Involuntary manslaughter—*Divisible statute*

Involuntary manslaughter via “culpable negligence” means a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission.⁴²² This is an insufficient

conviction for terroristic threatening is a CIMT); *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004) (Minnesota statute, threatening a crime of violence with the purpose of terrorizing another person is a CIMT).

⁴¹⁹ *Castrijon-Garcia*, 704 F.3d at 1213, *overruled in part by Ceron*, 747 F.3d 773 (California statute, simple kidnapping is not a CIMT since it does not necessarily involve intent to harm, actual harm, or an action affecting a protected class of victim).

⁴²⁰ *Lopez-Amaro*, 20 I. & N. Dec. 668 (B.I.A. 1993) (murder with a firearm); *Pataki*, 15 I. & N. Dec. 324 (B.I.A. 1975) (deliberate and willful killing); *Awajjane*, 14 I. & N. Dec. 117 (B.I.A. 1972) (Lebanese statute, attempted murder).

⁴²¹ *Judulang*, 565 U.S. 42 (voluntary manslaughter); *Sanchez-Marin*, 11 I. & N. Dec. 264 (B.I.A. 1965) (voluntary manslaughter); *Abi-Rached*, 10 I. & N. Dec. 551 (B.I.A. 1964) (Illinois statute, voluntary manslaughter).

⁴²² See MCM, *supra* note 150, pt. IV, ¶ 44.c.(2)(a)(i); *United States v. Riggleman*, 3 C.M.R. 70 (C.M.A. 1952) (discussing involuntary manslaughter). For more information on the term “culpable negligence” as set forth in UCMJ art. 119 see *Dominguez-Ochoa*, 386 F.3d at 645-46 (culpable negligence under UCMJ art. 119 does not require the accused to be subjectively aware of the risk posed by his conduct to be guilty of involuntary manslaughter).

scienter to qualify as a CIMT under the INA because it does not require a conscious or subjective disregard of the risk, just an objective disregard.⁴²³
Category III; not a CIMT.

Involuntary manslaughter while perpetrating an offense located in Article 118, except for the felony murder offense, is a ***Category I CIMT*** because the Article 118 offenses are CIMTs.

Article 119a: Death or injury of an unborn child—***Category III; Not a CIMT***

This statute specifically provides that neither knowledge of the pregnancy nor intent to harm or kill the unborn child are required elements in order to convict. Therefore, it cannot qualify as a CIMT under the INA.

Article 120: Rape and sexual assault—***Category I CIMT***

All subsections contain the requisite scienter and reprehension to qualify as INA CIMT offenses.⁴²⁴

Article 120a: Stalking—***Category I CIMT***

Stalking is a CIMT.⁴²⁵

Article 120b: Rape and sexual assault of a child—***Category I CIMT***

All subsections contain the requisite scienter and reprehension to qualify as INA CIMT offenses.⁴²⁶

⁴²³ For involuntary manslaughter to qualify as a CIMT, the statute must contain an element requiring a showing of a conscious disregard of a risk of serious harm to another by the act. Franklin, 20 I. & N. Dec. 867 (B.I.A. 1994) (Missouri statute, involuntary manslaughter constitutes a CIMT where the law requires the accused to have consciously disregarded a substantial and unjustifiable risk, and that such disregard constituted a gross deviation from the standard of care that a reasonable person would exercise in that situation). MCM, Part IV, ¶ 44.b.(2)(d) does not contain this element of conscious disregard.

⁴²⁴ See *supra* notes 80 and 87.

⁴²⁵ See *supra* note 66.

⁴²⁶ See *supra* notes 80-81, 83.

Article 120c: Other sexual misconduct—*Arguably a Category I CIMT*

Indecent viewing—*May be a Category I CIMT*

This subsection requires the knowing and wrongful viewing, video-taping, photographing or broadcasting of the private area of another person that violates the victim’s reasonable expectation of privacy. Requisite scienter is present as the act need be knowingly and wrongfully committed. A Tenth Circuit case pointed out that the BIA found a similar “peeping Tom” law to be a CIMT.⁴²⁷

Forcible pandering is a *Category I CIMT*.⁴²⁸

Indecent exposure is a *Category I CIMT* as the Article requires excitation of sexual desire or moral depravity with respect to sexual relations.⁴²⁹

Article 121: Larceny and wrongful appropriation—*Divisible statute*

With intent to permanently deprive is a *Category I CIMT*.⁴³⁰

Though larceny with intent to temporarily deprive is a CIMT under military law,⁴³¹ it is not a CIMT (*Category III*) under the INA, which requires an intent to *permanently* deprive.⁴³²

Article 122: Robbery—*Category I CIMT*

Robbery is a CIMT.⁴³³

⁴²⁷ Sifuentes-Felix v. Holder, 570 F. App’x. 803, 804 (10th Cir. 2014) (Colorado statute, intending to capture an image of a private area of an individual without their consent, and knowingly doing so under circumstances in which the individual has a reasonable expectation of privacy, is a CIMT).

⁴²⁸ See GORDON ET AL., *supra* note 47, § 71.05[1][d] nn.287-88; see also W—, 4 I. & N. Dec. 401 (B.I.A. 1951).

⁴²⁹ See MCM, *supra* note 150, pt. IV, ¶ 45c.a.(c)(6) (“Indecent manner”). Cortes Medina 26 I. & N. Dec. 79 (B.I.A. 2013) (California, indecent exposure is categorically a CIMT).

⁴³⁰ See *supra* note 106.

⁴³¹ United States v Conklin, 46 C.M.R. 942 (A.C.M.R. 1972).

⁴³² See *supra* note 106.

⁴³³ See *supra* note 65.

Article 123: Forgery—*Category I CIMT*

Both subsections of this offense require the government to prove beyond a reasonable doubt an intent to defraud. Fraud offenses are usually CIMTs.⁴³⁴

Article 123a: Making, drawing, or uttering check, draft, or order without sufficient funds—*Category I CIMT*

Intent to defraud is an element of this offense. Where a statute includes an intent to defraud as an essential element of a bad check offense, the crime is one involving moral turpitude under the INA.⁴³⁵

Article 124: Maiming—*Category I CIMT*

Maiming requires an intent to cause injury that results in serious disfigurement, destruction of an organ or member, or serious diminution of physical vigor by injury to an organ or member. This is a CIMT under the INA.⁴³⁶

Article 125: Sodomy; bestiality—*Divisible statute*

Forcible sodomy is a *Category I CIMT*.⁴³⁷ Bestiality lacks a sufficient scienter to qualify as an INA CIMT. *Category III; Not a CIMT*

Article 126: Arson—*Category I CIMT*

Willful and malicious arson is a CIMT.⁴³⁸

⁴³⁴ *De George*, 341 U.S. 223.

⁴³⁵ Khalik, 17 I. & N. Dec. 518, 519 (B.I.A. 1980).

⁴³⁶ *See supra* note 52.

⁴³⁷ *Chavez-Alvarez*, 2016 Immig. Rptr. LEXIS 3773, at *4-5 (Board found forcible sodomy in violation of UCMJ art. 125 is a CIMT); Leyva, 16 I. & N. Dec. 118 (B.I.A. 1977) (California statute, forcible sodomy is a CIMT).

⁴³⁸ *See supra* note 96.

Article 127: Extortion—*Category I CIMT*

Intending to unlawfully obtain something of value, or any other benefit through threatening another is a CIMT.⁴³⁹

Article 128: Assault—*Divisible statute*

Simple assault—Not a CIMT (*Category III*) as the minimum conduct necessary to convict requires only an apprehension of a battery.⁴⁴⁰

Assault consummated by a battery—Not a CIMT (*Category III*) as the contact involved need only be an offensive touching with no injury.⁴⁴¹

Assaults permitting increased punishment based on status of victim—

Assault upon a commissioned, warrant, noncommissioned, or petty officer—*Category III; Not a CIMT*

This offense consists of a mix of common law and military elements. In and of itself, the common law portion of this offense, which includes a mere offensive touching simple assault in order to convict, does not qualify as a CIMT.⁴⁴²

Assault upon a sentinel or lookout in the execution of duty, or upon a person in the execution of law enforcement duties—*Category III; Not a CIMT*

Even though it may be argued that the victim in this subsection is a member of a protected class of sentinels or law enforcement officers, only a mere offensive touching is required in order to convict, which is insufficient to qualify as a CIMT under the INA.⁴⁴³

⁴³⁹ See *supra* note 97.

⁴⁴⁰ Solon, 24 I. & N. Dec. 239 (B.I.A. 2007).

⁴⁴¹ *Id.*

⁴⁴² *Id.* (simple assault does not qualify as a CIMT under the INA).

⁴⁴³ See *Garcia-Meza v. Mukasey*, 516 F.3d 535 (7th Cir. 2008) (Illinois statute, aggravated battery of a police officer is not a CIMT because offense does not contain an element of bodily injury to the victim); *Danesh*, 19 I. & N. Dec. 669, 673 (B.I.A. 1988) (Texas, bodily injury to a police officer is required as an element in the criminal statute for such an offense to qualify as a CIMT under the INA).

Assault consummated by a battery upon a child under 16 years—
Category III; Not a CIMT

Even though it may be argued that the victim in this subsection is a member of a protected class of children, only a mere offensive touching is required in order to convict, which is insufficient to qualify as a CIMT under the INA.⁴⁴⁴

Aggravated assault—**Category I CIMT**

Aggravated assault with a dangerous weapon or with intent to cause grievous bodily harm is an INA CIMT.⁴⁴⁵

Article 129: Burglary—Divisible statute

Unlawfully breaking and entering the dwelling house of another in the nighttime with the intent to commit an offense punishable under Articles 118 through 128, except Article 123a, is a Category I CIMT, if the crime to be committed therein is a CIMT.⁴⁴⁶

Article 130: Housebreaking—Divisible statute

A service member who unlawfully enters a building with the intent to commit a criminal offense therein is guilty of housebreaking. The criminal offense required is an act or omission which is punishable by courts-martial, except a purely military offense.⁴⁴⁷ If that criminal offense intended to be committed is a CIMT, then the conviction for Housebreaking is a **Category I CIMT**.⁴⁴⁸

⁴⁴⁴ See *Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1060 (9th Cir. 2006) (California statute criminalizing assault on a child not a CIMT because bodily injury is not required in order to convict).

⁴⁴⁵ *Ruiz-Lopez*, 682 F.3d 513; *Andres v. Att’y Gen.*, 263 F. App’x. 212 (3rd Cir. 2008); *Ptasi*, 12 I. & N. Dec. 790 (B.I.A. 1968); *S—*, 5 I. & N. Dec. 668 (B.I.A. 1954).

⁴⁴⁶ See *supra* note 98.

⁴⁴⁷ MCM, *supra* note 150, pt. IV, ¶ 56.c.(3).

⁴⁴⁸ See *supra* note 98.

Article 131: Perjury—*Category I CIMT*

Perjury is a CIMT.⁴⁴⁹

Article 132: Frauds against the United States—*Category I CIMT*

This offense requires knowledge of the fraud against the United States, which is sufficient to be deemed a CIMT.⁴⁵⁰

Article 133: Conduct unbecoming an officer and gentleman—*Depends on whether the underlying offense is a CIMT.*

Article 134: General Article:

Abusing Public Animal—***Probably not a CIMT (Category III)***

This offense requires wrongfulness, which is arguably a sufficient scienter to qualify as an INA CIMT.⁴⁵¹ Nevertheless, the offense fails to define just what constitutes abuse in order to determine if it is reprehensible within the meaning of the INA. The MCM sample specification provides the example of kicking a drug detector dog in the nose.⁴⁵² No injury or serious harm need be proven. Therefore, it is unlikely that this offense would qualify as being reprehensible for INA purposes.

Adultery—***Category I CIMT***

The BIA as well as federal and military courts have found adultery to be a CIMT.⁴⁵³ It also passes the *Moore* test for turpitude, since the maximum punishment authorized exceed one year’s imprisonment. The offense requires wrongfulness, which is arguably a sufficient scienter to qualify as an INA

⁴⁴⁹ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.347.

⁴⁵⁰ *Id.* § 71.05[1][d] n.354.

⁴⁵¹ *See* United States v. Thomas, 65 M.J. 132, 134 (C.A.A.F. 2007) (“Wrongful” implies “a mind at fault before there can be a crime... The word “wrongful,” like the words “willful,” “malicious,” “fraudulent,” etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act).

⁴⁵² MCM, *supra* note 150, pt. IV, ¶ 61.f.

⁴⁵³ Leyva, 16 I. & N. Dec. 118 (B.I.A. 1977); H—, 7 I. & N. Dec. 616 (B.I.A. 1957); A—, 3 I. & N. Dec. 168 (B.I.A. 1948); *Jacobs*, 9 M.J. 794; GORDON ET AL., *supra* note 47, § 71.05[1][d] n.282.

CIMT.⁴⁵⁴ However, most likely due to evolving morals in American society, no recent case law was found declaring adultery to be a CIMT under the INA.

Assault- with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking—*Divisible statute*

Assault with an evil scienter of intent to commit murder, voluntary manslaughter, rape, forcible sodomy, robbery, arson, or burglary are clearly *Category I CIMTs* given that these crimes are common law CIMTs.⁴⁵⁵

Assault with intent to commit Housebreaking *may qualify as a Category I CIMT* if a crime intended to be committed therein is a Category I CIMT. For example, if the crime intended was arson or theft, it would qualify as a Category I CIMT, but if the crime intended was a mere offensive touch type of assault, it would not so qualify.

Bigamy—*Category I CIMT*

The Board and federal courts have found bigamy to be a CIMT.⁴⁵⁶ It appears that this Article 134 offense contains a sufficient scienter to qualify as a CIMT under the INA as it requires the government to prove the “wrongfully” marrying of another in order to convict.⁴⁵⁷ “Wrongful” implies “a mind at fault before there can be a crime...The word “wrongful,” like the words “willful,” “malicious,” “fraudulent,” etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act.⁴⁵⁸

⁴⁵⁴ See *supra* note 451.

⁴⁵⁵ See Beato, 10 I. & N. Dec. 730 (B.I.A. 1964) (because rape is a CIMT, so too is assault with intent to commit rape); GORDON ET AL., *supra* note 47, § 71.05[1][d] nn.280-81.

⁴⁵⁶ Matter of S—, 1 I.& N. Dec. 314, 315 (B.I.A. 1942); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.284.

⁴⁵⁷ MCM, *supra* note 150, pt. IV, ¶ 65.b.(2).

⁴⁵⁸ See *Thomas*, 65 M.J. at 134.

Bribery and graft—*Category I CIMT*

Bribery involves an intent, wrongfully, to influence or be influenced in an official matter.⁴⁵⁹ Such defiance against governmental authority is a CIMT.⁴⁶⁰

Graft requires wrongfully receiving compensation for services performed in an official matter when no compensation is due. “Wrongful” implies “a mind at fault before there can be a crime...The word “wrongful,” like the words “willful,” “malicious,” “fraudulent,” etc., when used in criminal statutes, implies a perverted evil mind in the doer of the act.⁴⁶¹ Therefore, sufficient scienter is present to qualify as a CIMT under the INA.

Burning with intent to defraud—*Category I CIMT*

Fraud offenses are CIMTs under the INA.⁴⁶²

Check, worthless, making and uttering-by dishonorably failing to maintain funds—*May be a Category I CIMT*

Intent to defraud is not an element of this offense.⁴⁶³ Rather, an element of this offense requires that maintenance of the accused’s bank account was “dishonorable.”⁴⁶⁴ This term is defined as fraudulent, deceitful, a willful evasion, made in bad faith, deliberate, based on promises, or indicate a grossly indifferent attitude toward the status of one’s bank account and just obligations.⁴⁶⁵ All of these terms, except perhaps the “grossly indifferent” term, appear to connote a sufficient scienter to be deemed a CIMT under the INA. If gross indifference can be deemed a scienter under the *Silva-Trevino* standard, then this offense is categorically a Category I CIMT. However, if gross indifference is found to be lacking in sufficient scienter, then the question becomes whether the statute is properly divisible. An adjudicator cannot look beyond the statute if a term within it includes both turpitudinous and

⁴⁵⁹ MCM, *supra* note 150, pt. IV, ¶ 66.c.

⁴⁶⁰ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.351.

⁴⁶¹ *See Thomas*, 65 M.J. at 134.

⁴⁶² *De George*, 341 U.S. 223; Flores, 17 I. & N. Dec. 225 (B.I.A. 1980).

⁴⁶³ MCM, *supra* note 150, pt. IV, ¶ 68.c.

⁴⁶⁴ *Id.* ¶ 68.b.(4).

⁴⁶⁵ U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 3-68-1 (1 Jan. 2010).

non-turpitudinous conduct.⁴⁶⁶ The term “dishonorable” as used in this statute would thus be indivisible, therefore the entire statute would fail to qualify as a CIMT under the INA as the minimum conduct necessary to convict would involve an offense that does not qualify as a CIMT.

Child endangerment—*Probably not a CIMT (Category III)*

Such endangerment does not require infliction of actual or mental harm to the child,⁴⁶⁷ and the scienter of “culpable negligence” is insufficient to qualify as an INA CIMT,⁴⁶⁸ even though the victim is a member of a protected class.⁴⁶⁹

Child pornography:—*Category I CIMT*

This article requires the accused to knowingly and wrongfully have possessed, received, or viewed child pornography, which is clearly a reprehensible act.⁴⁷⁰

⁴⁶⁶ *Descamps*, 133 S. Ct. 2276 (a statute is properly divisible—that is, if it sets out multiple elements in the alternative, e.g., in separate subsections or a disjunctive list—and when one or more alternate offenses is not a categorical match).

⁴⁶⁷ MCM, *supra* note 150, pt. IV, ¶ 68.a.c.(4).

⁴⁶⁸ Culpable negligence is defined as a disregard for the foreseeable consequences that the act may have on a child. MCM, *supra* note 150, pt. IV, ¶ 68.c.(3). This term does not satisfy the CIMT scienter standard which requires a conscious disregard of a foreseeable harm. *See* discussion *supra* Section V (discussing UCMJ art. 90(1), drawing or lifting up a weapon against a superior officer and why culpable negligence is an insufficient scienter for INA CIMT purposes); *Hernandez-Perez v. Holder*, 569 F.3d 345 (8th Cir. 2009) (Iowa, child endangerment statute deemed a CIMT as it contained the sufficient scienter of recklessness, an aggravating factor).

⁴⁶⁹ Merely being a member of a protected class is not sufficient in and of itself to deem an offense against that member as a CIMT. There must be an aggravating factor such as serious harm. *Franklin*, 20 I. & N. Dec. 867 (B.I.A. 1994); *Medina*, 15 I. & N. Dec. 611 (B.I.A. 1976), *aff'd sub nom. Medina-Luna*, 547 F.2d 1171. No aggravating factor is present in this statute. This offense does constitute a crime of child abuse under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). *See Soram*, 25 I. & N. Dec. 378 (B.I.A. 2010) (unreasonably placing a child’s life or health in danger is a CIMT even though neither harm nor injury is required to convict).

⁴⁷⁰ *Olquin*, 23 I. & N. Dec. 896 (B.I.A. 2006) (Florida statute, possession of child pornography is a CIMT).

Cohabitation: ***Probably not a CIMT—Category III***

Openly and publicly living with another as husband and wife while not married has been held to constitute a CIMT.⁴⁷¹ A military court in 1958 asserted that cohabitation was a CIMT.⁴⁷² However, there is no basis to conclude that such an offense is reprehensible by today's standards.⁴⁷³

Correctional custody-offenses against—***Category III; Not a CIMT***

No element in this subsection requires proving that the defendant engaged in force, violence or threat in order escape. Therefore, there is a realistic probability that one may be convicted of this offense based upon a non-turpitudinous act.⁴⁷⁴ Moreover, though the punishment authorized for escaping confinement includes one year's confinement and a dishonorable discharge, a military court has indicated that this offense is not a CIMT.⁴⁷⁵

Debt, dishonorably failing to pay—***May be a Category I CIMT***

See “Check, worthless, making and uttering-by dishonorably failing to maintain funds,” Article 134 offense, *supra*.

Disloyal statements: ***Category III; Not a CIMT***

The requisite scienter is present but it is doubtful an adjudicator will find a disloyal statement offense to be reprehensible without an element of potential or actual harm to some victim required in order to convict.

Disorderly conduct, drunkenness—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is reprehensible.

⁴⁷¹ C—, 3 I. & N. Dec. 790 (B.I.A. 1949) (New Jersey, open lewdness by cohabitation is a CIMT).

⁴⁷² See *United States v. Hunt*, 27 C.M.R. 557, 559 (A.B.R. 1958).

⁴⁷³ *Ortega-Lopez*, 26 I. & N. Dec. 99, 100 n.2 (B.I.A. 2013) (recognizing the evolving nature of what conduct society considers to be contrary to accepted rules of morality).

⁴⁷⁴ See J—, 4 I. & N. Dec. 512 (B.I.A. 1951); *United States ex rel. Manzella*, 71 F. Supp. 534.

⁴⁷⁵ See *Dyche*, 23 C.M.R. 723 (implies that escape from confinement is not a CIMT).

Drinking liquor with prisoner—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is reprehensible.

Drunk prisoner—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is reprehensible.

Drunkenness-incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is reprehensible.

False or unauthorized pass offenses—***Category I CIMT***

Both subsections involve fraud and therefore are CIMTs under the INA.⁴⁷⁶

False pretenses, obtaining services under—***Category I CIMT***

This offense involves intent to defraud, therefore it qualifies as a CIMT under the INA.⁴⁷⁷

False swearing—***Category I CIMT***

The offense involves a statement made under oath that the accused knew not to be true, a form of fraud.⁴⁷⁸

Firearm, discharging-through negligence—***Category III; Not a CIMT***

This offense lacks a sufficient scienter under the *Silva-Trevino* standard to qualify as a CIMT.

⁴⁷⁶ See *De George*, 341 U.S. at 229; Flores, 17 I. & N. Dec. 225 (B.I.A. 1980).

⁴⁷⁷ See *De George*, 341 U.S. at 229; Flores, 17 I. & N. Dec. 225 (B.I.A. 1980).

⁴⁷⁸ GORDON ET AL., *supra* note 47, § 71.05[1][d] n.361.

Firearm, discharging-willfully, under such circumstances as to endanger human life—***Category I CIMT***

Willful and wrongful discharge meets the scienter requirement for an INA CIMT, and the offense requires the discharge under circumstances such as to endanger human life. Such recklessness qualifies as a CIMT.⁴⁷⁹

Fleeing scene of accident—***Divisible statute***

Leaving the scene of an accident without providing identification is not a CIMT.⁴⁸⁰ However, leaving the scene without providing assistance to an injured victim is a ***Category I CIMT***.⁴⁸¹

Fraternization—***Category III: Not a CIMT***

This offense fails to qualify as a CIMT because it lacks a sufficient scienter. Also, such an offense cannot be said to be reprehensible, as it neither strikes at the heart of the military's ability to perform its mission during wartime nor does it endanger the safety of service members. Further, the offense does not require disobedience of a superior officer or failing to perform duty.

Gambling with a subordinate—***Category III: Not a CIMT***

Gambling is not a CIMT.⁴⁸²

⁴⁷⁹ *Knapik*, 384 F.3d at 89-90; Todd, No. A046-845-194, 2006 WL 3485847 (B.I.A. 2006) (Oklahoma statute, intentional discharge of firearm statute consciously disregarding the safety of others is a CIMT).

⁴⁸⁰ *Cerezo*, 512 F.3d 1163 (California statute, leaving the scene of an accident without providing certain information is not a CIMT); *Orosco v. Holder*, 396 F. App'x. 50 (5th Cir. 2010) (California statute, leaving the scene without providing certain information not involving fraud or deception is not a CIMT).

⁴⁸¹ *Garcia-Maldonado*, 491 F.3d 284 (Texas statute, failure to stop and render aid is a CIMT).

⁴⁸² *Gaglioti*, 10 I. & N. Dec. 719 (B.I.A. 1964) (Pennsylvania statute, conspiracy to establish gambling games is not a CIMT); *G—*, 1 I. & N. Dec. 59 (B.I.A. 1941) (New York statute, gambling by means of lottery policies is not a CIMT).

Homicide- negligent:—**Category III: Not a CIMT**

This offense fails to contain a sufficient scienter to qualify as a CIMT under the INA.⁴⁸³

Impersonating a commissioned, warrant, noncommissioned, or petty officer, or agent or official—**Divisible statute**

A wrongful and willful impersonation for the purpose of intending to defraud, is a turpitudinous act.⁴⁸⁴ (**Category I CIMT**). Wrongful and willful impersonation without intending to defraud does not appear to be a *malum in se* crime albeit one that is prejudicial to good order and discipline. (**Category III; Not a CIMT**).

Indecent language—**Probably not a CIMT; Category III**

Use of indecent language in and of itself does not clearly appear to be a *malum in se* offense. No case law was found wherein such an offense qualified as a CIMT under the INA.

Jumping from vessel into the water—**Category III: Not a CIMT**

The offense does involve an intent to wrongfully jump into the water, but there is no basis to conclude that the act is reprehensible. Nor can it *per se* be considered an inherently dangerous or reckless act as jumping from certain vessels can be no more dangerous than jumping into a pool.

Kidnapping—**May be a CIMT; Category I**

In an unpublished opinion reviewed by the Fifth Circuit, the Board held that a simple kidnapping statute, which requires intent to kidnap but does not require an element of extortion or ransom is inherently base, vile and depraved such as to qualify as a CIMT.⁴⁸⁵ The Ninth Circuit disagrees with this view, finding that to qualify as a CIMT a kidnapping offense must

⁴⁸³ Solon, 24 I. & N. Dec. 239 (B.I.A. 2007).

⁴⁸⁴ Gonzalez, 16 I. & N. Dec. 134 (B.I.A. 1977) (18 U.S.C. §§ 912 and 2, Impersonating an immigration officer is a CIMT); B—, 3 I. & N. Dec. 270 (B.I.A. 1948) (18 U.S.C. § 76, impersonating a Federal officer is a CIMT); Kisel, No.A70330513, 2007 WL 3301454 (B.I.A.) (California statute, impersonating a police officer is a CIMT).

⁴⁸⁵ Hamdan v. INS, 98 F.3d 183, 188 (5th Cir. 1996) (Louisiana statute, evidence was insufficient to demonstrate that attempted simple kidnapping was a CIMT).

contain an element of an intent to harm, actual harm, or a special class of victims.⁴⁸⁶ This Article 134 offense contains none of these elements.

Mail; taking, opening, secreting, destroying, stealing—***Category III; Not a CIMT***

Stealing Mail from letter boxes is a CIMT.⁴⁸⁷ But this article 134 offense does not require an intent to permanently deprive; thus, it cannot qualify as a CIMT under the INA.⁴⁸⁸

Mails: depositing or causing to be deposited obscene matters in—***Category III; Not a CIMT***

A similar federal offense was held by the Board not to constitute a CIMT.⁴⁸⁹

Misprision of serious offense—***Most likely a Category I CIMT***

This article 134 misprision offense requires an element of an active and wrongful concealment of a serious offense in order to convict,⁴⁹⁰ therefore it qualifies as a CIMT under the INA.⁴⁹¹

Obstructing justice—***Category I CIMT***

This offense requires an intent to obstruct justice, which qualifies as a CIMT.⁴⁹²

⁴⁸⁶ *Castrijon-Garcia* 704 F.3d at 1213, *overruled in part by Ceron*, 747 F.3d 773 (California statute, simple kidnapping is not a CIMT since it does not necessarily involve intent to harm, actual harm, or an action affecting a protected class of victim).

⁴⁸⁷ B—, 3 I. & N. Dec. 270 (B.I.A. 1948); *see supra* note 132.

⁴⁸⁸ *See supra* note 106 (taking must be intended to be permanent for offense to qualify as a CIMT).

⁴⁸⁹ D—, 1 I. & N. Dec. 190 (B.I.A. 1942) (18 U.S.C. § 334 (1940), knowingly mailing obscene matter is not a CIMT).

⁴⁹⁰ MCM, *supra* note 150, pt. IV, ¶ 95.c.(1).

⁴⁹¹ *See Robles-Urrea*, 24 I. & N. Dec. 22, 28 (B.I.A. 2006) (holding that misprision of a felony in violation of 18 U.S.C. § 4 (2000) is a CIMT because it requires more than a mere failure to report an offense, but instead an affirmative act of concealment).

⁴⁹² *See Jurado*, 24 I. & N. Dec. 29, 35 (B.I.A. 2006); *Vasquez-Valle*, No. A205-671-593, 2013 Immig. Rptr. LEXIS 4788 (B.I.A. Nov. 5, 2013).

Wrongful interference with an adverse administrative proceeding—***Categorical Category I CIMT***.

See “Obstructing Justice,” Article 134 offense, *supra*.

Pandering and prostitution—***Category I CIMT***

Both offenses are CIMTs under the INA.⁴⁹³

Parole, violation of—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is reprehensible.

Perjury: subornation of—***Category I CIMT***

Perjury is a CIMT.⁴⁹⁴

Public record: altering, concealing, (etc.)—***Category I CIMT***

Intent to willfully and unlawfully alter, conceal, etc. a public record is inherently fraudulent activity.⁴⁹⁵

Quarantine: medical, breaking—***Category III; Not a CIMT***

The statute provides no indication of whether knowingly breaking quarantine would necessarily cause bodily harm to another, and there is no other basis to conclude that such an offense would be considered reprehensible.

Reckless endangerment—***Divisible statute***

Wantonly reckless endangerment likely to produce death or grievous bodily harm is a CIMT.⁴⁹⁶ (***Category I CIMT***). However, mere reckless endangerment as defined at MCM para 100.a.c.(3) does not qualify as a CIMT

⁴⁹³ GORDON ET AL., *supra* note 47, § 71.05[1][d] nn.287-88.

⁴⁹⁴ *De George*, 341 U.S. 223 (crimes in which fraud is an ingredient involves moral turpitude); *Matinez-Recinos*, 23 I. & N. Dec. 175 (B.I.A. 2001); GORDON ET AL., *supra* note 47, § 71.05[1][d] n.347.

⁴⁹⁵ *United States ex rel. Abbenante v. Butterfield*, 112 F. Supp. 324, 326 (E.D. Mich. 1953) (citing *De George*, 341 U.S. 223 (violation of federal law proscribing the uttering of a forged prescription for narcotics with intent to defraud is a CIMT)).

⁴⁹⁶ *Hernandez*, 26 I. & N. Dec. 464 (B.I.A. 2015).

since it lacks a requirement of a *conscious disregard* for the consequences of the act engaged in.⁴⁹⁷ ***Category III; Not a CIMT.***

Restriction, breaking—***Category III; Not a CIMT***

There is no basis to conclude that this offense is morally turpitudinous.

Seizure: destruction, removal, or disposal of property to prevent:—***Probably a Category I CIMT***

Affirmative acts to conceal criminal activity and impede law enforcement have been found to be CIMTs.⁴⁹⁸

Self-injury without intent to avoid service—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is morally turpitudinous.

Sentinel or lookout: offenses against or by—***Category III; Not a CIMT***

There is no basis to conclude that such an offense is morally turpitudinous.

Soliciting another to commit an offense—***May be a CIMT***

If the offense solicited is a CIMT, so too is this offense.⁴⁹⁹

Stolen property: knowingly receiving, buying, concealing—***Category I CIMT***

Wrongfully receiving stolen property that the accused knew was stolen qualifies as a CIMT.⁵⁰⁰

⁴⁹⁷ See *supra* Part V, UCMJ art. 90(1) (drawing or lifting up a weapon against a superior officer).

⁴⁹⁸ *Padilla v. Gonzales*, 397 F.3d 1016 (7th Cir. 2005).

⁴⁹⁹ See *Mukasey*, 508 F.3d at 903 (Arizona, solicitation to possess marijuana for sale is a CIMT because the underlying offense is a CIMT).

⁵⁰⁰ See R—, 6 I. & N. Dec. 772 (B.I.A. 1955).

Stragglings—*Category III; Not a CIMT*

There is no basis to conclude that this offense is reprehensible.

Testify: wrongful refusal—*May be a Category I CIMT*

Refusing to testify without having to self-incriminate and with immunity may be considered obstruction of justice, which may be a CIMT. See “Obstructing justice,” Article 134 offense, *supra*.]

Threat or hoax designed or intended to cause panic or public fear—*May be a Category I CIMT*

Threatening behavior can be an element of a CIMT.⁵⁰¹ An offense is a CIMT if it involves culpable intent to instill terror in the victim.⁵⁰²

Threat, communicating—*May be a Category I CIMT*

See “Threat or hoax designed or intended to cause panic or public fear,” Article 134 offense, *supra*.

Unlawful entry—*Category III; Not a CIMT*

There is no basis to conclude that such an act is reprehensible.

Weapon: concealed, carrying—*Category III; Not a CIMT*

Mere possession of a firearm is not a CIMT.⁵⁰³

Wearing unauthorized insignia, badge, ribbon, device, or lapel button—*Category III; Not a CIMT*

There is no basis to conclude that this offense is reprehensible.

⁵⁰¹ See Ajami, 22 I. & N. Dec. 949 (B.I.A. 1999).

⁵⁰² Alatorre Barrera, 2014 WL 4966493 (B.I.A. 2014) (Texas statute, offense is a CIMT if it involves a culpable intent to instill terror in the victim). *But see Abpikar*, 544 F. App'x 719, 722-23 (Ohio statute, telephoning a bomb threat is not a CIMT because the offense does not contain an attendant physical harm or intent to harm someone).

⁵⁰³ See *supra* note 77.

VI. CONCLUSION

For foreign-born service members, qualifying honorable service deservedly begets entitlement to United States citizenship, but the pendulum swings both ways. A court-martial conviction that qualifies as a crime involving moral turpitude under the Immigration and Nationality Act may result in the loss of citizenship or lawful permanent resident status, mandatory detention for an indefinite period of time in a DHS jail, and forced deportation after a perhaps lengthy, costly and nerve-racking adversarial immigration court proceeding. Add to such collateral consequences the real possibility that the service member's family may have to break up or otherwise join the exiled service member outside of this country, leaving behind established lives in the United States for an uncertain or dismal future elsewhere in the world. Courts-martial practitioners must be aware of such potentially adverse consequences, and should know how to competently assess whether a particular offense under the UCMJ may or may not trigger them. A knowledgeable defense counsel could use such information as an effective argument in order to secure a better plea deal, be it to a lesser charge or to a limit on the maximum confinement time the convening authority would authorize in order to prevent the conviction from qualifying as a crime involving moral turpitude under the Immigration and Nationality Act. The prosecution should be equally aware of the immigration consequences in order to determine as a matter of justice and prosecutorial discretion just what charge to prefer or what guilty plea offer would be acceptable, given the unique circumstances of a court-martial involving a foreign-born service member. The honor of the American military community expects no less.

DEFENSE OFFSETS AND PUBLIC POLICY:
BEYOND ECONOMIC EFFICIENCY

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They will beat their swords into plowshares and their spears into pruning hooks. Nation will not take up sword against nation, nor will they train for war anymore.¹

Abstract

Defense offsets are a form of countertrade whereby arms importing countries demand some form of compensation for the lost opportunity for domestic production. Both the United States and the European Union (EU) maintain that offsets are economically inefficient and trade distorting, and free-trade advocates seek to prohibit offsets. In a previous article published in the *Public Contract Law Journal*, the author argued that offsets may be a “second-best” solution and questioned whether a ban would promote efficiency.

Building on that previous article, which concentrated on the question of economic efficiency, the author turns to a wider array of policy considerations. He finds that closer analysis of the questions catalogued is necessary before a ban should be pursued. He contends that the question is multifactorial and, thus, should not be decided on the basis of efficiency alone. Meanwhile, the author proposes public and private measures for mitigating any harm that offsets may cause and for coming to a better understanding of their effects.

¹ *Isaiah 2:4* (King James).

I. INTRODUCTION

Defense offsets are anathematized as “economically inefficient and trade distorting.”² That has been the official U.S. policy for three decades³ and the World Trade Organization (WTO), the European Union (EU), and Transparency International share similar views.⁴ The author recently challenged the received view, arguing that there are currently insufficient data to draw firm conclusions about the alleged inefficiency or trade distorting effects of offsets and arguing that they may, sometimes, promote efficient outcomes.⁵

In the call for abolition, evidence that offsets are inefficient and trade distorting has done the heavy lifting. If the claim that offsets are inefficient or trade distorting is uncertain, other considerations must compensate and bear a heavier load if the case for prohibition is to be persuasive.

Even if the inefficiency case “requires closer scrutiny” as this author has argued, that “does not settle the policy question[.]”⁶ Rather, “it has the opposite effect,” “[i]f efficiency is an open question, then it plays a less decisive role and other considerations come to the fore. Supposing that evaluation of the efficiency argument is effectively on hold while better data are being gathered, a corresponding need arises to *broaden the analysis*.”⁷

This Article picks up where the other left off. This entails, first, a deeper dive into the questions only briefly considered there: wider economics, corruption, and security. Next, to “widen[] the aperture,”⁸ it considers policy options, both public and private, which occupy Sections III and IV.

² Press Release, The White House, Presidential Policy on Offsets in Military Exports (Apr. 16, 1990), *reprinted in* DEF. INST. SEC. ASSISTANCE MGMT. J., Summer 1990, at 46-47 (announcing the position that “certain offsets for military exports economically inefficient and market distorting”); *see also* the Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106 Stat. 4198, 4206-07 (adopting the President’s statement on offsets as a congressional policy).

³ Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106 Stat. 4198, 4206-07.

⁴ Carola Hoyos, *Defence Groups Agree to \$75bn of Sweeteners to Win Big Contracts*, FIN. TIMES, Oct. 10, 2013, at 1.

⁵ *See generally* Daniel E. Schoeni, *Second-Best Markets: On the Hidden Efficiency of Defense Offsets*, 44 PUB. CONT. L.J. 369 (2015).

⁶ *Id.* at 410.

⁷ *Id.* at 410-11 (emphasis added).

⁸ *Id.* at 415.

Before coming to this analysis, however, this Article first provides some background. It starts with terminology. Secondly, it recounts the history of offsets. Lastly, it summarizes the case against offsets based on economic inefficiency and restates the author's counterargument. This occupies Section II.

Ultimately, this Article posits that even if enough data are gathered to prove that offsets are inefficient and trade distorting, the debate is not over. Whether to ban offsets depends on other considerations. This is not a binary question (i.e., efficient or inefficient), but is instead multifactorial.

Despite what many propose, there are many complex and vexing issues involved. For example, many of the non-economic criticisms of offsets are hopelessly utopian and probably overestimate the effect of offsets on the arms trade and the arms trade's effect on the incidence of armed conflict. What drives nations to war is complicated and perhaps inexorable. It is not obvious that prohibiting offsets would do much either to slow arms trafficking or reduce the frequency of war. Even if offsets are outlawed, nations "beat[ing] their swords into plowshares" seems unlikely.⁹ Offsets may not be the problem. To borrow a clever turn of phrase from another context, a ban may be "a solution that won't work in search of a problem that doesn't exist."¹⁰

Finally, a word about method and scope. Due to space limitations, this Article does not attempt a thorough analysis of the many issues it catalogues. It favors breadth, not depth. Its approach is panoramic as its purpose is "to broaden the analysis,"¹¹ widening the focus beyond questions of efficiency. Given that so many questions are implicated, this Article cannot give each the space it deserves. Rather, by widening the analysis this Article attempts to break new ground. Other hands will be needed to sow, cultivate, and harvest.

⁹ *Isaiah 2:4*, *supra* note 1.

¹⁰ Tim Heffernan, *Aji Pai's Fight for Internet Freedom*, NAT'L REV., Aug. 24, 2015 at 22 (quoting the FCC Chairman's summary of his dissent to the administration's net neutrality policy).

¹¹ Schoeni, *supra* note 5, at 411.

II. BACKGROUND

This section defines the jargon of the debate. Then it provides a history of offsets—from when the United States first imposed coproduction agreements to present—and based on that record and current trends, attempts to forecast the future. Next, it summarizes the inefficiency argument, the main reason for a ban. Finally, it restates the counterargument.

A. Definition

What do Dutch yarn, Finnish rail ferries, Swiss ball bearings, Danish hams,¹² Brazilian shoes, Turkish marble, and Canadian furniture have in common?¹³ They have all been part of offset transactions with large U.S. defense firms in exchange for American arms.¹⁴ This section laments the chore of defining offsets, attempts to define them, names the parties involved, and distinguishes offsets from a similar practice in civil trade.

1. Challenges with defining offsets

Observers have long “grappled” with defining offsets.¹⁵ The “literature on arms trade offsets (and offsets generally) is cluttered with a babel of terms.”¹⁶ Stephanie Neuman notes that sorting out the problems with “conflicting terminology” in this field “is a frustrating and thankless task.”¹⁷

¹² Leslie Wayne, *A Well-Kept Military Secret*, N.Y. TIMES, Feb. 16, 2003, § 3 at 1, (explaining that “American arms makers have helped the Dutch export yarn and missile parts, the Finns to sell rail carriers and passenger ferries, [and] the Swiss to sell machine tools and ball bearings”).

¹³ Grant Hammond, *Offsets, Arms, and Innovation*, WASH. Q., Winter 1987, at 173 (explaining that the “common denominator is that they are marketed by the offset departments of large [American] defense contractors”).

¹⁴ *Id.*

¹⁵ See Owen E. Herrstadt, *The Role of the U.S. Government in Setting Offset Policy*, in TRENDS AND CHALLENGES IN AEROSPACE OFFSETS 73, 73 (Charles W. Wessner ed., 1999).

¹⁶ Jurgen Brauer, *Economic aspects of arms trade offsets*, in ARMS TRADE AND ECONOMIC DEVELOPMENT: THEORY, POLICY, AND CASES IN ARMS TRADE OFFSETS 54, 54 (Jurgen Brauer & J. Paul Dunne eds., 2004) [hereinafter ARMS TRADE AND ECONOMIC DEVELOPMENT]; see also PETER W. LIESCH, GOVERNMENT MANDATED COUNTERTRADE: DEALS OF ARM TWISTING 8-12 (1991) (listing “various taxonomies of countertrade”).

¹⁷ Stephanie Neuman, *Coproduction, Barter, and Countertrade: Offsets in the International Arms Market*, 29 ORBIS 183, 183-84 (1985) (explaining that in addition to offsets “many other varieties of compensatory trade agreements exist, and each organization and source uses different and conflicting terminology to refer to

“Offset” is also a confusing term because it can be used in a broad or narrow sense. It can be used as an “umbrella term” covering several trade mechanisms or in a narrow sense “to describe one particular form of industrial benefit.”¹⁸ Stephen Martin observes, “[d]rawing hard and fast boundaries” among these various species of offsets “is not always useful or easy.”¹⁹ This Article uses “offset” in the broad sense and will not attempt to draw boundaries among the various types,²⁰ except to briefly discuss how offsets differ from countertrade.²¹

2. Some definitions

Definitions are numerous.²² Hammond defines offsets as “transactions in which the buyer demands, as a condition of sale, that the seller compensate

them” and that in the literature “offsets, coproduction, barter, and countertrade are used interchangeably with such terms [as] ‘buy backs,’ ‘barter,’ ‘counterpurchase,’ ‘compensation,’ or ‘licensed production’”).

¹⁸ Stephen Martin, *Introduction and Overview* to *THE ECONOMICS OF OFFSETS: DEFENCE PROCUREMENT AND COUNTERTRADE 2, 2* (Stephen Martin ed., 1996) [hereinafter *THE ECONOMICS OF OFFSETS*].

¹⁹ *THE ECONOMICS OF OFFSETS*, *supra* note 18, at 3.

²⁰ The Revised Government Procurement Agreement’s (GPA) definition provides another broad definition of offsets consistent with Martin’s approach: “offset means any condition or undertaking that encourages local development or improves a Party’s balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade and similar action or requirement.” *COMM. ON GOV’T PROCUREMENT, WORLD TRADE ORG., ADOPTION OF THE RESULTS OF THE NEGOTIATIONS UNDER ARTICLE XXIV: 7 OF THE AGREEMENT ON GOVERNMENT PROCUREMENT, GPA/113*, at 8, Art. I(I) (Apr. 2, 2012), https://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm.

²¹ See *infra* Section II.A.4 (explaining the distinction between offsets and countertrade).

²² Schoeni, *supra* note 5, at 376, n.37. Brauer and Dunne provide perhaps the most comprehensive definition, which they call “a set of universal characteristics that define countries’ offsets arrangements”:

(1) that importing countries generally mandate offset characteristics by law, often to 100 percent of the arms contract value; (2) that offset requirements start at some minimum contract value, often as low as \$5 million; (3) that multipliers are frequently attached to offset deals, meaning that a specific transaction (say, \$10 million) can be multiplied to count toward a higher value (say, \$15 million) in fulfillment of the offset obligation; (4) that virtually all arms trade contracts now contain clauses that subject arms trade exporters to a variety of penalties for nonfulfillment of the offset obligation (for example, exclusion from consideration for future contracts). In addition, there are expectations (5) that offsets will reduce arms acquisition costs; (6) that job creation and generalized economic development will result in the arms acquiring country; (7) that the offset will result in new and sustainable work (that is, that the offset not merely replace work that would have been sourced in-country anyway and that it not be one one-off but continuous

the buyer through a variety of nonmonetary means. These agreements are usually side agreements to contracts to purchase certain goods.”²³

Notwithstanding the disparate sorts of transactions and trade mechanisms loosely grouped together as offsets,²⁴ they share three elements.²⁵ First, the “compensation [is] in a non-monetary form.”²⁶ Second, “their intended purpose is to compensate buyer costs.”²⁷ Last, they are “a condition of the sale of military hardware.”²⁸

In addition to defining the word offset, several other terms require an explanation:

work); and (8) that the offsets result in general and specific technology transfers since technology is seen as a key component of future economic prosperity.

Jurgen Brauer & J. Paul Dunne, *Arms Trade Offsets: What Do We Know?*, in THE HANDBOOK ON THE POLITICAL ECONOMY OF WAR 243, 247 (Christopher J. Coyne & Rachel L. Mathers eds., 2011).

²³ Hammond, *supra* note 13, at 175; *see also* Bernard Udis & Keith E. Maskus, *Offsets as Industrial Policy: Lessons from Aerospace*, 2 DEF. ECON. 151, 155 (1991) (explaining that offsets are a “classic case of reciprocal bargaining beyond that normally found in the exchange of goods or services for monetary compensation”).

²⁴ *Foreign Military Sales and Offsets, Hearing Before the H. Comm. on Energy & Commerce Subcomm. on Oversight & Investigations*, 99th Cong. 2 (1985) [hereinafter Offsets Hearing] (statement of Frank C. Conahan, General Accounting Office) (reporting that “the concept of offsets lacks a uniform definition, and a variety of terms are used by different government and business entities to describe the same phenomenon”).

²⁵ William E. Jones, *The Value of Military Industrial Offsets*, DEF. INST. SEC. ASSISTANCE MGMT. J., Winter 2001-02, at 108 (citing Deborah Kremer & Bill Sain, *Offsets In Weapons System Sales: A Case Study of the Korean Fighter Program* (1992) (unpublished master’s degree thesis, Air Force Institute of Technology, Air University, Wright-Patterson AFB, Ohio).

²⁶ *Id.*

²⁷ *Id.* These costs include “the economic damage caused by purchasing costly [foreign] defense equipment[.]” Robert L. Waller, *The Use of Offsets in Foreign Military Sales*, 10 ACQUISITION R.Q. 225 (2003). More broadly, “their purpose is to compensate a buyer for the consequences, economic or political, of acquiring a foreign good or service”. GRANT T. HAMMOND, COUNTERTRADE, OFFSETS AND BARTER IN INTERNATIONAL POLITICAL ECONOMY 7 (1990).

²⁸ Jones, *supra* note 25, at 108; *see also* Offsets Hearing, *supra* note 24, at 2 (statement of Frank C. Conahan, Government Accounting Office) (defining offsets as “trade arrangements made as conditions of foreign military sales”).

Direct Offsets. Direct offsets concern side deals related to the underlying transaction for military hardware or services.²⁹

Indirect Offsets. Indirect offsets are side deals that are completely unrelated to the military goods and services being sold, and frequently are civil goods and services.³⁰

Offset Agreement. An offset agreement is “a stand-alone document or annex to the underlying contract” where the parties’ rights and obligations are spelled out.³¹

Multipliers. Recipients utilize multipliers to grant suppliers greater than dollar-for-dollar credit for offsets that contribute to local economic or political priorities.³²

Banking. This is the process whereby recipients let suppliers save offset credits for the fulfilment of future offset obligations and to sell them to other suppliers.³³

Penalties. Recipients have recently started imposing a range of penalties on suppliers who fail to meet offset commitments.³⁴

3. The parties involved

“In assessing the advantages and disadvantages of offsets,” Hammond observes, “we need to specify *whose* advantages and disadvantages

²⁹ See Neuman, *supra* note 17, at 187 (explaining that direct offsets permit offset recipients to demand in-country production of “components or subsystems of a weapons system [the recipient] is buying from a [foreign supplier] as a condition of sale”).

³⁰ *Id.*; see also Wayne, *supra* note 12 (listing yarn, rail ferries, ball bearings, and hams); Hammond, *supra* note 13, at 179 (listing shoes, and marble); see also Schoeni, *supra* note 5, at 370, n.2 (listing several headlines on offsets).

³¹ See Richard J. Russin, *Offsets in International Military Procurement*, 24 Pub. Cont. L.J. 65, 67-68 (1994) (explaining that in addition to listing the terms and conditions of the suppliers’ obligations, agreements should include provisions for dispute resolution, e.g., an arbitration clause).

³² See ALLEN B. GREEN, *INTERNATIONAL GOVERNMENT CONTRACT LAW* 280-81 (2011).

³³ See *id.* at 282.

³⁴ See *id.* at 281-82 (listing among the penalties “statutory monetary penalties (liquidated damages), increases in the amount of offset obligation amounts, reduction in the value of the underlying procurement contract, and exclusion from consideration on future contracts”).

we are talking about.”³⁵ The first step is to identify the parties. This includes the exporters who incur offset obligations when selling their wares abroad (suppliers),³⁶ the governments whose suppliers incur offset obligations (supplier governments), and the sovereign arms importers who demand offsets (recipients).³⁷ These are the three principal actors, about whom more later.³⁸ There are several third parties who should also be mentioned:

Brokers. These are consulting firms who advise suppliers and recipients on offsets and organizations “that structure complex deals and arrange financing.”³⁹ Not surprisingly, these brokers are “offsets most vocal defenders.”⁴⁰

Beneficiaries. These include recipients’ private firms, research centers, and militaries. As the end users, they may have the greatest vested interest in “ensur[ing] their direct benefit from” the “offset package[.]”⁴¹

Subcontractors. These are domestic suppliers who sell goods and services (e.g., components and subsystems) to the prime contractors. Offsets often displace their work.⁴²

³⁵ HAMMOND, *supra* note 27, at 42 (emphasis added).

³⁶ Suppliers are sometimes referred to as obligors; recipients as sovereigns. *See, e.g.,* AVASCENT, STRATEGIC OFFSETS 2 (2013), <http://www.avascent.com/wp-content/uploads/2013/03/Strategic-Offsets.pdf>.

³⁷ Recipients are not monolithic. Apart from distinguishing governments from the governed, the governments themselves can be divided into multiple agencies whose interests can diverge. For example, Russin says there is often one government agency that manages offset obligations, but other agencies have a stake in offsets including ministries of labor, industry, trade, and customs. *See* Russin, *supra* note 31, at 68-69.

³⁸ *See infra* Subsections IV.A, IV.B, and IV.C, respectively.

³⁹ *Guns and Sugar*; ECONOMIST, May 25, 2013, at 63, <http://www.economist.com/news/business/21578400-more-governments-are-insisting-weapons-sellers-invest-side-deals-help-them-develop>.

⁴⁰ *Id.*

⁴¹ BEN MAGAHY, FRANCISCO VILHENA DA CUNHA & MARK PYMAN, TRANSPARENCY INT’L, DEFENCE OFFSETS: ADDRESSING THE RISKS OF CORRUPTION AND RAISING TRANSPARENCY 13 (2010) [hereinafter TRANSPARENCY INT’L].

⁴² *See* BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, OFFSETS IN DEFENSE TRADE: NINETEENTH STUDY 7 (2015) (explaining that “offset activity displaces work that otherwise would have been conducted in the United States” and “can limit future business opportunities for U.S. subcontractors and suppliers”); MARTIN TRYBUS, BUYING DEFENSE AND SECURITY IN EUROPE: THE EU DEFENSE AND SECURITY PROCUREMENT DIRECTIVE IN CONTEXT 406-07 (2014) (explaining that offsets displace work that would have gone

Employees. These are domestic subcontractors' employees who sometimes lose out from foreign sales won using offsets.⁴³

Taxpayers. This includes the citizens of recipient and supplier governments alike. Recipients overpay for the offsets;⁴⁴ supplier governments are sometimes accused of subsidizing the defense industry at the expense of the public fisc,⁴⁵ and the same goes for offsets.⁴⁶

This list is not exhaustive, but it is illustrative of the knock-on effects of offsets on a variety of groups and in a range of fields both public and private.⁴⁷

to domestic suppliers and offsets are demanded as compensation); Judith K. Cole, *Evaluating Offset Agreements: Achieving a Balance of Advantages*, 19 L. & POL'Y INT'L BUS. 765, 769 (1987) (suggesting that offsets "may provide immediate returns to the exporter of military or related equipment" but may also "adversely affect the profits of other industries, particularly those involving subcontracting firms").

⁴³ See OWEN E. HERRNSTADT, ECON. POL'Y INST., BRIEFING PAPER NO. 201, OFFSETS AND THE LACK OF A COMPREHENSIVE U.S. POLICY: WHAT DO OTHER COUNTRIES KNOW THAT WE DON'T? 5 (2008) (reporting that "significant job losses occur in the United States each year due to offsets") (citing BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, OFFSETS IN DEFENSE TRADE: TWELFTH STUDY 4-5 (2007)); but see HARRY J. GILMAN & BRIAN F. SHEA, U.S. DEP'T OF LABOR, THE IMPACT OF OFFSETS ON DOMESTIC EMPLOYMENT 48 (1987) (stating "with the exception of several industries...the employment effects of offsets...are not substantial when compared with the actual employment levels in these industries").

⁴⁴ See, e.g., Keith Hartley, *Research Overview*, in E. ANDERS ERIKSSON, FINAL REPORT OF 06-DIM-022, STUDY ON THE EFFECTS OF OFFSETS ON THE DEVELOPMENT OF A EUROPEAN DEFENCE INDUSTRY AND MARKET 38, 42-43 (2007) (observing that "offsets are not costless and that the buyer bears most of the costs" and that premiums range from "3% to 60% with a typical range of 5% to almost 15%"); Neil Davies, Chief Economist and Director of Economic Advice, Ministry of Defence, United Kingdom, Presentation at the NATO Conference Panel: *Reducing Corruption Risks in Defence Contracts: The Challenge of Offset Agreements*, in DRAFT CONFERENCE REPORT, BUILDING INTEGRITY AND DEFENCE INSTITUTION BUILDING, NATO CONFERENCE 93, 95 (2009) [hereinafter NATO CONFERENCE] (arguing that "the true costs of offsets are high").

⁴⁵ See, e.g., William D. Hartung, *Corporate Welfare for Weapons Makers The Hidden Costs of Spending on Defense and Foreign Aid*, 350 POL'Y ANALYSIS 1, 3-12 (1999) (criticizing the United States for subsidizing arms exports at taxpayers' expense).

⁴⁶ See, e.g., Zachary Fryer-Biggs, *From Nuisance to Necessity*, DEF. NEWS, July 23, 2012, at 18 (noting that U.S. government distorts the "profit equation" for defense manufacturers by making offset expenses reimbursable); Kenneth Flamm, *The Policy Context for Military Aerospace Offsets*, in TRENDS AND CHALLENGES IN AEROSPACE OFFSETS, *supra* note 15, at 115, 121-27 (arguing the U.S. government "underwrites" arms exports and although U.S. policy is officially opposed to offsets "the U.S. government is a practical and enthusiastic supporter of offsets used to promote defense sales").

⁴⁷ To this list could be added suppliers' unions; suppliers' employees' communities; suppliers' countries' non-military firms; subcontractors' employees, unions, and the

4. Offsets versus countertrade

Offsets must be distinguished from a similar practice in the civil (i.e., non-military) realm called countertrade. The “relationship between these terms is confusing as some sources treat offsets as a subset of countertrade and vice versa.”⁴⁸

Martin advises that those seeking to understand offsets “should be aware of the parallel and at times overlapping literature on countertrade not least because research in one area can inform developments in the other.”⁴⁹ In fact, the premise of this author’s previous Article was that literature on countertrade should inform the debate over whether offsets are, in fact, trade distorting and inefficient.⁵⁰ For this reason and for simplicity, these two terms—offsets and countertrade—are used almost interchangeably here.

B. A History of and Prospects for Defense Offsets

Although countertrade has existed for thousands of years,⁵¹ offsets were first imposed when the United States demanded coproduction agreements from post-war Japan and Germany to compensate for expenditures on their behalf, to build their economies, and to encourage interoperability.⁵²

employees’ communities; third-party countries who lose from bilateral trade. *See* Brauer, *supra* note 16, at 56-58 (listing the “arms trade offset players” and discussing their incentives).

⁴⁸ Schoeni, *supra* note 5, at 377 (citing Travis K. Taylor, *Modeling Offset Policy in Government Procurement*, 25 J. POL’Y MODELING 985, 986 (2003) (listing countertrade as a type of offset); MATT SCHAFER, WINNING THE COUNTERTRADE WAR: NEW EXPORT STRATEGIES FOR AMERICA 3-5 (1989) (listing offsets as a type of countertrade)).

⁴⁹ *See id.* (citing Stephen Martin, *Countertrade and Offsets: An Overview of Theory and Evidence*, in THE ECONOMICS OF OFFSETS, *supra* note 18, at 15, 15).

⁵⁰ *Id.*

⁵¹ *See, e.g.*, Murat Sumer & Jason Chuah, *Emerging Legal Challenges for Countertrade Techniques in International Trade*, INT’L TRADE L. & REG. 111 (2007) (tracing countertrade to barter systems to 2,500 B.C.) (citing BELAY SEYOUM, EXPORT-IMPORT THEORY, PRACTICES AND PROCEDURES 1 (2000)).

⁵² *See, e.g.*, HAMMOND, *supra* note 27, at 15-17 (recounting that offsets “first came into vogue in a post-Second World War environment”); Cole, *supra* note 42, at 775-76 (recounting that coproduction of the T-33 and F-86 aircraft in Germany and Japan were among the first offset programs in the 1950s and the motives the rapid growth in offsets in the 1960s) (citing OFFICE OF MGMT. & BUDGET, IMPACT OF OFFSETS IN DEFENSE-RELATED EXPORTS 6 (1985)); U.S. GEN. ACCOUNTING OFFICE, TRADE OFFSETS IN FOREIGN MILITARY SALES, GAO/NSAID -84-102, App. I at 2-3 (1984) (explaining offsets’ history commenced in German and Japan).

What began as special arrangements mainly among NATO allies⁵³ eventually became the norm throughout the arms trade.⁵⁴ What would start with one nation's parochial security concerns would have unforeseen implications for global trade.⁵⁵ Precedent was set, and the demand for offsets multiplied.⁵⁶

⁵³ See Grant T. Hammond, *The Role of Offsets in Arms Collaboration*, in GLOBAL ARMS PRODUCTION: POLICY DILEMMAS FOR THE 1990s 205, 214 (Ethan B. Kapstein ed., 1992) (explaining that the U.S. government originally supported offsets as it was thought that they would “enhance standardization within the NATO alliance, reduce redundant [research and development] costs and improve national security and alliance cohesion”); Cole, *supra* note 42, at 776 (explaining that not only did recipients seek offsets “to create a national defense industrial base, to acquire modern technologies and management techniques, and to solve balance of payment problems” but the United States was complicit as they “bolstered the defense capability of...its allies and improved the industrial capacity and economics of the allies”); Hammond, *supra* note 13, at 177 (explaining it was thought to be “it in the security interests of the United States to enter into [offsets] with its friends and allies”).

⁵⁴ See Bernard Udis & Keith E. Maskus, *US Offset Policy*, in THE ECONOMICS OF OFFSETS, *supra* note 18, at 357, 357-58 (describing the transition from direct transfers of military equipment to licensed production of “the F-86 and F-104 fighters, the M113 Armored Personnel Carrier, and several utility helicopters” in order to “restor[e] the European defense industry”); Sumer & Chuah, *supra* note 51, at 120-21 (explaining that offsets started with NATO countries buying arms from the United States during the Cold War and then “spread rapidly,” then spread to the United States’ arms sales to developing countries, and finally has become a widespread practice in the arms trade); Hammond, *supra* note 13, at 177-78 (describing Northrop’s sale of F-5 fighters to Switzerland in the 1970s, the first major non-NATO offsets deal, and subsequent offset deals with Singapore and South Korea); TRANSPARENCY INT’L, *supra* note 41, at 8 (explaining that offsets were initially used to rebuild post-war economies in Western Europe, later to settle balance-of-payment accounts, and then increased in popularity in the 1970s as an industrial policy tool) (citing Gueorgui Ianakiev & Nickolay Mladenov, *Offset Policies in Defence Procurement: Lessons for the European Defence Equipment Market*, paper presented at the 13th Annual Conference on Economics and Security (June 24, 2009), www.loicorp.com/uploads/3/2/9/4/3294974/offset_europ.pdf); Hammond, *supra* note 53, at 208-09 (explaining that offsets first spread to NATO allies “as a necessary evil” to secure contracts and then quickly spread to developing nations).

⁵⁵ See *Defense Offsets: Are They Taking Away Our Jobs?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy & Human Resources of the H. Comm. on Gov’t Reform*, 106th Cong. 164 (1999) (statement of Roger Majak, Assistant Secretary for Export Administration, U.S. Dep’t of Commerce) (stating offsets were thought to be “needed to rebuild war-damaged defense industrial bases in Europe and Japan to enable them to resist the spread of communism”).

⁵⁶ See Joel L. Johnson, *The United States: Partnerships with Europe*, in KAPSTEIN, *supra* note 53, at 105, 108-09 (explaining that buyers demand offsets and defense firms must provide them to be competitive); Udis & Maskus, *supra* note 54, at 358-59 (noting a similarity between the United States’ early offset policies and contemporary practices).

With the end of the Cold War, demands for arms fell while supply remained constant, which made the arms trade a buyer's market.⁵⁷ Market conditions led to "ever-increasing offset demands."⁵⁸ Industry's response was that offsets were an "unavoidable part of doing business."⁵⁹ One observer noted that imposing "unilateral economic restraints" on offsets "would be the equivalent of economic suicide."⁶⁰

At first, mainly rich countries demanded offsets,⁶¹ but as the market tightened developing countries joined the queue.⁶² Recipients' demands grew quantitatively and qualitatively; demands became "increasingly sophisticated" and the offset's value came to exceed the underlying transaction's value.⁶³

Because offsets originated in the United States and its defense contractors firms are among the leading arms manufacturers in the world,⁶⁴ a word about U.S. offset policy seems to be in order. Officially, it opposes offsets as "economically inefficient and trade distorting" and prohibits agencies from "encouraging, entering directly into, or committing U.S. firms to any offset arrangement[.]"⁶⁵ Consistent with this policy, it has sought multilateral

⁵⁷ FED'N OF AMERICAN SCIENTISTS, OFFSETS: THE INDUSTRIAL, EMPLOYMENT AND SECURITY COSTS OF ARMS EXPORTS (2001), <http://www.fas.org/asmp/campaigns/offset.html> (explaining that "shrinking military budgets" in the 1990s have created a buyer's market").

⁵⁸ *Id.*

⁵⁹ U.S. GEN. ACCOUNTING OFFICE, OFFSET DEMANDS CONTINUES TO GROW, GAO/NSAID-96-65 11 (1996).

⁶⁰ Cole, *supra* note 42, at 802-03.

⁶¹ See, e.g., Jones, *supra* note 25, at 109 (writing in 2001 that "European countries demand more offsets than any other region by far" and reporting that they accounted for two-third of offsets in 1993-96).

⁶² U.S. GEN. ACCOUNTING OFFICE, GAO-01-278T, DEFENSE TRADE: OBSERVATIONS ON ISSUES CONCERNING OFFSETS 3-5 (2000) [hereinafter GAO, OBSERVATIONS ON ISSUES CONCERNING OFFSETS] (saying "[c]ountries that prior to the 1990's did not require offsets now require them as a matter of routine policy").

⁶³ *Id.* at 3.

⁶⁴ Udis & Maskus, *supra* note 23, at 161-62 (reporting that "disproportionate share of the costs of offsets is borne by countries that find the competitive positions of their broad aerospace industrial structure eroded" and "most prominently by the United States, which, given its relatively large domestic market and its advanced technology by has been the dominant provider of offsets").

⁶⁵ BUREAU OF INDUS. & SEC., U.S. DEP'T OF COMMERCE, OFFSETS IN DEFENSE TRADE: EIGHTEENTH STUDY 1 (2013) [hereinafter U.S. DEP'T OF COMMERCE, EIGHTEENTH STUDY] (citing Defense Production Act Amendments of 1992, Pub. L. No. 102-558, § 123, 106

talks to end the practice.⁶⁶ Yet its policies have also been contradictory, if not hypocritical⁶⁷—denouncing offsets while at the same time using them to pursue its own national security interests⁶⁸ or at least making demands that are the functional equivalent of offsets,⁶⁹ and even subsidizing defense firms’ discharge of their offset obligations abroad.⁷⁰ Some commentators allege that the United States, despite official policy, actually opposes restricting offsets.⁷¹

The U.S. Congress has mandated efforts “to minimize offsets through international negotiation,” but little progress has been made.⁷² That ship may have sailed. While the United States once held a dominant position in the defense industry, its lead is slipping⁷³ and with it the opportunity to exercise leadership on shaping offset policy.⁷⁴

Just as defense cuts in the 1990s increased the demand for offsets, cuts in the last five years have accelerated the demand.⁷⁵ Experts estimate

Stat. 4198, 4206-07).

⁶⁶ See Udis & Maskus, *supra* note 23, at 162.

⁶⁷ Frank S. Petty, *Defense Offsets: A Strategic Military Perspective*, DEF. INST. SEC. ASSISTANCE MGMT. J. Summer 1999, at 71-72 (claiming the United States is “no less than hypocritical when” it opposes offsets yet maintains “Buy American” laws).

⁶⁸ The United States has long encouraged offsets in order to “(1) enhance the national security of friendly countries, (2) promote equipment standardization and interoperability among, allies, and (3) reduce redundant research and development.” Offsets Hearing, *supra* note 24, at 4 (statement of Frank C. Conahan, Government Accounting Office).

⁶⁹ See Udis & Maskus, *supra* note 54, at 371-72 (“most foreign observers [hold] that the [Buy American] requirement is indistinguishable from a standard offset requirement”).

⁷⁰ See *supra* note 46 (explaining that the United States sometimes reimburses U.S. contractors for offsets costs); see also DFARS 225.7303-2(a)(3) (2015) (holding that U.S. contractors selling to foreign governments through the U.S. foreign military sales program “may recover all costs incurred for offset agreements with a foreign government or international organization” under certain conditions).

⁷¹ See Petty, *supra* note 67, at 67 (noting several missed opportunities where the United States was “averse” to restricting or eliminating offsets).

⁷² See Herrnstadt, *supra* note 43, at 9.

⁷³ Jonathan Caverley & Ethan B. Kapstein, *Arms Away: How Washington Squandered Its Monopoly on Weapons Sales*, FOREIGN AFFAIRS, Sept./Oct. 2012, at 125, 125 (explaining that America’s share of the international arms trade once peaked in the 1990s at 60% and has since dropped again to about 30%).

⁷⁴ Hammond, *supra* note 13, at 182-83 (arguing that “[i]t is unlikely, given the falling share in market sales, that the United States can reverse the trend in offsets”).

⁷⁵ Hoyos, *supra* note 4, at 1 (noting that NATO defense budgets were cut by \$120 billion in 2010-13); JON BARNEY & MATTHEW BREEN, RISING TIDE: GAME CHANGING COMPETITION IN THE GLOBAL AEROSPACE & DEFENSE MARKET 2 (2014), <http://www.avascent.com/>

that offset obligations could reach \$500 billion within the next decade.⁷⁶ Avascient forecasts a 42.8% spike in offsets over the five year period from 2011 to 2016.⁷⁷ Growth is on the horizon.⁷⁸

Some still hold out hope that offsets may be eliminated. Brauer and Dunne argue that while offsets may not disappear, they “may be in retreat.”⁷⁹ They cite official U.S. and EU offset policies as evidence that the “economic arguments... have carried the day.”⁸⁰ There is some truth to that; the United

blog/2014/07/10/rising-tide-game-changing-competition-global-aerospace-defense-market/ (reporting “U.S. defense spending is flattening out while spending in the rest of the world is expected to top \$500 billion in 2016, up from just over \$300 billion in 2008”); DELOITTE, 2013 GLOBAL AEROSPACE AND DEFENSE INDUSTRY OUTLOOK 4 (2013), http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Manufacturing/gx_mfg_2013GlobalADIndustryOutlook.pdf (predicting shrinking budgets for the foreseeable future).

⁷⁶ ALESSANDRO R. UNGARO, TRENDS IN THE DEFENCE OFFSETS MARKET 7 (2013), <http://ssrn.com/abstract=2386528> (citing AVASCENT, THE HALF-TRILLION DOLLAR CHALLENGE: BUILDING SUCCESSFUL GLOBAL OFFSET STRATEGIES 1 (2012), <https://www.avascient.com/blog/2012/03/07/the-half-trillion-dollar-challenge-building-successful-global-offset-strategies/> (estimating that offsets will reach \$500 billion by 2016)); DOMINIK KIMLA, MILITARY OFFSETS & IN-COUNTRY INDUSTRIALISATION MARKET INSIGHT: TOP 20 MILITARY OFFSET MARKETS 15 (2013), www.frost.com/prod/servlet/cio/275947347 (stating “the cumulative value of military offsets obligations by top 20 countries is predicted to be \$424.57 billion” by 2021).

⁷⁷ Fryer-Biggs, *supra* note 46, at 18 (citing a study predicting that offsets would grow to \$50 billion in 2016).

⁷⁸ See Marjorie Censer, *Contractors Refocus on Offsets as International Market Heats Up*, INSIDE DEFENSE, June 3, 2015, <https://insidedefense.com/daily-news/contractors-refocus-offsets-international-market-heats> (saying that contractors look to international sales “to manage the U.S. downturn in defense spending,” which results in an increase in offsets).

⁷⁹ Brauer & Dunne, *supra* note 22, at 263.

⁸⁰ *Id.* (citing BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, OFFSETS IN DEFENSE TRADE, THIRTEENTH STUDY i (2008) (reiterating the United States’ policy that offsets are “economically inefficient and trade distorting”); EUROPEAN DEFENSE AGENCY, A CODE OF CONDUCT ON OFFSETS AGREED BY THE EU MEMBER STATES PARTICIPATING IN THE EUROPEAN DEFENSE AGENCY 2 (2005) <http://www.eda.europa.eu/docs/documents/CoC.pdf> (criticizing the efficiency of offsets but allowing that the defense market is imperfect)). See also Katharina Weiner, *Towards European Preferences? Implications of Directive 2009/81/EC on Domestic Preferences in Defense Procurement*, 47 PROC. LAW. 16, 16-17 (2012) (recounting efforts to end offsets in Europe); Aris Georgopoulos, *Revisiting Offset Practices in European Defense Procurement: The European Defense Agency’s Code of Conduct on Offsets*, 1 PUB. PROC. L. REV. 29, 33 (2011) (describing the EDA’s then-new Code of Conduct on Offsets).

States has certainly felt the need to pay lip service to the inefficiency of offsets,⁸¹ and some argue the EU has impliedly banned them since 2010.⁸²

On balance it seems offsets are here to stay. Recipients have market power and continue to demand them.⁸³ Multilateral efforts have so far come to naught. Few suppliers or their governments are willing to risk losing business, making unilateral action unlikely.⁸⁴ And supplier governments have more subtle reasons to favor offset-friendly policies.⁸⁵ In 1985, the General Accounting Office's Frank Conahan predicted that offsets have become a "fact of life in international trade" and "and will likely continue to be."⁸⁶

C. The Economic Case Against Offsets

The United States, EU, WTO, and Transparency International agree that offsets are inefficient and distort trade.⁸⁷ These indictments were explored in the author's previous Article,⁸⁸ so this section will be brief. That is not because these claims are without merit; they are not. Indeed, it seems the burden lies with those who seek to disprove these claims, insufficient data notwithstanding.⁸⁹

⁸¹ See sources cited *supra* notes 2 and 4.

⁸² See TRYBUS, *supra* note 42, at 418-21 (citing Council Directive 2009/43, 2009 O.J. (L 146) (EC); Dominik Eisenhut, *Offsets in Defence Procurement: A Strange Animal at the Brink of Extinction?*, 38 EUR. L. REV. 393, 396 (2013)).

⁸³ See Asif M. Khan, *Market Trends and Analysis of Defense Offsets*, 32 DEF. INST. SEC. ASSISTANCE MGMT. J., Summer 2010, at 138, 149-51 (describing a "steady increase" in demand for offsets in the past 20 years).

⁸⁴ U.S. DEP'T OF COMMERCE, EIGHTEENTH STUDY, *supra* note 65, at 1 (deferring to U.S. arms manufacturers who "see offsets as a reality of the marketplace for companies competing for international defense sales" and that several firms have reported that "offsets are usually necessary in order to make defense sales").

⁸⁵ Supplier governments favor offsets for a variety of reasons. For example, to spread the costs of expensive weapons systems by leveraging economies of scale. See Flamm, *supra* note 46, at 29-30. Offsets also enable interoperability and strengthen ties with allies. See David C. Mowery, *Offsets in Commercial and Military Aerospace: An Overview*, in TRENDS AND CHALLENGES IN AEROSPACE OFFSETS, *supra* note 15, at 19, 19-20 (explaining that the origin was the desire for interoperability and stronger friendships).

⁸⁶ Offsets Hearing, *supra* note 24, at 1 (statement of Frank C. Conahan, Government Accounting Office).

⁸⁷ Hoyos, *supra* note 4, at 1.

⁸⁸ Schoeni, *supra* note 5, at 389-95.

⁸⁹ Brauer & Dunne, *supra* note 22, at 259-60 (arguing that "from what data points are available, the general picture can be pieced together" and "[t]he onus to prove otherwise

Recipients demand offsets for a variety of reasons.⁹⁰ Some motives are economic. For example, it is thought that offsets can be used to capture economic rents, effect technology transfers, develop infant industries, break into previously inaccessible markets, create jobs, and promote general economic development, among other alleged benefits.⁹¹

But from the available data⁹² it appears that offsets rarely answer the purposes for which they are demanded. Brauer and Dunne state: “[t]o date, the evidence does not suggest that offsets advance countries’ long-term goals.”⁹³ They continue:

To summarize the evidence, it is now quite clear that offsets do not result in arms acquisition cost reductions, that offsets do not stimulate broad-based civilian economic development, that neither substantial nor sustained job creation occurs, not even within the military sector, that almost no successful technology transfer into the civilian sector is observed, and

lies with those who would champion” offsets).

⁹⁰ Markusen argues that “reasons of political economy” are the primary motive for offsets. See Ann Markusen, *Arms Trade as Illiberal Trade*, in *ARMS TRADE AND ECONOMIC DEVELOPMENT*, *supra* note 16, at 66, 85 (quoting HAMMOND, *supra* note 27, at 86 (“perhaps the most important insight into offsets is that they occur for political not for economic reasons”)). Section IV.C returns to the question of recipients’ motives and incentives.

⁹¹ See, e.g., GUY ANDERSON & BEN MOORES, *THE GROWING OFFSET BURDEN: WHAT A&D BUSINESSES NEED TO KNOW 4* (2014), www.ihs.com/offset (reporting that while assessing the impact of offsets is hard a rough estimate can be calculated from “headline benefits as a percentage of GDP” which “are typically less than 1% of GDP”); Martin, *supra* note 49, at 37-40 (also listing breaking up oligopolies, overcoming protectionism, and enabling technology spillovers); HAMMOND, *supra* note 27, at 37-42 (also listing securing a competitive advantage, developing trade, creating alternate financing options, bypassing commercial barriers, changing the terms of trade, avoiding cartel production limits, increasing market services, avoiding taxes/tariffs, and increasing diversification); Lloyd J. Dumas, *Do Offsets Mitigate or Magnify the Military Burden*, in *ARMS TRADE AND ECONOMIC DEVELOPMENT*, *supra* note 16, at 16, 19-21 (also listing substitutes for hard currency, maintaining jobs in the defense manufacturing sector, mitigating impacts of military procurement, and creating capital inflows); Brauer & Dunne, *supra* note 22, at 246-47 (also listing “targeting” development of “arms niches,” “maintain[ing] international competitiveness,” furthering “regional power ambitions,” “reviv[ing] a collapsed or failed indigenous arms industry,” “reaching an ever more advanced state of globally integrated arms manufacturing,” or “simply get[ting] arms and keep[ing] the money at home”).

⁹² Subsection II.D discusses the lack of sufficient data about offsets.

⁹³ Brauer & Dunne, *supra* note 22, at 259.

that only limited technology transfer into the military sector occurs, often over decades and at high cost. Moreover, what technology is transferred is quickly outpaced by continuous technology advances in the main developed countries[.]⁹⁴

Brauer and Dunne conclude that “[t]hese lessons can be drawn in spite of severe data problems[.]”⁹⁵ They are not alone in drawing these conclusions.⁹⁶

In addition, offsets are not free.⁹⁷ Recipients pay a premium when they compel suppliers to utilize more expensive sources and to work outside of their core expertise⁹⁸ because suppliers pass on the cost. Hartley reports that the markup is as high as 60 percent.⁹⁹ Whatever the exact figure is, any benefit

⁹⁴ *Id.*

⁹⁵ *Id.* at 259-60.

⁹⁶ See, e.g., Stephanie G. Neuman, *Arms Transfers, Military Assistance, and Defense Industries: Socioeconomic Burden or Opportunity?*, 535 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 102-03 (1994) (finding that “hopes for self-sufficiency have not been borne out, nor have imported technologies benefitted the civilian industrial sector”); Martin, *supra* note 49, at 40-44 (expressing doubts due to the lack of data, providing a useful review of U.S. Office of Management and Budget, and suggesting offsets do not seem to contribute to recipients’ objectives); ECONOMIST, *supra* note 39, at 63 (reporting offsets’ “promised benefits remain elusive”); Schoeni, *supra* note 5, at 391-95 (reviewing the anecdotal evidence of “failed offset policies”—including common objectives such as economic development, rent capture, technology transfer, marketing, support for infant industries, employment, and foreign currency shortages—and concluding that “[d]escribing offsets as a failure is a gross understatement”).

⁹⁷ ARMS TRADE AND ECONOMIC DEVELOPMENT, *supra* note 16, at 2 (arguing although offsets may sound “like a variant of the ‘free lunch’ idea” but “[a]s a matter of pure logic lunch may be free to those invited but the host still has to pay the bill”); Brauer & Dunne, *supra* note 22, at 251-54 (arguing that while “the expectation is that offsets will reduce arms procurement costs,” in practice “many countries recognize and pay for the additional cost”); THE ECONOMICS OF OFFSETS, *supra* note 18, at 7-8 (concluding from two surveys about offsets associated with UK defense imports and exports that “offsets *do* cost more than an equivalent off-the-shelf purchase and, not surprisingly, that vendors seek to include most of the premium in the selling price”).

⁹⁸ See Jones, *supra* note 25, at 112 (explaining that offsets increase costs as they “prevent the supplier from obtaining needed commodities from the most cost-effective sources”); Markusen, *supra* note 90, at 76-77 (observing that offsets force suppliers to function like venture capital firms and to work outside of their core competencies, increasing costs) (quoting HAMMOND, *supra* note 27, at 42-43); ECONOMIST, *supra* note 39, at 63 (reporting that “some projects take contractors disconcertingly far away from their core competence”).

⁹⁹ Hartley, *supra* note 44, at 42-43 (arguing that “offsets are not costless” and the buyer bears most of the costs” and that premiums range from “3% to 60% with a typical range

to recipients must be discounted by “the degree to which the purchase price of the weapons system has been artificially inflated to cover the cost of the offset.”¹⁰⁰ Further, Brauer and Dunne contend that this “overcost” does not actually buy development, sustainable employment, or technology transfer as recipients suppose.¹⁰¹

Finally, theory suggests that offsets are inefficient. Hammond lists several problems, including the double coincidence of wants, monopsonies, and increased transaction costs.¹⁰² Offsets’ “economic” rationale, he writes, “flies in the face of basic economic principles.”¹⁰³ Hammond is not alone in that assessment.¹⁰⁴

In sum, though most would concede that the data are insufficient for firm conclusions, the weight of the available evidence counsels against offsets.¹⁰⁵ And offsets are not free. Even if the data cannot yet prove offsets are inefficient, it appears that recipients are getting less than they bargain for.

D. Some Reasons for Doubting the Economic Case

Saying aloud that offsets may not be a bad thing sounds antediluvian; one does not share such opinions in polite company. Everyone simply *knows*

of 5% to almost 15%”); *see also* Wally Struys, *Offsets in Belgium: Between Scylla and Charybdis?*, in *ARMS TRADE AND ECONOMIC DEVELOPMENT*, *supra* note 16, at 163, 166-67 (estimating Belgium paid 20-30% in “overcosts”).

¹⁰⁰ Dumas, *supra*, note 91, at 21.

¹⁰¹ *See* Brauer & Dunne, *supra* note 22, at 254 (adding “[t]here is no question that offsets work in the sense that funds are returned to the importing country, although it has never yet been shown – and often been questioned – just what this foreign exchange saving would amount to”) (citations omitted).

¹⁰² HAMMOND, *supra* note 27, at 48-53.

¹⁰³ *Id.* at 48.

¹⁰⁴ *See, e.g.*, Brauer, *supra* note 16, at 54-55 (giving the case against offsets after listing theories purporting to justify them); Dumas, *supra* note 91, at 22-25 (finding “offsets cannot be expected to fully compensate for the economic disadvantages of military procurement, let alone to produce net economic benefits”); Hartley, *supra* note 44, at 39-40 (writing that “[s]tandard economic theory starts from the proposition that offsets are economically inefficient and welfare-diminishing reflecting trade diversion rather than trade creation”).

¹⁰⁵ Brauer and Dunne say, “while positive economic development effects from arms trade offset are not impossible, they are *theoretically implausible and empirically improbable.*” *ARMS TRADE AND ECONOMIC DEVELOPMENT*, *supra* note 16, at 5, 54, 58-61 (emphasis added).

offsets are “economically inefficient and trade distorting.”¹⁰⁶ This shibboleth “has been repeatedly uttered and has almost assumed a mantra-like quality.”¹⁰⁷ Yet it is possible to appreciate the merits of free trade and to still harbor doubts.

Following NYU’s Robert Howse’s work on countertrade,¹⁰⁸ the author previously contended that offsets may encourage trade, enhance welfare, and increase efficiency.¹⁰⁹ Howse lamented that countertrade has been “largely ignored” or “simply maligned” rather than properly studied.¹¹⁰ There is a similar hostility against defense offsets; it would seem that unorthodox views in the economics literature have likewise been ignored or maligned.

Too often the “economic” case against offsets amounts to little more than an appeal to common sense.¹¹¹ But economics is often counterintuitive, so this is a slippery touchstone.¹¹² Rigorous analysis of empirical evidence is the hallmark of economics; that is what separates it from softer social science.¹¹³

¹⁰⁶ See U.S. DEP’T OF COMMERCE, EIGHTEENTH STUDY, *supra* note 65, at 1 (citing Defense Production Act Amendments of 1992, Pub. L. 102-558, § 123).

¹⁰⁷ Bernard Udis, *Offsets and Industrial Participation*, in *THE MODERN DEFENSE INDUSTRY: POLITICAL, ECONOMIC, AND TECHNOLOGICAL ISSUES* 257, 257 (Richard A. Bitzinger ed., 2009).

¹⁰⁸ See generally Robert Howse, *Beyond the Countertrade Taboo: Why the WTO Should Take Another Look at Barter and Countertrade*, 60 U. TORONTO L.J. 289 (2010).

¹⁰⁹ See Schoeni, *supra* note 5, at 371-72, 395-403.

¹¹⁰ Howse, *supra* note 108, at 314.

¹¹¹ See HELGE HVEEM, *COUNTERTRADE: THE GLOBAL PERSPECTIVE* 91 (1988) (suggesting that the economists who aver that countertrade is inefficient do so based on “theoretical arguments”).

¹¹² A bestselling introduction to economics text tells a story in reply to the view that economics is just common sense: “An insolent natural scientist asked a famous economist to name one economic rule that is not either obvious or unimportant. Ricardo’s Law of Comparative Advantage was the immediate response,” which few policymakers understand, as “quotas, tariffs, and trade wars” attest. TODD G. BUCHHOLZ, *NEW IDEAS FROM DEAD ECONOMISTS: AN INTRODUCTION TO MODERN ECONOMIC THOUGHT* 65 (1989).

¹¹³ See, e.g., Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 39 (1966) (arguing economics “is a body of tentatively accepted generalizations about economic phenomena that can be used to predict the consequences of changes in circumstances”); Thomas Mayer, *Economics and Hard Science: Realistic Goal or Wishful Thinking?*, 18 *ECON. INQUIRY* 165, 165-66 (1980) (arguing “the ability to test hypothesis rather than the use of advanced mathematics to formulate hypothesis is the distinguishing mark of a hard empirical science”); *Soft Science No More*, *ECONOMIST*, Oct. 11, 2003, at 78, <http://www.economist.com/node/2121822>, (arguing economics has become a hard science based on its use of sophisticated mathematical tools). Economics’

Such analysis remains impossible without more data.¹¹⁴ And as a rule, one should be wary of economists hawking opinions ungrounded in evidence.¹¹⁵

Data shortage is not the only problem. Ours is a fallen world: Men are not angels, geometry not Euclidian, particulars not their Platonic forms. And “[i]mperfections abound” in the arms market.¹¹⁶ This market is “complex, often lacking in transparency, and always hyped as operating on the ‘dark side,’ characterized by corruption, bribery, shady deals, and nepotism.”¹¹⁷

status as a science is contested. *See, e.g.*, Brian Leiter, *Is Economics a “Science”?*, LEITER REPORTS: A PHILOSOPHY BLOG (July 16, 2004), http://leiterreports.typepad.com/blog/2004/10/is_economics_a_.html (challenging the assertion that economics is a science merely because it makes falsifiable claims and tests them).

¹¹⁴ Regarding the limited data about offsets there is general agreement. *See, e.g.*, Hoyos, *supra* note 4, at 16 (quoting an Avascent executive who says that “mechanics to track, manage and report offsets have not kept up with their growth”); Adel Ben Youssef & Gueorgui Ianakiev, *Intégration du Marché Européen de la Défense et Politiques d’Offsets: Une Analyse en Termes de Coûts de Changement et d’Externalités Technologiques*, 12/13 *ECONOMIE ET INSTITUTIONS* 113, 119 (2008-09) (say that offsets are “un phénomène peu étudié dans la littérature économique et des statistiques peu disponibles”); Ron Matthews, *Defense Offsets: Policy Versus Pragmatism*, in *ARMS TRADE AND ECONOMIC DEVELOPMENT*, *supra* note 16, at 89, 95 (explaining that “empirical data about offsets difficult to come by” in part due to “the subject’s sensitivity”); MARK A. LORELL, JULIA LOWELL, RICHARD M. MOORE, VICTORIA GREENFIELD & KATIA VLACHOS, *GOING GLOBAL, U.S. GOVERNMENT POLICY AND THE DEFENSE AEROSPACE INDUSTRY* 49-50 (2002) (noting the limitations of the “statistical snapshots,” which are the only available data); Offsets Hearing, *supra* note 24, at 9 (statement of Frank C. Conahan, Government Accounting Office) (lamenting the “dearth of information on the nature and scope of” offsets); GAO, *OBSERVATIONS ON ISSUES CONCERNING OFFSETS*, *supra* note 62, at 4 (writing that “the lack of reliable data on the impact of offsets on the U.S. economy has been a concern for many years”); Neuman, *supra* note 96, at 107 (writing that 30 years’ “research on the consequences of various military activities for the civilian sector has failed to yield strong and unambiguous evidence one way or the other”).

¹¹⁵ Even critics concede that “offsets may entail net benefits” and this is a question that “needs to be decided empirically.” Brauer, *supra* note 16, at 55; *see also* Udis & Maskus, *supra* note 23, at 161 (observing “there can be no a priori presumption of net welfare gain or loss in general” from offsets). Further, at least one report suggests that having more data may cast doubt on allegations that offsets are trade distorting. *See* Björn Hagelin, Pieter D. Wezeman, Siemon T. Wezeman & Nicholas Chipperfield, *International Arms Transfers*, in *STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2002: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY* 373, 395 (2004) (citing PRESIDENTIAL COMMISSION ON OFFSETS IN INTERNATIONAL TRADE, STATUS REPORT (2001)) (reporting that the interim report of the Commission “downgraded the overall negative effect of offsets in military trade” concerning the “distortion of the competitive market”).

¹¹⁶ Matthews, *supra* note 114, at 89.

¹¹⁷ *Id.*

Yet the desirability of offsets is sometimes evaluated as if this market were perfect. Such abstractions should give way to the reality of the “second best”—that is, the world we actually live in—where offsets may serve a corrective function.¹¹⁸

Besides a few economists who have investigated offsets, few have devoted much attention to this question.¹¹⁹ Economics has much to say, however, about the possibility that countertrade may mend flaws in the market,¹²⁰ and the author previously argued that these same insights may apply to offsets.¹²¹ He presented arguments that offsets create efficiencies by reducing transaction costs and alleviating information asymmetries.¹²² These are not the only arguments that economists make for countertrade but are two of the most noteworthy.¹²³

¹¹⁸ Schoeni, *supra* note 5, at 395-403 (describing the theory of second best and the corrective function offsets may serve).

¹¹⁹ See, e.g., Ethan B. Kapstein, *International Collaboration in Armaments Production: A Second-Best Solution*, 106 POL. SCI. Q. 657, 660-62 (1992) (arguing offsets appeal to statesmen seeking to avoid the “efficiency trap” where efficiency alone might dictate foregoing domestic arms production).

¹²⁰ See, e.g., Udis & Maskus, *supra* note 23, at 154-155 (arguing that offsets may result in more efficient contracts due to “multidimensional advantages that are not amenable to a single efficiency criterion” and that offsets may have a “pro-competitive” effect); Michael Thorpe, *Economic Motivations and the Development of Countertrade*, 23 (Curtain University of Technology, School of Economics and Finance, Working Paper 90.07, 1990) (arguing that countertrade may have an “optimizing response” and that under the circumstances “it is not possible to clearly determine what might happen to welfare).

¹²¹ Schoeni, *supra* note 5, at 371-72. But the author was not the first to note the similarity of countertrade and offsets, see, e.g., Neuman, *supra* note 17, at 184 (calling their similarities “striking”), nor the first to suggest that “research in one area can inform developments in the other,” Martin, *supra* note 18, at 15 (observing that there is a “parallel and at times overlapping literature on countertrade” that should inform research about offsets), nor the first to suggest that offsets may be efficient. Chuck Grieve, *Why It’s Good to Switch on to Offsets*, DEFENCE, May 8, 2015, at 53-56, <http://www.offsets2000.com/wp-content/uploads/2013/07/Offsets-2000-Roger-Bulgin-Defence-Interview.pdf> (contending that recipients increasingly use offsets “as a sophisticated tool of national development”); Brajesh Chhibber & Rajat Dhawan, *A Bright Future for India’s Defense Industry?*, MCKINSEY ON GOV’T, Spring 2013, at 44, http://www.mckinsey.com/~media/mckinsey%20offices/india/pdfs/a_bright_future_for_indias_defense_industry.ashx (arguing offsets could spur economic growth).

¹²² Schoeni, *supra* note 5, at 399-403.

¹²³ Economists make other arguments that countertrade may be efficiency enhancing which were not presented in the author’s previous Article, including the following. First, they may facilitate transactions that would not otherwise occur, thereby liberalizing trade flows. See Claude Duval, *Regulatory and Contractual Aspects of a Countertrade*

There is ample anecdotal evidence supporting the view that offsets are inefficient. And this view accords not only with received opinion but with “common sense” economics. Many have been persuaded that offsets are inefficient by such an appeal to common sense. But drawing this conclusion from the available evidence is “premature”¹²⁴ and the conclusion itself may be false.¹²⁵

The author’s previous Article presented another possibility: that offsets are a rational response to imperfect markets and may even enhance

Agreement and Ways and Means, from the Exporter’s Perspective, to Address Issues Which May Arise in Connection with Its Implementation, in INTERNATIONAL CHAMBER OF COMMERCE, COUNTERTRADE: OFFSET CONTRACTS, Publication No. 440/7, 9, 11 (1989) (explaining that from an exporter’s point of view offsets are “not a first choice or a preferred practice” but rather should “be viewed as the only alternative to not trading”); Dorothy A. Paun, Larry D. Compeau & Dhruv Grewal, *A Model of the Influence of Marketing Objectives on Pricing Strategies in International Countertrade*, 16 J. PUB. POL’Y & MARKETING 69, 72 (1997) (arguing that offsets help firms break into new markets); Jean-François Hennart, *The Transaction-Cost Rationale for Countertrade*, 5 J.L. ECON. & ORG. 127, 133-38 (1989) (arguing offsets facilitate transactions that would not otherwise happen due to high transaction costs). Second, they act as a hedge against uncertainty. See Martin, *supra* note 18, at 24-26 (summarizing several economists’ views that offsets can compensate for uncertainty); William D. Zeller, *Countertrade, The GATT, and the Theory of the Second Best*, 11 HASTINGS INT’L & COMP. L. REV. 247, 260 (1988) (arguing that “countertrade may provide the “least expensive hedge against uncertainty”); Erwin Amann & Dalia Marin, *Risk-Sharing in International Trade: An Analysis of Countertrade*, 42 J. INDUS. ECON 63, 75 (1994) (arguing that offsets substitute for futures market and hedge against risk); John E. Parsons, *A Theory of Countertrade Financing of International Business* 3, 9-14 (MIT Working Paper No. 1632-85, 1985) (arguing offsets “represent solutions to difficult problems of uncertainty of trade over time”) (emphasis in original); Dalia Marin & Monika Schnitzer, *Tying Trade Flows: A Theory of Countertrade with Evidence*, 85 AM. ECON. REV. 1047, 1048-50 (1995) (arguing that offsets can address moral-hazard problems). Third, offsets may lead firms to identify better subcontractors. See TODD SANDLER & KEITH HARTLEY, *THE ECONOMICS OF DEFENSE* 240 (1995) (arguing “offsets might contribute to efficiency improvements if they remove nontariff barriers and lead prime contractors to search for, and to discover, more efficient subcontractors located overseas”); Udis & Maskus, *supra* note 23, at 163 (arguing if offsets lead a primes to “broaden” their search for subcontractors, that offsets “may actually lead to a more efficient pattern of production linkages and a welfare-enhancing arrangement”).

¹²⁴ See Udis & Maskus, *supra* note 23, at 162 (finding banning offsets would be “premature” based on “general theoretical considerations” and “phenomena in the real world of offsets that force the observer to be cautious before rushing to condemn all offsets as trade diverting and welfare reducing”).

¹²⁵ Sandler and Hartley argue “[o]ffsets need not necessarily be inefficient and welfare reducing” and may even “contribute to efficiency improvements” in some circumstances. SANDLER & HARTLEY, *supra* note 123, at 240.

efficiency.¹²⁶ It is too soon to know if this will be borne out. Meanwhile, more data ought to be gathered to establish if offsets sometimes serve a useful function or to confirm that they are always inefficient.¹²⁷

Until better data are available, prognostication will remain guesswork and other considerations come to the fore. Hence the need to broaden the scope of the debate.

III. BROADENING THE PUBLIC POLICY DEBATE

The previous Article listed three considerations bearing on the question of offsets: wider economics, especially opportunity cost;¹²⁸ corruption risks;¹²⁹ and security from supplier governments' perspective.¹³⁰ This section revisits those three considerations.

This section identifies arguments for and against but does not presume to end the debate. There are no easy answers to these questions. Like most policy questions, the questions about offsets raised here are moot, are not susceptible to simple resolution, and frequently come down to questions of first principle.

A. Economics

The author previously argued, "Even if offset policies are efficiency-enhancing, economics may counsel against offsets for other reasons" because "[m]aximizing efficiency is not the only lesson from economics."¹³¹ This section reconsiders opportunity cost, and then presents three new economic questions: what constitutes an "economic" argument; the benefits that can accrue from security cooperation; and that attempting to eliminate offsets may contravene the law of supply and demand. It starts with the first new question, returns to opportunity cost, and covers the two new issues in turn.

¹²⁶ "In a world of imperfect markets, oligopoly rents, complex transactions, and asymmetrical information, offsets might enhance the welfare of the purchaser[.]" SANDLER & HARTLEY, *supra* note 123, at 240.

¹²⁷ See Schoeni, *supra* note 5, at 404-08 (describing a plan for gathering better data locally and globally).

¹²⁸ *Id.* at 411.

¹²⁹ *Id.* at 411-12.

¹³⁰ *Id.* at 412-13.

¹³¹ *Id.* at 411.

1. Global welfare, not local balance sheets

Too often the “economic” debate is couched in terms of domestic costs and benefits; for example, the burden on suppliers or their governments or the high cost that recipients pay. Yet, properly understood, “economics is about the material and immaterial well-being of all people.”¹³² “By training,” Brauer continues, “economists cannot but look with great unease at analyses that are limited to one or the other interest group (labor unions, employees, one country).” Thus, an “economic valuation of arms trade offsets must therefore ultimately ask what the contract contributes to the lives of the people that finance it. And it must ask this question not only with regard to the flow-back of funds (the particular offset deal) but also, and especially with regard to the out-flow of funds – the arms deal itself.”¹³³

Economics has been misused, or selectively used, in this debate. This is not the only attempt to invoke economics like this. As the field becomes focused on “abstract models and mathematical theories” and “less relevant to public discourse and inaccessible not only to the larger public but also to academic colleagues,”¹³⁴ the “intellectual vacuum” is “too frequently filled” by those “who misunderstand economics or deliberately misuse” its findings.¹³⁵

To observe that economics is sometimes misused is not, however, to say the discipline has nothing to add. Indeed, the debate about offsets is largely, though not only, a question of economics. But whether offsets should be promoted, tolerated, or eliminated is not, or should not be, merely a question of any one party’s interests. Whether economics counsels for or against offsets is an empirical question¹³⁶ that is still undecided and, ultimately, will require an “economic audit” to weigh the costs and benefits for *all* interested

¹³² Brauer, *supra* note 16, at 61 (citing Bruno S. Frey & Alois Stutzer, *What Can Economists Learn from Happiness Research?*, 40 J. ECON. LITERATURE 402-35 (2002)).

¹³³ *Id.*

¹³⁴ ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 13 (2001).

¹³⁵ *Id.*

¹³⁶ See Brauer, *supra* note 16, at 55 (“offsets may entail a net benefit when compared with the *status quo* and that the issue needs to be decided empirically”); see also Markusen, *supra*, note 90, at 83 (arguing that offsets are a problem yet holding that the discerning “magnitude” is an empirical question).

parties.¹³⁷ Until such an audit is available, assertions about “economics” must be taken with a pinch of salt.

In addition to “economic” appeals being limited to the interests of particular parties, the invocation has also been too narrow in another sense. Critics speak of the “economics” as if this were a binary question: efficient or inefficient? To be sure, economists are more than bean counters. There is more to economics than the calculation of Pareto efficiency,¹³⁸ as the next subsections illustrate.

2. Recipients’ high opportunity costs

The author previously remarked on the lessons to be drawn from the principle of opportunity cost.¹³⁹ This is the price “paid” for foregoing one option in order to pursue another.¹⁴⁰ This would suggest that even if offsets are “welfare-enhancing in a narrow sense,” such benefits may not “overcome the welfare-diminishing effects of military expenditure that finances the arms trade in the first place.”¹⁴¹

Transparency International flagged this as a particularly significant issue for poor countries, especially when used for promotion of domestic industries.¹⁴² This is because “resources used to facilitate investment through offsets might be better deployed elsewhere.”¹⁴³ Offsets are costlier for poor

¹³⁷ Brauer, *supra* note 16, at 58-59 (“Anecdotes abound, but case studies are few, and none are comprehensive in the sense of an economic audit that would assess all costs and benefits to all people.”).

¹³⁸ See Schoeni, *supra* note 5, at 411 (citing Brauer, *supra* note 16, at 62 (arguing that even if purchases are “efficient” in some narrow sense that does not mean that recipients have set appropriate goals for arms imports); *contra* Peter Hall & Stefan Markowski, *On the Normality and Abnormality of Offset Obligations*, 5 DEF. & PEACE ECON. 173, 176 (1994) arguing that once “the objectives of defence procurement have been agreed,” the only remaining question is if “an offset requirement [is] an efficient means of pursuing them”).

¹³⁹ *Id.* at 411.

¹⁴⁰ See FRANCESCO PARISI, *THE LANGUAGE OF LAW AND ECONOMICS: A DICTIONARY* 208 (2013) (defining the opportunity cost of a decision as “the value of the second best (unchosen) alternative”).

¹⁴¹ Dumas, *supra*, note 91, at 5.

¹⁴² TRANSPARENCY INT’L, *supra* note 41, at 20-21 (citing Davies, *supra* note 44, at 93-94).

¹⁴³ *Id.* at 21; *see also* Dumas, *supra*, note 91, at 26-27 (observing that “[m]odern militaries are expensive,” and so are the “human and physical capital investment projects that catalyze real economic development,” and consequently few “countries of limited

countries in both relative and absolute terms. They are costly in absolute terms since recipients pay more than they would for commercial-off-the-shelf goods and services.¹⁴⁴ They are especially costly in poor countries for two reasons. First, the burden of military spending is heavy, which offsets exacerbate.¹⁴⁵ Second, poor countries face “competing needs and demands on public spending” more acutely than do rich countries, meaning that “the actual burden of even a moderate share of military spending in GDP is higher for poor countries than the GDP share suggests.”¹⁴⁶ For these reasons, poor countries’ spending on offsets is especially troubling.

3. Security cooperation and economic growth

Offsets are often part of a complex web of trade and security agreements among allies. It is an axiom of political economy that nations align “politically, economically, and diplomatically” with those “with whom they trade arms.”¹⁴⁷ Rarely is the purchase of arms once and done. Importing and exporting nations often form business relationships spanning decades; contracts for training, maintenance, and spare parts cannot be delivered all at once and, thus, are far more valuable than the original sale of equipment.¹⁴⁸ Offsets can deepen such relationships, as recipients demand compensation for the arms purchased, further tying together recipient and supplier countries in reciprocal business relationships.¹⁴⁹

economic means can afford to do both”).

¹⁴⁴ TRANSPARENCY INT’L, *supra* note 41, at 23. “Opportunity costs associated with mandated arms trade offsets, to force or compel the development of indigenous arms industry, appear to be higher than voluntarily negotiated arms trade offsets between supplier and recipient buyer state[.]” HANDBOOK OF DEFENSE ECONOMICS: VOLUME 2: DEFENSE IN A GLOBALIZED WORLD 988 (Todd Sandler & Keith Hartley eds., 2007) (citing Hall & Markowski, *supra* note 138); *cf.* Schoeni, *supra* note 5, at 392 n.158, 408-10 (summarizing the economics literature criticizing the inefficiency of mandatory offsets and praising voluntary offsets).

¹⁴⁵ Elizabeth Sköns, *Military Expenditure: Investing in Security*, 3 DISARMAMENT FORUM 3, 4 (2005) (noting a low per capita GDP means “even a modest defence force may consume a significant share of national resources”).

¹⁴⁶ *Id.*; *see also* Neuman, *supra* note 96, at 96 (summarizing the argument that the opportunity cost for developing countries is that spending on arms imports “crowd[s] out public and private investment, depriving the economy of vital growth inputs”); Brauer, *supra* note 16, at 61-62 (“squarely question[ing] the notion that developing countries need to import major weapons systems in the first place”).

¹⁴⁷ Petty, *supra* note 67, at 74.

¹⁴⁸ *See* Neuman, *supra* note 96, at 96.

¹⁴⁹ *See generally* MIKE MARRA & JAMES GORDON, AMERICA – THE ARSENAL OF SOVEREIGNTY

Offsets are akin to foreign military aid. Indeed, they are mirror images. Both bind countries together “politically, economically, and diplomatically” through arms sales and associated trade deals.¹⁵⁰ Both are complex public-private arrangements. Here lies the difference. With offsets, recipients choose from whom to purchase arms and demand offsets; with foreign military aid the roles are reversed and the arms exporting countries choose the aid recipients and subsidize those countries’ military purchases. What differs is the initiating party. But the net result is the same: both arrangements deepen ties between the arms importing and exporting countries.

The similarity between foreign military aid and offsets is noteworthy because a recent study suggests that enduring military connections can affect economic growth. Using data gathered from 1950-2000, Garrett Jones and Tim Kane show that a statistically significant correlation exists between U.S. military deployments and host countries’ economic growth.¹⁵¹ Mancur Olson,¹⁵² Paul Collier,¹⁵³ and others¹⁵⁴ had long postulated that foreign military

(2014), http://www.globalsecurity.org/military/library/report/2014/marra-gordon_arsenal-of-sovereignty.pdf (describing the interdependence that direct offsets can create between recipients and supplier countries); Petty, *supra* note 67, at 74-75 (arguing the “follow-on activities” associated with FMS can foster ties between the exporters and importers).

¹⁵⁰ Petty, *supra* note 67, at 74. *See also* Ethan B. Kapstein, *Allies and Armaments*, SURVIVAL, Summer 2002, at 141, 143-47 (providing an overview of the defense economics literature maintaining that armaments cooperation entangles allies and leads them to form deeper relationships).

¹⁵¹ Garrett Jones & Tim Kane, *U.S. Troops and Foreign Economic Growth*, 23 DEF. & PEACE ECON. 225 (2012). They “utilize a new dataset documenting the deployment of U.S. troops to foreign countries over the years 1950–2000, based on U.S. Department of Defense records, which covers all countries of the world.” *Id.* From an econometric review of this data set, they show that the “presence of those forces had a significant and robustly positive correlation with economic growth.” *Id.* at 226. “On average,” they found, “an increase in troop levels of an order of magnitude is associated with a 0.3 percent higher annual long-term growth rate of GDPP.” *Id.* They consider three possibilities: “the security umbrella provided by U.S. forces, diffusion of technology and institutions, and finally an aggregate demand stimulus from the U.S. forces.” *Id.* at 227, 240-42.

¹⁵² *See* MANCUR OLSON, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES 3-6, 75-77, 175-76 (1982) (speculating on the role foreign occupation plays and citing studies on the “economic miracles” of Japan and Germany and contrasting countries with lesser occupations).

¹⁵³ *See* PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT 124-34 (2007) (arguing that “external military intervention has an important place in helping the societies of the bottom billion” and that their “own military forces are more often part of the problem”).

¹⁵⁴ *See, e.g.*, Steve Chan, *Growth with Equity: A Test of Olson’s Theory for the Asian*

deployments could have such an effect. Jones and Kane now provide robust evidence.¹⁵⁵

Jones's and Kane's findings are significant to the question of offsets because their work suggests there is a "bonus" to establishing military ties with some countries. Their research concerned the number of boots on the ground.¹⁵⁶ But there is a substantial overlap between the countries that buy U.S. weapons and the countries that host U.S. soldiers, sailors, and airmen.¹⁵⁷ Sometimes troops come first and the arms trade comes later; sometimes vice versa. Whether these relationships are initiated through military aid, offsets, or commercial sales may be immaterial if the ties developed through trade are in fact related to the economic "bonus" associated with the presence of deployed troops.¹⁵⁸ Even if offsets rarely answer the purposes for which they are demanded, they may have unintended or indirect benefits.

Pacific-Rim Countries, 24 J. PEACE RES. 135, 138 (1987) (arguing foreign occupation can "disrupt, weaken, inhibit, or uproot special interests that block socioeconomic change" and thereby fosters economic growth); Gary A. Stradiotto, *Democratizing Iraq: Regime Transition and Economic Development in Comparative Perspective*, 21 INT'L J. WORLD PEACE, no. 2, 2004, at 3, 16-17 (speculating on how Iraq's growth might benefit from military occupation just as Germany and Japan did).

¹⁵⁵ Little empirical work had been done on "war consequences," including its effect on economic growth. See, e.g., Jeffrey Pickering & Emizet F. Kisangani, *Political, Economic, and Social Consequences of Foreign Military Intervention*, 59 POL. RES. Q. 363, 373 (2006) (noting a scholar complaining of the "paucity of war consequence studies" in 1993 and writing that "little has changed since") (quoting William R. Thompson, *The Consequences of War*, 19 INT'L INTERACTIONS 125, 126 (1993)).

¹⁵⁶ Jones and Kane predict a "tenfold increase in troop levels in the typical country is associated with a one-third percentage point higher long-term growth rate of per capita gross domestic product (GDP) per year in that country during 1950-2000." Jones & Kane, *supra* note 151, at 231. "This would imply that if a country went from hosting no U.S. soldiers to hosting 100,000 soldiers per year for a decade—going from essentially no troops to the level of troops the U.S. currently has in Germany—that country would be predicted to grow an average of 1.8 percent faster per year." *Id.*

¹⁵⁷ The arm trade fosters closer ties between importers and exporters. Petty, *supra* note 67, at 74 (noting that nations tend to align "politically, economically, and diplomatically" with countries "with whom they trade arms").

¹⁵⁸ Jones and Kane test three hypotheses for what causes the growth where U.S. troops deploy: the "security umbrella" associated with foreign troop deployments, the diffusion of technology and economic institutions (e.g., "[d]iscipline, lawful authority, respect for human and economic rights, construction standards"), and the Keynesian hypothesis that increased aggregate demand causes economic growth. *Id.* at 227-28, 240-42. They find that the data do not support "support the notion that Keynesian expenditures from a larger troop presence stimulate host-country GDP[.]" *Id.* at 245. They conclude that the other two hypotheses are more convincing. They argue that the data demonstrate

So Jones's and Kane's work may explain why recipients are willing to pay a premium for offsets: they may provide recipients the opportunity to enter into deep relationships with advanced economies to overcome stagnation. If that works, that would explain why offsets are an attractive policy tool, even if the direct benefits "remain elusive"¹⁵⁹

4. The law of supply and demand

Economists have long derided the United States' "war on drugs" as a war on the law of supply and demand.¹⁶⁰ While drug trade is an imperfect analogy, perhaps a ban on offsets could have similar unintended consequences such as forcing offsets underground.¹⁶¹

that "the security guarantee of U.S. troops is a powerful signal to foreign investors" results in increased foreign direct investment. *Id.* at 241. Further, they contend that the diffusion argument has merit, both in terms of the U.S. military's "explicit" efforts to build economic and political institutions and its "exemplary role" whereby "the presence of U.S. troops involves cross-cultural exposure, and that means the U.S. standards of law, property, human rights, and respect for human dignity are inevitably on display." *Id.* at 242. This is where offsets may be relevant because the DoD's foreign military sales program is frequently the medium for selling U.S. arms abroad and leads to further "cross-cultural exposure". Such relationships span decades, and uniformed personnel have a role not only in selling the hardware but also in training foreign militaries to use and maintain it. Importers, in turn, demand offsets not only to form such relationships in the first place but also to prolong and deepen commercial and political ties.

¹⁵⁹ ECONOMIST, *supra* note 39, at 63 (enumerating several examples of such failed offset projects, such as Raytheon's infamous shrimp farm in Saudi Arabia).

¹⁶⁰ See, e.g., *Supply and Demand*, ECONOMIST, June 2, 2011, <http://www.economist.com/node/18772646>; *In America, Lessons Learned*, ECONOMIST, Mar. 5, 2009, <http://www.economist.com/node/13234144>. The argument goes that the justice system pursues dealers not users, increasing the price of illegal drugs and encouraging more suppliers to enter the market. See, e.g., Tom Wainwright, *How Economists Would Wage the War on Drugs*, WALL ST. J., Feb. 19, 2016, <http://www.wsj.com/articles/how-economists-would-wage-the-war-on-drugs-1455895053>; *The Wars Don't Work*, ECONOMIST, Apr. 30, 2015, <http://www.economist.com/news/leaders/21650112-one-war-drugs-ends-another-starting-it-will-be-failure-too-wars-dont-work>.

¹⁶¹ Or perhaps outlawing offsets would push them *further* underground. The illegal arms trade is already big business for organized crime around the world. See MISHA GLENNY, *McMAFIA: A JOURNEY THROUGH THE GLOBAL CRIMINAL UNDERWORLD* 6-7, 28-29, 91-95, 126-27, 197-201 (2008) (recounting the illegal arms trade in Afghanistan, Angola, Argentina, the Balkans, Bulgaria, the Congo, Russia, and the Ukraine). And the author interviewed one defense industry insider who observed that what we know about offsets is limited to what is reported and speculated that arms transactions with Russia and China frequently involve *sub rosa* arrangements that are not formally reported as "offsets."

Though speculative, the notion that a prohibition could drive offsets underground is not fanciful.¹⁶² Recipients are oligopsonies.¹⁶³ Monopsonies exist when there is only one buyer in a market; oligopsonies exist when there are only a few. Such conditions shift power to buyers.¹⁶⁴ Apart from the limited number of buyers, recipients also wield lopsided market power in the arms market for other reasons.¹⁶⁵ The result is that recipients can name their terms. What they want is offsets. Like the drug trade, as long as that demand exists, there will be willing suppliers. A ban would have little effect on that economic reality. Further, for the same reasons offsets are an “ideal playground” for corruption, such corruption will flourish if offsets are forced underground, where monitoring would be impractical.¹⁶⁶

B. Corruption

Corruption “merits closer scrutiny[.]”¹⁶⁷ That may be the single “most important consideration weighing against offsets” especially if “efficiency is no longer controlling” and, thus, such questions “weigh more heavily on the debate[.]”¹⁶⁸ Given that several articles have ably summarized the cor-

¹⁶² See, e.g., TRYBUS, *supra* note 42, at 196 n.56, 215 (recounting the EDA’s failed experience with a single portal to provide transparency about offsets among member states).

¹⁶³ Travis Taylor, *Using Procurement Offsets as an Economic Development Strategy*, in ARMS TRADE AND ECONOMIC DEVELOPMENT, *supra* note 16, at 30, 31 (describing offset recipients as oligopsonies).

¹⁶⁴ See ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1-2 (2010) (listing examples of monopsonies, including college athletic scholarships in the United States and tuna canneries in California, where one buyer exercises market power).

¹⁶⁵ See *infra* notes 237-240 and accompanying text.

¹⁶⁶ See TRANSPARENCY INT’L, *supra* note 41, at 2, 15-19 (diagnosing the corruption risks from offsets). In fact, since monitoring would decrease if offsets were forced underground, prohibition would exacerbate such risks. *Id.* at 16 (listing opacity among the corruption risks because “[c]orruption thrives where it is shielded from attention”).

¹⁶⁷ Schoeni, *supra* note 5, at 412.

¹⁶⁸ *Id.*

ruption risks,¹⁶⁹ Section II.B takes a contrarian perspective.¹⁷⁰ After a review of the characteristics said to make the offsets trade prone to corruption, the author suggests the problem may lie not with offsets but with the arms trade generally. In other words, offsets may be an epiphenomenon, not the cause, of corruption in the arms trade.

1. Offsets as an “ideal playground” for corruption

Arms procurement is susceptible to corruption.¹⁷¹ Offsets are said to impose an even greater risk. Indeed, Transparency International claims that offsets are an “ideal playground for corruption” since offsets receive far less scrutiny than the primary transactions.¹⁷² They lament that “there is almost no due diligence on potential improper beneficiaries from the offsets, no monitoring of performance on offset contracts, no audits of what was delivered compared to the pledges, and no publication of offset results, benefits or performance[.]”¹⁷³ And they name three categories of “corruption risks”: that governments may be persuaded to buy arms they would not otherwise

¹⁶⁹ TRANSPARENCY INT’L, *supra* note 41, at 15-17 (describing three characteristics of offsets that make them susceptible to corruption risks); Peter Platzgummer, *Arms Trade Offsets and Cases of Corruption: The Usage of Anti-Corruption Tools in Special Forms of Arms Acquisitions*, 14 INT’L PUB. MGMT. REV., no. 2, 2013, at 17, 22-27 (surveying the major cases of corruption in offsets in 1980-2012); Ryan J. Lambrecht, *The Big Payback: How Corruption Taints Offset Agreements in International Defense Trade*, 70 AIR FORCE L. REV. 73, 94-99 (2013) (listing the main corruption risks as bribery of foreign officials, commercial bribery, internal control violations, and false claims); Mark J. Nackman, *A Critical Examination of Offsets in International Defense Procurements: Policy Options for the United States*, 40 PUB. CONT. L.J. 511, 517-18 (2011) (listing Foreign Corrupt Practices Act violations, antitrust violations, and various forms of “bribe and extortion” among the corruption risks).

¹⁷⁰ To be clear, this contrarian view is adopted to encourage further study of these questions. It is not the author’s position that rampant corruption should be ignored, tolerated, or encouraged. But it seems that thinking about corruption with regard to offsets is muddled. It is axiomatic that corruption is bad in this realm as in any other. Everyone agrees on that much. Less clear are the root causes and the solutions. The fact that corruption is bad leads some, it seems, to skip over challenging questions that must be considered before corruption can be effectively addressed.

¹⁷¹ See Susan Willett, *Defence Expenditures, Arms Procurement and Corruption in Sub-Saharan Africa*, 36 REV. AFR. POL. ECON. 335 (2009) (reporting there is a “web of corruption” between arms manufacturers and sub-Saharan Africa); Sanjeev Gupta, Luiz R. de Mello & Raju Sharan, *Corruption and Military Spending*, 17 EUR. J. POL. ECON. 749 (2001) (finding an empirical correlation between military spending and corruption).

¹⁷² TRANSPARENCY INT’L, *supra* note 41, at 2.

¹⁷³ *Id.* at 2, 17 (arguing that offsets are “under-scrutinised in comparison to the major contract”).

want;¹⁷⁴ that source selection process is uncompetitive or “non-transparent;”¹⁷⁵ and that purchasing officials accept kickbacks for influence.¹⁷⁶

These concerns are not without merit. Some features of the offsets trade may indeed make it especially susceptible to corruption. Transparency International blames the use of offsets to promote local industries for creating an incentive to bribe public officials who exercise discretion in the allocation of “access” to such business opportunities.¹⁷⁷ Further, they contend that since offsets are capital-intensive there are special risks: those seeking bribes favor capital-intensive projects since “there is more potential for illicit gain and less chance of detection” and they “tend to be long-lasting, technical, [and] difficult to comprehend in the absence of specialist knowledge[.]”¹⁷⁸ Any attempt to curtail offsets should take into account these risks, as well as the incentives that give rise to such risks.

¹⁷⁴ *Id.* at 2, 18. *See also* Lambrecht, *supra* note 169, at 77 (explaining “much of the offset work incentivizing [arms procurement] bears no direct relation to the basic defense item” and this “disconnect...raises a suspicion that offset incentives contain improper or corrupt inducements”).

¹⁷⁵ TRANSPARENCY INT’L, *supra* note 41, at 2, 16 (observing that offsets are “highly opaque instruments, with decisions made away from legitimate scrutiny, contracts awarded on a discretionary basis, and little commitment to management evaluation, audit or completion of offsets contracts” and that when “processes are unobservable and the potential private benefits of corruption are high, malfeasance is likely”). The authors explain that such influence peddling can occur at four stages other than source selection. These are solicitation, bidding, offset design, and award stages. *Id.* at 18. *See also* Lambrecht, *supra* note 169, at 82 (saying that a “fundamental reason offsets are vulnerable to corruption is because they combine a highly valuable asset with a lack of transparency”).

¹⁷⁶ TRANSPARENCY INT’L, *supra* note 41, at 2, 17 (explaining that officials managing offset programs have “a significant amount of discretionary power in terms of how the offsets package can be divided up and distributed” and that this power can be used “to demand illicit enrichment” and provides “attractive opportunities for such malfeasance”). *See also* Steven L. Schooner, Associate Professor of Law and Co-Director of the Government Procurement Law Program at the George Washington School of Law, Presentation at the NATO Conference Panel: *Reducing Corruption Risks in Defence Contracts: The Challenge of Offset Agreements*, in NATO CONFERENCE, *supra* note 44, at 97, 97 (calling offsets a “sophisticated kickback regime”).

¹⁷⁷ *See* TRANSPARENCY INT’L, *supra* note 41, at 15; *see also* Lambrecht, *supra* note 169, at 100-06 (“[t]racing [c]orruption [p]athways in [o]ffset [t]ransactions”).

¹⁷⁸ TRANSPARENCY INT’L, *supra* note 41, at 16.

2. Same susceptibility for corruption

Notwithstanding the corruption risks outlined, it seems that most of these risks are common to the arms trade and are not unique to deals that include offsets.¹⁷⁹ In fact, the Transparency International authors cite a U.S. Department of Commerce report saying 50 percent of bribery in international trade came from the arms trade, which is “all the more startling, since defence constitutes a very small proportion of international trade.”¹⁸⁰ Such levels of corruption could mean offsets are not the problem, or more specifically it may be that the adumbrated risks are not unique to offsets. Correlation is not causation.

Nancy Hite-Rubin recently has analyzed the relationship among corruption, military procurement (including offsets), and foreign investment.¹⁸¹ She finds that “countries riddled with corruption tend to attract greater foreign capital when their military spending rises,”¹⁸² calling this a “curious triangular

¹⁷⁹ Perhaps one reason for the corruption risks associated with offsets is that the arms trade, in general, is and “must remain illiberal for security reasons[.]” Markusen, *supra* note 90, at 66. Critics suggest that offsets create the lack of transparency in the defense trade. But, in fact, offsets “*like defense procurements in general*, lack transparency because their negotiation and award are shielded from public scrutiny based on alleged national security concerns.” Lambrecht, *supra* note 169, at 82 (emphasis added). “Defense procurements are subject to secrecy because they involve purchasing items containing national security sensitivity, classified information, and protected commercial information.” *Id.* (citing Directive 2009/81/EC, of the European Parliament and of the Council of 13 July 2009 on the Coordination of Procedures for the Award of Certain Works Contracts, Supply Contracts and Service Contracts by Contracting Authorities or Entities in the Fields of Defence and Security and Amending Directives 2004/17/EC and 2004/18/EC, 2009 O.J. (L 216) 80 at para. 27, 94 at Arts. 13(a) & 13(b) (discussing exclusions for intelligence and security reasons)).

¹⁸⁰ TRANSPARENCY INT’L, *supra* note 41, at 14 (citing WILLIAM M. DALEY, TRADE PROMOTION COORDINATING COMM., U.S. DEP’T OF COMMERCE, THE NATIONAL EXPORT STRATEGY, SEVENTH ANNUAL REPORT TO CONGRESS 11 (2000) (citing data collection from 1994-1999)). *Cf.* Andrew Feinstein, Paul Holden & Barnaby Pace, *Corruption and the Arms Trade: Sins of Commission*, in STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2011, ARMAMENTS, DISARMAMENTS, AND INTERNATIONAL SECURITY 3, 3 (2011) (citing studies indicating that “corruption in the arms trade contributes roughly 40 percent to all corruption in global transactions”).

¹⁸¹ Nancy Hite-Rubin, *A Corruption, Military Procurement and FDI Nexus?*, in GREED, CORRUPTION, AND THE MODERN STATE: ESSAYS IN POLITICAL ECONOMY 224, 224 (Susan Rose-Ackerman and Paul Lagunes eds., 2015), <https://www.law.upenn.edu/live/files/4289-nancy-hite-rubin-a-corruption-military-procurement>.

¹⁸² *Id.* at 241.

relationship.”¹⁸³ “An optimistic take on this could be that the offset agreements are making it possible for foreign investors to enter into markets that were deemed too risky,” or perhaps the “observed FDI [foreign direct investment] inflows could be a function of...spill over from opening new streams of foreign investment.”¹⁸⁴ Recognizing the risk of corruption associated with defense procurement,¹⁸⁵ she emphasizes this “rosy scenario is likely to be incomplete.”¹⁸⁶ Using a hypothetical about buying jets from Lockheed and attracting FDI from Pepsi introduced earlier in her piece, she concludes:

First, we do not know if the Indonesian government would have bought fighter jets, but for the offset package inducements. Second, it may also be unclear if the winning contract was most beneficial to the Indonesian government and economy, or if there were side payments involved. Finally, even if the sale of major weapons to Indonesia corresponds to a boost in FDI, it is not obvious that this is welfare enhancing. In other words, foreign investment for a “bridge to nowhere” could register as FDI but actually undermine the host country’s development prospects and international profile.¹⁸⁷

In other words, though her research “demonstrates that robust correlation exists across arms procurement and FDI,” the “question for future research is *why*[.]” *Id.* at 23. “The economic, political, and security implications of this cannot be understated.”¹⁸⁸ Following Hite-Rubin, this Article would make a similar point about the relationship between offsets and corruption. Offsets may cause corruption as Transparency International maintains. Or perhaps corruption is an epiphenomenon, related to but not resulting from offsets. This requires further study. The importance of such questions, to borrow again from Hite-Rubin, cannot be understated.

¹⁸³ *Id.* at 225.

¹⁸⁴ *Id.* at 248.

¹⁸⁵ *Id.* at 225-29.

¹⁸⁶ *Id.* at 248.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

3. More scrutiny than most foreign trade

Critics complain offsets are subject to less scrutiny than the primary transactions.¹⁸⁹ Assuming that is true, perhaps the better question is not whether offsets receive the *exact same* level of scrutiny but *enough* scrutiny to detect and deter corruption.¹⁹⁰ The primary deal may also be the wrong comparison. Offsets may even undergo more scrutiny than most of international trade.¹⁹¹ Regardless, the level of scrutiny varies.¹⁹² While critics of offsets frequently complain about inadequate scrutiny, that may be more rhetoric than reality.

4. Prevalence of corruption may be overstated

Like this Article, much of the literature on corruption in the offsets trade relies on Transparency International's "noteworthy report."¹⁹³ It may be, however, that the incidence of corruption is much less frequent than

¹⁸⁹ See, e.g., TRANSPARENCY INT'L, *supra* note 41, at 2 (asserting that "[o]ffsets are under much less scrutiny during their negotiation than the main arms deal"); Lambrecht, *supra* note 169, at 82 (stating that offsets "are shielded from public scrutiny").

¹⁹⁰ See Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973) (arguing that government spending on consumer protection efforts should not exceed the "optimal" amount so the cost of fighting fraud is not greater than the benefit attained). As an example of anticorruption efforts that were not cost effective, consider the Texas Medicaid Fraud Control Unit, until recently considered to be at the cutting edge of the Medicaid fraud fight. See U.S. DEP'T OF HEALTH & HUMAN SERV., TEXAS STATE MEDICAID FRAUD CONTROL UNIT: 2013 ONSITE REVIEW, OEI-06-13-00300 5 (2014) (reporting that the Texas unit collected \$844 million in 2010-12); Steven Malanga, *How to Fight Medicaid Fraud*, CITY J., Spring 2006, <http://www.city-journal.org/html/how-stop-medicaid-fraud-12934.html> (describing Texas's innovative efforts to police Medicaid fraud). More recently, however, a state audit revealed that the unit "struggle[d] to recover [its] costs." Brian M. Rosenthal, *Medicaid Fraud Unit to Get Special Review After Scathing Audit*, HOUS. CHRON., Oct. 8, 2014, <http://www.houstonchronicle.com/news/politics/texas/article/Medicaid-fraud-unit-to-get-special-review-after-5809243.php> (citing TEXAS HEALTH & HUMAN SERV. COMM. & SYS. ISSUES, SUNSET ADVISORY COMMISSION STAFF REPORT (2014), <https://www.sunset.texas.gov/public/uploads/files/reports/HHSC%20and%20System%20Staff%20Report.pdf>).

¹⁹¹ See Marra & Gordon, *supra* note 149, at 15 (arguing these "transactions, all of them, undergo a level of scrutiny beyond the realm of most other international business deals").

¹⁹² See, e.g., TRANSPARENCY INT'L, *supra* note 41, at 37 (reporting that U.S. firms now have developed the world's leading anti-corruption systems due to "strict enforcement" of the FCPA).

¹⁹³ Platzgummer, *supra* note 169, at 22; see also Nackman, *supra* note 170, at 526 (frequently citing the report); Lambrecht, *supra* note 170, at 75 (framing his article as an elucidation of the report's themes).

that report would suggest. Peter Platzgummer reviewed all publications about corruption in offsets from 1980 to 2012.¹⁹⁴ He initially found more 1,000 articles; however, only 300 allegations were left after he eliminated the duplicates and only 100 of those were substantiated.¹⁹⁵ *Countertrade & Offsets* summarized his work, saying, the Transparency International report “is wrong.”¹⁹⁶ “By and large,” the article continues, “the number of allegations correctly alleging corruption in relation to offsets is relatively low.”¹⁹⁷ Platzgummer found only 100 cases over 30 years, which, he observed in a presentation at the Deutsches Kompensations Forum, “is not a lot.”¹⁹⁸ Further research is of course necessary, but inordinate concern about the corruption associated with offsets may be misplaced.

5. Military spending in corrupt economies

The discussion has thus far taken for granted that corruption is bad for economies. Indeed, the standard view is that “[c]orruption of any form stifles economic development.”¹⁹⁹ But in another paper that Nancy Hite-Rubin coauthored with Daniel Drezner, the authors’ findings would challenge the standard view.²⁰⁰ They demonstrated that countries with a reputation for corruption actually attract *more* FDI when they increase military spending, and FDI is generally thought to foster economic growth. This would suggest that encouraging countries that are both poor and corrupt to reduce defense spending (or to prohibit offsets to that end) may not lead to economic development, even if these measures would reduce the level of corruption. There are no doubt other good reasons to reduce military spending and to eliminate corruption, but economic development may not be among them. This also requires further study.²⁰¹

¹⁹⁴ Platzgummer, *supra* note 169, at 22-27.

¹⁹⁵ *A Hundred Cases of Corruption Involving Offsets Are Not a Lot*, 32 COUNTERTRADE & OFFSETS Mar. 24, 2014 at 3 (citing Platzgummer, *supra* note 169).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Hite-Rubin, *supra* note 181, at 224.

²⁰⁰ *Id.* at 224 (citing Daniel W. Drezner & Nancy Hite-Rubin, Paper Presented at the American Political Science Association, Washington, DC: Does Military Spending Attract (Corrupt) Foreign Investment? An Empirical Investigation, (Aug. 2014)).

²⁰¹ Defense economists have long debated “whether military expenditure is growth promoting or inhibiting.” See Todd Sandler & Keith Hartley, *Introduction* to HANDBOOK OF DEFENSE ECONOMICS: VOLUME 1 1, 5 (Todd Sandler & Keith Hartley eds., 1995) [hereinafter HANDBOOK OF DEFENSE ECONOMICS: VOLUME 1].

C. International Stability and Security

Critics warn that offsets somehow sow dragon's teeth,²⁰² referring to the unintended consequences that may result.²⁰³ This subsection addresses how offsets affect the arms trade, which, in turn, affects international security.²⁰⁴ Like the previous section, this section takes a contrarian perspective to stimulate debate.²⁰⁵ It contends, first, that offsets probably have little effect on proliferation; second, that even if offsets do cause greater proliferation, it is unclear what effect such proliferation has on the incidence of war; third, that because offsets create complicated supply chains, they may foster interdependence and deter aggression and, thus, eliminating offsets may be counterproductive.

1. The received opinion on proliferation

Critics frequently charge that offsets stimulate the arms trade.²⁰⁶ There is truth to this. As with most industries, larger production lines achieve econo-

²⁰² Hammond, *supra* note 53, at 211-13 (using this phrase in reference to the dangers of technology transfer associated with coproduction agreements).

²⁰³ Dragon's teeth can refer to any policy "that is intended to prevent trouble, but which actually brings it about." OXFORD DICTIONARY OF IDIOMS 85 (Judith Siefring ed., 2d ed. 2004). Yet this metaphorical language also evokes a particular concern for national and international security and stability, which is the topic covered in this section.

²⁰⁴ Another consideration is supplier governments' perspective on how licensing arms sales abroad affect domestic security and readiness. This is covered in Section IV.B.

²⁰⁵ Received opinion says offsets cause proliferation and are a destabilizing force. The author remains unpersuaded; however, he is also unconvinced by the opposite view. The debate does not seem to rise above the level of speculation. The author presents a contrarian view to stimulate further investigation.

²⁰⁶ See, e.g., J. Paul Dunne & Eamon Surry, *Arms Production*, in STOCKHOLM INT'L PEACE RESEARCH INST., SIPRI YEARBOOK 2006: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 387, 414 (2006) (arguing recipients use offsets "to justify arms purchases" even though such transactions are of "questionable value"); Hoyos, *supra* note 4, at 1 (reporting offsets "distort the market, leading governments to order arms they do not need"); Petty, *supra* note 67, at 72-73, 76 (observing that "offsets inevitably expand global arms production" resulting in proliferation); Hagelin et al., *supra* note 115, at 402 (concluding that "offsets stimulate international military transfers"); Schooner, *supra* note 176, at 97 (explaining offsets can lead to proliferation and destabilization and arguing "[i]t does not serve societies well if defence increases in size because of... inducements from offsets"); Markusen, *supra* note 90, at 79-80 (remarking that a "sobering outcome of the illiberal nature of the arms trade is the tendency for countries to spend more on military equipment than they would in the absence of the ability to buy domestic and to extract offsets on imported systems").

mies of scale. Unit costs are higher for producing hundreds of tanks, ships, and fighter jets than for producing thousands. With the post-Cold War cuts, costs mounted. Supplier governments tolerated offsets to share costs despite the proliferation risks.²⁰⁷ The cost of arms production continues to grow,²⁰⁸ arms producing nations still seek to spread their costs,²⁰⁹ and, therefore, seem willing to tolerate offsets.²¹⁰ Yet perhaps the effect on security and stability is not as straightforward as critics sometimes suggest.²¹¹ That is, perhaps a straight line cannot be drawn between proliferation and greater international instability, as some critics posit.

2. Offsets may have little effect on proliferation.

Offsets are said to stimulate arms transfers. Yet Dumas contends that the “presence or absence of offsets should not substantially affect the decision as to how much or even what kind of military equipment a nation wants to buy.”²¹² Even if offsets do reduce costs, that “should at most influence the quantity purchased at the margin.”²¹³ “More likely,” Dumas writes, “if comparable equipment is available from multiple sources and under similar conditions of risk, offsets should only influence which particular supplier base to choose.”²¹⁴ Thus, despite dire warnings about perverse incentives, it is unlikely that recipients overbuy as much as some critics suppose.²¹⁵ Dumas’s more measured assessment seems more probable.

²⁰⁷ See Markusen, *supra* note 90, at 66-67 (arguing that “security concerns [e.g., proliferation] are subordinate to commercial aspirations”).

²⁰⁸ See, e.g., Brauer & Dunne, *supra* note 22, at 261-62 (describing a “military Malthusianism” wherein the unit cost of major weapons systems grows geometrically).

²⁰⁹ See, e.g., Markusen, *supra* note 90, at 71 (explaining the U.S. armed forces have “come to believe that they cannot afford all the weapons purchases and upgrades that the need without spreading the cost”).

²¹⁰ See Lori Valigra, *What Your Mother Never Told You About International Trade*, HIGH-TECH MARKETING, Mar. 1986, at 42, 46 (explaining that major weapons systems have become so expensive that importing countries have come to believe they cannot afford them without demanding offsets to defray the cost).

²¹¹ Proliferation is not the only consequence of offsets that affects stability. They may also encourage imports of high-tech weaponry and thereby increase recipients’ militaries’ political influence. See Neuman, *supra* note 96, at 97.

²¹² Dumas, *supra* note 91, at 25.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *supra* note 206 (citing concerns that offsets distort the market, which in turn encourages arms purchases, and that this proliferation of arms is a destabilizing force).

3. Having more weapons does not necessarily mean more war

Even if offsets cause the arms trade to grow, that does not mean that more or better quality arms inevitably lead to war. Technology enthusiasts have long been susceptible to a similar fallacy in the opposite direction, supposing that advances in weapons would shorten wars or reduce their incidence.

In 1621, English poet John Donne predicted the advent of long-range artillery would lead wars to “come to a quicker ends [sic] than heretofore.”²¹⁶ The centenary of World War I, a lengthy conflict with 16 million combat deaths, is but one bloody reminder that Donne’s prophecy remains unfulfilled. More or better arms do not necessarily make war longer, deadlier, or more frequent; fewer or poorer arms do not necessarily have the opposite effect.²¹⁷ The quality and quantity of weapons have been poor bellwethers of wars’ incidence, duration, or severity.²¹⁸ War is, to some degree, inevitable. Limiting the availability of the implements of war can only go so far toward preventing or deterring the outbreak of war.²¹⁹

²¹⁶ See Charles Dunlap, *Technology and the 21st Century Battlefield: Recomplicating Moral Life for the Statesman and the Soldier*, PARAMETERS, Autumn 1999, at 24, 24 (quoting Donne in his epigraph).

²¹⁷ For example, during the 1994 Rwandan civil war, the Hutus killed as many as two million of their Tutsis neighbors in a mere 100 days using machetes, clubs, and blunt objects. See Edwin Musoni, *Report Claims 2 Million Killed in 1994 Genocide*, THE NEW TIMES (Kigali, Rwanda), Oct. 4, 2008, <http://www.newtimes.co.rw/section/article/2008-10-04/5288/>; Alan J. Kuperman, *Rwanda in Retrospect*, FOREIGN AFFAIRS, Jan./Feb. 2000, at 101, <https://www.foreignaffairs.com/articles/rwanda/2000-01-01/rwanda-retrospect>.

²¹⁸ See, e.g., Frederic S. Pearson, Michael Brzoska & Christopher Crantz, *The Effects of Arms Transfers on Wars and Peace Negotiations*, in STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 1992: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 399, 399, 415 (1992) (observing that “categorical statements” about the effects of the arms trade “ignore the complex record” and that “the literature contains little systematic evidence of the actual effects of arms transfers on conflicts”).

²¹⁹ Limiting the availability of weapons is not a panacea. Yet that is not to say that all efforts to restrict the use of the cruelest sorts of weapons or to establish a consensus on the lawful conduct of war are in vain. Most would agree that the world was made a better place with the signing of the Geneva Protocols banning chemical weapons, even if not all of the signatories have always abided by its prohibitions and others have yet to sign it. For a study on how the excesses of World War I led to international efforts to curb the unrestrained prosecution of war, see DIANA PRESTON, *A HIGHER FORM OF KILLING: SIX WEEKS IN WORLD WAR I THAT FOREVER CHANGED THE NATURE OF WARFARE* (2015).

Three assumptions underlie the received opinion.²²⁰ First, the growth of the arms trade leads to war and instability. Second, stemming the arms trade would reduce the frequency or deadliness of warfare. Third, war is not inevitable and can be avoided with the right policies. From these premises, critics would hold that banning offsets would reduce the incidence of war and make the world more peaceful, stable, and secure. Perhaps.

Yet, one could plausibly argue, these assumptions are tendentious, naïve, and false. They are tendentious in that they take for granted a particular position on geopolitics,²²¹ ignoring the venerable (if equally debatable) tradition of peace through strength.²²² They are naïve in that they assume a utopian view, seemingly trusting that once offsets are banned the flow of arms will diminish and nations “will beat their swords into plowshares” and will not “train for war anymore.”²²³ They are false in that many historians of war would argue that history has shown that war is unavoidable.²²⁴ Sadly, there

²²⁰ The received opinion criticized here is outlined in Subsection III.C.1, *supra*.

²²¹ Critics who favor banning offsets for their destabilizing effect seem to assume the position of the liberal internationalism championed by Woodrow Wilson and Franklin Roosevelt. This school holds that warfare can largely be avoided through multilateral diplomacy and economic interdependence and that each nation should practice peaceful diplomacy and can depend on other nations reciprocating. See HENRY R. NAU, CONSERVATIVE INTERNATIONALISM: ARMED DIPLOMACY UNDER JEFFERSON, POLK, TRUMAN, AND REAGAN 48-50 (2013). This is not the only school of thought and is not uncontroversial. *Id.* at 39-50 (describing the three prominent schools of thought on foreign policy in the United States: internationalism, realism, and nationalism).

²²² This tradition goes back to Roman times. A Latin proverb from the Fourth Century general Vegetius says, “vis pacem, para bellum,” which is translated as, “If you want peace, prepare for war.” See CHRISTOPHER ALLMAND, THE DE RE MILITARI OF VEGETIUS: THE RECEPTION, TRANSMISSION AND LEGACY OF A ROMAN TEXT IN THE MIDDLE AGES 50, 128, 190, 267 (2011) (tracing Vegetius’s ideas from late antiquity through the Middle Ages). George Washington held a similar view. See George Washington, First Annual Address to Congress (Jan. 8, 1790), in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, VOL. I, at 65 (James D. Richardson ed., 1897), <http://onlinebooks.library.upenn.edu/webbin/metabook?id=mppresidents> (“To be prepared for war is one of the most effectual means of preserving peace.”). And this has been a familiar refrain of the Republican Party since Ronald Reagan. See also Henry R. Nau, *How Restraint Leads to War*, COMMENTARY, Sept. 1, 2015, at 13, 14-15 (arguing that weakness can be provocative and that assuming a position “too modest and restrained in foreign affairs” can lead to war as surely as ambition and aggressiveness does).

²²³ *Isaiah* 2:4, *supra* note 1.

²²⁴ See, e.g., Joseph J. Cook, *From Liddell Hart to Keegan: Examining the Twentieth Century Shift in Military History Embodied by Two British Giants of the Field*, SABER & SCROLL, Spring/Summer 2015, at 23, 28 <http://digitalcommons.apus.edu/cgi/viewcontent.cgi?article=1143&context=saberandscroll> (reporting that famed military historians

is wisdom in the adage attributed to Trotsky: “You may not be interested in war, but war is interested in you.”²²⁵

One need not be convinced by the skeptical point of view offered here.²²⁶ Arguing this point is clearly beyond this Article’s scope. Suffice it to say that whether limiting the flow of arms would affect the incidence of war is an old question, which turns on matters of first principle about the (in)evitability of war and the (im)mutability of human nature. These are not simple questions, nor uncontroversial.²²⁷ This Article seeks not to take sides so much as to note that the question about the effect of the arms trade on peace and stability is unsettled.²²⁸ It follows that the argument for banning

Liddell Hart and John Keegan both held that war is inevitable); Victor Davis Hanson, *Why Study War?*, CITY J., Summer 2007, <http://www.city-journal.org/html/why-study-war-13029.html> (writing that military history teaches that war is a “nearly inevitable aspect of human existence”); Jeremy Black, *Why Teach Military History?*, FOREIGN POL’Y RES. INST., Oct. 6, 2007, <http://www.fpri.org/article/2007/10/why-teach-military-history/> (remarking that “[w]ar cannot be wished away”); see, e.g., VICTOR DAVIS HANSON, BETWEEN WAR AND PEACE: LESSONS FROM AFGHANISTAN TO IRAQ xvi, 119 (2004) (espousing, like Thucydides, a tragic view of the human condition wherein war is inevitable).

²²⁵ REFLECTIONS ON WAR: PREPAREDNESS AND CONSEQUENCES 287, n.1 (Thean Potgieter & Ian Liebenberg eds., 2012) (explaining that although this quote is often attributed to Trotsky that he probably did not say it).

²²⁶ Perhaps the ancient Romans were wrong about the virtue of preparing for war to secure peace; they were after all a famously bellicose nation, and Vegetius’s proverb may have been self-serving casuistry. See, e.g., WILLIAM V. HARRIS, WAR & IMPERIALISM IN ANCIENT ROME: 327–70 B.C. 10-40, 41-53 (2d ed., 1985) (describing the aggressive “social ethos” of Roman aristocrats and ordinary citizens).

²²⁷ An analogous and rancorous debate about the correlation between private arms and crimes is ongoing. See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (3d ed., 2013) (reviewing a decade of empirical evidence from major U.S. cities and challenging the received opinion that violent crime correlates with the availability of legal firearms).

²²⁸ From the perspective of defense economics, the effect of the arms trade “on the likelihood of wars breaking out, on the course of wars, and on their general severity” is “perhaps the most important question [.]” STOCKHOLM INT’L PEACE RESEARCH INST., THE ARMS TRADE WITH THE THIRD WORLD 73 (Frank Blackaby et al. eds., 1971). There are two schools of thought: the “stabilizing” school and the “destabilizing” school. The former holds that “arms transfers promote conflict”; the latter holds that “arms transfers can restrain conflict by restoring the balance of power in unstable regions.” Charles H. Anderton, *Economics of Arms Trade*, in HANDBOOK OF DEFENSE ECONOMICS: VOLUME 1, *supra* note 201, at 523, 547. Anderton continues:

Connections between arms trade and conflict, however, are not easy to make. *Arms transfers can increase or decrease the likelihood of inter-state war or internal conflict depending upon a variety of intervening variables: conflict setting (i.e., intensity of rivalry, issues at stake, history, geography), types and quantities of*

offsets in furtherance of peace and stability rests on uncertain premises and should be reexamined.

4. Complicated supply chains may deter warfare

Setting aside the degree to which offsets stimulate the arms trade and whether this trade increases the incidence of warfare, a question arises about whether offsets may have a counterintuitive effect through the creation of complicated supply chains. The argument goes like this. No nation is fully self-sufficient in arms.²²⁹ To some degree, all depend on imports for components, spare parts, and munitions, if not for major weapon systems. If exporters can stop or curb the flow of arms upon the outbreak of war, this could limit the duration or intensity of conflicts as belligerents cannot adjust domestic production in the short run.²³⁰ It has long been observed that economic interdependence discourages aggression among trade partners.²³¹ A corollary is that offsets create complicated supply chains, which, in turn, create interdependencies among potential adversaries. Such interdependencies may deter war.²³² It may prove that offsets create interdependencies of supply

weapons transfers, existing weapons stocks, goals and perceptions of political leaders, commitments of allies, and prospects of foreign intervention.

Id. (emphasis added).

²²⁹ See, e.g., Michael K. Woodward, *An Analysis of the Impact of Offset Requirements on the U.S. and Defense Industry* (Mar. 1995) (unpublished master's thesis, Naval Postgraduate School) (on file in with NPS Institutional Archive) (explaining that “[n]o nation is entirely self-sufficient in arms production, but to some degree relies upon other nations to produce or acquire arms”); JOHN ADAMS, *REMAKING AMERICAN SECURITY: SUPPLY CHAIN VULNERABILITIES & NATIONAL SECURITY RISKS ACROSS THE U.S. DEFENSE INDUSTRIAL BASE* 319 (2013), http://www.americanmanufacturing.org/page/-/uploads/research-pdf/RemakingAmericanSecurityMay2013_2.pdf (detailing supply chain risks to the U.S. defense industry and concluding that “[s]ome sectors are vulnerable to immediate disruption arising from excessive or misaligned foreign dependency, while others face longer-term challenges” but that “risks posed to many sectors of the defense industrial base may prove very difficult to fix, because they are a part of powerful, prevailing trends in the international technology market and the global economy”); Jones, *supra* note 25, at 114 (explaining that few components in U.S. weapons systems are manufactured domestically).

²³⁰ See, e.g., Paul Freedenberg, *Can Manufacturing Support a War?*, *AM. MACHINIST*, Jan. 1, 2005, at 22 (explaining that U.S. industrial strategy lacks the capacity to compensate for shortages of materiel once a war has started).

²³¹ See, e.g., Dumas, *supra*, note 91, at 26 (citing the example of the close economic relationships within the EU deterring aggression among the member states).

²³² Offsets may foster security utilizing interdependencies in another way. Marra and Gordon explain that the United States tolerates offsets, in part, because benefits arise

chains that deter conflict, promote stability, and shorten the conflicts that do arise. Eliminating offsets could have the opposite effect and could prove to be destabilizing.²³³ If the goal is to promote peace and stability, further study should be devoted to such questions before offsets are banned.

IV. PUBLIC AND PRIVATE POLICY OPTIONS

Having reviewed some of the issues bearing on whether offsets should be banned, this section turns to the measures for mitigating the harm that offsets may cause and for coming to a better understanding of them. Thus far this article has stressed that since the data about offsets are limited, predictions must remain tentative, lest they become speculative.

Whether the options catalogued here are advisable depends on whether offsets are good or bad, how good or bad, and in what manner. The evidence suggests recipients are receiving less value than they pay for since they pay a premium for hiring suppliers to deliver work that is outside their core expertise.²³⁴ It is hard to say more than that. Until more is known, the options listed below should be taken with a pinch of salt. Without a deeper understanding of what makes offsets succeed or fail, these measures may fix a problem that does not exist, exacerbate the harm, or create new problems.

Assessing the pros and cons requires “specify[ing] *whose* advantages and disadvantages we are talking about.”²³⁵ This section is divided into four subsections: the first three consider the three principal parties in interest (suppliers, their governments, recipients); the last considers multilateral options. Each of the first three subsections begins with a short review of the incentives that are at work for the three parties in interest.

from the “interdependence” between the supplier and recipient, “which enhances the foreign relationships.” See Marra & Gordon, *supra* note 149, at 14-15. In this manner, a recipient enters into a close relationship with the supplier’s government and this extends beyond the commercial transaction. See also Petty, *supra* note 67, at 74 (arguing that it is an axiom of political economy that nations align “politically, economically, and diplomatically” with countries “with whom they trade arms”).

²³³ See generally Baudouin Heuninckx, *Security of Supply and Offsets in Defence Procurement: What’s New in the EU?*, 23 PUB. PROCUREMENT L. REV. 33 (2014).

²³⁴ See Brauer & Dunne, *supra* note 22, at 259-60 (arguing that “from what data points are available, the general picture can be pieced together” and it is bleak, even if recipients often “exaggerate benefits and understate or ignore the costs”).

²³⁵ See *supra* note 35 and accompanying text (quoting HAMMOND, *supra* note 27, at 42 (emphasis added)).

A. Suppliers' Options

Transparency International explains that suppliers face “fierce” competition for a few “highly lucrative” contracts.²³⁶ Under such circumstances, defense contractors hold that “[h]alf a loaf is better than none.”²³⁷ The alternative, to mix metaphors, is “economic suicide.”²³⁸ With spending cuts following the financial crisis, foreign military sales have become vital to U.S. and European defense firms in part because they enjoy higher margins on foreign sales.²³⁹ It is thus no wonder that suppliers are said to face a “prisoner’s dilemma.”²⁴⁰ Whereas some suppliers were once hostile, many now embrace offset delivery providing offsets as a competitive advantage²⁴¹ or even as an enterprise profitable in its own right.²⁴²

²³⁶ TRANSPARENCY INT’L, *supra* note 41, at 7 (describing a “dynamic balance” between a small number of buyers and sellers having oligopsonistic and oligopolistic market power, respectively).

²³⁷ Wayne, *supra* note 12, at B11; *see also* Carola Hoyos, *Defence Groups' Sweeteners Swell to \$75bn*, FIN. TIMES, Oct. 9, 2013, at 1, <https://www.ft.com/content/27fad6b8-1964-11e3-80ec-00144feab7de> (quoting a Raytheon executive saying that offsets are a problem but “[i]t sure beats the alternative”).

²³⁸ Cole, *supra* note 42, at 803. *See also* Patrick Costello, *Explainer: How Defense Offsets Help Drive the Global Defense Industry*, JANINE DAVIDSON: DEFENSE IN DEPTH (Dec. 4, 2014), <http://blogs.cfr.org/davidson/2014/12/04/explainer-how-defense-offsets-help-drive-the-global-defense-industry/> (saying “offsets are crucial to winning large defense contracts overseas”).

²³⁹ *See* Fryer-Biggs, *supra*, note 46, at 18 (reporting that “margins on international commercial deals tend to be higher”); LORELL ET AL., *supra* note 114, at 21 (saying offsets “induce” firms “to engage in cross-border transactions in which they might not otherwise elect to participate”); Flamm, *supra* note 46, at 117 (describing a “complex, self-reinforcing dynamic at work” so that with “declining defense spending, exports have become critical to the very survival of most defense industries”). *But see* *It's an Ill Wind that Blows No Good*, ECONOMIST, Mar. 14, 2015, at 65, <http://www.economist.com/news/business/21646232-higher-political-risk-means-rising-spirits-defence-firms-its-ill-wind-blows-no-good>, (arguing that political uncertainty is improving the defense industry’s prospects).

²⁴⁰ *See, e.g.*, Herrnstadt, *supra* note 43, at 13; Travis K. Taylor, *Countertrade Offsets in International Procurement: Theory and Evidence*, in DESIGNING PUBLIC PROCUREMENT POLICY IN DEVELOPING COUNTRIES 16, 23-24 (Murat Yülek and T.K. Taylor eds., 2012) (discussing the prisoner’s dilemma and discussing options for addressing it).

²⁴¹ *See* HAMMOND, *supra* note 27, at 37; Matthews, *supra* note 114, at 97 (“competitive edge over rivals”).

²⁴² *See* Markusen, *supra* note 90, at 71 (writing that “major American defense companies, traditionally hostile to offsets, have come to see them as a part of their business”).

In the past, suppliers have tolerated offsets because their cost was less than dollar-for-dollar for at least three reasons. First, because recipients use multipliers to tailor offsets to meet local needs and because suppliers fulfill offset obligations below cost at the expense of their profit margin²⁴³ and compensate thereby for lost revenue.²⁴⁴ This will likely continue, and may serve mutually beneficial ends.²⁴⁵ Second, suppliers recognize the opportunity value of money, so that a dollar spent on an offset tomorrow is less dear than one spent today.²⁴⁶ This, too, is harmless from a supplier's perspective and will continue so long as recipients are willing to pay a premium.²⁴⁷ Third, in the past unscrupulous suppliers entered into offset agreements because enforcement was lax and fulfillment of obligations was easily avoided. This should be discouraged. A growing number of recipients are demanding penalty clauses for nonperformance to deter this sort of behavior.²⁴⁸

Despite limited market power, suppliers still have options for mitigating the costs that offsets impose: they can agree to offsets only if it is in their interest; they can walk away from unprofitable deals; when deciding whether to strike a deal, they can consider the full range of risks; and they can create and enforce internal codes of conduct.

1. Consent only to mutually beneficial agreements

To the extent suppliers consent to offsets, such transactions are mutually beneficial. To the extent that suppliers consider the full costs that such obligations entail, there is no reason to discontinue the practice, at least not from the suppliers' perspective.²⁴⁹ Insofar as their market position permits, suppliers should drive a hard bargain. Such sharp bargaining among buyers and sellers may be the best cure for what ails the arms trade.²⁵⁰

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²⁴⁴ See GREEN, *supra*, note 32, at 280-81.

²⁴⁵ See *supra* Section III.A.3.

²⁴⁶ Jones, *supra* note 25, at 114 (explaining that "because offset obligations are performed over the span of as much as a decade, they are fulfilled in later year dollars, which are worth less than current year dollars").

²⁴⁷ Recipients pay a premium based on the same principle of the opportunity value of money: they often pay in current dollars for goods and services delivered in the distant future.

²⁴⁸ See GREEN, *supra*, note 32, at 281-82.

²⁴⁹ See Cole, *supra* note 42, at 785 (finding that suppliers enjoy "net economic benefits for sales with offsets compared with no sales at all").

²⁵⁰ Usually, suppliers care little about recipients' economic development. Instead,

Yet the net costs and benefits are difficult to assess. Markusen observes:

It is difficult to “unpack” the motivation of the multiple actors in this highly regulated, yet highly competitive market. The complexity of gains and losses, and initiatives and responses means that even large companies and government agencies are uncertain whether they are gaining or losing by engaging in offsets[.]²⁵¹

Sharing her experience on the U.S. Presidential Commission on Offsets in the Arms Trade, she continues, “officials disagreed across agencies on the security and economic costs and benefits, while defense industry officials admitted their concern with proliferation of offsets even as they defended their latitude to contract for them.”²⁵² In short, appealing to the virtues of the free market from one’s armchair is easy, but sorting out the true costs and benefits of offsets so that suppliers can pursue their interests in a manner that would ensure efficient outcomes is harder.²⁵³

they view offsets as a marketing tool useful for winning business. See Dumas, *supra*, note 91, at 16. That is as it should be. As Friedman wrote in his eponymous article, the social responsibility of business is to increase its profits. Milton Friedman, *The Social Responsibility of Business Is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at SM17. Economies benefit from each man pursuing his own interests. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 34-35 (R.H. Campbell & A.S. Skinner eds., 1976) (1776) (coining the “invisible hand”); BUCHHOLZ, *supra* note 112, at 19-25 (1989). So also would the arms trade benefit from the crucible of free trade. *But see The Business of Business*, ECONOMIST, Mar. 21, 2015, at 62, <http://www.economist.com/news/business/21646742-old-debate-about-what-companies-are-has-been-revived-business-business> (recounting the debate over the firm’s role in the pursuit of social welfare) (referencing Henry Hansmann & Reiner Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (proclaiming the end of the debate just before the Arthur Andersen, Enron, and WorldCom scandals reopened it)).

²⁵¹ Markusen, *supra* note 90, at 69.

²⁵² *Id.* at 69-71.

²⁵³ Exacerbating this problem is the fact that defense firms will fail to consider negative externalities:

[W]hile a firm would not likely agree to offset demands if the firm did not perceive the arrangement to yield net gains for the firm, there may be negative impacts to the firm’s country—such as detrimental effects to its industrial base—that are not incorporated into the firm’s calculations, but which may limit or negate “the economic and industrial benefits claimed to be associated with defense export sales.”

Carole Dawn Petersen, *Defense and Commercial Trade Offsets: Impacts on the U.S. Industrial Base Raise Economic and National Security Concerns*, 45 J. ECON. ISSUES 485, 489 (2011) (quoting BUREAU OF INDUS. & SEC., U.S. DEP’T OF COMMERCE, OFFSETS IN

2. Walk away from unprofitable offset agreements

As mentioned, observers sometimes lament that suppliers are caught in a prisoner's dilemma and have no choice but to provide offsets.²⁵⁴ While it is certainly true that defense firms face stiff competition,²⁵⁵ that is nonsense. Suppliers fighting for sales face a zero sum game, but their predicament is no different than suppliers in other competitive markets. Calling this a prisoner's dilemma is a misnomer.²⁵⁶ What makes such a scenario a dilemma is that the prisoner's fate is not entirely her own but depends on her counterpart's choice.²⁵⁷ Here, a firm that does the math and finds that it cannot satisfy an offset at a profit can freely walk away; other firms' business decisions have

DEFENSE TRADE: FOURTEENTH STUDY 14 (2009), https://www.bis.doc.gov/index.php/forms-documents/doc_download/131-fourteenth-report-to-congress-1-10). While suppliers have an important role to play as watchmen, their scope is limited and their pursuit of their private interests is not a panacea.

²⁵⁴ See *supra* note 241.

²⁵⁵ See, e.g., KPMG, GLOBAL AEROSPACE & DEFENSE OUTLOOK ii (2014), <https://www.kpmg.com/SG/en/IssuesAndInsights/ArticlesPublications/Documents/IM-Global-Aerospace-Defense-Outlook.pdf> (noting that the industry has “few buyers” and faces “massive cost pressures,” and is thus looking for sales abroad or to adapt “current product and service lines to adjacent industry sectors”); Barney & Breen, *supra* note 75, at 2 (reporting that 80 percent of executives believed competition in the arms industry would only increase in coming years).

²⁵⁶ “The fundamental problem of decision theory,” of which the prisoner's dilemma is an example, “is that a person or a group “is faced with several alternative courses of action but has only incomplete information about the true state of affairs and consequences of each possible action.” “The problem,” Patrick Suppes explains, “is to choose an action that is optimal or rational relative to the information available and in accord with some definite criteria of optimality or rationality.” Patrick Suppes, *Decision Theory*, in THE ENCYCLOPEDIA OF PHILOSOPHY 310, 310 (Paul Edwards ed., 1967); cf. Brad Armendt, *Decision Theory*, in THE ENCYCLOPEDIA OF PHILOSOPHY SUPPLEMENT 121, 122 (Paul M. Borchert ed., 1996) (describing the research on the prisoner's dilemma in the subsequent three decades). Firms do not face an epistemic problem of this kind here. They know what will happen if they refuse to supply an offset that the recipient demands; they will be uncompetitive and are unlikely to win the contract. The fact that market force firms into an undesirable position does not make this a prisoner's dilemma. *But see* Taylor, *supra* note 240, at 23 (arguing this market is a “bilateral oligopsony” and that under certain conditions the “market structure is such that a prisoner's dilemma-style game could ensue”).

²⁵⁷ The setup for the classic prisoner's dilemma is as follows:

Two prisoners...are interrogated separately and offered the same deal: If one of them confesses (“defects”) and the other does not, the defector will be given immunity from prosecution and other will get a stiff prison sentence. If both confess, both will get moderate prison terms. If both remain silent (cooperate with each other), both will get light prison terms for a lesser offense.

little bearing on the viability of that option. A firm turning down an offset is not punished except insofar as not winning a contract is “punishment”.²⁵⁸ There is no penalty beyond the loss of a business opportunity. When the cost of an offset demand exceeds the benefit, firms are free to walk away and should.²⁵⁹

3. Consider all of the associated risks

When deciding whether to strike a deal, suppliers should consider the full range of risks. This includes financial, reputational, and legal risks.²⁶⁰ McKinsey, a consultancy, recently issued a report detailing some of these risks:

Contractors that have acted improperly in fulfilling their offset obligations, or that have proposed programs that failed to produce the intended impacts, have been subject to any number of penalties—among them, congressional inquiries, reputational damage associated with broken contracts, inclusion on “black lists” of companies restricted from bidding on public procurements in specific countries, and investigations under the US Foreign Corrupt Practices Act and the UK Bribery Act.²⁶¹

Lawrence C. Becker, *Prisoner's Dilemma*, in *THE CAMBRIDGE DICTIONARY OF PHILOSOPHY* 740, 740 (Robert Audi ed., 2d ed. 1999). In this scenario, the two prisoners have incentives that are at cross-purposes, so that if they cooperate both will come out better and if they do not both will come out far worse. Analogizing the prisoner's dilemma to the arms market is misleading. Unless firms were to establish an international cartel in order to resist the pressure for offsets (which would be probably be illegal under most antitrust laws), it is unclear how their efforts could be coordinated. So close inspection of what the “prisoner's dilemma” could mean here suggests that observers are merely noting that recipients have the market power to nudge suppliers into unfavorable agreements. That is trivially true, but analogizing to the prisoner's dilemma adds more heat than light. It is mere rhetoric.

²⁵⁸ That is, a firm refusing to supply offsets can often compete for the contract or can always decide not to compete for the contract at all. In any event, unlike the prisoner who chooses not to confess risking his counterpart choosing to defect, there is no analogous penalty for declining an offset. A firm simply loses a single business opportunity. It does not pay a fine, risk criminal sanctions, or forego all future business opportunities.

²⁵⁹ See Hagelin et al., *supra* note 115, at 394 (describing a situation in 2001 where the French and U.S. companies withdrew their offers to the Czech Republic claiming that the conditions were unfair).

²⁶⁰ See, e.g., Ungaro, *supra* note 76, at 8 (detailing some of the risks associated with offsets).

²⁶¹ KEVIN DEHOFF ET AL., MCKINSEY & CO. DEFENSE OFFSETS: FROM “CONTRACTUAL

In addition to such formal public sanctions, “Over the past few years,” many recipients “have introduced reforms in their offset policies that are raising the bar for contractors’ industrial participation and prompting customers to judge bids and enforce offsets with refined criteria for success.”²⁶² This includes India’s new Defence Offset Monitoring Wing, designed to provide “stronger oversight of and standardized performance reporting on offset programs,” and the UAE’s Tawazun Economic Council, which imposes “a detailed set of multipliers to target investments” and “penalties for underperforming programs[.]”²⁶³ In this manner, the level of risk multiplies as the scale of the offset obligation increases.²⁶⁴

Suppliers should factor in these risks before entering into offset agreements. That puts a heavy burden on them to predict the probability and magnitude of risk.²⁶⁵ Yet, among the three principal parties—suppliers, their governments, and recipients—suppliers are the only private actors and thus have the requisite incentive to calculate and evaluate uncertainty. Suppliers are uniquely qualified to carry that burden; investors, boardrooms, and bottom lines incentivize efficiencies that are lacking in the public sector.²⁶⁶ Suppliers are thus indispensable watchmen because they have the most to lose if an offset deal goes sideways. Assuming their governments do not underwrite suppliers’ risks, thereby creating moral hazards,²⁶⁷ firms have an incentive to

BURDEN” TO COMPETITIVE WEAPON 3 (2014), http://www.mckinsey.com/insights/public_sector/defense_offsets_from_contractual_burden_to_competitive_weapon.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ See Anderson & Moores, *supra* note 91, at 5.

²⁶⁵ See, e.g., Lambrecht, *supra* note 169, at 113-18 (describing the vendor compliance initiative necessary for suppliers to detect corruption and comply with anti-corruption statutes); Dehoff et al., *supra* note 261, at 4-5 (listing the areas firms must take into account to offer competitive offset packages).

²⁶⁶ See, e.g., William P. Rogerson, *Economic Incentives and the Defense Procurement Process*, J. ECON. PERSPECTIVES, Fall 1994, at 65, 83 (explaining that the DoD’s performance is “very difficult to measure objectively” because “there is no analog to profit or stock market value” in the boardroom).

²⁶⁷ If supplier governments adopt policies that bear the burden of the risks associated with offset agreements, costs will be “socialized while the economic benefits remain private.” See David Gould, *The Changing Economics of the Arms Trade*, in *ARMING THE FUTURE: A DEFENSE INDUSTRY FOR THE 21ST CENTURY* 249, 262 (Ann R. Markusen & Sean S. Costigan eds., 1999). If suppliers are to serve a heuristic role and effectively exercise a veto over transactions that the free market cannot sustain, governments must resist the temptation to help them. Shielding suppliers from the downside of risky transactions will dull their senses and perversely encourages them to engage in increasingly risky behavior, creating

enter into only those agreements where they can turn a profit without undue risk.²⁶⁸ Risk of financial ruin sharpens minds.

4. Create and enforce internal codes of conduct

Perhaps the most straightforward effort firms can take is to formalize their stand against corruption by creating and enforcing an internal code of ethics:

Private defence companies should take an active approach to minimising corruption risk in offsets arrangements, and explicitly address this risk through internal codes of conduct, compliance standards and business ethics programmes. They should ensure that these are communicated to and implemented among the subcontractors, as well as agreed to by local partners and third parties. They should also ensure that the offset elements of their codes and compliance programmes are appropriately audited and evaluated.²⁶⁹

Private firms' incentives often serve a salutary purpose. As discussed, they are often in the best position to recognize offsets that are not economically viable. But as important as that may be, firms should do more than pursue in their self-interest. An internal code of ethics can set the metes and bounds for the pursuit self-interest. And this sort of self-policing is preferable (if not always sufficient) to the alternative of intrusive external regulation.

what economists call a "moral hazard". See *infra* note 313 (defining moral hazard).

²⁶⁸ If supplier governments succumb to the temptation to protect suppliers from risky offsets, they risk becoming subject to regulatory capture. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (the seminal work on regulatory capture, articulating the theory that regulators risk being captured by the firms they regulate); Richard Posner, 5 BELL J. ECON. & MGMT. SCI. 335, 341 (1974) (summarizing the view that "economic regulation is not about the public interest at all, but is a process by which interest groups seek to promote their (private) interests"). Thus, rather serving a benign or even an ameliorative function, firms' market incentives may be subverted and become a corrupt and corrupting influence, merely competing for economic rent. See PARISI, *supra* note 140, at 254-55 (citing Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967) (defining "rent seeking" as "unproductive competition" utilizing the "political process" and stating that Tullock's article "lays the foundations for the understanding of unproductive and destructive competition"); Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974) (first coining "rent seeking").

²⁶⁹ TRANSPARENCY INT'L, *supra* note 41, at 5.

An internal code sends an important message and helps establish a culture that is sensitive to the financial, reputational, and legal risks associated with offsets.²⁷⁰ McKinsey reports that “offsets are increasingly becoming a C-suite agenda item.”²⁷¹ Establishing and enforcing an internal code of ethics would send a top-down message commensurate with their significance to suppliers’ executives is essential.

B. Supplier Governments’ Options

Rich countries with large defense sectors are the principal suppliers, the United States the largest among them. They face rapid growth in the price of next-generation equipment.²⁷² They therefore seek to sell abroad to spread costs.²⁷³ Because this is a buyer’s market, selling abroad entails tolerating offsets.²⁷⁴ While such governments probably cannot unilaterally end or even curtail offsets much,²⁷⁵ they should still play a leading role in shaping offset policy.

²⁷⁰ See, e.g., Ungaro, *supra* note 76, at 8 (detailing some of the risks associated with offsets).

²⁷¹ Dehoff et al., *supra* note 261, at 2 (noting that in the past 20 years, “US defense contractors have typically entered into an average of 30 to 60 offset agreements each year, representing between \$3 billion and \$7 billion in obligations per year,” that Lockheed Martin reported \$9.3 billion of outstanding offset agreements in 2012, and “ten other companies have accumulated obligations in excess of \$1 billion each”).

²⁷² See Brauer & Dunne, *supra* note 22, at 261-62 (describing “geometric” growth in the cost of weapons systems).

²⁷³ See Valigra, *supra* note 210, at 46 (connecting offsets with costs spreading); see, e.g., Markusen, *supra* note 90, at 71 (reporting that United States believes it cannot afford weapons upgrades without spreading costs); Jason Sherman, *DoD Seeks Expansion of Pilot Program to Facilitate Foreign Weapons Sales*, INSIDE PENTAGON, May 16, 2013, <https://www.defensenewsstand.com/defensealert/dod-seeks-expansion-pilot-program-facilitate-foreign-weapons-sales> (describing the Pentagon’s push for a “program that allows the government to match defense industry investments in the tamper-proof features of critical weapon system components, and aims to facilitate foreign sales and additional revenue for U.S. companies”); Anderson & Moores, *supra* note 91, at 3 (reporting that exports have grown while Western military spending has dipped); Dehoff, *supra* note 262, at 1 (urging firms “to look outside their core markets for growth”).

²⁷⁴ See Schoeni, *supra* note 5, at 382 n.84 (citing ETHAN B. KAPSTEIN, *THE POLITICAL ECONOMY OF NATIONAL SECURITY* 168 (1992) (“Given the competitive nature of the contemporary arms market, buyers have been able to demand any number of services from sellers as part of a weapon package.”); Matthews, *supra* note 114, at 90 (describing the transition from a seller’s market to a buyer’s market in the early 1980s)).

²⁷⁵ See Hammond, *supra* note 13, at 182-83 (arguing that “[i]t is unlikely, given the falling share in market sales, that the United States can reverse the trend in offsets”).

Among the most important insight into supplier governments is that firms' interests and the public interest often diverge.²⁷⁶ Suppliers maximize profits; their governments must consider a wider range of issues. These include national²⁷⁷ and international security,²⁷⁸ the defense industrial base,²⁷⁹

²⁷⁶ See Petersen, *supra* note 253, at 490 (saying policymaking should not be delegated to private parties "because private sector firms have a legal, fiduciary responsibility to their stockholders and, as such, their focus and responsibilities may or may not align with the economic and national security interests" of their government).

²⁷⁷ See, e.g., *id.* at 489-490 (citing Herrnsstadt, *supra* note 43, at 6-7) (listing ways offsets can undermine security); Neuman, *supra* note 96, at 99-100 (noting that proponents and opponents alike agree that offsets implicate security issues).

²⁷⁸ Proliferation is an international security concern that is bound up with offsets. See *supra* note 206. Bolstering military autocracies is another such concern. See *supra* note 211. This is not, of course, an exhaustive list.

²⁷⁹ See SMITH, *supra* note 250, at 522-23 (advocating an exception to free trade for gunpowder and sailcloth, which were the war materiel in his time, because "it might not always be prudent to depend upon our neighbours for the supply"). Though efficiency would favor eliminating domestic arms production in most countries, many consider this an "efficiency trap" and have "the need for 'second-best,' non-market solutions." Kapstein, *supra* note 119, at 660 (citing Robert Keohane & Joseph Nye, *International Interdependence and Integration*, in HANDBOOK OF POLITICAL SCIENCE, VOL. 6, ___, 400 (Fred I. Greenstein & Nelson W. Polsby eds., 1975)).

technology transfer,²⁸⁰ employment,²⁸¹ and competitiveness.²⁸² Developing an offsets policy entails choices between revenue and security.²⁸³ Even among suppliers, interests diverge between prime and subcontractors, with the former often favoring offsets, the latter opposing them.²⁸⁴ Thus, supplier governments must serve as the “impartial arbiter” and weigh the “net benefits[.]”²⁸⁵ This is no mean feat.

“The arms trade,” Markusen writes, “must remain illiberal for security reasons[.]”²⁸⁶ This is because some measure of self-reliance in arms produc-

²⁸⁰ Technology transfer may imperil national security. *See, e.g.*, Herrstadt, *supra* note 43, at 6 (explaining the danger of “leakage” of leading weapons technology) (quoting Ann Markusen, *Regarding Offsets and U.S. Export Controls*, in NAT’L COMM. ON THE USE OF OFFSETS IN DEF. TRADE, STATUS REPORT OF THE PRESIDENTIAL COMMISSION ON OFFSETS IN INTERNATIONAL TRADE (2001)); William Keller et. al, *Technological Dimensions of National Security*, in POLICY ISSUES IN AEROSPACE OFFSETS: REPORT OF A WORKSHOP 13, 13-17 (Charles W. Wessner & Alan Wm. Wolff eds., 1997), <https://www.nap.edu/read/5832/chapter/5>, (summarizing a panel on the effect of technology transfers on national security and related issues). Yet sharing technology with allies fosters relationships and enables interoperability. *See* Hammond, *supra* note 13, at 182 (explaining that the United States favored offsets within NATO to enhance standardization, interoperability, and “alliance cohesion”); Martin, *supra* note 18, at 42-43 (noting offsets contribute to NATO’s rationalization, standardization, and interoperability efforts).

²⁸¹ *See, e.g.*, *Defense Offsets: Are They Taking Away Our Jobs?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of H. Comm. on Gov’t Reform*, 106th Cong. 114 (1999), <https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg64306/pdf/CHRG-106hhrg64306.pdf>; U.S. GEN. ACCOUNTING OFFICE, GAO-03-649, DEFENSE TRADE: REPORT AND RECOMMENDATIONS OF THE DEFENSE OFFSETS COMMISSION STILL PENDING 4-5 (2003), <http://www.gao.gov/assets/240/238373.pdf>; Robert E. Scott, *The Effects of Offsets, Outsourcing, and Foreign Competition on Output and Employment in the U.S. Aerospace Industry*, in TRENDS AND CHALLENGES IN AEROSPACE OFFSETS, *supra* note 15, at 133, 145-54. *But see* Martin, *supra* note 49, at 15, 43-44 (suggesting offsets have little impact on employment except to shift workers away from fields where they enjoy a comparative advantage); Mowery, *supra* note 85, at 109 (reporting that the effect of offsets on employment shifts has been “modest”).

²⁸² *See, e.g.*, Barney & Breen, *supra* note 75, at 4-5 (noting that U.S. firms’ competitors have fewer export restrictions and that “availability can trump technology”).

²⁸³ *See* Kapstein, *supra* note 119, at 674. That is, offsets are to resolve the tension between domestic security interests and the globalization of high technology. *Id.* at 658.

²⁸⁴ Cole, *supra* note 42, at 769 (despite “immediate returns” to primes who win contracts to sell arms abroad, subcontractors often lose out); ANNETTE ROSENKÖTTER, POLICY DEP’T ECON. & SCI. POLICY, EUROPEAN PARLIAMENT, BRIEFING NOTES ON DEFENCE PROCUREMENT, IP/A/IMCO/NT/2008-07, at 27-28 (2008) (arguing that offsets affect subcontractors more than primes).

²⁸⁵ Brauer, *supra* note 16, at 57.

²⁸⁶ Markusen, *supra* note 90, at 66; *see also* SMITH, *supra* note 250, at 405, 461-62

tion is thought to be necessary for national security. This view is held as much in Europe²⁸⁷ as it is in the United States.²⁸⁸ While this is one reason recipients demand offsets, from supplier governments' perspective, offsets exacerbate the decline of their domestic arms markets, disrupt supply chains,²⁸⁹ and erode their defense industrial bases.²⁹⁰

Short of banning suppliers from entering into offset agreements, thereby undercutting its defense industry's competitiveness abroad, supplier governments can do little to stem the demand for offsets. They nonetheless have options for addressing their effect. One option is doing nothing; they can weigh how foreign sourcing affects security and favor offsets with allied nations; they can end "know nothing" policies; they can study the effect on lower-tier suppliers; and they can gather more data, including "real-time" tracking.

(making an exception to his general advocacy for free trade for nations to produce war materiel to defend themselves and ensure security of supply).

²⁸⁷ See, e.g., Heuinckx, *supra*, note 233; Baudouin Heuinckx, *The EU Defence and Security Procurement Directive: Trick or Treat?*, 1 PUB. PROCUREMENT L. REV. 9, 15 (2011) (detailing European concerns for and EU provisions regarding "security of supply" of defense materiel) (citing Aris Georgopoulos, *European Defence Procurement Integration: Proposals for Action Within the European Union* (2004) (unpublished Ph.D. thesis, University of Nottingham) (on file at the University of Nottingham library); William R. Hawkins, *The Need for Socioeconomic Guidance in Procurement*, 40 PROCUREMENT LAW. 8, 9, 13 (2005) (extolling the virtues of self-reliance in arms production and noting that the French are committed to "autonomy of supply").

²⁸⁸ See, e.g., U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 9 (2014) (explaining that the U.S. armed forces depend on "the continued strength of our defense industrial base, a national asset that the Department of Defense is committed to supporting"); Petersen, *supra* note 253, at 488-90 (2011) (lamenting the lack of coherent U.S. policy and failure to address interplay of economic and security considerations).

²⁸⁹ See Herrstadt, *supra* note 43, at 6.

²⁹⁰ See Nackman, *supra* note 169, at 521-24.

1. First do no harm

The United States lacks a comprehensive offsets policy.²⁹¹ What, if anything, needs to be done?²⁹² Perhaps nothing. At the close of an offsets forum in 1996 Wolff observed, the “issues surrounding offsets may be too complex to resolve through government intervention without causing unintended harm to trade.”²⁹³ Attempts to “fix” offsets will result in unintended consequences.²⁹⁴ Some critics denounce this as insouciance,²⁹⁵ but it may be that “benign neglect” is best²⁹⁶ as it unclear what additional role supplier governments should have.²⁹⁷

²⁹¹ See Offsets Hearing, *supra* note 24, at 7 (statement of Frank C. Conahan, Government Accounting Office) (reporting that the United States “lacks a comprehensive approach to managing offsets” and that the federal “government takes no active role in administering offset transactions”); U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-99-35, DEFENSE TRADE: U.S. CONTRACTORS EMPLOY DIVERSE ACTIVITIES TO MEET OFFSET OBLIGATIONS 2-3 (1998) (explaining that the U.S. government generally takes a “hands-off” policy on both “offsets and the offset relationships between a U.S. contractor and a country purchasing”).

²⁹² See generally Alan Wm. Wolff, *An Overview of the Issues: What, If Anything, Needs to Be Done?*, in POLICY ISSUES IN AEROSPACE OFFSETS, *supra* note 280, at 37, 37-38, <https://www.nap.edu/read/5832/chapter/10>.

²⁹³ *Id.* at 37; Sharon Weinberger, *Experts Express Concerns Over Defense Offsets, But Offer Few Solutions*, DEF. DAILY, July 9, 2004, <http://go.galegroup.com/ps/i.do?id=GALE%7CA120373650&v=2.1&u=con&it=r&p=AONE&sw=w&asid=1e2ed666c244ca487ca4dfada5206f838> (reporting that experts agree that offsets are “troublesome” but are unable to offer “easy solutions”).

²⁹⁴ Ungaro, *supra* note 76, at 9 (observing that offsets are complex and “not an easy issue to handle”).

²⁹⁵ See generally Herrnstadt, *supra* note 43 (faulting the United States’ for not having a comprehensive policy).

²⁹⁶ Udis & Maskus, *supra* note 54, at 357. But Flamm contends that the United States’ indifference to offsets is only superficial. Flamm, *supra* note 46, at 126. That is fitting because at this level “offsets are purely private matters . . . and there is no reason for the government to intervene.” *Id.* At another level, the United States condemns offsets as inefficient and trade distorting. *Id.* at 126-27. “At a still deeper level,” it is a “practical and enthusiastic supporter of offsets used to promote defense sales.” *Id.* at 127. At the “deepest level” the United States exercises “policy leverage over privately negotiated packages” with control over export licenses. *Id.*

²⁹⁷ See Neuman, *supra* note 17, at 211 (summarizing the view of firms who are “unsure there is a positive role for government” who “express concern that any kind of government interference will compromise the independence and confidentiality of their business transactions”).

One thing seems certain: supplier governments should do nothing unilaterally.²⁹⁸ Even for the United States, by far the largest offset supplier, the time has long passed when a single country could end the global offsets trade.²⁹⁹ Unilateral prohibitions would only serve to cripple domestic defense firms or force them to move their corporate domiciles abroad.³⁰⁰

2. Increase transparency

One thing that all can agree on is that supplier governments can do more to “shin[e] a light” on offsets.³⁰¹ The United States can put paid to its rhetoric about offsets by ending its “no known offsets” policy, under which the government officially turns a blind eye to offsets associated with Foreign Military Sales.³⁰² And, as few supplier countries mandate disclosure, perhaps those “with major defence exporting industries” ought to “detail current offsets programmes entered into by their companies, with reports on the performance of the contracts.”³⁰³

Supplier governments can also amend their civil and criminal laws to encourage transparency and fight corruption. On the civil side, suppliers can be made liable for the fulfillment of offset obligations – both their own and

²⁹⁸ See Cole, *supra* note 42, at 802 (urging that the United States “impose further unilateral restraints rendering U.S. companies noncompetitive”); Johnson, *supra* note 56, at 49 (speaking for the Aerospace Industries Association and issuing “a plea for no unilateral action”); Gordon Healey, *Defense Industry Offset Association Position on Offset Issues*, in *TRENDS AND CHALLENGES IN AEROSPACE OFFSETS*, *supra* note 15, at 215, 223 (recommending “no unilateral action” given that “[o]ur foreign trading partners will continue to demand them, and our international competitors will continue to offer them”).

²⁹⁹ See Hammond, *supra* note 13, at 182-83 (arguing that “[i]t is unlikely, given the falling share in share in market sales, that the United States can reverse the trend in offsets”); see also Flamm, *supra* note 46, at 116 (noting that one of “two big questions surrounding the use of offsets in the defense trade” is whether the United States should “attempt to unilaterally ‘countervail’ foreign government policies”).

³⁰⁰ Nackman, *supra* note 169, at 528 (writing that the United States “clearly cannot simply prohibit U.S. companies from participation in offsets through regulation, as that would prove crippling in the international defense trade market” but that “a global prohibition is needed” instead).

³⁰¹ Herrstadt, *supra* note 43, at 15-16.

³⁰² Nackman, *supra* note 169, at 526-27.

³⁰³ TRANSPARENCY INT’L, *supra* note 41, at 41 (reporting that the United States in the one notable exception); see also Nackman, *supra* note 169, at 525-26 (recommending real-time tracking).

subcontractors’ – to incentivize more responsible conduct.³⁰⁴ On the criminal side, governments can fight global corruption by criminalizing misconduct abroad with domestic criminal laws, as the United States has successfully done with the Foreign Corrupt Practices Act.³⁰⁵

3. Track foreign sourcing carefully

Supplier governments have traditionally entered into offsets mainly with friends and allies.³⁰⁶ To the extent that offsets affect national security, supplier governments should assess foreign sourcing and favor agreements with allied nations.³⁰⁷ Where sourcing is critical, they should consider “second sourcing” to ensure continuity of supply.³⁰⁸ And they should be wary of the fact that nations have interests not allies³⁰⁹ and should practice statecraft to avoid overdependence on nations whose interests may change at inopportune moments.³¹⁰

³⁰⁴ TRANSPARENCY INT’L, *supra* note 41, at 42.

³⁰⁵ See Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT’L L. 365, 377-81 (2011) (describing the United States’ success with the Foreign Corrupt Practices Act); Eric C. Chaffee, *The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Corruption Laws in Preventing or Lessening Future Financial Crises*, 73 OHIO ST. L.J. 1283, 1289–92 (2012) (describing how the U.S. uses domestic law to combat crimes committed abroad).

³⁰⁶ See Woodward, *supra* note 229 at 78 (reporting that the United States has historically favored entered into offsets with friends and allies but that as “governments change and the strength of these relationships ebb and flow,” foreign source becomes more dangerous).

³⁰⁷ *Id.* at 85 (arguing the DoD “should continue to assess its current dependency on foreign sources for critical components in weapons systems” and “develop a measure for when this foreign sourcing becomes a threat to or national security”).

³⁰⁸ *Id.*

³⁰⁹ See RON CHERNOW, ALEXANDER HAMILTON 506-07 (2004) (writing that the “centerpiece” of Washington’s farewell address was strict neutrality and his view that interests not permanent alliances should guide American foreign policy); see also George Washington, Farewell Address (Sept. 19, 1796), http://avalon.law.yale.edu/18th_century/washing.asp (holding that “passionate attachment of one nation for another produces a variety of evils,” that “permanent, inveterate antipathies against particular nations, and passionate attachments for others, should be excluded,” that “our true policy to steer clear of permanent alliances with any portion of the foreign world,” and that to do otherwise is “to betray or sacrifice the interests of [one’s] own country”).

³¹⁰ For example, a 2004 study shows that the U.S. Army was forced to import munitions from Israel and Canada when domestic production proved insufficient when hostilities escalated in Iraq. Hawkins, *supra* note 287, at 10. Another study indicated the DoD found

Lower-tier suppliers are a particular concern to the defense industrial base as they lack the political muscle of prime contractors to make their concerns known or effectively lobby for protection. The GAO has warned that the U.S. Department of Defense “needs to improve its knowledge of the supplier base at the lower tiers to enable it to better understand who its suppliers are and what vulnerabilities may exist.”³¹¹

Finally, though nations have legitimate security concerns that may sometimes justify illiberal measures to protect their defense industrial bases, a word of caution is in order. Supplier governments must be careful to avoid the twin evils of moral hazard and regulatory capture³¹² based on dubious security concerns. They must likewise resist the temptation of protecting local industry under the false flag of “security” when economic protectionism is the true motive.

that it lacked sufficient precision guided munitions in Kosovo, Afghanistan, and Iraq *after* these conflicts had commenced. See U.S. DEP’T DEFENSE, ANNUAL INDUSTRIAL CAPABILITIES REPORT TO CONGRESS 4 (2005), http://www.acq.osd.mil/mibp/docs/annual_ind_cap_rpt_to_congress-2005.pdf).

³¹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-954T, DEFENSE TRADE: ISSUES CONCERNING THE USE OF OFFSETS IN INTERNATIONAL DEFENSE SALES 4 (2004). See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-236, COUNTERFEIT PARTS: DoD NEEDS TO IMPROVE REPORTING AND OVERSIGHT TO REDUCE SUPPLY CHAIN RISK 32-33 (2016); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-5, DEPARTMENT OF DEFENSE: A DEPARTMENTWIDE FRAMEWORK TO IDENTIFY AND REPORT GAPS IN THE DEFENSE SUPPLIER BASE IS NEEDED 10-14 (2008).

³¹² Market forces can foster efficiencies in the public realm only if governments do not create moral hazards and if regulators are not subverted by those whom they regulate. Economists define as a “moral hazard” the fact that contracts promising payment “on the occurrence of certain events *will cause a change in behaviour to make these events more likely.*” JOHN BLACK, ET AL., A DICTIONARY OF ECONOMICS 270 (2012) (defining moral hazard). Supplier governments are sometimes tempted to adopt that “socialize[]” the costs of offsets “while the economic benefits remain private.” Gould, *supra* note 267, at 262; see also *supra* notes 45-46 (citing evidence that governments sometimes “subsidize” offsets). This is a dangerous game and encourages undue risk taking. Similarly, the beneficial effects of the market will be to no avail if regulators are pursuing not the public interest but only the interests of the private firms they are supposed to monitor. Economists call this “regulatory capture”, and there is no reason to suppose that it does not occur in this realm. See *supra* note 268.

4. Make suppliers liable

Because suppliers' costs are often "socialized" while their benefits remain private,³¹³ the cost of noncompliance is sometimes "external" to the industry's cost-benefit analysis. This is what economists call a negative externality.³¹⁴ Supplier governments can "internalize" such costs by making prime contractors liable not only for their own noncompliance but also for partners and third parties in offset agreements.³¹⁵ This would deter them from renegeing on offsets after securing lucrative contracts and would encourage them to do business only with reliable subcontractors.

C. Recipients' Options

The arms market is an oligopsony, with many sellers and few buyers, which gives arms importers disproportionate market power.³¹⁶ But recipients want more than a price cut.³¹⁷ They want offsets. Offsets are attractive for achieving political objectives. They allow recipients to "double dip," that is, "to get the arms and yet to keep the money at home."³¹⁸ It is no wonder that

³¹³ See Gould, *supra* note 267, at 262.

³¹⁴ *The Economist* defines externalities as follows:

Externalities are costs or benefits arising from an economic activity that affect somebody other than the people engaged in the economic activity and are not reflected fully in prices.... Because these costs and benefits do not form part of the calculations of the people deciding whether to go ahead with the economic activity they are a form of market failure, since the amount of the activity carried out if left to the free market will be an inefficient use of resources. If the externality is beneficial, the market will provide too little; if it is a cost, the market will supply too much.

Economics A-Z Terms Beginning with E, ECONOMIST, <http://www.economist.com/economics-a-to-z/e/#node-21529743> (last visited on May 25, 2016).

³¹⁵ See TRANSPARENCY INT'L, *supra* note 41, at 41.

³¹⁶ Andrew L. Ross, *Developing Countries*, in *CASCADE OF ARMS: MANAGING CONVENTIONAL WEAPONS PROLIFERATION* 89, 102-03 (Andrew J. Pierre ed., 1997).

³¹⁷ Waller, *supra* note 27, at 226 (explaining that recipients utilize their market power to demand offsets because they want more than just "an effective price reduction").

³¹⁸ Brauer & Dunne, *supra* note 22, at 244; see also Kapstein, *supra* note 119, at 658 (saying offsets seek to resolve the tension between "nationalistic conceptions of security and the globalization of advanced industries"); see also Udis & Maskus, *supra* note 23, at 154 (explaining for programs seeking to "promote simultaneously numerous objectives in a reasonably consistent way without running afoul of various constraints," offsets arise naturally); Kapstein, *supra* note 119, at 674 (explaining that recipients seek to resolve the tension between the nationalistic conception of security and the globalization of high technology and arms markets).

recipients consider offsets to be of equal or greater value than the underlying arms transactions.³¹⁹

Offsets undoubtedly inflate prices.³²⁰ Despite what some recipients seem to think, they are not a “free lunch.”³²¹ Notwithstanding the price premium, it may be that benefits can accrue from properly structured offset agreements.³²²

Just as supplier governments should be careful about where public and private interests diverge,³²³ a similar tension arises between recipients and end users.³²⁴ For example, officials entering into offsets are sometimes more interested in scoring short-term political points from entering into offset agreements. End users, however, have different incentives. They want to ensure obligations are effectively fulfilled. Successful delivery matters to them.

Perhaps recipients are the best position to reform the offset trade. They have both the market power to demand changes and the incentive to ensure that they are not overpaying. Some of their options include setting goals that are realistic and worthwhile; increasing transparency; improving monitoring; and making suppliers liable for unfulfilled obligations.

1. Set goals that are realistic and worthwhile

Frequently, recipients pursue goals that are unrealistic based on the development level of their domestic industrial bases.³²⁵ For example, copro-

³¹⁹ See Dehoff et al., *supra* note 261, at 3 (writing that “governments sometimes give offset packages equal or greater weight than procurement costs when evaluating competing bids”).

³²⁰ See Hartley, *supra* note 44, at 42-43 (estimating offsets are marked up by 60 percent); Struys, *supra* note 99, at 166 (reporting Belgium overpaid for offsets by 20-30 percent).

³²¹ Petty, *supra* note 67, at 69 (explaining that recipients “pay a price for inefficient and uneconomical offsets” but these agreements are still “perceived” as “attractive”).

³²² See TRANSPARENCY INT’L, *supra* note 41, at 36.

³²³ See *supra* note 276 and accompanying text.

³²⁴ Pedro Montoya, Chief Compliance Officer at European Aeronautic Defence and Space Co., Presentation at the NATO Conference Panel: *Reducing Corruption Risks in Defence Contracts: The Challenge of Offset Agreements*, in NATO CONFERENCE, *supra* note 44, at 96, 96 (describing the “tension between the organisation demanding the offset, and the buyer or user of the offset”).

³²⁵ Ungaro, *supra* note 76, at 10 (observing that recipients’ ambitions frequently outstrip

duction or sourcing demands will be easier and cheaper to meet in Canada than in India. And if India demands offsets that are unsustainable under its current level of technological and industrial development, the price will be dear. Recipients should consider pursuing only those offset deals that are realistic and pay a premium only for strategically necessary production capacities.³²⁶

Technology transfer and economic development are often recipients' goals.³²⁷ Favorable results have been elusive – in part because suppliers are reluctant to part with their technology, in part because transferring such technology to countries lacking the requisite background technology is difficult.³²⁸ Perhaps the perfect has been the enemy of the good, and recipients would fare better if they sought more modest goals in their pursuit of economic development. They should consider steering suppliers³²⁹ utilizing multipliers to steer offset agreements toward indirect offsets. Direct offsets concern defense industries. Indirect offsets, in contrast, could be applied to any sector of the economy and could be used for the greater good.³³⁰ Investments in agriculture or education may be better long-term investments than efforts to artificially stimulate a non-existent domestic defense industry.³³¹

2. Increase transparency

For too long offsets have been “shrouded in secrecy.”³³² Recipients would benefit from greater transparency.³³³ Three options are particularly attractive. First, as Transparency International suggests, they should demand

“local reality” as countries demand coproduction agreements that they cannot deliver on based on their level of industrial development).

³²⁶ Davies, *supra* note 44, at 95 (arguing that the “premium on defence offsets should be paid only to sustain capabilities for defence strategic reasons”).

³²⁷ Ungaro, *supra* note 76, at 9.

³²⁸ See Schoeni, *supra* note 5, at 392-93, nn.162-64.

³²⁹ Steering suppliers toward indirect offsets could be accomplished using multipliers and similar policies. See *supra* note 32 and accompanying text (defining multipliers).

³³⁰ Costello, *supra* note 238 (urging use of multipliers “to drive investment in non-defense sectors to advance public health and social welfare systems, promote agricultural development, and improve their education systems”).

³³¹ See *id.*

³³² Hoyos, *supra* note 4, at 16.

³³³ TRANSPARENCY INT'L, *supra* note 41, at 31 (writing “importing government should make performance delivery and transparency the cornerstones of developing a clean offsets strategy”).

that suppliers “submit two prices for bids: one with the offsets package, and one without.”³³⁴ “This would allow,” the report continues, “for a real cost-benefit analysis to be made on offsets and increase visibility over the economics of offsets that allow for an enhanced monitoring process.”³³⁵ Another option is to adopt a one-stop webpage like the European Defence Agency’s (EDA) offset policies and practices page, which was a good idea, though it failed in practice.³³⁶ Third, they should publish obligations annually, for which the United States provides a useful model.³³⁷

3. Improve monitoring

A related option for supplier governments is to develop a bureaucracy for monitoring offset fulfilment.³³⁸ This means investing in acquisition personnel.³³⁹ Schooner has argued, “It should be remembered that rules do not stop corruption. People stop corruption. In credible procurement system models, implementation is a people issue. Corruption arises, in part, from inadequate investments in acquisition personnel.”³⁴⁰ Just so.

D. Multilateral Options

Perhaps some problems with offsets cannot be addressed separately at the corporate or national level but require, instead, coordinated efforts at the multinational level.³⁴¹ Currently, international efforts have been “contradictory and ineffective[.]”³⁴² “Consensus is a long way off,” and gradual efforts to mitigate corruption and to improve the management of offsets are probably

³³⁴ *Id.* at 35-36 (citing Davies, *supra* note 44, at 95 (recommending that officials demand bids with the price both with and without the offset package)).

³³⁵ *Id.* at 35.

³³⁶ Georgopoulos, *supra* note 80, at 36-37; TRYBUS, *supra* note 42, at 196 n.56, 215. This resulted in part because there was no consequence for failure to report and thus many countries chose not to report.

³³⁷ TRANSPARENCY INT’L, *supra* note 41, at 41-42.

³³⁸ Jones, *supra* note 25, at 114-15 (citing improvements in administration as reason for hope that offsets programs may not be as harmful as once thought).

³³⁹ Schooner, *supra* note 176, at 98.

³⁴⁰ *Id.*

³⁴¹ See Ianakiev & Mladenov, *supra* note 54, at 194 (concluding that “[i]t appears difficult to completely address the issue only at the corporate and national level”).

³⁴² Markusen, *supra* note 90, at 84 (writing that “policies of international organizations and national governments are contradictory and ineffective”).

the best that can be done for now.³⁴³ In 2009, NATO held a conference in Monterey, California to consider how to reduce corruption in member countries' defense procurement. Among their recommendations was increased transparency in the "volume, types, and concentration of offset[s]" at all levels of government.³⁴⁴ This would include improving data collection and developing mutual recognition of suspension and debarment programs. But, if offsets are to be curtailed, the United States must first exercise leadership.

1. American leadership

If multilateral change is to happen, the United States should exercise leadership. Although it may lack the market power to do so unilaterally,³⁴⁵ the fact that U.S. defense firms occupy an outsized share of the arms market gives the United States leverage to lead multilateral efforts.³⁴⁶ "A major impediment," however, is the Buy American Act, "which for all practical purposes renders the home market the exclusive domain of American prime contractors."³⁴⁷ "To our allies and buyer nations," Markusen writes, "demanding the cessation of offsets without opening up our domestic market is a non-starter."³⁴⁸ And this would seem to apply as much to reforming offsets as it would to ending them.

2. Better data collection

Suppliers, their governments, and recipients should push for better data collection and sharing through international institutions.³⁴⁹ Since this

³⁴³ See Schooner, *supra* note 176, at 97.

³⁴⁴ *Id.* at 97-98 (quoting NATO's official recommendations before the 2009 Strasbourg-Kehl summit).

³⁴⁵ Caverley & Kapstein, *supra* note 73, at 125 (explaining that America's share of the international arms trade once peaked in the 1990s at 60% and has since dropped again to about 30%).

³⁴⁶ Markusen, *supra* note 90, at 84 (writing that the United States "must play a lead role in the illiberal trade logjam").

³⁴⁷ *Id.*

³⁴⁸ Markusen, *supra* note 90, at 84.

³⁴⁹ *But see* ALISTAIR D. EDGAR & DAVID G. HAGLUND, THE CANADIAN DEFENCE INDUSTRY IN THE NEW GLOBAL ENVIRONMENT 43-47, 172 n.82 (1995) (citing NATO ECONOMICS DIRECTORATE, EXPERT TEAM ON THE IMPROVEMENT OF STATISTICS (1991) (reporting that NATO found a meaningful collection of defense trade data was impractical)).

was explored in the author’s previous Article,³⁵⁰ it is not elaborated on here. Suffice it to say that outside the United States data collection is poor.

The first step is developing common standards. The Organisation for Economic Cooperation and Development (OECD) may be the best forum for developing transparency, valuation, and competition standards.³⁵¹ International accounting rule makers could also develop standards for offset liabilities.³⁵²

In addition to tracking the offset transactions, better data collection would also include the development of mutual recognition of suspensions and debarments. In theory, such programs could help protect recipients from suppliers who have no intention of fulfilling offset obligations. Protections from better data collection would be prospective and indirect, but the recognition of suspensions and debarments could provide immediate and direct protection from bad actors.

V. CONCLUSION

Albert Einstein famously spent his final years vainly pursuing a unified field theory. Similarly, assuming that offsets are a problem, it may be that there is no “unified” solution.³⁵³ It may be that the search for a comprehensive strategy to address offsets is a fool’s errand.

Three conclusions can be drawn from the foregoing. First, more data are necessary to know what the true economic consequences are.

Second, even if the data confirm that offsets are inefficient, that does not settle the matter. Markusen notes that the arms trade “must remain illiberal for security reasons[.]”³⁵⁴ That is the practical reality. This debate is not only about dollars and cents; recipients will continue demanding offsets if they believe it is in their interest to do so.

³⁵⁰ Schoeni, *supra* note 5, at 404-08.

³⁵¹ See Lambrecht, *supra* note 169, at 107-13.

³⁵² THE ECONOMIST, *supra* note 39, at 63 (reporting that “accounting rulemakers have failed to impose any requirement to disclose offset liabilities” and that firms “can thus choose how, or whether, to put them on the balance-sheet”).

³⁵³ Youssef & Ianakiev, *supra* note 114, at 120 (writing that perhaps “qu’il est illusoire de rechercher à établir une théorie unifiée des offsets”).

³⁵⁴ Markusen, *supra* note 90, at 66.

Third, the questions raised here require further development. In particular, the position taken on corruption and international security are intended to stimulate debate and illustrate the fact that there are no easy answers to these questions. True believers seem to suppose that banning offsets would usher in peace and prosperity. That seems unlikely. Unfortunately, it is not that simple. This is a policy question, and such questions are rarely binary. As literary critic H.L. Mencken once observed, “There is always an easy solution for every human problem—neat, plausible, and wrong.”³⁵⁵ The policy questions raised here should be thoroughly examined or else a hasty ban on offsets may prove a similarly disappointing solution.

³⁵⁵ H.L. Mencken, *The Divine Afflatus*, in *A MENCKEN CHRESTOMATHY* 442, 443 (1949).

“UNLEASH US FROM THE TETHER OF FUEL”—THE
STRANGE HARMONIOUS DICHOTOMY OF SECTION 526
OF THE ENERGY INDEPENDENCE AND SECURITY ACT

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“No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, or any mobility-related use, other than for research or testing, unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.” - 42 U.S.C. § 17142

I. INTRODUCTION

Since the advent of modern warfare utilizing motorized ships, vehicles, and aircraft, energy supplies, particularly fossil fuels such as petroleum, have been central to victory or defeat in armed conflict.¹ Following World War II, then-United States (U.S.) naval aviator Thomas Moorer interrogated former Imperial Japanese Navy Vice-Admiral Takeo Kurita during the U.S. military's postwar interrogation of former Japanese commanders.² During the interrogation, Admiral Kurita stated that one of the main turning points of the war occurred when the Japanese lost their fuel supplies, or as Admiral Kurita put it, "[w]e ran out of oil."³ Admiral Kurita went on to describe the Japanese military's desperation, which used fuel derived from used "tires, rice, and even pine needles" to fulfill its ever-increasing energy needs.⁴ Many years later, then Chief of Naval Operations, Admiral Moorer would assert, "[w]hat I learned then... was never lose a war, and the way to lose a war is to run out of oil."⁵ Even the victorious side of a conflict is not immune from energy supply issues. For example, when leading the United States Third Army's advance into Germany in 1944, General George S. Patton experienced frustration with fuel supply lines.⁶ General Patton opined, in August 1944, "[a]t the present time, my chief difficulty is not the Germans but gasoline. If I could only steal some gas, I could win this war."⁷ More recently, during the United States' involvement in OPERATION IRAQI FREEDOM, General James Mattis, who served as Marine Corps Commanding General, First

¹ "[Secretary] Burke pointed out that the protection of fuel lines was an important concern for both the Axis and Allied powers in World War II; the Allies were much more successful at protecting access to fuel, whereas by the end of the war, the Germans were brewing fuel from coal and the Japanese from pine roots and tires." Sarah E. Light, *The Military Environmental Complex*, 55 B.C.L. REV. 879, 887, 893, & 906 n.136 (2014) (quoting Interview with Sharon Burke, Assistant Sec'y of Def. for Operational Energy Plans and Programs (May 22, 2013)), available at <http://lawdigitalcommons.bc.edu/bclr/vol55/iss3/5>.

² Sharon E. Burke, *Powering the Pentagon: Creating a Lean, Clean Fighting Machine*, FOREIGN AFFAIRS, May/June, 2014, available at <http://www.foreignaffairs.com/articles/141207/sharon-e-burke/powering-the-pentagon>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Burke, *supra* note 2.

Marine Division, declared that the “Department of Defense must unleash us from the tether of fuel.”⁸

The United States’ dependence on foreign oil has been not only a military concern, but also has been a focal point of multiple Presidential administrations, with many working tirelessly to increase energy independence.⁹ During the early to mid-1970s Arab oil embargo, President Richard Nixon introduced Project Independence, a plan designed to end American reliance on foreign oil.¹⁰ In 2006, during the State of the Union address, President George W. Bush recognized the United States’ dependence on foreign, imported oil.¹¹ Even today, President Barack Obama’s administration has made it a priority to decrease American dependence on imported oil from volatile, inimical, and unpredictable countries and regions around the world.¹²

While energy independence has been a priority for Presidential administrations and the military, reducing the Department of Defense’s reliance on conventional oil is much easier said than done. The Department of Defense (DoD) is the largest consumer of energy in the United States.¹³ In total, the

⁸ See Light, *supra* note 1, at 914 (citing DEF. SCI. BD., REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON DoD ENERGY STRATEGY: MORE FIGHT—LESS FUEL 4 (2008), available at <http://www.acq.osd.mil/dsbreports/ADA477619.pdf>, archived at <http://perma.cc/8ZH5-DK44>).

⁹ Surya Gablin Gunasekara, *A Sticky Situation: Oil Sands, Alternative Fuels, Energy Security, and the EISA Section 526 Petroleum-Procurement Problem*, 3 GEO. WASH. J. OF ENERGY & ENVTL. L. 248, 248 (2012).

¹⁰ *Id.* (citing Address to the Nation About Policies to Deal with the Energy Shortages, PUB. PAPERS 916, 920 (Nov. 7, 1973)).

¹¹ Gunasekara, *supra* note 9, at 248 (citing Address to the Nation About Policies to Deal with the Energy Shortages, 1 PUB. PAPERS 920 (Nov. 7, 1973) and Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 146, 151 (Jan. 31, 2006)).

¹² Gunasekara, *supra* note 9, at 248 (citing Remarks at Georgetown University, 2011 DAILY COMP. PRES. DOC. 1, 1-3 (Mar. 30, 2011)).

¹³ See Light, *supra* note 1, at 881 (citing ENVTL. & ENERGY STUDY INST., FACT SHEET: DoD’S ENERGY EFFICIENCY AND RENEWABLE ENERGY INITIATIVES 1 (2011), available at http://files.eesi.org/dod_eere_factsheet_072711.pdf, archived at <http://perma.cc/6U7Z-HUCY>). In 2012, DoD emitted 77 million metric tons of CO₂-equivalent from energy consumption, or 72% of all CO₂ emitted by all federal agencies. See *FY 2012 Greenhouse Gas Inventory: Government Totals 2012*, U.S. DEP’T OF ENERGY (June 14, 2013), available at <http://energy.gov/eere/femp/downloads/fy-2012-greenhouse-gas-inventory-government-totals-2012>, archived at <http://perma.cc/T72J-BSBU>. In 2011, DoD was also responsible for 72% of all federal agency greenhouse gas (GHG) emissions. See *FY 2011 Greenhouse Gas Inventory: Government Totals 2011*, U.S. DEP’T

DoD accounts for 1% to 1.2% of all energy used in the United States.¹⁴ This usage equates to the military consuming “approximately 125 million barrels of oil per year,¹⁵ which cost taxpayers more than \$15 billion a year.”¹⁶ Further, DoD will spend an additional \$130 million for every \$1 increase in the price per barrel of crude oil which, when taking into account the volatility of the oil market, is easily foreseeable.¹⁷

As discussed above, given both the quantity and cost of DoD reliance on imported oil, the large and unpredictable economic burden shouldered by the American taxpayer, and the importance that previous and current Presidential administrations have placed on energy independence, it comes as no surprise that there are current federal laws and guidelines which speak directly to this issue. The Energy Independence and Security Act of 2007 (EISA), for example, is an omnibus energy bill passed by the 110th Congress and signed into law by President George W. Bush on December 19, 2007.¹⁸ When he signed the law, President Bush heralded it by remarking, “Today we make a major step with the Energy Independence and Security Act. We make a major step toward reducing our dependence on oil, confronting climate change, expanding the production of renewable fuels and giving future generations of our country a nation that is stronger, cleaner and more secure.”¹⁹

OF ENERGY (June 14, 2013), available at <http://energy.gov/eere/femp/downloads/fy-2011-greenhouse-gas-inventory-government-totals-2011>, archived at <http://perma.cc/Q367-39W6>).

¹⁴ Shobet Karbuz, *How Much Energy Does the US Military Consume – An Update*, The Daily Energy Report, Aug. 5, 2013, available at <http://www.dailyenergyreport.com/how-much-energy-does-the-u-s-military-consume-an-update/> (oil, mostly imported, accounted for over 80% of DoD’s energy consumption). In 2011, the U.S. military consumed approximately 125 million barrels of oil per year. *Id.*

¹⁵ See Gunasekara, *supra* note 9, at 248 (citing Coral Davenport & Yochi J. Dreazen, *The Green Latern*, NAT’L J., May 28, 2011, at 22, 24, available at <http://www.nationaljournal.com/magazine/the-clean-energy-military-20110526>).

¹⁶ See Gunasekara, *supra* note 9, at 249 (quoting Mark Udall, *Congress Should Support Military’s Energy-Efficient Initiatives*, COLO. SPRINGS GAZETTE, May 5, 2011, <http://www.gazette.com/articles/energy-118337-fuel-every.html>).

¹⁷ Sharon E. Burke, *National Security and Fuels of the Future: The Importance of Sec. 526*, WHITE HOUSE: BLOG (July 15, 2011, 12:26 PM), <http://www.whitehouse.gov/blog/2011/07/15/national-security-and-fuels-future-importance-sec-526>.

¹⁸ Press Release, White House, President Bush Signs H.R. 6, the Energy Independence and Security Act of 2007 (Dec. 19, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/12/20071219-6.html>.

¹⁹ *Id.*

It would seem that a law with support from both major political parties, heralded by a Republican President, and passed with a Democratic majority in Congress, would be fairly uncontroversial.²⁰ However, contained within EISA is Section 526, a small section discussing procurement of alternative fuels by federal entities. In a 300-page omnibus law, Section 526 comprises only nine lines. Yet those nine lines essentially forbid federal agencies from purchasing petroleum mobility-related products derived from unconventional or alternative fuel sources when their life-cycle green-house gas (GHG) emissions exceed those of conventional crude oil.²¹ What Section 526 lacks in length, it makes up for in controversy, as for the better part of the last seven years, from its inception up until present day, there have been countless efforts to repeal Section 526 and its regulatory guidance. These repeal efforts have found support from both Republicans and Democrats alike. The main focus of these repeal efforts centers on Section 526's effects on national security and the DoD's budget. What makes the debate surrounding Section 526 so interesting is that advocates for upholding Section 526 also use national security concerns and effects on the DoD's budget as the primary talking-points to support their position.

This Article is organized into in four main parts. Part A provides background on EISA and Section 526. It specifically focuses on what spurred passage of the law as well as its peculiar legislative history. Part B analyzes *Sierra Club v. United States Def. Energy Support Ctr.*, the seminal case addressing government fuel purchases under Section 526. It focuses on the effect the court's holding could have on potential similar litigation. Part C summarizes and analyzes arguments both for and against repealing Section 526 and the particular parties and groups in each camp. Part C also discusses the national security implications and concerns of Section 526, with particular focus on why the military has become a strong proponent of the law. Lastly, Part D addresses the unique situation and opportunities presented by the alignment of military and environmental objectives and the impact such an alliance can have on the greater population.

²⁰ A Visual Guide: The Balance Of Power Between Congress and The Presidency (1901-2016), <http://wiredpen.com/resources/political-commentary-and-analysis/a-visual-guide-balance-of-power-congress-presidency/>

²¹ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 526, 121 Stat. 1492, 1663 (2007) (codified as amended at 42 U.S.C. § 17142 (2006 & Supp. V)).

A. The History of Section 526 of EISA

1. Under the cover of darkness

For a law that engendered tumult shortly after its enactment on December 19, 2007, Section 526 of EISA had a rather quiet start. Yet, shortly after its passage, many legislators decried the fact that, in their view, Section 526 was a provision slipped into the larger EISA energy bill at the twelfth hour without appropriate review. Representative (Rep.) Thomas Jeb Hensarling (R-TX), stated, “Section 526 is a perfect example of a misguided provision being covertly tucked into a broad piece of legislation shortly before it was passed.”²² Likewise, Senator (Sen.) James Inhofe (R-OK) noted, “This misguided provision was surreptitiously inserted into the 2007 energy bill shortly before final passage. Despite the potential enormity of the provision’s consequences, no public hearings, discourse, or examination occurred before its inclusion.”²³ Contrary to Rep. Hensarling’s and Sen. Inhofe’s statements, the bill’s sponsor, Rep. Henry Waxman (D-CA), in a May 2, 2008 letter addressed to Sen. Carl Levin (D-MI) and Sen. John McCain (R-AZ), detailed the law’s history and process.²⁴

On June 7, 2007, Rep. Waxman, then Chair of the House Committee on Oversight and Government Reform, introduced House of Representative (H.R.) 2635, known as the Carbon Neutral Government Act of 2007.²⁵ From its inception, the Carbon Neutral Government Act had strong House Democratic backing, being praised by then House Majority Leader Rep. Nancy Pelosi (D-CA) as helping “achieve energy independence, strengthen national security, grow our economy and create new jobs, lower energy prices, and address global warming.”²⁶ As part of the Carbon Neutral Government Act,

²² Ben Geman, *CLIMATE: Energy bill’s fuel language was hidden in plain sight*, E&E Daily (Apr. 16, 2008), available at <http://www.eenews.net/stories/63396>.

²³ *Id.*

²⁴ Letter from Rep. Henry Waxman, Chairman, House Comm. on Oversight & Gov’t Reform, to Sen. Carl Levin, Chairman, Sen. Comm. on Armed Svcs, and Sen. John McCain, Ranking Minority Member, Sen. Comm. on Armed Svcs, (May 2, 2008) (on file with author) [hereinafter Waxman-McCain-Levin Letter]. <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/20080502110331.pdf>, see also <https://www.congress.gov/bill/110th-congress/house-bill/3221>.

²⁵ *Id.*

²⁶ *House Energy Bill Seeks Carbon Neutral DoD, Federal Government*, INSIDE EPA BLOG (July 10, 2007), <http://insideepa.com/daily-news/house-energy-bill-seeks-carbon-neutral-dod-federal-government>.

H.R. 2635 included Section 207, Procurement and Acquisition of Alternative Fuels.²⁷ Section 207 read as follows:

No Federal agency shall enter into a contract for procurement of an alternative or synthetic fuel, including a fuel produced from nonconventional petroleum sources, or any mobility-related use, other than for research or testing, unless the contract specifies that the lifecycle greenhouse gas emissions associated with the production and combustion of the fuel supplied under the contract must, on an ongoing basis, be less than or equal to such emissions from the equivalent conventional fuel produced from conventional petroleum sources.²⁸

When enacted as law seven months later in Section 526 of EISA, the original text from Section 207 in the Carbon Neutral Government Act remained unchanged.

On June 7, 2007, the same day Rep Waxman introduced the bill, H.R. 2635 was referred to the following House committees for review and comment: Oversight and Government Reform; Energy and Commerce; Armed Services; Transportation and Infrastructure; Natural Resources; and Agriculture.²⁹ Shortly thereafter, the Carbon Neutral Government Act was provided to the DoD and other various federal agencies to present comments or note any concerns.³⁰ Neither the DoD nor any other Federal agency provided any comments or concerns with respect to Section 207.³¹ Five days later on June 12, 2007, the House Committee on Oversight and Government Reform marked up H.R. 2635, which was reported as amended by voice vote, though no changes were noted or made to Section 207.³² On July 30, 2007, Rep. Nancy Pelosi introduced H.R. 3221, the New Direction for Energy Independence, National Security, and Consumer Protection Act, which was

²⁷ See Waxman-McCain-Levin Letter, *supra* note 24, see also <https://www.congress.gov/bill/110th-congress/house-bill/3221>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Waxman-McCain-Levin Letter, *supra* note 24, see also <https://www.congress.gov/bill/110th-congress/house-bill/3221>.

renamed the Housing and Economic Recovery Act of 2008, adopting H.R. 2635 as Title VI and incorporating Section 207 as Section 6207 as written.³³

On August 3, 2007, the following House committees discharged H.R. 2635: Energy and Commerce; Armed Services; Transportation and Infrastructure; Natural Resources; and Agriculture.³⁴ The next day, on August 4, 2007, the House of Representatives passed H.R. 3221 without any changes to Section 6207.³⁵ On December 6, 2007, after Senate review, comment, and markup, H.R. 3221, with Senate amendments, passed the House as H.R. 6, with Section 6207 being incorporated as Section 526.³⁶ Seven days later, the Senate passed H.R. 6 with Section 526 left untouched, with the House also passing H.R. 6 the following day.³⁷ After six-plus months during which legislators had the opportunity to review, comment, and markup Section 526, President George W. Bush signed H.R. 6 into law as part of EISA, with Section 526 mirroring the original language contained in section 207 of H.R. 2635.³⁸

Following H.R. 2635's enactment, the Congressional Research Service (CRS), on December 21, 2007, delivered a report on EISA to Congress. The CRS report made scant reference to Section 526, devoting only one line out of the 27-page document discussing the bill.³⁹ Absent from Section 526 is any discussion of key or controversial provisions.⁴⁰ Thus, the question becomes, how did such a seemingly benign section that failed to raise any concern before its enactment become so controversial? For this, we need to look into the catalyst that propelled Rep. Waxman to introduce the original provision in the initial Carbon Neutral Government Act.

2. The rest of the story: impetus behind enactment of Section 526

In the early 2000s, the United States Air Force set forth a policy of decreasing dependence on foreign oil by supplying fifty percent of its domes-

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Waxman-McCain-Levin Letter, *supra* note 24.

³⁸ *Id.*

³⁹ Fred Sissine, CONG. RESEARCH SERV., RL34294, ENERGY INDEPENDENCE AND SECURITY ACT OF 2007: A SUMMARY OF MAJOR PROVISIONS 16 (2007).

⁴⁰ *Id.* at 2.

tic fuel requirements from alternative sources by 2016.⁴¹ The majority of alternative fuel needed to meet this 50-50 requirement was proposed to come from coal-to-liquids (CTL) technology.⁴² In 2007, the Air Force announced plans to construct a large CTL plant at Malmstrom AFB, MT.⁴³ However, environmental studies and research suggested CTL fuel produced far more greenhouse house gas emissions than conventional petroleum.⁴⁴ Therefore, while CTL technology was thought of as an alternative to conventional fuel, in the aggregate it could be harmful to the environment, and thus less favored by environmentalists. When informed of the Air Force's plan to construct a CTL plant, Rep. Waxman, desiring to reduce the Federal government's greenhouse gas emissions, drafted and inserted Section 526 into the Carbon Neutral Government Act.⁴⁵ When subsequently asked why he proposed Section 526, Rep. Waxman unabashedly stated that it was proposed in response to the Air Force's desire to purchase and develop CTL fuels because of such fuel's ability to emit double the GHG emissions of conventional fuel.⁴⁶

This justification for Section 526 sparked controversy that Rep. Waxman wanted to keep the section under the radar until final passage. Consistent with this argument, one lobbyist stated, "he kept it below the radar to make sure it never engendered any opposition."⁴⁷ Tom Corcoran, a former Republican congressman and leading lobbyist for the use of fuels such as CTL and Canadian oil-sands, expressed the frustration of many CTL proponents when he remarked, "it would have been, in my opinion, proper for Chairman Waxman to take the floor and explain Section 526 and let the legislators know what the purpose of the legislation was and... what he was trying to accomplish."⁴⁸ Whether through lack of engagement by others—who had the opportunity to review and comment on the law—or through Rep. Waxman's

⁴¹ InsideEPA, July 10, 2007, *House Energy Bill Seeks Carbon Neutral DoD, Federal Government*.

⁴² *Id.* CTL technology is the scientific process of turning coal into useable liquid fuel.

⁴³ SourceWatch, *Malmstrom Air Force Base Coal-to-Liquids*, http://www.sourcewatch.org/index.php?title=Malmstrom_Air_Force_Base_Coal-to-Liquids.

⁴⁴ See Geman, *supra* note 22.

⁴⁵ David I. Bloom, Roger Waldron, Duane W. Layton & Roger W. Patrick, *EISA Provision Poses Major Problems*, Law 360 Blog (Mar. 17 2008), <http://www.law360.com/articles/50344/eisa-provision-poses-major-problems>.

⁴⁶ Letter from Rep. Henry Waxman, Chairman, House Comm. on Oversight & Gov't Reform, to Sen. Jeff Bingaman, Chairman, Senate Comm. on Energy and Natural Resources (March 17, 2008) (on file with author) [hereinafter Waxman-Bingaman Letter].

⁴⁷ See Geman, *supra* note 22.

⁴⁸ *Id.*

purported efforts to keep the section out of the spotlight, Section 526 has garnered much attention. Most of this attention stems from interpretations of the section’s broad and ambiguous language.

B. *Sierra Club v. United States Defense Energy Support Center*⁴⁹

In 2011, the seminal case dealing with Section 526 arose when the Sierra Club (Plaintiffs) sued the United States Defense Energy Support Center (now known as DLA Energy and will hereinafter be referred to as DLA).⁵⁰ “DLA...is responsible for procurement, storage, and distribution of fuel for DoD and other federal agencies.”⁵¹ The court explained DLA’s function as “[c]ompanies throughout the country sell to DLA refined petroleum products from a variety of crude oil feedstocks, including light, medium, and heavy crudes from a variety of sources, which are comingled at various stages of the shipping and refining process prior to market.”⁵² Some crude oil used by domestic refineries originate from oil sands in Alberta, Canada.⁵³

The case arose from DLA’s development of an Interim Implementation Plan (hereinafter “Interim Plan”) for providing guidance to the “agency’s workforce, suppliers, and customers on how DLA [would] comply with Section 526.”⁵⁴ Under the Interim Plan, DLA’s contracts for petroleum products fell outside Section 526’s purview.⁵⁵ In reaching this conclusion, DLA’s Interim Plan relied on DLA’s legal analysis of Section 526 as well as the rest of EISA, commonly used statutory definitions, legislative history, knowledge and experience with energy related commodities, and the best data available regarding lifecycle greenhouse gas emissions for several fuels.⁵⁶ Accordingly, DLA decided that procuring fuel derived from oil sands was outside the parameters of Section 526 because it was a commercially available fuel

⁴⁹ *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 01:11-cv-41, 2011 WL 3321296 (E.D. Va. Jul. 29, 2011).

⁵⁰ See Gunasekara, *supra* note 9, at 249 (explaining how DESC was renamed DLA Energy in 2010 to “create a clearer and more definite identity,” but its mission remained unchanged).

⁵¹ *Sierra Club*, 2011 WL 3321296, at * 3.

⁵² *Id.*

⁵³ *Id.* (explaining Alberta oil sands make up approximately 6 percent of crude supplied to all domestic refineries, but make up only less than 2 percent of fuel supplied from U.S. refineries to DLA Energy).

⁵⁴ *Id.* at *4-*5.

⁵⁵ *Id.* at *5.

⁵⁶ *Sierra Club*, 2011 WL 3321296, at *5.

source. DLA stated, “[t]he amount of oil sands crude mixed with conventional crude oil is not substantial and is part of the normal crude oil distribution system.”⁵⁷ DLA reasoned that even if the amount of fuel originating from oil sands were ‘more than incidental,’ section 526 would not apply so long as DLA did not explicitly single out oil sands for procurement.⁵⁸ Under its own argument, DLA reasoned the lions-share of its fossil fuel-related acquisitions would be outside the coverage of Section 526’s umbrella.⁵⁹

In response to DLA’s Interim Plan, the Sierra Club filed a civil suit asserting three counts. The first count stated the DLA fuel purchase violated Section 526 because:

(1) fuel derived from oil sands are allegedly synthetic fuel, or... a nonconventional petroleum source; (2) some mobility related fuels supplied from DoD to the U.S. military under these contracts are refined from crude derived in part from Canadian oil sands; and (3) contracts for those fuels omit Section 526’s lifecycle GHG emissions certification.⁶⁰

Next, Sierra Club’s second count asserted DLA violated the Administrative Procedures Act (APA) in developing the Interim Plan because DLA failed to follow proper rulemaking procedures. Lastly, Sierra Club’s third count asserted a violation of the National Environmental Policy Act (NEPA), in that DLA failed to conduct an environmental assessment (EA) for the Interim Plan and the mobility-related fuel purchases as required under Section 102(2) (C) of the Act.⁶¹

Sierra Club sought relief primarily for two injuries. First, it alleged an “increased risk of harm to their health, recreational, economic, and aesthetic interests as a result of [DLA’s] conduct.”⁶² Specifically, Sierra Club averred

⁵⁷ Gunasekara, *supra* note 9, at 251 (quoting Waxman-Bingaman Letter, *supra* note 49).

⁵⁸ Gunasekara, *supra* note 9, at 251-52 (quoting DEF. ENERGY SUPPORT CTR., INTERIM IMPLEMENTATION PLAN REGARDING SECTION 526 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, at 8 (2009), available at <http://www.decs.dla.mil/DCM/Files/Interim%20Implementation%20Plan%20Aug%202009.pdf>).

⁵⁹ Gunasekara, *supra* note 9, at 252 (citing DEF. ENERGY SUPPORT CTR., INTERIM IMPLEMENTATION PLAN REGARDING SECTION 526 OF THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, at 8).

⁶⁰ *Sierra Club*, 2011 WL 3321296, at *5.

⁶¹ *Id.*

⁶² *Id.* at *6.

that DLA failed to include a GHG emission lifecycle certification for fuel derived from the Alberta oil sands.⁶³ Plaintiffs claimed that proper redress for these injuries required DLA to comply with EISA Section 526, “thereby restricting the use of oil sands derived fuels by Defendants and reducing the impacts of the mining, refining, and end use of these fuels, including increased GHG emissions and global warming.”⁶⁴ Second, Plaintiffs claimed DLA’s compliance with the APA and NEPA procedures should lead DLA to reconsider and perhaps modify their practice and begin to include Section 526 certifications in their contracts going forward.⁶⁵

DLA and the American Petroleum Institute (API) filed motions to dismiss for lack of subject matter jurisdiction.⁶⁶ Thus, before moving to the merits of the case, the court addressed DLA’s and API’s procedural arguments that Plaintiffs lacked standing to bring suit on behalf of its members.⁶⁷ As the court explained, organizations may bring suit on behalf of its members if they can “demonstrate that (1) their members would have standing to sue as individuals; (2) the interest they seek to protect are germane to the organizations’ purposes; and (3) the suit does not require the participation of individual members.”⁶⁸ The court noted the standing analysis in environmental cases does not center on whether the challenged action will significantly affect the environment in general, but rather “it focuses on whether [plaintiffs] have shown a particularized environmental interest of theirs that will suffer demonstrably increased risk, and whether [defendant’s activity]...is substantially likely to cause the demonstrable increase in risk to their particularized interest.”⁶⁹ The court noted Plaintiffs alleged their injuries were the consequence of climate change linked to GHG emissions that “caused or purportedly will cause generalized environmental impacts, such as increased frequency in storms, increased risk of fire to public lands, increased risk of damage to coastal properties, and loss of plant species.”⁷⁰ Thus, the district court found the asserted claims too generalized because Plaintiffs failed to

⁶³ *Id.* at *6.

⁶⁴ *Id.* at *6-*7

⁶⁵ *Id.* at *7.

⁶⁶ *Sierra Club*, 2011 WL 3321296, at *7.

⁶⁷ *Id.*

⁶⁸ *Id.* at *7-*8 (citing *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)).

⁶⁹ *Sierra Club*, 2011 WL 3321296, at *8 (citing *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 665 (D.C. Cir. 1996)).

⁷⁰ *Sierra Club*, 2011 WL 3321296, at *10.

adequately allege its members suffered or would have suffered “injuries from pipeline transmission or the refining of COSRC [Canadian oil sands recovered crude oil], let alone DLA’s purchasing contracts for fuel that may contain [incidental amounts of] COSRC.”⁷¹

The court also found, in regards to the second and third counts, Plaintiffs failed to meet the injury requirement for standing.⁷² The court noted Plaintiffs failed to illustrate a particularized harm stemming from the DoD’s purchase contracts for fuel derived from COSRC.⁷³ Next, the court stated Plaintiffs failed to show an adequate causal connection between DLA’s behavior and the alleged harm.⁷⁴ The court reasoned that Plaintiffs failed to demonstrate a satisfactory causal connection because the asserted harms were not fairly traceable to DLA’s conduct, but rather were the result of “independent actions of third parties not before this court, namely producers of fuel from Canadian oil sands and persons who would purchase that fuel if DLA did not, and emitters of greenhouse gases whose emissions will continue regardless of what happens in the lawsuit.”⁷⁵ The court set out in detail the “logical leaps and attenuated assumptions” required to find any causal connection, when it stated:

First, if Defendants had complied with Section 526, they would not have been able to purchase fuels that are refined in part from [Canadian oil-sands-recovered crude (“COSRC”)]. Second, without those purchases, U.S. refineries would not have been able to sell such fuels refined in part from COSRC to other purchasers and thus would have reduced their demand for and refining of such crude. Third, if those domestic refiners had reduced their demand for COSRC, no other purchasers would have purchased the same or comparable amounts. Fourth, based on these assumptions, producers of fuel from COSRC would have and will commensurately reduce the mining and production activities that emit greenhouse gases. Fifth, this reduction would not have been offset by increased emissions anywhere else. Sixth, as a result, fewer overall GHG would have mixed in the earth’s atmosphere. Seventh, as a

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at *11.

⁷⁴ *Id.*

⁷⁵ *Sierra Club*, 2011 WL 3321296, *12.

result of the emissions reduction, the accumulated atmospheric emissions would trap less heat. Eighth, the resulting reduction in atmospheric heat would result in a reduction in the risk of harm Plaintiffs allegedly face to their health, recreation, economic, and aesthetic interests as a result of climate change.⁷⁶

Failing to find any, even tenuous, causal association, the court determined the inclusion or exclusion of a lifecycle-GHG-emission certification in DLA contracts could not have impacted how CORSC was mined or produced.⁷⁷

With respect to redressability, the district court stated that even if it could be shown Plaintiffs caused the alleged injuries, the court would be unable to provide any relief.⁷⁸ The court concluded that, even if DLA was enjoined from contracting for fuels partially derived from CORSC, it would not reduce the climate change risks Plaintiffs alleged because “others around the world [would] purchase the same amounts of the fuels that Defendants are forced to forgo.”⁷⁹ Likewise, any injunction would fail to reduce the climate change risks Plaintiffs alleged because any decrease in GHG emissions attributable to a Section 526 lifecycle certification requirement could be offset by others in the world increasing their emissions.⁸⁰

Unfortunately, this case never reached the merits, because the court ruled the Plaintiffs lacked standing and dismissed the case. Plaintiffs filed no appeal to the district court’s decision, and there has yet to be another case that addresses the scope of Section 526 violations. Presumably, given the case’s posture, DLA has continued to purchase commercially available fuel that is at least partially derived from CORSC, even though Section 526 remains in effect and potentially prohibits continuing such purchases and contracts.⁸¹

That *Sierra Club* was unsuccessful demonstrates the difficulties plaintiffs most likely will face when seeking to prove standing in climate-related claims. Thus, the question arises: whether there is any possibility of bringing a successful suit for non-compliance with Section 526? First, the *Sierra Club* court’s holding indicates plaintiffs will have a steep uphill battle in proving

⁷⁶ *Id.* at *13.

⁷⁷ *Id.* at *14.

⁷⁸ *Id.* at *16.

⁷⁹ *Id.* at *17.

⁸⁰ *Sierra Club*, 2011 3321296, at *17.

⁸¹ See Gunasekara, *supra* note 9, at 253.

the injury-in-fact requirement for failure “to conclusively demonstrate that the global warming produced by defendant’s carbon dioxide emissions creates an actual injury, or that a future injury from such emissions is imminent.”⁸² The biggest hurdle plaintiffs will face is the generalized nature of the risks associated with climate change, such as degraded recreational use of the surrounding environment and incidental health issues which are often too abstract to meet the “concrete and particularized” or “imminent” standard.⁸³ Second, with the complexity in tracking an alleged injury to a specific defendant, it remains doubtful whether a plaintiff could prove any form of causation.⁸⁴ There are likely millions of global sources of GHG emissions, and it would surely prove to be an exercise in futility to try and pinpoint a particularized party as responsible for causing a plaintiff’s alleged injury.⁸⁵

Climate change cases, and the attendant plaintiff’s allegations of climate change injuries, present the classical all-or-nothing paradox of “everyone or no one is at fault.”⁸⁶ This paradox ultimately means that “either everyone or no one will have standing in climate litigation,” because climate change, in some form or fashion, likely affects all citizens throughout the globe.⁸⁷ This paradox also raises judicial concerns about a deluge of lawsuits, and the overwhelming majority of courts have been hesitant to find suitable standing in climate-related claims.⁸⁸ “[W]ith climate change, the Court must enforce some limits on what constitutes an injury-in-fact; otherwise, it would be overwhelmed by a flood of lawsuits asserting generalized grievances against polluters large and small.”⁸⁹ *Sierra Club* and the absence of overrul-

⁸² Shepard Daniel, *Sierra Club v. U.S. Defense Energy Support Center: Standing in the Way*, 39 *ECOLOGY L.Q.* 622 (2012), available at <http://scholarship.law.berkeley.edu/elq/vol39/iss2/14> (citing Blake Bertagna, Comment, “(citing Blake Bertagna, Comment, *The Ability of Plaintiffs to Establish Legal Standing to Redress Injuries Caused by Global Warming*, 2006 B.Y.U. L. REV. 415, 418 (2006)).

⁸³ Daniel, *supra* note 82, at 622 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

⁸⁴ *Id.* (citing *Lujan*, 504 U.S. at 560).

⁸⁵ *Id.* at 622-23.

⁸⁶ *Id.*

⁸⁷ *Id.* at 623 (citing David R. Hodas, *Standing and Climate Change: Can Anyone Complain about the Weather?*, 9 *J. TRANSNAT’L L. & POL’Y* 451, 486 (2000)). “Under Justice’s Scalia’s standing theory [as established in *Lujan*], because increases in CO2 concentration affect changes in the climate globally, everyone is harmed so on one could complain.”).

⁸⁸ *Id.*

⁸⁹ Daniel, *supra* note 82, at 623 (quoting *Amigos Bravos v. U.S. Bureau of Land Mgmt.*,

ing precedent supports the view of judicial reluctance to broadly interpret standing requirements for plaintiffs alleging climate-change injury. Thus, the probability of a plaintiff bringing a successful suit against a Federal agency based on particularized injuries stemming from failure to follow Section 526 is highly unlikely.

C. The Parties at Play: Proponents and Opponents of Section 526

Though Section 526 became law with little debate, there is no question that it has been controversial and contentious since its enactment. Different parties across the political spectrum have declared themselves as either proponents or opponents of the law, including the Canadian Federal Government, the Provincial Government of Alberta, API, the U.S. Chamber of Commerce, DoD, various environmental groups both in Canada and the United States, and U.S. politicians from both sides of the aisle. Some parties have even switched allegiance; vocal critics have become outspoken and powerful allies of the legislation. The following sections will discuss the arguments from those who oppose Section 526, and those who support it.

1. Opponents of Section 526

Since enactment of the law, detractors of Section 526 have had two goals: (1) to have the law broadly interpreted in order to permit little if any enforcement or, (2) to have the law fully repealed. Opposition has come from various sectors of the North American continent as well as different sectors of the economy and political spectrum. While the arguments are fairly consistent and homogenous, motivations are varied.

a. Congressional opposition

Opposition to the provision arose shortly after its enactment. Questions arose from members of Congress about the applicability of Section 526 to governmental entities procuring fuels. Rep. Waxman sought to clear up ambiguity regarding how Section 526 should be applied and the lack of record of debate on the provision. In this effort he wrote a series of letters to particular members of Congress in an attempt to clarify exactly what Section 526 covered.⁹⁰ In a March 2008 letter to then Chairman of the Senate Committee on Energy and Natural Resources, Sen. Jeff Bingaman (D-NM), Rep.

816 F. Supp. 2d 1118, 1133 (D.N.M. 2011)).

⁹⁰ See Waxman-McCain-Levin Letter, *supra* note 24.

Waxman attempted to illustrate specific examples of the types of transactions to which Section 526 would apply. He offered an example that “Section 526 would clearly apply to a contract that specifically required the contractor to provide an alternative fuel, such as coal-to-liquids fuel, or a fuel produced from a nonconventional petroleum source, such as fuel from tar sands.”⁹¹ Rep. Waxman’s letter, however, only further muddled the already murky waters, because he also asserted “the provision would also apply to such a contract where the purpose of the contract [was] to obtain such an alternative fuel or fuel from a nonconventional petroleum source, even if the source of the fuel [was] not explicitly identified in the contract.”⁹² As a result, a contract calling for fuel derived from coal-to-liquids or tar sands would be prohibited. However, his letter also raised the question of whether a contract for fuel, the source of which was not identified in the contract, could be prohibited under the law.

Towards the end of the letter to then-Sen. Bingaman, Rep. Waxman’s stance became even more unclear when he stated, “this provision would not apply to a contract to purchase a generally available fuel, such as a specific diesel or jet fuel blend, if that fuel is not an alternative fuel or predominantly produced from an unconventional fuel source.”⁹³ Yet, earlier in the same letter, Rep. Waxman wrote Section 526 “must be interpreted in a manner that makes sense in light of federal contracting principles,” and the Section was not meant to prohibit purchase of fuel containing “only incidental amounts of fuel produced from nonconventional petroleum resources.”⁹⁴ Here, confusion arose from an apparent inconsistency in the letter itself, because Rep. Waxman espoused two different standards under which fuels are permitted for purchase through government procurement. Initially, Rep. Waxman asserted that federal entities could purchase fuels readily available on the market which contain only incidental amounts of tar sand. Yet, in his closing remarks, he advanced a different standard: that federal entities may purchase generally available fuels not predominantly produced from unconventional sources. Further, there lacked any clarification for terminology regarding terms such as “incidental amounts” or “predominately produced,” and a lack of clarification concerning the applicability to specific contracts. Also, there remained ambiguity regarding applications to fuel transport processes and mechanisms through the refinery and pipeline systems.

⁹¹ See Waxman-Bingaman Letter, *supra* note 46.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

Rep. Waxman’s initial effort at clarification only further complicated the basis for interpreting Section 526—particularly with respect to the law’s applicability to government procurement of fuels—and it sparked the initial fears of its opposition. Specifically, although lacking in documentation, it has been anecdotally speculated that special interest groups and other members of Congress approached Sen. Carl Levin and Sen. John McCain, members of the Senate Armed Services Committee. These overtures to key Committee members are speculated to have included lobbying for inserting a repeal of the provision in the fiscal year 2009 National Defense Authorization Act. In a May 2008 letter, expressing concern about the provision’s effect on the U.S. military, Sens. Levin and McCain requested Rep. Waxman provide further clarification of Section 526’s application to military fuel purchases. In response, Rep. Waxman again stated, “Section 526 applies to fuels derived from unconventional petroleum sources such as tar sands. . . .”⁹⁵ He went on, adding, “with respect to tar sands, Section 526 does not bar federal agencies from purchasing generally available fuels that may contain incidental amounts of fuel from tar sands.”⁹⁶ Thus, much like in the letter to Sen. Bingaman two months prior, Rep. Waxman asserted that on the one hand, Section 526 applied to fuel derived from tar sands, but on the other hand, not all fuel derived from tar sands is prohibited from purchase so long as it does not contain more than an incidental amount of a prohibited unconventional or alternative fuel. However, the threshold that would constitute an incidental amount was never identified, nor was there any guidance as to whether the standard referred to an “incidental amount” or “predominantly produced.” This ambiguity has been the driver of much opposition to the provision, especially as it relates to military fuel purchases.

b. The Department of Defense: money & national security

Shortly after its enactment, the DoD expressed opposition to Section 526 and vocally advocated its repeal.⁹⁷ The DoD’s Office of General Counsel believed Section 526 could create substantial problems in DoD’s procurement of fuels.⁹⁸ The DoD General Counsel thought that Section 526 “creates uncertainty about what fuels DoD can procure and will discourage the

⁹⁵ See Waxman-McCain-Levin Letter, *supra* note 24.

⁹⁶ *Id.*

⁹⁷ Letter from Department of Defense General Counsel Daniel J. Dell’Orto to Senator James Inhofe, Ranking Member, Senate Comm. on Environment and Public Works (July 9, 2008), (on file with author) [hereinafter DoD-Inhofe Letter].

⁹⁸ *Id.*

development of new sources, particularly reliable domestic sources of energy supplies for the Armed Forces.”⁹⁹ A primary DoD concern was that the law would apply worldwide, yet there was no means to precisely and confidently determine the lifecycle GHG emissions from foreign produced fuel, and DoD argued that many foreign countries lacked the necessary infrastructure and established controls necessary to make such measurements.¹⁰⁰ Further, DoD argued that the analysis required to comply with Section 526, both domestically and abroad, would never be possible because the fuels were mixed in both the pipelining and refining processes; moreover, a chosen source of a fuel is a determinative factor in its GHG emissions footprint.¹⁰¹ In other words, the DoD argued that Section 526 required “an analysis of individual fuel purchases for lifecycle GHG emissions, even though determining the emissions footprint for any individual batch of fuel may be impossible.”¹⁰² For example, fuel from Nigeria or Venezuela would have a larger footprint than domestically produced fuel because of the GHG emitted when transporting the fuel to the United States.¹⁰³ Once the fuel is mixed together either in the pipeline or in a refinery, the fuels are incapable of being distinguished or separated from one another. This makes it impossible to confidently and accurately measure a purchased fuel’s lifecycle GHG emission, a necessary component of Section 526 compliance.¹⁰⁴ Lastly, the DoD argued that a strict interpretation of Section 526 would constrain both the DoD level of flexibility required under emergency fuel purchase scenarios and its purchases at commercial fuel stations and airports.¹⁰⁵

A core argument advanced by Section 526 opponents is that failure to repeal it would foster an increase in the United States’ dependence on foreign oil. More specifically, it would increase the dependence on foreign oil from unstable, unfriendly, and unreliable countries.¹⁰⁶ As API Executive

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² DoD-Inhofe Letter, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Sabrina Fang, *API: repeal of Section 526 of Energy Independence and Security Act could boost national security* (May 12, 2011), <http://www.api.org/news-and-media/news/newsitems/2011/may-2011/api-repeal-of-section-526>; *see also* Letter from Sen. James Inhofe to President Barack Obama (July 17, 2012) (Sen Inhofe advocates that by repealing Section 526 and constructing the Keystone XL Pipeline, “we could easily increase these [oil sands] imports from our friend and neighbor [Canada] – and reduce

Vice President Marty Durbin bluntly stated, “Section 526 of the EISA is bad for America...Our neighbor to the north is a reliable trading partner and strategic resource for meeting our nation’s growing energy demands and making America more energy secure.”¹⁰⁷ In contrast to our stable “neighbor to the north,” opponents of Section 526 point to the unstable, though oil-rich, Middle Eastern countries. For example, take the operations of the U.S. military to stabilize the Middle East and the ancillary bases that support operations to stabilize Iraq and Afghanistan.¹⁰⁸ Essential to the U.S. military presence in the Middle East region is the U.S. Air Force base and refueling station located in Abu Dhabi, United Arab Emirates (UAE).¹⁰⁹ This is one of the richest countries in the world and is controlled by a single family and led by one man, Sheik Khalifa bin Zayed Al Nahyan.¹¹⁰ Sheik Al Nahyan maintains control of both the country’s government and the national oil company, the Abu Dhabi National Oil Company (ADNOC).¹¹¹ From 2005 through 2012, ADNOC received \$5.2 billion dollars from the U.S. military.¹¹² Another example involves the U.S. Navy, which requires critical base support in the Middle East in Bahrain, home to the U.S. Navy’s Fifth Fleet.¹¹³ Since the beginning of the Arab Spring in 2011, Bahrain has continually dealt with civil unrest and uprisings.¹¹⁴ Like the Emir of Abu Dhabi, Bahrain’s ruling family also serves as head of the national oil company.¹¹⁵ Bahrain’s ruling family also has received billions of dollars from its oil sales to the United

imports from less friendly countries”) (on file with author).

¹⁰⁷ *Id.*

¹⁰⁸ See Gunasekara, *supra* note 9, at 248 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

¹⁰⁹ See Gunasekara, *supra* note 9, at 249 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

¹¹⁰ Beth Greenfield, *World’s Richest GDP per Capita: The World’s Richest Counties*, FORBES, Feb. 22, 2012, available at <http://www.forbes.com/sites/bethgreenfield/2012/02/22/the-worlds-richest-countries/#4f46171a697b>.

¹¹¹ See Gunasekara, *supra* note 9, at 249 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

¹¹² See Gunasekara, *supra* note 9, at 249 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

¹¹³ See Gunasekara, *supra* note 9, at 249 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

¹¹⁴ *Arab uprising: Country by country – Bahrain*, BBC News (Dec. 16, 2013), <http://www.bbc.com/news/world-12482295>.

¹¹⁵ See Gunasekara, *supra* note 9, at 249 (citing Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011, at 34).

States since 2004.¹¹⁶ With considerable cash reserves flowing into unstable, unreliable, and possibly unfriendly countries, many opponents of Section 526 believe it “jeopardizes our national security and simply defies logic.”¹¹⁷ However, nowhere in Section 526 does it mandate the United States continue to rely on foreign oil supplied by countries that could possibly jeopardize our national security. Instead, Section 526’s intended purpose is to lessen our nation’s dependence on conventional and unconventional sources of petroleum, and to foster the U.S. Government’s use of cleaner, renewable sources of fuel.¹¹⁸

Recently, Section 526 opponents have argued that it is not prudent in this time of government austerity to prohibit the government, especially the DoD, from buying fair priced oil for operations at home and abroad from friendly neighbors like Canada. This argument highlights that the alternative is to spend extravagant amounts of money on greener and cleaner fuels. Sen. Inhofe, a previously described Section 526 opponent, has repeatedly requested the DoD report the approximate extra two billion dollar price tag the U.S. Navy incurred in a single year for securing advanced biofuels.¹¹⁹ This report adds to the other examples opponents raise: the Navy paying \$429 per gallon for 20,000 gallons of renewable diesel in 2009 and paying \$27 per gallon for 450,000 gallons of biofuel in 2011, and the United States Air Force buying 11,000 gallons of alternative jet fuel at \$59 per gallon.¹²⁰ Thus, Section 526’s opponents question the judgment and logic of increasing the cost for the military to maintain operational readiness in a time of shrinking budgets but expanding global commitments.¹²¹

¹¹⁶ Aram Roston, *Welfare for Dictators*, NEWSWEEK, July 4 & 11, 2011.

¹¹⁷ Sabrina Fang, *API: Section 526 Jeopardizes U.S. National Security and Jobs*, (June 6, 2013), <http://www.api.org/news-and-media/news/newsitems/2013/june-2013/api-section-526-jeopardizes-us-national>; *see also id.*, *API: Section 526 Threatens U.S. National Security and Jobs* (Apr. 21, 2015), <http://www.api.org/news-policy-and-issues/news/2015/04/21/api-section-526-threatens-us-national-se>.

¹¹⁸ *See* Waxman-Bingaman Letter, *supra* note 46.

¹¹⁹ Sen. James Inhofe, *The not-so-great ‘Green Fleet’: President Obama’s skewed national defense priorities*, THE HILL: CONGRESS BLOG (July 17, 2012, 9:40 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/238487-the-not-so-great-green-fleet-president-obamas-skewed-national-defense-priorities>.

¹²⁰ *Id.*

¹²¹ *Id.*

c. Big business

Section 526's opponents fear that failure to repeal it would not only increase our nation's dependence on imported oil from potentially hostile countries and regions, but also would jeopardize thousands of U.S. jobs that rely on the continued stream of Canadian oil production.¹²² Expressing the sentiment of many Section 526 opponents, Karen Harbert, president and CEO of the U.S. Chamber of Commerce's Institute of 21st Century Energy, stated, "[m]any U.S. industries produce, process, transport, or otherwise rely on Canadian oil sands derived crude. [Section 526] would cause... significant economic harm and have long-term impacts on U.S. jobs and growth..."¹²³ As of 2012, Canada sends more than ninety-nine percent of its oil exports to the United States, with the province of Alberta producing more than two billion barrels per day of oil derived from oil sands.¹²⁴ According to the United States Chamber of Commerce, as of 2012, over 80,000 U.S. jobs are supported by Canadian Oil Sands development and growth.¹²⁵ The expected economic impact of the continued importation of Canadian Oil Sands petroleum would reportedly create 340,000 new jobs in the United States and add approximately \$34 billion to the United States economy.¹²⁶

d. The Canadian government

The Canadian government continues to strongly oppose Section 526 because of the potential loss of its largest consumer, the United States government.¹²⁷ The Canadian government's opposition is based on the argument that Section 526 poses a possible impediment to the budding oil sands petroleum industry that is expected to attract \$80 billion of investment over

¹²² See Fang, *supra* note 106.

¹²³ U.S. Chamber of Commerce: Institute for 21st Century Energy, *U.S. Chamber Defends Military's Right to Purchase Canadian Oil Sands Fuels* (Sept. 29, 2010), <http://www.energyxxi.org/us-chamber-defends-militarys-right-purchase-canadian-oil-sands-fuels>.

¹²⁴ See Fang, *supra* note 106.

¹²⁵ U.S. Chamber of Commerce: Institute for 21st Century Energy, *U.S. Chamber Applauds Court's Dismissal of Oil Sands Fuels Lawsuit* (Aug. 2, 2011), <http://www.energyxxi.org/us-chamber-applauds-court-s-dismissal-oil-sands-fuels-lawsuit>.

¹²⁶ See Fang, *supra* note 106.

¹²⁷ Barrie McKenna & David Parkinson, *US law puts chill on oil sands*, THE GLOBE AND MAIL (Mar. 13, 2009), <http://www.theglobeandmail.com/report-on-business/us-law-puts-chill-on-oil-sands/article675192/?page=all>.

the next few years.¹²⁸ “Oil sands are natural mixtures of sand or clay, water, and a heavy mineral source of petroleum called bitumen.”¹²⁹ Bitumen is a solid material, and it requires heating or dilution for further processing to be transported.¹³⁰ While bitumen can eventually be transformed into petroleum, it must first “be recovered and processed to separate it from oil sands.”¹³¹ Bitumen deposits near the earth’s surface are recovered through open pit mines, whereas deposits of bitumen found deep underground are extracted in situ.¹³² In situ processing necessitates using steam to warm the bitumen so it can be elevated to the earth’s surface.¹³³ All these processes cause oil sand extraction to have greater well-to-tank (WTT) GHG emissions than conventional petroleum.¹³⁴ WTT GHG encompass gas emissions released during extraction and refining and include emissions associated with fuel combustion.¹³⁵ WTT gas emissions only compromise approximately 20 percent of total lifecycle GHG emission for a particular crude.¹³⁶ The majority of GHG emissions emanate from combustion and do not differ based on crude source.¹³⁷ Thus, though the lifecycle GHG emissions of Albertan oil sands crude is not significantly higher in the aggregate than conventional petroleum, the WTT emissions caused during extraction and refining make it susceptible to the prohibitions of Section 526 as it has “a higher lifecycle greenhouse emissions than comparable conventional fuels.”¹³⁸

¹²⁸ *Id.*

¹²⁹ *See* Gunasekara, *supra* note 9, at 250 (citation omitted).

¹³⁰ *Id.* (citation omitted).

¹³¹ *Id.* (quoting ALTA. ENV’T & WATER, ALBERTA’S OIL SANDS: OPPORTUNITY. BALANCE. 2 (2008), available at http://www.environment.alberta.ca/documents/Oil_Sands_Opportunity_Balance.pdf).

¹³² *Id.* (citation omitted).

¹³³ *See* Gunasekara, *supra* note 9, at 250 (citing MICHAEL E. CANES & RACHAEL G. JONASSEN, LMI GOV’T CONSULTING, REPORT, DES86TI, EISA SECTION 526: IMPACTS ON DESC SUPPLY (2009), at 4-1 to 4-3 available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA502264>).

¹³⁴ *See* Gunasekara, *supra* note 9, at 250 (citing KRISTIN J. GERDES & TIMOTHY J. SKONE, U.S. DEP’T OF ENERGY, DOE/NETL-2009/1360, CONSIDERATION OF CRUDE OIL SOURCE IN EVALUATING TRANSPORTATION FUEL GHG EMISSIONS 4 (2009), <http://www.netl.doe.gov/energy-analyses/pubs/Life%20Cycle%20GHG%20Analysis%20of%20Diesel%20Fuel%20by%20Crude%20Oil%20Source%20.pdf>).

¹³⁵ *See* Gunasekara, *supra* note 9, at 250 (citation omitted).

¹³⁶ *Id.* (citation omitted).

¹³⁷ *Id.* (citation omitted).

¹³⁸ *See* Waxman-Bingaman Letter, *supra* note 46.

The Canadian government is concerned that if the policy initiatives set out in Section 526 become more widespread and adopted into other U.S. laws that apply more broadly to industry or the public, the result will be a significant curtailment of U.S. demand for oil sands oil. Such a curtailment of U.S. demand could lead to injury to the Canadian economy.¹³⁹

When the Canadian government realized how vexing Section 526 could be to their exporting of oil sand oil, energy experts within the Canadian Embassy in Washington, D.C. and the Canadian Government in Ottawa exchanged a flurry of emails between January and March 2008; these e-mails fashioned a multi-pronged effort to influence regulations and legislation through lobbying of the oil industry, the Bush Administration, and the United States Congress.¹⁴⁰ Included in this effort were e-mails written by then-Canadian Ambassador to the United States Michael Wilson to then-U.S. Defense Secretary Robert Gates. Ambassador Wilson stated, “Canada would not want to see an expansive interpretation of Section 526, which would then include commercially-available fuel made in part from oil derived from Canadian oil sands.”¹⁴¹ Particularly noteworthy are e-mails revealing how the Bush Administration asked the Canadian Embassy to help it interpret Section 526 in a narrow manner by saying the restriction on bitumen might run counter to the North American Free Trade Agreement (NAFTA) trade requirements.¹⁴² On February 8, 2008, Jason Tolland, the then Canadian Embassy’s Counselor on Energy and the Environment, wrote, “the US government [Bush administration] is looking to provide support for their work to kill any interpretation of this section that would apply to Canadian oil sand.”¹⁴³ In an email sent later that day to colleagues, Mr. Tolland laid bare Canada’s position when he stated the embassy’s job was to “find a solution to ensure that the oil keeps a-flowing.”¹⁴⁴ With that goal in mind, it was no

¹³⁹ Duff Harper and Nikki Stewart-St Arnault, *Impact of US Energy Independence Act on Alberta Oil Sands Still Unknown*, INTERNATIONAL LAW OFFICE BLOG (Nov. 24, 2008), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=d73d641d-4734-4000-9396-d312ec8cee88>.

¹⁴⁰ Brian Angliss, *Canadian Embassy emails reveal Canadian, US lobbying on tar sands-derived oil*, SCHOLARS AND ROGUES (Jan. 6, 2011), <http://scholarsandrogues.com/2011/01/06/canada-us-lobbying-tar-sands/>.

¹⁴¹ E-mail from Gitane deSilva to Aaron Annable & Tristan Landry (Feb. 22, 2008) (on file with author).

¹⁴² *Id.*

¹⁴³ E-mail from Jason Tolland to Dominic Gingras & Kevin Gray (Feb. 8, 2008, 17:00 EDT) (on file with author).

¹⁴⁴ *Id.*

small wonder Canada spent \$24 million on an international media blitz to counter any negativity surrounding Alberta's oil sands.¹⁴⁵

e. Section 369 of the Energy Policy Act of 2005

Section 369 of the Energy Policy Act of 2005 stands in stark contrast to Section 526 and has been used in attacking the legislation. Section 369 provided for the Secretary of Energy, Secretary of Interior, and Secretary of Defense to find avenues to increase development of alternative fuels, including oil sands.¹⁴⁶ To accomplish this task, the Secretaries established an Oil Shale Task Force, which concluded that oil shale, coal, and tar sands could supply all of DoD's domestic fuel requirements by 2016.¹⁴⁷ The Task Force recommended initiating a partnership with Alberta and declared oil sands an important and strategic fuel resource.¹⁴⁸

Section 369 further directed the DoD to develop and implement a strategy to utilize fuel from oil sands.¹⁴⁹ Yet, not more than two years after Section 369's enactment, Section 526 was also adopted into law. While there remains a conflict between Section 369 and the guidance of Section 526, the disparity persists today, and for unknown reasons has been a little-used argument for the opposition.

f. Recent attacks on Section 526

In April 2015, several senior legislators voiced their opposition to Section 526.¹⁵⁰ On April 21, 2015, a group of five U.S. Senators renewed their effort to repeal Section 526, which garnered quick support from the API.¹⁵¹

¹⁴⁵ Alex Boutilier, *Federal government prepares \$25-million oil sands advertising blitz* (Oct. 10, 2013), <http://o.canada.com/uncategorized/federal-government-prepares-24-million-oilsands-advertising-blitz>.

¹⁴⁶ Sheila Slocum Hollis and Dufferin, *Alberta Oil Sands – Energy Panacea or Energy Pariah?* Canadian Bar Association's Eco Bulletin (Oct. 2008),

¹⁴⁷ ANTHONY ANDREWS, CONG. RESEARCH SERV., RL34748, DEVELOPMENTS IN OIL SHALE 14 (2008).

¹⁴⁸ American Petroleum Institute – Energy, *Issue Papers: Obama-Biden Transition Project, Section 7 Canadian Oil Sands*, Dec. 2008.

¹⁴⁹ *Id.*

¹⁵⁰ Sabrina Fang, *API: Section 526 Threatens U.S. National Security and Jobs* (Apr. 21, 2015), <http://www.api.org/news-and-media/news/newsitems/2015/apr-2015/api-section-526-threatens-us-national-se>.

¹⁵¹ *Id.* (the five senators included Sens. John Barrasso (R- Wyo), Joe Manchin (D-W.Va),

The Senators and API voiced their tried and true oppositional talking points. API immediately issued a press release decrying “Section 526 is bad for America.”¹⁵² The press release stated, “[p]rohibiting the use of one of the most secure sources of oil – Canadian oil sands – jeopardizes our national security and simply defies logic. As American forces continue to combat terrorists abroad, the Pentagon must have the versatility to secure and develop fuel from our strongest ally, Canada.”¹⁵³ The Senators and API concluded with the remark, “Section 526 could increase fuel costs for our military and severely restrict the Pentagon’s ability to get the reliable energy it needs to fight the war on terror. True national security rests on a secure, diverse fuel supply for our armed forces.”¹⁵⁴ Though sticking to their talking points, the Senators and API failed to mention that those actually charged with defending our national security, i.e., the military community, have expressed open backing for Section 526. In comparison with previous DoD statements in opposition to Section 526, members of the military community support Section 526. The basis for such support, discussed in the next section of this Article, is precisely because it enhances our national security and the lethality of our armed forces.

While opponents of Section 526 come from all political spectrums and big business, and have diverse end-states in mind, their quest to have Section 526 repealed or severely weakened has been unrelenting and unwavering. Every year since its enactment, some version of proposed legislation has been introduced seeking either full repeal or significant exceptions to Section 526. Given the most recent April 2015 bi-partisan senatorial opposition to Section 526, it appears unlikely this hostility will end any time soon. While opposition has been strong, proponents of Section 526 have proven equally robust and fervent.

2. Supporters of EISA Section 526 and an unlikely ally

From Section 526’s enactment, proponents have been faced with a steady stream of detractors and have been forced to maintain steady resolve in their support of the legislation. As expected, the oil industry, stakeholders in tar sand development, and the Canadian Government have continually remained opposed to Section 526. In comparison, the majority of support

Heidi Heitkamp (D-N.D.), Mike Enzi (R-Wyo), and John Hoeven (R-N.D.).

¹⁵² *Id.* (Fang quoting API Senior Director of Federal Relations Khary Cauthen).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

for the law has come from environmentally focused advocacy groups, such as the Sierra Club, National Resources Defense Council (NRDC), Green Peace, and The Pew Charitable Trusts, among many others. This collective group has held fast to Section 526's original goals: to reduce the nation's dependency on petroleum, to incentivize the creation of domestic alternatives, and to reduce U.S. exposure to GHG-intensive energy sources.¹⁵⁵ These groups believe a repeal of the law would continue our nation's reliance on imported oil, increase the ever evolving problem of global warming, and tie our nation to a rapidly shrinking fuel source.¹⁵⁶ As the debate surrounding the law has evolved over the past eight years, an initial detractor has become a strong supporter. Specifically, the DoD, for reasons very similar to those of environmental advocacy groups, has evolved into a supporter of Section 526. For example, the issue of national security, once a key talking point of the law's detractors, has seemingly shifted direction: there is growing belief within the military services that the law's focus on cleaner and renewable energy sources is crucial in advancing both a strategic and tactical military advantage. This support within DoD is further buttressed by concomitant arguments that Section 526 could contribute to saving money, equipment, and, most importantly, service members' lives.

a. Environmental groups

Section 526's proponents believe it is a vital piece of legislation that serves as an important tool in the fight against global warming. Because atmospheric carbon is a main culprit of climate change and global warming, Section 526 limits the Federal government from procuring fuels that emit GHG, such as carbon at levels beyond what is currently emitted by conventional petroleum. The law's supporters view it as an effective mechanism in forcing the federal government to be cleaner and greener—or at least not any dirtier than it is in its current state. Proponents want the federal government, which is the largest purchaser of fuel in the world, to take a stronger and leading role in the fight against climate change, as many view the proliferation of alternative dirty fuels, such as oil sands, as significantly detrimental to our planet's viability.

¹⁵⁵ Mary Rosenthal, *Algal Biomass Organization Policy Alert Section 526 of EISA* (July 6, 2011), <http://advancedbiofuelsusa.info/algal-biomass-organization-policy-alert-section-526-of-eisa/>.

¹⁵⁶ *Id.*

According to the Intergovernmental Panel on Climate Change (IPCC), a scientific intergovernmental body under the United Nations that serves as an internationally accepted authority on climate change, there is more than twice as much carbon in tar sands oil than in conventional oil.¹⁵⁷ Bill McKibben, a staunch supporter of Section 526, explains that the process of recovering oil from the Alberta tar sands would raise carbon in the atmosphere by 200 parts per million (ppm), thereby increasing the 390 ppm of carbon currently in the atmosphere by more than half.¹⁵⁸ Given that the upper limits for the safe amount of carbon in the atmosphere is 350 ppm, the addition of 200 ppm to the current 390 ppm widens the gap between the safe atmospheric carbon level and the current level by almost five-fold.¹⁵⁹ Thus, supporters seek to avoid the circumstance stated by retired NASA lead climate change specialist Dr. Jim Hansen, “if tar sands are thrown into the mix, it is essentially game over for a viable planet.”¹⁶⁰

While advocates of Section 526 contend it is a crucial piece of legislation for a variety of reasons, some believe it fails to go far enough in combating GHG emissions. Some proponents—mainly environmental non-profit organizations such as the NRDC, Sierra Club, Earthjustice, Greenpeace (both U.S. and Canada), and the World Wildlife Fund (WWF)—advocate that Section 526 does not do enough to prohibit the actual production and importation of alternative fuels from unconventional sources.¹⁶¹ These groups see Section 526 as “simply keep[ing] the U.S. government from using taxpayer dollars to support development of fuels such as CTL, tar sands, and oil shale as long as their lifecycle process continues to have higher global warming pollution emissions than conventional fuels.”¹⁶² These groups want

¹⁵⁷ Intergovernmental Panel on Climate Change (IPCC), *IPCC Fourth Assessment Report: Climate Change 2007: Working Group III: Mitigation of Climate Change, 4.3.1.4 Unconventional Oil*, https://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch4s4-3-1-4.html.

¹⁵⁸ Brendan Smith, *The Keystone Pipeline: Too Dirty for George W. Bush?*, The Huffington Post (2011), http://www.huffingtonpost.com/brendan-smith/the-keystone-pipeline-too_b_966648.html

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Open Letter from Natural Resources Defense Council & 26 other U.S. and Canadian Environmental Groups to U.S. Senate and House, *Preserve Section 526 of the Energy Independence and Security Act of 2007 (EISA)* (May 9, 2008), <http://www.greenpeace.org/canada/en/documents-and-links/publications/climate-and-energy-reports/preserve-section-526-of-the-en-2/>.

¹⁶² *Id.*

the United States government barred from purchasing dirty unconventional fuels and want cessation of all importation and production of dirty alternative fuels in United States federal and commercial markets.¹⁶³ These groups maintain Section 526 might not go far enough in combatting climate change, but along with other supporters such as the DoD, also stress that the law is a step in the right direction in terms of “hav[ing] a robust and effective energy program that meets the needs of our nation and our common defense by reducing oil dependence without CTL, tar sands, oil shales or other dirty alternative fuels.”¹⁶⁴ As such, these environmental groups forecast that Section 526 sets our country on “an energy path that enhances our national security, our economy and our environment.”¹⁶⁵ In addressing the paramount threat of global warming, proponents of Section 526 believe the sizeable social, economic, and environmental negatives of dirty fuels such as tar sands “preclude them from being sound options for achieving greater energy independence” and poses a serious national security threat.¹⁶⁶

b. An unlikely ally—the military community

Initially, the DoD and the defense community looked unfavorably on Section 526. Many within the DoD sounded their opposition to the legislation because they feared the law would impede access to the variety of fuels the DoD needs to procure in a responsibly fiscal manner.¹⁶⁷ The DoD believed Section 526 would severely impact national security by decreasing our nation’s energy independence.¹⁶⁸ DoD also believed Section 526 would curtail fuel importation from Canada and further stymie domestic production of alternative fuels from unconventional sources such as CTL and oil shale.¹⁶⁹ Many anticipated that a critical consequence of the law would be an increase in our reliance on fuel from nations whose interests might be opposed to ours.¹⁷⁰ However, as the debate on the propriety of Section 526 evolved, so did the DoD’s views and others within the military community.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Open Letter from Natural Resources Defense Fund & 26 other U.S. and Canadian Environmental Groups to U.S. Senate and House, *supra* note 161.

¹⁶⁷ See DoD-Inhofe Letter, *supra* note 97; Ganasekara, *supra* note 9, at 249 (citing omitted).

¹⁶⁸ See DoD-Inhofe Letter, *supra* note 97.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

While detractors still decry the perceived negative effects of Section 526 on national security, the military community has become an unlikely, albeit powerful and vocal, ally of the legislation and its continued perpetuity because of its positive effects on national security.

In 2011, the DoD opposed a proposed piece of legislation that would have defunded the continuing implementation of Section 526. In asserting its opposition, it stated:

The DoD opposes this provision [to defund Section 526] because the Department supports the goals and intent behind the current law. This exemption could further increase America's reliance on non-renewable fuels. Our dependence on those types of fuels degrades our national security, negatively impacts our economy, and harms our planet. This exemption would also send a negative signal to America's advanced biofuel industry and could result in adverse impacts to U.S. job creation, rural development efforts, and the export of world leading technology.¹⁷¹

Such strong public repudiation of opposition to the law, coupled with the public explanation of why the DoD endorsed Section 526, raises the question: what caused the military community's new perspective on the legislation?

In reviewing this question, it appears the catalyst for the change came during the 2010 Quadrennial Defense Review (QDR). The 2010 QDR trailblazed the issue and publicly identified for the first time the interrelated threats of global warming, energy security, and geopolitical stability. Specifically, noted in the 2010 QDR:

While climate change alone does not cause conflict, it may act as an accelerant of instability or conflict, placing a burden on civilian institutions and militaries around the world. In addition, extreme weather events may lead to increased demands for defense support to civil authorities for humani-

¹⁷¹ Brian Geman, *Defense Department memo bashes push to lift high-carbon fuels ban*, THE HILL, July 8, 2011; see also Brian Siu, *Department of Defense on Section 526: Don't Change a Thing*, NRDC SWITCHBOARD BLOG, July 12, 2011, http://switchboard.nrdc.org/blogs/bsiu/departement_of_defense_on_secti.html.

tarian assistance or disaster response both within the United States and overseas.¹⁷²

While this statement was groundbreaking and significant, the QDR went even further by stating that the increased use of low-carbon technologies could enhance global security, thereby decreasing the burden on civilian institutions and militaries, as well as the need for U.S. involvement in conflict.¹⁷³ Thus, the 2010 QDR not only supported ideals tantamount to Section 526, but also called for the proliferation of fuels with even lower levels of GHG emissions than conventional petroleum. In other words, the QDR advocated for the advancement of low-carbon alternative fuels in the military.

While the 2010 QDR was the first public acknowledgment that climate change and national security issues were intertwined, such sentiment had been brewing under the surface in the military for years. In 2008, according to the National Intelligence Council (NIC):

while climate changes spur more humanitarian emergencies, the international community's capacity to respond will be increasingly strained. The U.S., in particular, will be called upon to respond. [Such] demands...may significantly tax U.S. military and support force structure, resulting in strained readiness and decreased strategic depth for combat operations.¹⁷⁴

In 2009, the Center on Naval Analysis announced, "destabilization driven by ongoing climate change has the potential to add significantly to the mission burden of the U.S. military in fragile regions of the world, and the U.S. should not pursue energy options inconsistent with the national response to climate change."¹⁷⁵

¹⁷² U.S. DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (2010), at 85 [hereinafter 2010 QDR]. available at http://www.efense.gov/qdr/images/QRD_as_of_12Feb10_1000.pdf, archived at <http://perma.cc/DLM6-474Z>.

¹⁷³ *Id.*

¹⁷⁴ Brian Siu, *Department of Defense on Section 526: Don't Change a Thing, Brain Siu*, NRDC: SWITCHBOARD BLOG (July 12, 2011), http://switchboard.nrdc.org/blogs/bsiu/departement_of_defense_on_secti.html25 (citing testimony in June 2008 by Dr. Thomas Fingar, Deputy Director of National Intelligence for Analysis to House Permanent Select Committee on Intelligence & House Select Committee on Energy Independence and Global Warming).

¹⁷⁵ *Id.*

In October 2014, then-Secretary of Defense Chuck Hagel released a report entitled *The 2014 Climate Change Adaptation Roadmap*.¹⁷⁶ The report detailed that climate change is a real and immediate threat to national security, with increased risk from terrorism, global poverty, and food shortages.¹⁷⁷ What is significant is that the report characterized climate change as a real and immediate threat, marking a significant shift in DoD philosophy. Previously, as articulated in the 2010 QDR, national security threats induced by climate change seemed to be characterized as a future threat, but in the recent 2014 report such issues have risen from a “possible future threat” to an “immediate and real” threat.¹⁷⁸ The report goes on to predict rising demand for military disaster responses based on extreme weather caused by climate change.¹⁷⁹ These disasters were predicted to create more global humanitarian crises.¹⁸⁰ The report calls on the military to incorporate climate change into broader strategic thinking about higher-risk regions, such as ways in which drought and food shortages might set off political unrest in the Middle East and Africa.¹⁸¹ In announcing the report, Secretary Hagel stated, “[d]efense leaders must be part of this global discussion. We must be clear-eyed about the security threats presented by climate change, and we must be pro-active in addressing them.”¹⁸²

As national security concerns induced by climate change are made public, with respect to its fuel purchases, the military community continues to face a harsh fiscal reality. As stated previously, the DoD is the largest single consumer of energy in the United States.¹⁸³ During the time the military community was connecting the dots between national security and climate change, from 2005 to 2011, the DoD saw fuel costs increase 381%. Translated

¹⁷⁶ U.S. DEP’T OF DEF., RELEASE NO: NR-517-14, *DoD Releases 2014 Climate Change Adaptation Roadmap*, <http://www.defense.gov/News/Speeches/Speech-View/Article/605617>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ U.S. DEP’T OF DEF., RELEASE NO: NR-517-14, *DoD Releases 2014 Climate Change Adaptation Roadmap*, <http://www.defense.gov/News/Speeches/Speech-View/Article/605617>.

¹⁸² *Id.*

¹⁸³ Andrew Holland and Nick Cunningham, *Fact Sheet: DoD’s Biofuels Program*, AMERICAN SECURITY PROJECT (Jan. 2013), available at <http://www.americansecurityproject.org/ASP%20Reports/Ref%200109%20-%20Factsheet-%20DoD%E2%80%99s%20Biofuels%20Program.pdf>.

into dollar amounts, it equates to an increase from \$4.5 billion in 2005 to \$17.5 billion in 2011.¹⁸⁴ This cost increase occurred not when DoD-wide consumption was increasing, but rather when DoD-wide fuel consumption was decreasing by approximately 4%.¹⁸⁵ Such volatility in the price of petroleum made it difficult to properly budget and plan, which subsequently perpetuated budget shortfalls in all the military services and combatant commands.¹⁸⁶ Price volatility must be taken seriously. “An estimated 75% of the DoD’s energy usage is ‘operational energy,’ which is defined as ‘the energy required for training, moving, and sustaining the military forces.’”¹⁸⁷ In other words, this energy usage represents energy usage that the military needs to do its job properly.¹⁸⁸

With national security and fiscal issues at the forefront of the current debate, many former and current military and DoD civilian leaders have taken up the cause of not only supporting Section 526, but also advocating for the advancement of cleaner alternative fuels than conventional petroleum. Retired Vice Admiral (USN) Dennis McGinn, former Deputy Chief of Naval Operation for Warfare Requirements and Programs and current Assistant Secretary of the Navy, Energy, Installations & Environment, states, “there is no compelling rationale for changing 526. Zero.”¹⁸⁹ Retired Lt. Gen. (USAF) Norman R. Seip declares, “the carbon emissions from those [fossil] fuels are causing climate change which is a global security threat multiplier. Removing Section 526 would be a step backward for U.S. security and clean energy innovation.”¹⁹⁰ Current Deputy Under Secretary of the Navy, the Honorable Tom Hicks, in response to the Navy’s position on repealing Section 526, asserts, “we are comfortable with 526...it is an effective policy tool, it is

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* For illustration, in FY 2012, with unexpected fuel costs, U.S. Pacific Command (USPACOM), encountered a \$200 million budget shortfall.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* The remaining 25% of DoD energy consumption is allotted to “installation energy” usage, which is energy used for the running and maintenance of military bases and buildings.

¹⁸⁹ Julia Pyper, *Military leaders fight back against clean energy repeal*, CLIMATEWIRE, (June 7, 2011).

¹⁹⁰ Nicole Lederer & Lt Gen Norman R. Seip, *For Memorial Day: A Clean Energy Future for Our Military*, THE HILL: CONGRESS BLOG, (May 27, 2011, 7:27 PM), <http://thehill.com/blogs/congress-blog/energy-a-environment/163749-for-memorial-day-a-clean-energy-future-for-our-military>.

having an effect on the market that I think is one in the right direction.”¹⁹¹ Chris Tindal, Navy Director of Operational Energy Crisis, maintains, “Section 526 is an effective tool for steering the market toward clean fuels because it signals a stable demand to those companies.”¹⁹²

These leaders advocate for Section 526 because the law makes sense for the military and the security of our nation because it contributes to resolving the fiscal volatility of conventional and unconventional petroleum. Section 526 also sends a powerful message to the marketplace that the largest consumer of fuel is in the market for cleaner burning fuels. Such a signal should foster advancement in clean alternative fuel forms. Section 526 fosters the largest consumer of fuel from purchasing fuel with higher lifecycle GHG emissions than conventional petroleum. It also fosters the advancement of innovative alternative cleaner fuels. In doing so, Section 526 aids the military mission by reducing a major contributing source of GHG emissions, which consequently should slow climate change, and lessen, if not prevent, the national security concerns induced by climate change.

c. A unique military argument supporting Section 526

While the military community has asserted national security and fiscal reasons as key factors in supporting Section 526, there is another reason that is uniquely military: Section 526 helps save American lives on the battlefield. This effect results from spurring the development of the advanced biofuels industry and other renewable forms of energy that have begun to alleviate the military’s reliance on fossil fuels. Though Section 526 prohibits only the federal government from purchasing dirtier alternative fuels, it has helped push the U.S. military into becoming one of the leading organizations in the development of renewable and sustainable energy products.¹⁹³ As Sharon Burke, former Assistant Secretary of Defense for Operational Energy at the DoD, remarked, “[t]o ensure our military forces will have the fuel they need for the future, the Department has to go beyond better fuel economy. Tomorrow’s soldiers, sailors, airmen, and Marines are going to need a greater

¹⁹¹ Ben Geman, *Navy official says greenhouse gas rule is working*, THE HILL, (June 3, 2011), <http://thehill.com/policy/energy-environment/164665-navy-official-says-greenhouse-gas-rule-is-working>.

¹⁹² See Pyper, *supra* note 189.

¹⁹³ The Pew Charitable Trusts, *Protect Section 526 for America’s National and Energy Security* (July 13, 2011), <http://www.pewtrusts.org/en/research-and-analysis/factsheets/2011/07/13/protect-section-526-for-americas-national-and-energy-security>.

range of energy sources, and that's why the Department supports the goals of Section 526 of the Energy Independence and Security Act of 2007.¹⁹⁴

Our military forces will always need energy. Only during recent times has energy been so singularly centered on petroleum-based products. This has necessitated long and constant supply lines that are attractive targets for U.S. enemies during times of conflict.¹⁹⁵ There is little question that providing fuel supplies to the battlefield carries significant costs and risks, and it is a significant downside to relying on fossil fuels. Between 2003 and 2007, more than 3,000 service men and women and supporting contractors were either killed or wounded in attacks on fuel convoys.¹⁹⁶ According to the Pentagon, moving fuel by air into combat outposts in Afghanistan requires about two gallons of fuel for every gallon of oil supplied.¹⁹⁷ A quick calculation reveals that using two gallons of fuel to deliver one gallon is a costly proposition, especially when factoring in the risk to service personnel. As described by General Martin Dempsey, then-Chairman of the Joint Chiefs of Staff, our forces' ever-evolving appetite for fossil fuels is a particular vulnerability that is likely to be exploited as U.S. adversaries employ more sophisticated weaponry such as unmanned aerial and ground vehicles and precision-guided mortars and missiles.¹⁹⁸ There are high risks and dire consequences in maintaining the status quo—using petroleum as the main fuel source. It is apparent why the 2010 QDR stated that when engaged in conflict, renewable low-carbon technologies better protect and serve U.S. military members by saving lives and enhancing fighting capabilities.¹⁹⁹

The 2010 QDR described climate change as a threat multiplier. Alternatively, the DoD's focus and increased use of lower GHG emitting renewable forms of energy act as a "force multiplier...increasing the range and endurance of forces in the field while reducing the number of combat forces diverted to protect energy supply lines, as well as reducing long-term energy costs."²⁰⁰ The DoD has routinely stressed Section 526's importance

¹⁹⁴ See Burke, *supra* note 17.

¹⁹⁵ See Burke, *supra* note 2.

¹⁹⁶ Press Release, The Pew Charitable Trusts, Congress Continues Military Program to Use Advanced Fuels (Dec. 17, 2011), <http://www.pewtrusts.org/en/about/news-room/press-releases/2011/12/17/congress-continues-military-program-to-use-advanced-fuels>.

¹⁹⁷ See Burke, *supra* note 2.

¹⁹⁸ *Id.*

¹⁹⁹ See 2010 QDR, *supra* note 172.

²⁰⁰ See Light, *supra* note 1, at 886 n.26 (quotation omitted).

in decreasing its reliance on non-renewable fuels and why such a goal is important to the military and its mission. As exemplified by Assistant Secretary of Defense, Elizabeth King, when asked by Sen. Bingaman why the DoD opposed a House bill recommending revocation of the law, Secretary King explained, “repeal or exemption could hamper the Department’s efforts to provide better energy options to our warfighters and further increase America’s reliance on non-renewable fuels. Our dependence on those types of fuels degrades our national security, negatively impacts our economy, and harms the environment.”²⁰¹

D. The Way of the Future

1. DoD leading from the front

Many believe the military’s mission to “provide the military forces needed to deter war and protect the security of the country”²⁰² is diametrically opposed to the goals of environmental protection and environmental development, but such sentiment is incorrect.²⁰³ Taking into account the perspective articulated by the 2010 QDR, which asserts climate change is a threat multiplier while energy efficiency is a force multiplier, military and environmental objectives have aligned the military to be a leading figure going forward in fighting climate change and developing cleaner, renewable forms of energy.²⁰⁴ “[D]uring the twentieth century, the military-industrial complex led to the development of new technologies such as semiconductors, the global positioning system (GPS), the internet, and computers, inventions that transformed both war fighting fare and the civilian realm.”²⁰⁵ The same should be true in the environmental context. Per Assistant Secretary of

²⁰¹ *Id.*, at 918 (citing Letter from Elizabeth King, Assistant Sec’y of Def. for Legislative Affairs, to Sen. Jeff Bingaman, Chairman, U.S. Senate Energy and Natural Res. Comm. (July 12, 2011), available at <http://www.energy.senate.gov/public/index.cfm/2011/7/press-473d1eab-d00f-42ba-939d-02a0989b536a>, archived at <http://perma.cc/U7WZ-BHFV>).

²⁰² *Id.*, at 880 (quoting U.S. DEP’T OF DEF., STRATEGIC SUSTAINABILITY PERFORMANCE PLAN: FY 2010, at i (2010)).

²⁰³ *Id.*, at 1, at 880 (citations omitted).

²⁰⁴ *Id.* at, at 886 (citing Memorandum of Understanding Between the U.S. Dep’t of Energy and the U.S. Dep’t of Def.1 (July 22, 2010), available at <http://energy.gov/sites/prod/files/edg/media/Enhance-Energy-Security-MOU.pdf> (“Energy efficiency can serve as a force multiplier, increasing the range and endurance of forces in the field while reducing the number of combat forces diverted to protect energy supply lines, as well as reducing long-term energy costs.”)).

²⁰⁵ See Light, *supra* note 1, at 881 (citations omitted).

Defense Burke, Section 526 not only restricts the military from purchasing alternative fuels that are more polluting than conventional fuels, “[b]ut it also sets an important baseline in developing the fuels we need for the future.”²⁰⁶

Further, the U.S. military has historically been a leader in changing norms and behavior in ways that are unthinkable in the civilian sector.²⁰⁷ For example, the military led the way in integration when “President Harry Truman issued Executive Order 9981 on July 26, 1948, formally abolishing segregation in the military even while so-called ‘Jim Crow’ laws were still widely in force in parts of America.”²⁰⁸ By implementing this Executive Order (E.O.) and holding the military accountable, President Truman was able to affect the military’s behavior and attitudes toward segregation in ways that, some scholars argue, eventually spilled over into the civilian sector.²⁰⁹ Much like E.O. 9981 did in establishing a racially integrated military force, Section 526 is helping drive the military into using cleaner fuels and more advanced environmental technology. As Assistant Secretary of Defense Burke reiterates, “[Section 526] has not hindered the Department from purchasing the fuel we need today, worldwide, to support military missions...[and] repeal could complicate the Department’s efforts to provide better energy options to our warfighters and take advantage of the promising developments in homegrown biofuels.”²¹⁰

Section 526 restrictions have permitted the U.S. military to become one of the leading organizations in researching and developing advanced biofuels.²¹¹ As noted in the 2010 QDR, the DoD’s high-energy demands, coupled with its procurement capabilities and the mandate of Section 526, should accelerate development and deployment of innovative low-carbon

²⁰⁶ See Burke, *supra* note 17.

²⁰⁷ See Light, *supra* note 1, at 904.

²⁰⁸ *Id.* (citing Exec. Order No. 9981, 3 C.F.R. § 722 (1943–1948) (citations omitted)).

²⁰⁹ *Id.* (citing John Sibley Butler & Kenneth L. Wilson, *The American Soldier Revisited: Race Relations and the Military*, 59 Soc. Sci. Q. 451, 465 (1975) (reaffirming the “contact thesis” by which integration within the military among people of different races, but equal rank and status, reduced negative racial attitudes prior to the U.S. Supreme Court’s 1954 *Brown v. Board of Education* decision); Charles C. Moskos, Jr., *Racial Integration in the Armed Forces*, 72 Am. J. Soc. 132, 139–40 (1966) (noting a significant increase in support for integration among both whites and African Americans in the U.S. military between 1943 and 1951, and suggesting that this radical shift was a precipitating factor in the civil rights movement in the United States) (citation omitted)).

²¹⁰ See Burke, *supra* note 17.

²¹¹ See The Pew Charitable Trusts, *supra* note 193.

technologies like advanced drop-in biofuels.²¹² Not only does this recognition help the DoD maintain its broad focus of implementing an ambitious renewable energy agenda, but it also bolsters cutting edge renewable fuel initiatives established by the Navy and Air Force, the two largest users of energy within the DoD.²¹³ Specifically, the Navy and Air Force have focused their efforts on introducing advanced biofuels into its respective fleets.²¹⁴ The Air Force, the largest consumer of fuel within the DoD community, has a stated goal of procuring up to 50% of domestic aviation fuel from clean alternative fuel sources and certifying all aircraft on a 50:50 biofuel blend by 2016.²¹⁵ The Navy shares the goals of obtaining 50% of fleet liquid fuel from alternative sources by 2020, deploying a completely “Great Green Fleet” running on advanced biofuels by 2016, and collaborating with other government agencies and the private sector to invest and develop “a cost competitive domestic advanced biofuels industry.”²¹⁶ In 2010, Secretary of Agriculture Thomas Vilsack and Secretary of the Navy Raymond Mabus signed a groundbreaking Memorandum of Understanding (MOU) to encourage commercialization of advanced drop-in biofuels “to secure the strategic energy future of the United States, create a more nimble and effective fighting force and protect our planet from climate change.”²¹⁷ These goals tie directly to Section 526.²¹⁸ The DoD as a whole intends to invest approximately \$170 million over three years to support the development of biofuels, with the Department of Agriculture and Department of Energy granting matching amounts.²¹⁹ As illustrated by The Pew Charitable Trusts Foundation, any attempt to repeal or defund Section 526 would:

Unnecessarily hinder a growing sector of the American economy...[as the military services]...are helping bring these domestic-produced renewable fuels to market by serving as

²¹² See 2010 QDR, *supra* note 172, at 85-93.

²¹³ *Id.*

²¹⁴ See The Pew Charitable Trusts, *supra* note 193.

²¹⁵ See Holland & Cunningham, *supra* note 183.

²¹⁶ *Id.*

²¹⁷ Press Release, United States Department of Agriculture (USDA), Navy Signs Agreement to Encourage Development, Use of Renewable Energy (Jan. 21, 2010), http://www.navy.mil/submit/display.asp?story_id=50710.

²¹⁸ *Id.*

²¹⁹ See Holland & Cunningham, *supra* note 183 (citing Dep’t of Navy, Dep’t of Energy, Dep’t of Agriculture, Memorandum of Understanding (June 2011). <http://www.rurdev.usda.gov/SupportDocuments/DPASignedMOUEnergyNavyUSDA.pdf>).

an early adopter and prime customer. With the support of DoD, the advanced biofuels industry is steadily growing and establishing itself across the country, in turn providing much-needed jobs and economic activity.²²⁰

While the military has been compelled by Section 526 to research and develop renewables and advanced biofuels, the private sector has benefited and should continue to benefit from this focus. The 2010 QDR highlighted the DoD's role in addressing these possibilities, specifically the ability of military installations to serve as a test ground for demonstrating and creating a market for innovative, low-carbon renewable energy technologies.²²¹ Section 526 is instrumental in continuing this development and advancement of cleaner, renewable forms of energy. For example, from a leading biofuels producer:

[A]dvanced drop-in biofuel companies benefit enormously from Section 526 for two reasons. First, the DoD has historically led transitions from one source of energy to another, and no greater challenge exists than transitioning from conventional petroleum to domestically produced, lower carbon drop-in substitutes. Second, the DoD is an ideal market for initial acquisition and use of alternative fuels, given its relative contracting and price flexibility, as well as its ability to test, certify, and acquire new fuels. Section 526 is one of the most significant pieces of legislation for our industry, as it maintains pressure on all branches of the DoD to procure alternative fuels that will directly decrease our military's dependence on foreign oil.²²²

Section 526's importance is also evident from an industry insider's estimate that DoD's internal and external biofuels programs have the potential to generate an estimated \$9.6 to \$19.8 billion in economic activity by 2020, while creating as many as 14,000 new jobs during the same period.²²³

²²⁰ See The Pew Charitable Trusts, *supra* note 193 (advocating that repealing Section 526 would not only hinder job growth in America, but also stymie critical research and development activities).

²²¹ See 2010 QDR, *supra* note 172, at 86.

²²² Press Release, Sapphire Energy Policy Document: A United States firm that produces petroleum from algae, *available at*: <http://www.sapphireenergy.com/Policy/policy-dod>.

²²³ See Holland and Cunningham, *supra* note 183.

2. Critics take aim at DoD's position

Though there remain an abundance of factors favoring the military's continued advancement of renewable, low-carbon energy sources, there are individuals who believe it unwise and fiscally irresponsible for the DoD to fund unproven low-carbon, climate change technologies. A constant critic of government spending on climate change technologies, Sen. Inhofe stated that DoD expenses on low-carbon technologies are:

not only wrong...it is reckless. [The money that the] DoD has spent...on climate change and energy- efficient activities... could have been used to purchase 30 brand new [sic] F-35 Joint Strike Fighters, 28 new F-22 Raptors, or completely pay for the C-130 Aviation Modernization Program that we have been working on for a long period of time.²²⁴

What Sen. Inhofe and his supporters fail to accept is that the continued reliance on high-carbon, fossil fuel energy sources is a threat multiplier, exposing significant weakness in our military's ability to carry out its mission, regardless of the weapon system employed. Further, using cleaner, renewable forms of energy could be considered a weapon system itself given that such utilization increases the lethality of force by allowing greater reach and flexibility of response. Rather than being constrained by the tether of fossil fuels and the risks associated with fuel resupply lines, clean renewable energy sources allow for a more adaptable and more sustainable fight against our nation's enemies.

The DoD recognizes climate change can accelerate conflict in ways that subsequently affect our country's national security interests.²²⁵ For example, DoD leaders understand the potential national security implications from recent news reports about Russian Naval ships patrolling newly opened Arctic Ocean shipping lanes.²²⁶ DoD understands how such situations highlight the impact of climate change on new areas of potential conflict.²²⁷

²²⁴ See Light, *supra* note 1, at 920 (citing 158 CONG. REC. S3267 (daily ed. May 17, 2012) (statement of Sen. James Inhofe)).

²²⁵ See Light, *supra* note 1, at 919 (citations omitted).

²²⁶ *Id.* (citing Andrew E. Kramer, *Russia Preparing Patrols of Arctic Shipping Lanes*, N.Y. TIMES, Sept. 15, 2013, at A8, available at <http://www.nytimes.com/2013/09/15/world/europe/russiapreparingpatrols-of-arctic-shipping-lanes.html>, archived at <http://perma.cc/9X5P-X85T>).

²²⁷ *Id.*

While Sen. Inhofe and his counterparts view spending on climate change technology as unwise and unfruitful, the DoD realizes the real-time importance of reducing energy demand and increasing energy efficiency to the national security mission.²²⁸

Critique of DoD spending on green technology extends beyond politicians, as noted in a recent business news periodical:

We wonder if the environment is the uppermost thing on the minds of soldiers being shot at by the Taliban and avoiding being blown up by IEDs.... Certainly fuel and energy costs have risen for the military as for the rest of us. But wouldn't we be better served by tapping into the 200-year supply of oil under our feet and within our borders?²²⁹

While doubtful that soldiers under fire have the welfare of the environment at the forefront of their thoughts, what this critic fails to accept is soldiers might not be in such a situation if the DoD continues to follow its environmental enhancement programs and move away from reliance on conventional, high-carbon emitting fuels. Critics fail to accept the “national security implications of transporting fuel to forward operating bases, the importance of reducing deaths by reducing the number of fuel convoys, or the importance of reducing GHG emissions to avoid increased geopolitical instability caused by climate change.”²³⁰ As stated by General James Allen, “operational [low-carbon emitting, renewable] energy, is about improving combat effectiveness. It's about increasing our forces' endurance, being more lethal, and reducing the number of men and women risking their lives moving fuel.”²³¹ With the above immediate and serious consequences incident to continued use of

²²⁸ *Id.*, at 919-20.

²²⁹ *Id.* at 920-21 (citing *Billions for Climate, Not One More Cent for Defense*, INVESTOR'S BUS. DAILY (May 18, 2012, 7:00 PM), <http://news.investors.com/ibd-editorials/051812-612092-defense-billions-tofightclimate-change-.htm#ixzz2UDoHggEi>, archived at <http://perma.cc/HK6T-5NVB>).

²³⁰ *Id.*, at 921.

²³¹ See Light, *supra* note 1, at 919 and 885 n.22 (quoting Amy Westervelt, *How the Military Uses Green Tech to Save Soldiers' Lives*, FORBES, (Feb. 14, 2012, 2:43 PM), <http://www.forbes.com/sites/amywestervelt/2012/02/14/how-the-military-uses-green-tech-to-save-soldiers-lives/>, archived at <https://perma.cc/W9AS-X2X2>. Colonel Peter Newell, Director of the Army's Rapid Equipping Force, explained: “It's not about reducing energy usage and the overall bills, but about saving lives.”) “At the tactical edge, we don't look at energy efficiency in terms of saving gallons, we count it in lives saved. That's really what we focus on.” *Id.*

conventional petroleum, the military must continue to advance the research and use of cleaner renewable energy sources.

II. SUMMARY AND CONCLUSIONS

Section 526 has proven to be a significant and controversial piece of legislation, with the battle over its funding, interpretation, and continued existence carrying on today. The debate over Section 526 spans the entire political spectrum, with bi-partisan support found in the camps of proponents and opponents of the legislation. Legislators, both Republican and Democrat, hailing from states where alternative production of fossil fuel such as hydraulic fracturing, coal, and oil shale are prevalent, are firmly entrenched in their opposition to Section 526 and continue to push for its repeal, while legislators from more environmentally conscious states continue to support the law. However, while these allegiances should not be at all surprising, the military's shift of support is compelling.

The military's initial reasons for opposing Section 526 were valid, namely that the law was poorly written and the services were unsure how the provision would be interpreted; for example, what energy sources would be precluded from procuring under the law's rubric. Such concerns were soon alleviated by guidance from both the law's author and the military's fuel buying advisors, the Defense Logistics Agency (DLA). Even before assuaging initial fears, the internal drive of the military to effectively accomplish its mission had laid the seeds for it not only to support Section 526, but also to take over its policy guidance.

To accomplish the mission of protecting our nation and its national security interests, the DoD relies heavily on energy supplies, namely conventional petroleum, to fuel ships, vehicles, aircraft, and other equipment. As the global reach of the military continues to grow and increase, the reliance on fuel also increases. Since the 2010 QDR, the DoD has embraced climate change as a threat multiplier. Thus, it promotes instability around the world by creating weather conditions that are more unpredictable and extreme. This nurtures destabilizing forces on already fragile geo-political structures. As a result, the military has realized that petroleum, alone, cannot fulfill the requirements of global reach. Instead, the military has determined that it must also go green by using clean renewable energy sources, and that it could be a force multiplier.

The goals of both the military and combating global climate change, though stemming from diverse desires and foundations, seamlessly coincide and position the military to be a leader in environmental stewardship. To effectively accomplish this, the DoD seeks ways to reduce the source of climate change, namely the emission of GHG from fossil fuels. The DoD pursues this through the use of advanced biofuels and other renewable forms of energy, ones that alleviate the need for fuel resupply lines and save the military not only money, but also lives. Through the coalescence of military mission achievement and environmental stewardship, the military currently supports—and should continue to support—Section 526.

When President Bush signed EISA into law, he remarked it was a “major step toward reducing our dependence on oil, confronting global climate change, expanding the production of renewable fuels and giving future generations of our country a nation that is stronger, cleaner and more secure.”²³² While EISA has many provisions, Section 526 has been instrumental in achieving the President Bush’s stated goals. The Act has continued to push the Federal government, including the DoD, to purchase and subsequently use cleaner and renewable energy sources. Section 526’s opponents continue to discuss the purported negative impact of the legislation on our national security and military, even though the military itself has evolved into supporting Section 526. Tempered by the fire of warfare, those charged with leading and providing our national defense have repeatedly turned to, and unequivocally voice their support for, the law and its intended purpose. To reduce the proliferation of this threat of dependence upon oil to our national security, DoD civilian and military leaders now state how instrumental Section 526 has been in combating the threat. Moreover, DoD leaders identify additional benefits in pushing the military to research, develop, and use more clean, renewable energy sources. Through DoD’s study and use of cleaner energy sources, Section 526 has helped foster a force multiplier and has edged the military ever closer to unleashing itself from the tether of fossil fuels. In furtherance of not only protecting the environment, but also in securing our national security and increasing our military’s lethality of force, Section 526 should not be repealed and should continue to push the DoD to greater energy efficiency.

²³² See White House Press Release, *supra* note 18.

DEVELOPING BETTER U.S. STATUS OF FORCES
PROTECTIONS IN AFRICA

*MAJOR YVONNE S. BRAKEL**

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I. INTRODUCTION

The tragic results of the Battle of Mogadishu, often referred to as Black Hawk Down,¹ stung the United States, and ultimately led then-President Clinton to order the withdrawal of U.S. forces out of Somalia in early 1994.² This withdrawal marked the beginning of a nine year near-absence of United States (U.S.) forces in Africa³ and period where the Department of Defense (DoD) mistakenly believed there were very limited strategic interests on the African continent.⁴

The DoD's erroneous assessment of Africa's strategic interests was short-lived. The 1998 bombings of the U.S. Embassies in Kenya and Tanzania,⁵ orchestrated by Osama bin Laden, served as a deadly warning that

¹ See MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999).

² The Battle of Mogadishu occurred in Mogadishu, Somalia on Oct. 3, 1993. U.S. special forces were sent into Mogadishu to arrest two high ranking military members working for warlord, Mohammed Aidid. The team was met with significant resistance, and ultimately two Black Hawk helicopters were shot down during the mission. After a firefight lasting approximately 16 hours, 18 American soldiers and an estimated hundreds to thousands of Somalis were killed. *What A Downed Black Hawk In Somalia Taught America*, NATIONAL PUBLIC RADIO (Oct. 5, 2013), <http://www.npr.org/2013/10/05/229561805/what-a-downed-black-hawk-in-somalia-taught-america>.

³ The limited U.S. intervention during this timeframe included support to humanitarian efforts in Rwanda in 1994 and noncombatant evacuation operations (NEO) of U.S. embassies during periods of instability. See LAUREN PLOCH, CONG. RESEARCH SERV., RL34003, *AFRICA COMMAND: U.S. STRATEGIC INTERESTS AND THE ROLE OF THE U.S. MILITARY IN AFRICA* 31 (2011). For example, a NEO was conducted to evacuate the American Embassy in Sudan in 1998. *U.S. Missiles Pound Targets in Afghanistan, Sudan: Clinton: "Our Target was Terror,"* CNN, Aug. 21, 1998, <http://www.cnn.com/US/9808/20/us.strikes.02/> [hereinafter *Our Target Was Terror*]. The United States also conducted limited military to military training under the African Crisis Response Initiative (ACRI), which was created in 1997. See Daniel Henk and Steven Metz, *The United States and the Transformation of African Security: The African Crisis Response Initiative and Beyond* (Dec. 1997), <http://www.strategicstudiesinstitute.army.mil/pubs/summary.cfm?q=201>.

⁴ U.S. Dep't of Defense, Office of International Security Affairs, *United States Security Strategy for Sub-Saharan Africa* 3 (Aug. 1995).

⁵ In response to the bombings, President Clinton authorized cruise missile attacks on targets in Afghanistan and Sudan. The Sudanese target, the El Shifa Pharmaceutical Industries factory, was linked to Osama bin Laden and was alleged to be manufacturing chemical weapons. See *Our Target Was Terror*, *supra* note 3. U.S. justification for the missile attack was based upon a soil sample obtained by the CIA, which contained Empta, a key ingredient in nerve gas. After the attack, however, it appeared that the factory was only being used for processing of antibiotics and other legitimate medicines.

anti-American terrorist groups were thriving in Africa.⁶ It was not until after the attacks of September 11, 2001 (9/11), however, that the United States refocused its military strategic approach in Africa. In the 2002 U.S. National Security Strategy, the Executive Department acknowledged, “In Africa, promise and opportunity sit side by side with disease, war, and desperate poverty. This threatens both a core value of the United States—preserving human dignity—and our strategic priority—combating Global terror.”⁷ By 2006, U.S. policy recognized the importance of developing partnerships within African nations to “strengthen fragile and failing states and bring ungoverned areas under the control of effective government.”⁸

With 54 nations having varying levels of stability and security concerns, Africa is a complex operational environment in which to build partnerships. To focus the DoD’s efforts in the region, the U.S. Government created United States Africa Command (AFRICOM) in 2007.⁹ Headquartered out of Stuttgart, Germany, AFRICOM is the combatant command responsible for maintaining U.S. military relations with African partners and directing all military activities in Africa, with the exception of Egypt,¹⁰ which falls under United States Central Command’s (CENTCOM) area of responsibility (AOR).¹¹ Similar to other combatant commands, AFRICOM conducts extensive military exercises, operations and humanitarian efforts within its AOR.¹² Unlike other combatant commands, however, AFRICOM focuses heavily on increasing African military capabilities to improve their own security and stability.¹³

See Seymour M. Hersh, *The Missiles of August*, THE NEW YORKER, Oct. 12, 1998, http://www.newyorker.com/archive/1998/10/12/1998_10_12_034_TNY_LIBRY_000016572.

⁶ For example, Osama bin Laden was living in Sudan and training terrorists in the 1990s. *See* Heather Nauert, *Bin Laden’s path Crossed Through Sudan*, FOX NEWS (Oct. 6, 2004), <http://www.foxnews.com/story/2004/10/06/bin-laden-path-crossed-through-sudan/>.

⁷ The White House, National Security Strategy 10 (2002).

⁸ The White House, National Security Strategy 37 (2006).

⁹ Prior to the creation of AFRICOM, the African area of responsibility was divided between the United States European Command (EUCOM), Pacific Command (PACOM) and Central Command (CENTCOM). Though created in 2007, USAFRICOM was not fully independent and operational until 2008. *See* Ploch, *supra* note 3, at 1.

¹⁰ Because it falls into CENTCOM’s AOR, Egypt will not be discussed in this paper.

¹¹ *See* USAFRICOM: ABOUT THE COMMAND, <http://www.africom.mil/about-the-command> (last visited Oct 15, 2016).

¹² *Id.*

¹³ *See* USAFRICOM: WHAT WE DO, <http://www.africom.mil/what-we-do> (last visited Oct 15, 2016).

Building partner capacity and trust in this diverse region of the world requires significant diplomacy. Several members of the Department of State (DOS) are assigned to the AFRICOM staff, including one high-ranking diplomat who serves as a co-deputy commander, and is tasked with providing policy input and advice to the AFRICOM Commander.¹⁴ Incorporating DOS staff into AFRICOM's leadership helps the DoD address the challenges of building stable security environments in Africa.¹⁵

While AFRICOM's mission is directed from Germany, it obviously cannot be accomplished without deploying U.S. military forces to Africa. The United States currently has one major military installation in Africa, Camp Lemonnier, and several other smaller cooperative security locations (CSL).¹⁶ The United States also participates in regional military partnerships throughout the continent.¹⁷ Overall, it is estimated that U.S. forces are working with as many as 49 African countries.¹⁸ Service-members executing these missions are exposed to significant risks, so the DoD and DOS must ensure that physical and legal protections are in place.¹⁹ Key legal protections that should be arranged prior to a deployment of U.S. troops are status of forces agreements (SOFAs),²⁰ outlining the privileges and immunities U.S. troops will receive in foreign territories.

¹⁴ *AFRICOM: Promoting Partnership for Global Security in Africa Before the H. Subcomm. on Africa, Global Health and Human Rights*, 112th Cong. (2011) (testimony of Don Yamamoto, Acting Secretary, U.S. Dep't of State).

¹⁵ See Ploch, *supra* note 3, at 8.

¹⁶ Jim Garamone, *Jones Says Changes to U.S. Posture Will Strengthen Europe*, AMERICAN FORCES PRESS SERVICE, Sept. 24, 2004, <http://www.defense.gov/news/newsarticle.aspx?id=25214>.

¹⁷ Currently, the DOS lists 12 counterterrorism programs and initiatives. They include the Anti-Terrorism Assistance Program (ATA), Countering Violent Extremism (CVE), Counterterrorism Finance (CTF), Counterterrorism Preparedness Program, Foreign Emergency Support Team (FEST), Global Counterterrorism Forum, International Security Events Group (ISEG), Regional Strategic Initiative (RSI), Technical Support Working Group (TSWG), Terrorist Screening and Interdiction Programs (TSI), Trans-Sahara Counterterrorism Partnership (TSCTP) and the Partnership for East African Counterterrorism (PREACT). See DEP'T OF STATE PROGRAMS AND INITIATIVES, <http://www.state.gov/j/ct/programs/> (last accessed Apr. 27, 2014), [hereinafter PROGRAMS AND INITIATIVES].

¹⁸ Nick Turse, *The US Military's Pivot to Africa*, THE NATION, Sep. 5, 2013, <http://www.thenation.com/article/176045/us-militarys-pivot-africa#>.

¹⁹ Secretary of Defense Message, Importance of Obtaining Status Protections in Host Nations (Jul. 11, 2006) (on file with the DoD) [hereinafter SECDEF Memo].

²⁰ For purposes of this paper, the term SOFA is used to describe all SOFAs, SOFA-like

It has been suggested that U.S. operations in Africa would benefit from a multilateral SOFA tailored to existing regional security arrangements.²¹ While potentially useful, this paper argues that the creation of a regional multilateral SOFA, using the Trans-Sahara Counterterrorism Partnership (TSCTP) as an example, is currently not feasible due to significant obstacles. Instead, this paper argues that U.S.-African bilateral SOFAs should be negotiated, or in some cases improved upon, to correspond with the level of U.S. military involvement in a receiving state.

Multilateral SOFAs offer consistency across borders and help reduce disputes by clearly identifying the persons associated with the “forces,” the status of those forces and the privileges and immunities each nation can expect its forces to receive within the territory of a partner nation. The United States currently has 32 bilateral SOFAs in Africa.²² These agreements vary in level of protections, which means that the privileges and immunities afforded to U.S. troops can differ dramatically from one country to the next. The resulting patchwork of protections can be difficult for mission planning and is particularly burdensome when coordinating actions involving multiple countries or military partners.

Within the TSCTP, for example, U.S. protections range from comprehensive SOFAs to nothing, depending on the country.²³ Yet, all ten participating countries have agreed to work together and with the United

agreements or other status protection agreements, such as administrative and technical status (A&T status).

²¹ Shortly after AFRICOM was established, Colonel Jeffrey Palmer wrote an article highlighting the challenges faced by the new combatant command. One problem he identified was insufficient SOFA protections throughout the continent. As a possible solution, he proposed a pan-African SOFA. Col Palmer explained that it could initially be accomplished on a regional basis as “an extension of subregional capabilities identified by the African Union by incorporating reciprocal provisions for signatory states.” As an option, he suggested the multilateral SOFA could be tailored to the Economic Community of West African States (ECOWAS) or to other regional security arrangements. Jeffrey Palmer, *Legal Impediments to USAFRICOM Operationalization*, 51 *JOINT FORCE Q.* 80 (2008).

²² More information regarding this number of SOFAs is provided on page 36 of this paper. Generally, the total is derived from the DOS List of Treaties in Force, plus additional SOFAs provided by the DoD that are not currently listed. Classified SOFAs will not be discussed in the paper. See Dep’t of State, *Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force* (Jan. 1, 2013), <http://www.state.gov/documents/organization/218912.pdf> [hereinafter *Treaties in Force*] (containing a list of most treaties to which the United States is party to).

²³ See Figure 1 below for breakdown of provisions found in each SOFA.

States to counter terrorism. Participant countries travel to partner nations to engage in joint training, exercising and military operations.²⁴ A multilateral SOFA between the TSCTP countries would offer consistency for all partners. Unfortunately, as discussed in Section IV of this paper, there are significant obstacles preventing the conclusion of a multilateral SOFA within the TSCTP. The DoD and DOS should focus their efforts instead on improving or negotiating bilateral SOFAs.

Despite AFRICOM's close ties to DOS, adequate SOFAs have not been negotiated with many African countries.²⁵ Currently, the existing 32 U.S.-African SOFAs²⁶ generally fit into one of the three categories: administrative and technical (A&T) status, mini-Global SOFA, or Global SOFA²⁷; however, not all provide sufficient protection for the current level of DoD activities. Additionally, there are 22 countries with which the U.S. has not successfully negotiated a SOFA, yet U.S. troops are working within some of these territories pursuant to a DoD SOFA waiver. To provide sufficient protections, Global SOFAs must be negotiated in countries where U.S. operations include basing or continuous presence. Mini-Global SOFAs should be negotiated in locations in which U.S. troops exercise, train or operate frequently. A&T status should be required for all other situations to ensure U.S. forces are insulated from host nation criminal prosecution. Finally, this paper argues that the DoD SOFA waiver process, whereby U.S. forces are sent into countries where there are no SOFA protections, should be used sparingly.

Currently, there is significant literature discussing SOFAs, U.S. SOFAs with partners in Europe, Asia and in the Middle East, but not about Africa. The author seeks to begin filling that gap by drawing on the existing information about SOFAs in other regions and applying it to U.S. SOFAs in Africa. Part II of this paper provides a brief introduction to SOFAs, including

²⁴ PROGRAMS AND INITIATIVES, *supra* note 17.

²⁵ Yamamoto, *supra* note 14.

²⁶ Treaties in Force, *supra* note 22. For purposes of this paper, Egypt is not included. As discussed, Egypt does not fall under AFRICOM's area of responsibility.

²⁷ These categories are guided in part by Colonel Richard Erickson's categories: A&T status, "mini-SOFA" and "full-blown SOFA." They differ in that his "mini-SOFA" category is more typical of the most comprehensive SOFAs in Africa, which are referred to as full-Global SOFAs in this paper. His category entitled, "full-blown SOFAs" refers to agreements similar to the NATO SOFA, a comprehensive agreement that considers visiting forces and their dependents. There are no "full-blown SOFAs" in Africa. See Richard Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 140, 141-143 (1994) [hereinafter *A Sharing of Sovereign Prerogative*].

their historical evolution, common modern provisions and general information about how SOFAs are concluded. Part III discusses A&T status, mini-Global SOFAs and Global SOFAs and the levels of operations the author argues are appropriate for each category. Part III also discusses potential issues and problems that can arise when sending U.S. forces into countries with which the United States has not negotiated a SOFA. Part IV discusses the potential for a regional multilateral SOFA within the TSCPT using the North Atlantic Treaty Organization (NATO) SOFA as a model. Finally, Part IV discusses the numerous challenges within TSCPT and concludes that a multilateral SOFA is not currently viable.

II. STATUS OF FORCES AGREEMENTS

Sending U.S. service-members to foreign territories in furtherance of national security objectives and foreign policies raises the important issues of their status, privileges and immunities.²⁸ Members of armed forces are not like tourists or business travelers; they are sent abroad in service of their country to participate in military operations.²⁹ Because they are sent without their “specific consent,” the U.S. Government must ensure they are protected, as much as is possible, from foreign criminal jurisdiction³⁰ so they can perform their duties independently and free from receiving state interference.³¹

Accordingly, visiting forces are often afforded special privileges and immunities. In this context, “immunity” means that local courts do not have adjudicative jurisdiction (the ability to entertain a suit) over the visiting forces.³² The term “privilege,” in contrast, is understood to mean that a state does not have prescriptive jurisdiction over the subject matter, meaning the authority to make and apply law to persons or things.³³ Privileges and immunities, as well as other administrative matters, are negotiated in SOFAs. While SOFAs define the status of visiting forces within a receiving state (*ius in praesentia*), it is important to note they do not establish a legal basis

²⁸ *A Sharing of Sovereign Prerogative*, *supra* note 27, at 137-153.

²⁹ STUART ADDY ET AL., *THE HANDBOOK OF THE LAW OF VISITING FORCES* 47 (Dieter Fleck ed., 2001) [hereinafter *HANDBOOK*].

³⁰ Sean Murphy, *The Role of Bilateral Defense Agreements in Maintaining the European Security Equilibrium*, 24 *CORNELL INT'L LJ.* 415, 423 (1991).

³¹ Aurel Sari, *The European Union Status of Forces Agreement (EU SOFA)*, 13 *J. CONFLICT & SEC. L.* 353, 356 (2008).

³² William Thomas Worster, *Immunities of United Nations Peacekeepers in the Absence of a Status of Forces Agreement*, 47 *MIL. L. AND THE L. OF WAR REV.* 280 (2008).

³³ Worster, *supra* note 32.

for the presence of visiting forces (*ius ad praesentiam*).³⁴ Nevertheless, a SOFA is intrinsically linked to the legal basis for their presence in a foreign territory. If the legal basis changes, the SOFA may need to be reevaluated and renegotiated.³⁵

The following section provides foundational information about SOFAs prior to the discussions in Section III and Section IV. “Evolution of SOFAs” presents historical context and demonstrates how political situations can affect SOFAs. “Modern U.S. SOFAs” explains what SOFAs do, provides a brief introduction to common SOFA provisions and discusses how SOFAs are created.

A. Evolution of SOFAs

Ideas about the privileges and immunities afforded to visiting forces have evolved significantly in the last two centuries. Prior to World War II (WWII), peacetime presence of visiting armed forces was not a common occurrence and their legal status was often taken for granted.³⁶ In 1812, the *Schooner Exchange v. McFadden*³⁷ case marked the first time a court addressed the legal position of visiting forces within another territory.³⁸ In his opinion, Chief Justice Marshall asserted, “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.”³⁹ He explained there are certain circumstances where a nation limits its jurisdiction.⁴⁰ One such exception occurs when a sovereign grants the passage of visiting forces through its territory.

³⁴ Visiting forces gain the right to be present within a foreign territory in basing rights or stationing agreements. See Paul Conderman, *Status of Armed Forces on Foreign Territory Agreements (SOFA)*, MAX PLANCK INST. FOR COMP. PUB. L. AND INT’L L. P B(1)(a) (2009).

³⁵ Joop Voetelink, *Status of Forces and Criminal Jurisdiction*, ACIL Research Paper 2014-10, NETHERLANDS INT’L L.R 231, 232 (2014), <http://ssrn.com/abstract=2400977>.

³⁶ *Id.* at 234.

³⁷ *The Schooner Exchange v. McFadden*, 11 U.S. 116 (1812).

³⁸ S. LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 12 (1971); see also HANDBOOK, *supra* note 29, at 12.

³⁹ *The Schooner Exchange*, 11 U.S. at 136.

⁴⁰ Chief Justice Marshall indicates that three ways receiving severing wave the exclusive territorial jurisdiction: (1) an “exemption of the person of the sovereign from arrest or detention within a foreign territory;” (2) “immunity which all civilized nations allow to foreign ministers;” (3) “sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.” *Id.* at 138-139.

“The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.”⁴¹ This principle, that sending states retain exclusive jurisdiction over their forces while in foreign territories, is commonly referred to as the “law of the flag.” The “law of the flag” ruled U.S. foreign policy through World War I (WWI) and WWII.⁴²

WWI brought with it the large numbers of visiting forces within Allied territories. This challenge led to the conclusion of a number of agreements between the Allied Powers establishing rules for the exercise of criminal jurisdiction over visiting forces.⁴³ These basic documents, which recognized the “law of the flag” principle, were the first real SOFAs.⁴⁴

During WWII, SOFAs began to evolve into more comprehensive agreements. Though the United States continued to assert the “law of the flag,”⁴⁵ SOFAs between other nations began to recognize territorial jurisdiction, meaning the receiving states retained jurisdiction over visiting forces. Countries also began negotiating provisions into SOFAs to address a range of administrative matters in addition to criminal jurisdiction.⁴⁶

As relations between the Soviet Union and the west deteriorated following WWII, the world entered into the Cold War, which lasted between 1947 and 1991. During this time period, it was common practice for the United States and its allies to permanently station their forces abroad.⁴⁷ Given the long-term nature of the assignments, families often accompanied forces bringing their own legal issues along with them. This new situation

⁴¹ *Id.*

⁴² Steven Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. Rev. 169, 171 (1994). *See also*, Voetelink, *supra* note 38, at 235 (While the U.S. held firmly to the law of the flag, internationally the rule was not clear. Voetelink asserts that, while there were differing ideas, the inconsistencies weren’t necessarily addressed in the 19th century since the impact of foreign forces was minimal at the time).

⁴³ Voetelink, *supra* note 35, at 235.

⁴⁴ *Id.*; *see also* Lepper, *supra* note 42, at 171.

⁴⁵ *Id.*; *see also* Lepper, *supra* note 42, at 171.

⁴⁶ Voetelink, *supra* note 35, at 240.

⁴⁷ *Id.*

prompted the need for more comprehensive rules governing the legal position of visiting forces and their dependents.⁴⁸

For the members of the newly created North Atlantic Treaty Organization (NATO), this culminated in the drafting of the NATO SOFA, a comprehensive multilateral agreement between all members concluded in 1951.⁴⁹ The NATO SOFA, which helps demonstrate the significant evolution of SOFAs, includes a comprehensive list of provisions.

The NATO SOFA remains in effect and serves as a useful model for other SOFAs.⁵⁰ SOFAs are not frozen in 1951, however, and have continued to evolve as new threats emerge. For example, SOFAs have adjusted to the post-WWII emergence of “crisis management operations,” which refers to military operations that occur with the consent of the host state⁵¹ and other “war-like” operations.⁵² In these situations, the NATO SOFA, which was designed with shared criminal jurisdiction, is not necessarily an appropriate model.

B. Modern U.S. SOFAs

U.S. SOFAs are negotiated to establish the best possible legal position of U.S. forces present within a foreign territory. U.S. policy is to maximize its jurisdiction over U.S. forces. The United States seeks to conclude SOFAs prior to deployment of forces into a foreign territory, which promotes good working relationships with the receiving states and reduces the potential for future disputes.⁵³

⁴⁸ *Id.*; see also *A Sharing of Sovereign Prerogative*, *supra* note 27, at 139 (stating that following WWII, negotiation of SOFAs became important because forces were permanently stationed abroad, as opposed to temporarily stationed. In light of the change, SOFAs had to address matters in addition to criminal jurisdiction, including taxation, customs and labor issues).

⁴⁹ Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

⁵⁰ Sari, *supra* note 31, at 358 (Explaining that since 1951, a significant number of SOFAs have been modeled after the NATO SOFA. For example, the Partnership for Peace (PfP) SOFA adopted the entire text of the NATO SOFA.); see also U.S. Africa Command Instruction 5800.08, Legal Affairs, Status of Forces Policies and Information, Encl. A, para.1(c) (Aug. 2, 2012) [hereinafter ACI 5800.08].

⁵¹ Voetelink, *supra* note 35, at 236.

⁵² HANDBOOK, *supra* note 29, at 31.

⁵³ *A Sharing of Sovereign Prerogative*, *supra* note 27, at 140.

1. Subjects addressed in U.S. SOFAs

SOFAs should specify the privileges and immunities of foreign military personnel while in the territory of another nation.⁵⁴ Though SOFA content varies, certain core privileges, immunities, and administrative matters are regularly addressed. The most common matter discussed is criminal jurisdiction over DoD personnel while in a host nation. Before jurisdiction can be discussed, however, SOFAs must establish to whom the provision applies.

a. Definitions

Since a SOFA is designed to define the status of visiting forces, a critical part of the negotiation process is the determination of who is entitled to the privileges and immunities.⁵⁵ Certain basic notions are common to the definitional organization of modern SOFAs. One such notion is that individuals must fit into one of the enumerated categories of covered persons to benefit from the agreement.⁵⁶ The categories typically include: (1) members of the “force” itself, typically encompassing DoD military and civilian employees on official duty, (2) members of the civilian component,⁵⁷ and (3) dependents.⁵⁸ The privileges and immunities afforded to each category differ dramatically, so SOFAs typically explain which provisions apply to each group.⁵⁹

b. Criminal jurisdiction

SOFAs most commonly address criminal jurisdiction over DoD personnel.⁶⁰ The DoD’s current policy is to protect, to the maximum extent possible, “the rights of United States personnel who may be subject to criminal

⁵⁴ R. CHUCK MASON, CONG. RESEARCH SERV, RL34531, *Status of Forces Agreement (SOFA): What is it, and How has it Been Utilized* 1 (2012).

⁵⁵ HANDBOOK, *supra* note 29, at 51.

⁵⁶ Conderman, *supra* note 34 at para. A(2)(a).

⁵⁷ Members of a civilian component generally includes individuals who are (1) civilian (2) accompanying a force and in the employ of an armed service of that contracting party (3) who are not ordinarily a resident of the host nation. *Id.*

⁵⁸ *Id.*; see also Anderson Burkhardt, *Members of Visiting Forces, Civilian Components, Dependents*, HANDBOOK, *supra* note 29, at 51; see also Thomas Desch, *Military Forces Abroad*, Max Planck Institute for Comparative Public Law and International Law para. 11 (2013).

⁵⁹ Conderman, *supra* note 34, at A(2)(a).

⁶⁰ Mason, *supra* note 54, at 2.

trial by foreign courts and imprisonment in foreign prisons.”⁶¹ The purpose of this policy is not to completely immunize visiting forces from criminal sanctions, but rather, to ensure discipline is applied in a manner considerate of military status, custom and needs.⁶²

Depending on the country situation, SOFAs call for either exclusive or shared jurisdiction. Exclusive jurisdiction grants the United States sole responsibility for prosecution and discipline of host nation law violations and is generally used in operational settings⁶³ or when U.S. forces have otherwise deployed to provide security for the foreign nation.⁶⁴ It is also preferred when the United States has concerns about the adequacy of the host nation’s legal system.⁶⁵ As the name suggests, shared jurisdiction involves an agreement in which the host nation shares jurisdiction over offenses with the sending state. Shared jurisdiction is more common in modern SOFAs, but is typically negotiated with stable countries with developed legal systems.⁶⁶

i. Exclusive jurisdiction example

Currently, all Global SOFAs between the United States and its African partners accord the United States exclusive criminal jurisdiction. The U.S.-Chad SOFA,⁶⁷ which provides a typical example, states, “U.S. authorities shall ensure discipline among U.S. military and civilian personnel. The

⁶¹ Dep’t of Def. Directive 5525.1, Status of Forces Policy and Information, para. 3 [hereinafter DoDD 5525.1].

⁶² *A Sharing of Sovereign Prerogative*, *supra* note 27, at 137-153.

⁶³ Lepper, *supra* note 42.

⁶⁴ John Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT’L L. REV. 291, 300 (2006).

⁶⁵ *Id.* at 9; *see also* Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 FLA. ST. J. TRANSNAT’L L. & POL’Y 213, 237 (2003) (asserting that South Korea may have been treated different than that of a NATO country due to U.S. concern that the South Korean legal system is not as developed as NATO countries).

⁶⁶ Mason, *supra* note 54, at 4; *see also* Voetelink, *supra* note 35, at 246 (discussing sending state preference for national criminal proceedings over foreign that differ in level of protections, and where host nation has underdeveloped legal systems or are weakened due to conflict).

⁶⁷ Agreement on Defense: Status of Forces, Jul. 5, 2005, U.S.-Chad, T.I.A.S No. 05-705, at 2 [hereinafter U.S.-Chad SOFA].

government of Chad authorizes the United States government to exercise criminal jurisdiction over such personnel.”⁶⁸

ii. Shared jurisdiction example

The NATO SOFA was the first instance where the United States ended its insistence upon exclusive jurisdiction.⁶⁹ The agreement creates a framework applicable between member nations wherein a sending state retains jurisdiction over criminal offenses committed by its forces that violate its own laws. Similarly, the receiving state has jurisdiction over offenses committed by visiting forces that violate the receiving state’s law. Where the offense violates both sets of laws, there is said to be concurrent jurisdiction. When this occurs, Article VII(3) provides that the sending state has primary jurisdiction where the offense committed is against the sending state’s national or property, or when the offense is committed during the performance of official duty. Otherwise, the receiving state has primary jurisdiction.⁷⁰

A more limited example of shared jurisdiction can be seen in the withdrawal agreement between the U.S. and Iraq.⁷¹ Article 12 of that agreement provides that the Iraqi Government has primary jurisdiction over members of the U.S. forces for all “grave premeditated felonies” committed outside of duty status.⁷² The U.S. maintains primary jurisdiction of all offenses committed by U.S. military personnel inside U.S. facilities, “during duty status outside at agreed facilities and areas,” or other offenses committed outside of duty status, but not considered “grave.”⁷³

⁶⁸ *Id.*

⁶⁹ Lepper, *supra* note 42, at 171.

⁷⁰ NATO SOFA, *supra* note 49, Article VII.

⁷¹ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Jan. 1, 2009, U.S.-Iraq, T.I.A.S. 09-6, at 10-12 [hereinafter U.S.-Iraq Withdrawal Agreement].

⁷² *Id.* Article 12(1): Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, which such crimes are committed outside agreed facilities and areas and outside duty status.

⁷³ Article 12(3) states, “The United States shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for matters arising inside agreed facilities and areas; during duty status outside agreed facilities and areas; and in circumstances not covered by paragraph 1.” Some commentators argue the U.S.-Iraq SOFA does not, in practice, lead to shared criminal jurisdiction since the U.S. maintains criminal jurisdiction over all acts committed in duty

c. Respect for host nation law

Another important provision included at the beginning of many SOFAs is the requirement that visiting forces and their dependents must respect the host nation's laws.⁷⁴ While there are diverging views as to the definition of "respect," this provision is psychologically important in that it sets the tone of the agreement and serves as reinforcement that the visiting forces need to live in harmony with the people and laws of the host nation.⁷⁵

d. Other common provisions

As previously mentioned, more comprehensive SOFAs include provisions addressing administrative matters in addition to criminal jurisdiction. While there is no set formula for inclusion, provisions commonly seen in SOFAs discuss the following: carrying of weapons, death and damage waivers, entry and exit requirements, freedom in local contracting, freedom of movement of armed forces, freedom to use the radio spectrum, professional licensing, tax and customs exemptions, vehicle operations, licensing and insurance and wearing of uniforms. These provisions will be discussed in more detail in Section IV as they pertain to U.S.-African SOFAs.

2. Matters generally not addressed in SOFAs

SOFAs do not establish the legal basis for the presence of visiting forces in a host country.⁷⁶ Instead, the legal basis for the presence of visiting forces is typically granted in basing or stationing agreements.⁷⁷ These agreements determine the locations that receiving state's forces may access within a foreign territory, and should enumerate duties, privileges, powers and rights of both parties to the agreement.⁷⁸ Stationing agreements can contemplate long-term presence, such as a base, or short-term presence, such as an exercise. They also determine geographical, force size and weaponry

status. See Chris Jenks, *A Sense of Duty: The Illusory Criminal Jurisdiction of the U.S./Iraq Status of Forces Agreement*, 11 SAN DIEGO INT'L L.J. 411, 421-23 (2010).

⁷⁴ HANDBOOK, *supra* note 29, at 61; see also Conderman, *supra* note 34, at para. A(1)(b).

⁷⁵ HANDBOOK, *supra* note 29.

⁷⁶ Conderman, *supra* note 34, at B(2)(a).

⁷⁷ *Id.*

⁷⁸ JOHN WOODLIFFE, THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW 135-138 (1992) (discussing the interpretation of rights and duties of the parties to a base agreement).

limitations.⁷⁹ After the stationing agreement establishes authority for the visiting force's presence is concluded, a SOFA can be negotiated.

Another matter generally not addressed in SOFAs is bilateral agreements seeking the non-surrender of U.S. persons to the ICC. Established by the Rome Statute,⁸⁰ the ICC is a permanent international tribunal with jurisdiction over the "most serious crimes of international concern,"⁸¹ which include genocide, crimes against humanity, war crimes and aggression.⁸² Pursuant to the Rome Statute, the ICC may investigate and prosecute offenses that were (1) committed in the territory of a member state, or by a member state's national; (2) committed in the territory, or by a national of, a non-member state that consented to ICC jurisdiction; or (3) referred by the Security Council.⁸³ There are currently 122 parties to the Rome Statute, including 34 African states.⁸⁴

Although the United States supported the creation of the ICC and initially signed the treaty despite feeling it contained what President Clinton believed were "significant flaws,"⁸⁵ the United States ultimately withdrew from the Rome Statute on May 6, 2002.⁸⁶ Several factors led to the decision to withdraw- most relevant to this paper was the United States' concern that politicized prosecutions and investigations could lead to prosecution of U.S. forces for alleged "war crimes" resulting from lawful use of force.⁸⁷

⁷⁹ Condeman, *supra* note 34, at B(2)(a).

⁸⁰ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁸¹ *Id.* Part I, Article 1.

⁸² *Id.* Part II, Article 5.

⁸³ SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW, 146 (2006).

⁸⁴ See https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx for a complete list of all ICC states.

⁸⁵ See Statement on the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES DOC 4 (Dec. 31, 2000), <http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>.

⁸⁶ Jim Garmone, *U.S. Withdraws from International Criminal Court Treaty*, AMERICAN FORCES PRESS SERVICE (May 7, 2002), <http://www.defense.gov/news/newsarticle.aspx?id=44089>.

⁸⁷ See Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington D.C. (May 6, 2002), <http://2001-2009.state.gov/p/us/rm/9949.htm>.

The United States has since taken steps to limit U.S. persons' exposure to the ICC. Specifically, it has concluded bilateral international agreements with other countries in which both promise not to surrender each other's citizens to the ICC without agreement, commonly referred to as Article 98 agreements.⁸⁸ Pursuant to Article 98(2) of the Rome Statute, these agreements should prohibit the ICC from requesting surrender of an individual without first obtaining consent of the United States. Article 98(2) states:

The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the cooperation of the sending state for the giving of consent for the surrender.⁸⁹

The United States has since concluded over 100 bilateral non-surrender agreements.⁹⁰ Though related to the criminal jurisdiction, it is important to clarify that Article 98 agreements discuss the non-surrender of individuals to the ICC. SOFA provisions, in contrast, accord visiting forces immunity from a host nation's jurisdiction and/or determine how criminal jurisdiction over visiting forces will be distributed between the sending and receiving states. Thus, these two types of agreements can be complementary, but they are not interchangeable.

3. Concluding SOFAs

The DOS is the executive agency primarily responsible for negotiating and concluding SOFAs.⁹¹ The DoD has a secondary, but important role in the process. Combatant commanders make recommendations regarding where new or updated SOFAs are warranted. Their requests are prioritized and

⁸⁸ For example, *see* Agreement between the United States and Algeria, Apr. 13, 2004, U.S-Algeria, T.I.A.S. 04-413.

⁸⁹ Rome Statute, *supra* note 80, Art. 98(2).

⁹⁰ Treaties in Force, *supra* note 22.

⁹¹ ACI 5800.08, *supra* note 50, at Encl. A, para. 1(a); *see* Richard Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45, 17-18 (1995) (Explaining that SOFA matters are primarily Defense matters, but the DoD is accorded a secondary role in these negotiations. He indicates his concern that the DOS sometimes will use "the foreign policy card to override defense interests.").

forwarded to the Chairman of the Joint Chiefs of Staff (CJCS).⁹² DOS leads SOFA negotiations, but personnel from the Office of the Secretary of Defense (OSD), Joint Staff and the Combatant Command are usually involved in the process.⁹³ In the case where a Commander determines the need for amendment of an existing agreement, supplemental agreements can be negotiated or the SOFA can be amended. A SOFA can be amended pursuant to a provision in the agreement itself, the parties can consent to modifications, or they simply can conclude a new, superseding agreement.⁹⁴ When an agreement is reached between the parties, the resulting SOFA can be concluded as an executive agreement or as a treaty. Despite differing levels of formalities, all SOFAs are legally binding international agreements.

U.S. SOFAs can be concluded as “treaties” within the meaning of the U.S. Constitution. Under Article II of the Constitution, a “treaty” is an international agreement that is negotiated and signed by the executive branch, and then submitted for consent by a two-thirds majority in the Senate before the President deposits the instrument of ratification.⁹⁵ To date, the only SOFA regarded as a treaty to which the United States is a party, is the NATO SOFA.⁹⁶

SOFAs can also be concluded by executive agreement. There are three types of executive agreements: congressional-executive, treaty-based and sole executive.⁹⁷ A Congressional-executive agreement occurs when both houses of Congress have either explicitly or implicitly authorized the conclusion of an agreement in advance.⁹⁸ Treaty-based executive agreements are those agreements concluded by the Executive pursuant to the authority of a treaty.⁹⁹ Finally, as the name suggests, a sole-executive agreement is

⁹² *Id.* at Encl. A, para. 2.

⁹³ *Id.*

⁹⁴ Vienna Convention on Diplomatic Relations, Art. 39, Apr. 18, 1961, 23 U.S.T. 3227 (a treaty may be amended by agreement between the parties. The rules established in Part II apply to such an agreement except in so far as the treaty may otherwise provide.) [hereinafter VCDR].

⁹⁵ Michael John Garcia, R. Chuck Mason and Jennifer K. Elsea, Cong. Res. Serv., *Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq* 9 (2012), available at www.fas.org/sgp/crs/mideast/RL34362.pdf.

⁹⁶ Murphy, *supra* note 30, at 423.

⁹⁷ COMM. ON FOREIGN RELATIONS, 106TH CONG. TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 5 (2001).

⁹⁸ *Id.*

⁹⁹ *Id.*

one that is concluded by the Executive alone based upon powers granted to him/her in the constitution.¹⁰⁰ Specifically, the Executive may conclude an international agreement based upon the general executive power,¹⁰¹ status as the commander in chief of the army, navy and the militia,¹⁰² the treaty power,¹⁰³ authority to receive ambassadors¹⁰⁴ and the take care clause.¹⁰⁵

The United States primarily concludes SOFAs through executive agreements, and not as formal treaties. Since SOFAs do not commit deployment of U.S. forces, nor do they create rights for other countries in the United States, it is permissible to conclude a SOFA without the advice and consent of the Senate.¹⁰⁶ The United States primarily concludes bilateral SOFAs as sole-executive agreements, based exclusively on the Executive's inherent constitutional powers. As for the format, SOFAs can be concluded by means of a single written instrument or by an exchange of diplomatic notes.¹⁰⁷ Most U.S.-African SOFAs were negotiated by exchange of diplomatic notes.

To ensure congressional awareness of all international agreements not concluded as treaties, including bilateral SOFAs, the Case-Zablocki Act requires that the State Department transmit all international agreements not concluded by the executive branch as treaties to Congress within sixty days after entry into force.¹⁰⁸ Further, the Act requires that executive agencies consult with the Secretary of State prior to concluding an international agreement on behalf of the United States.¹⁰⁹ The DOS ensures the consultation requirement is met through the Circular 175 (C-175) process.¹¹⁰ When an executive agency has a "number of treaties to be negotiated according to a

¹⁰⁰ *Id.*

¹⁰¹ U.S. CONST. art. II, § 1.

¹⁰² *Id.* art. II, § 2, cl. 1.

¹⁰³ *Id.* art. II, § 2, cl. 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. II, § 3.

¹⁰⁶ Murphy, *supra* note 30, at 423.

¹⁰⁷ U.S. Dep't of State, 11 Foreign Affairs Manual § 731.1 (2006) [hereinafter Foreign Affairs Manual]; *see also* 5 FAH-1 H-611 (Diplomatic notes are generally used by the U.S. Government when corresponding with other governments. When using diplomatic notes to negotiate an international agreement, diplomats must comply with the guidelines for concluding international agreements found in Foreign Affairs Manual § 700).

¹⁰⁸ Case Zablocki Act, 1 U.S.C. 112b (1972) (implemented by 22 C.F.R. § 181).

¹⁰⁹ *Id.*

¹¹⁰ Foreign Affairs Manual, *supra* note 107, at § 720.

more or less standard formula,” the State Department may issue a blanket authorization.¹¹¹ Under current U.S. policy, new U.S.-African SOFAs may be negotiated using the Global SOFA template that has been pre-approved with a blanket approval subject to DOS and DoD concurrence.¹¹²

Despite the Case-Zablocki Act’s requirements, the reporting system is not perfect. The “Forward” to the DOS Treaties in Force warns that, “[w]hile all efforts are made to ensure the accuracy of this publication, the presence or absence of a particular agreement, as well as the details cited regarding a listed agreement, should not be regarded as determinative of the status of the agreement.”¹¹³ This language anticipates intentional omissions for classified or sensitive agreements and unintentional omissions due to mistakes or failure to report.

The search for U.S.-African SOFAs revealed numerous omissions on the DOS List of Treaties in Force, which currently only lists SOFAs negotiated with 22 African countries.¹¹⁴ Those countries include: Benin, Botswana, Burkina Faso, Central African Republic (CAR), Chad, Djibouti, Ethiopia, Gabon, Ghana, Guinea, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Nigeria, Senegal, South Africa, South Sudan (by way of Sudan’s 1981 agreement), Sudan, and Uganda. While there are approximately three SOFAs omitted due to their classification, there are five valid, unclassified U.S.-African SOFA not listed, which include the SOFAs with Cameroon, Ivory Coast, Rwanda, Swaziland and Uganda.¹¹⁵ The DOS was able to verify the validity of the U.S.-Cameroon Agreement, however, they have no record of the other four. The lack of reporting in the Treaties in Force does not affect the United States’ rights or obligations under those agreements.

¹¹¹ *Id.* at § 724.5.

¹¹² ACI 5800.08, *supra* note 50, at para. 4.

¹¹³ Treaties in Force, *supra* note 22.

¹¹⁴ *Id.*

¹¹⁵ Email from USAFRICOM/JA to Yvonne Brakel (Apr. 22, 2014, 09:45 AM) (on file with the author).

III. IMPROVEMENT OF EXISTING SOFAs IN AFRICA

Africa's security challenges are overwhelming. As highlighted by Major General Charles Hooper,¹¹⁶ the African continent is threatened by the rise in violent extremism, piracy, and the illegal trafficking of people, arms and drugs.¹¹⁷ Extreme poverty and governmental corruption contribute to a cycle of "instability, conflict, environmental degradation, and disease."¹¹⁸ These conditions set the stage for terrorist organizations like al-Qaida in the Islamic Maghreb (AQIM), al-Shabaab, Boko Haram and the Lord's Resistance Army (LRA) to flourish, which in turn, threaten African and U.S. security.¹¹⁹ To counter those organizations and other threats, the DOS has initiated several regional partnerships in Africa aimed at improving intelligence, military and law enforcement capabilities, and strengthening aviation, port and border security.¹²⁰

In support of these initiatives, AFRICOM frequently deploys U.S. military personnel to Africa to train partner military forces and to participate in joint exercises.¹²¹ As of 2016, AFRICOM conducts 15 major joint exercises planned to foster regional and continental security in Africa.¹²² These exercises have or will bring U.S. troops to places like South Africa, Morocco, Djibouti, Seychelles, Senegal and Gabon. Countless smaller exercises have brought troops to places like Lesotho for medical readiness training¹²³ and South Africa for operational training.¹²⁴ The United States even sends members of the

¹¹⁶ At the time this article was written, Major General Hooper was assigned to AFRICOM as the Director of Strategic Plans and Programs.

¹¹⁷ Charles W. Hooper, *Going Farther by Going Together: Building Partner Capacity in Africa*, 67 JOINT FORCE Q. 8-12 (2012).

¹¹⁸ *Id.*

¹¹⁹ *LRA, Boko Haram, Al-Shabaab, AQIM and Other Sources of Instability in Africa Testimony Before the H. Comm. on Foreign Affairs*, 112th Cong. (Apr. 25, 2012) (testimony of Daniel Benjamin, Coordinator, Office of Coordinator for Counterterrorism).

¹²⁰ Ploch, *supra* note 3, at 18.

¹²¹ U.S. Africa Command Fact Sheet: U.S. Africa Command Exercises (Feb. 24, 2014), <https://www.africom.mil/what-we-do/exercises>.

¹²² *Id.*

¹²³ Kimball Rey, *USARAF Training in Lesotho Provides Sustainable Knowledge* (Mar. 3, 2014), <http://www.africom.mil/Newsroom/Article/11810/usaraf-training-in-lesotho-provides-sustainable-knowledge>.

¹²⁴ Mindy Anderson, *USARAF Training Helps African Nations Secure Borders* (Feb. 4, 2014), <http://www.africom.mil/Newsroom/Article/11726/usaraf-training-helps-African-nations-secure-borders>.

National Guard to various African countries as part of the State Partnership Program in which the guardsmen help promote regional stability and trust with their partner countries.¹²⁵

In addition to training and joint exercises, the United States also conducts military operations in Africa. For example, an estimated 100 U.S. special operations forces are currently working in central Africa with the African Union in the hunt for Joseph Kony and the Lord's Resistance Army (LRA), a violent rebel group responsible for killing thousands of men, women and children in Uganda and neighboring countries.¹²⁶ Their missions have taken them into Uganda, South Sudan, CAR and Democratic Republic of the Congo (DRC).¹²⁷

The United States also recently provided airlift and surveillance support to Opération Serval, a French led intervention in Mali.¹²⁸ In order to provide surveillance, the United States deployed approximately 100 DoD personnel to Niger to establish a temporary location to host drones. Though first reports indicated the location was created solely to support the efforts in Mali, Niger's government indicated its desire for the U.S. drones to remain and assist with surveillance.¹²⁹ Recent news reports indicate the location remains active.¹³⁰

¹²⁵ There are currently eight states partnered with African nations: California and Nigeria, Michigan and Liberia, New York and South Africa, North Carolina and Botswana, North Dakota and Benin, Ghana and Togo, Utah and Morocco, Vermont and Senegal and Wyoming and Tunisia. See Press Release, U.S. Africa Command Fact Sheet: State Partnership Program (May 6, 2014), <http://www.africom.mil/NewsByCategory/article/6107/fact-sheet-united-states-africa-command>; see also Press Release, North Dakota National Guard Announces New African Partnerships (Feb. 27, 2014), <http://www.africom.mil/newsroom>.

¹²⁶ Jason Straziuso, *US troops now in 4 African countries to fight LRA*, Feb. 22, 2012, ASSOCIATED PRESS, <http://news.yahoo.com/us-troops-now-4-African-countries-fight-lra-170955126.html>.

¹²⁷ Craig Whitlock and Thomas Gibbons-Neff, *U.S. Troops have Turned to Some Unsavory Partners to Help find Warlord Joseph Kony*, WASHINGTON POST, Sep. 29, 2015, https://www.washingtonpost.com/world/national-security/us-military-opens-a-new-front-in-the-hunt-for-african-warlord-joseph-kony/2015/09/29/73ffef96-66a9-11e5-9223-70cb36460919_story.html.

¹²⁸ Craig Whitlock, *Drone Base in Niger Gives U.S. Strategic Foothold in West Africa*, WASHINGTON POST, Mar. 21, 2013, http://www.washingtonpost.com/world/national-security/drone-base-in-niger-gives-us-a-strategic-foothold-in-west-africa/2013/03/21/700ee8d0-9170-11e2-9c4d-798c073d7ec8_story.html.

¹²⁹ *Id.*

¹³⁰ Eric Schmitt, *U.S. Takes Training Role in Africa as Threats Grow and Budgets Shrink*,

These, and other activities, take U.S. troops into many African countries, some of which the United States has negotiated adequate SOFA protections, some they have not. The following section explains the provisions found in the three categories of U.S.-African SOFAs and the appropriate level of operations corresponding to each. Following the discussion about the three SOFA types, this section addresses concerns of operating in locations with no SOFAs, leaving U.S. forces subject to the jurisdiction of the host nation.

A. Current State of U.S. SOFAs in Africa

The creation of AFRICOM in 2007 raised concerns that the existing framework of U.S.-African SOFAs was inadequate for increased military operations.¹³¹ At that time, the U.S. had approximately 24 SOFAs in Africa.¹³² While the number of agreements has since risen to 32,¹³³ the DoD is still conducting training, joint exercises and military operations in an environment where there are 22 countries without SOFA protections.

As demonstrated in Figure 1, the existing U.S.-African SOFAs lend themselves to three generalized categories based upon their provisions: A&T status, mini-Global SOFA, and Global SOFA to label each category.¹³⁴

B. Matching Operations and SOFA Provisions

The United States negotiates SOFAs to establish the best protection of its forces, both physically and legally.¹³⁵ The extent of protections warranted by a situation depends upon several factors, including the extent and timeframe of the anticipated military activities, the nature of the relationship with the host nation and the current political situation.¹³⁶ Regarding criminal jurisdiction, the United States prefers its own legal systems to those of foreign

N.Y. TIMES, Mar. 5, 2013, http://www.nytimes.com/2014/03/05/world/africa/us-takes-training-role-in-africa-as-threats-grow-and-budgets-shrink.html?_r=0.

¹³¹ See Palmer, *supra* note 21.

¹³² See Treaties in Force, *supra* note 22 (The 2007 publication indicates 18 countries, but did not include the SOFAs concluded with Cameroon, Cote d'Ivoire, Rwanda and Uganda, which were all in effect at that time based upon the date they entered into force.).

¹³³ *Id.*

¹³⁴ Other commentators have previously categorized types of SOFAs, but not specific to U.S.-Africa SOFAs. See *A Sharing of Sovereign Prerogative*, *supra* note 21.

¹³⁵ DoDD 5525.1, *supra* note 61, para. 3.

¹³⁶ *A Sharing of Sovereign Prerogative*, *supra* note 27, at 137-153.

	Benin (1998)	Botswana (2001)	Burkina Faso (2007)	Cameroon (2000)	CAR (2010)	Chad (2005)	Cote d'Ivoire (1998)	DRC (2008)	Djibouti (2003)	Ethiopia (2002)	Gabon (1999)	Ghana (1998)	Guinea (2001)	Liberia (2005)	Madagascar (2000)	Malawi (1997)	Mali (1997)	Mauritania (2005)	Mozambique (2000)	Niger (2013)	Nigeria (2000)	Rwanda (2006)	Senegal (2001)	Seychelles (2008)	South Africa (1999)	South Sudan (2011)	Sudan (1981)	Swaziland (2009)	Uganda (1997)
Global SOFA Provisions																													
A&T	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
Mini-Global SOFA +	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
A&T Status for DoD Personnel	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Entry and Exit with DoD ID/Orders	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Uniforms	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Arms	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Tax Exemptions	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Customs Exemptions	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Death/Damage Waiver	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Vessel/Vehicle Operations	no	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
Criminal Jurisdiction	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	no	no	yes	no	no	no	no	no	no	yes	no
Professional Licensing	no	no	yes	no	yes	no	no	yes	no	no	no	no	no	no	no	no	no	no	no	yes	no	no	no	no	no	no	no	yes	no
Local Procurement	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	yes	no	yes	no	no	no	no	no	no	yes	no
Tax Exemption for Contractors	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	yes	no	yes	no	no	no	no	no	no	yes	no
Freedom of Movement	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	no	no	yes	no	no	no	no	no	no	yes	no
Radio Spectrum	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	yes	no	yes	no	no	no	no	no	no	yes	no
Security	no	no	yes	no	yes	yes	no	yes	yes	no	no	no	no	yes	no	no	no	no	yes	no	yes	no	no	yes	no	no	no	yes	no

Figure 1

nations, which can offer different levels of protection. This is especially true in places like Africa where legal traditions can be drastically different or, in some cases, underdeveloped or weakened by conflict.¹³⁷

This section will discuss the three general categories that U.S.-African SOFAs can be grouped in, beginning with the most basic agreements- A&T status. Protections in each group build upon the preceding level and the information provided previously in Section II.

1. Administrative and technical (A&T) status¹³⁸

As the name suggests, A&T status offers protections equivalent to those received by administrative and technical staff under the Vienna Convention on Diplomatic Relations.¹³⁹ This status, which falls just short of full immunity, provides exemption from host nation criminal jurisdiction, and civil immunity for acts committed in the course of official duty.¹⁴⁰ A&T status also grants an exemption from host nation taxes and duties.¹⁴¹ Accordingly, these agreements represent a significant degree of political accommodation and are usually only agreed to by countries with a strong desire to host U.S. forces.¹⁴²

A&T status can be negotiated quickly through an exchange of diplomatic notes, which makes it useful for emergency relief or humanitarian efforts requiring fast action.¹⁴³ A&T status is also negotiated for situations

¹³⁷ For example, in CAR reports indicate that people carrying bloodstained machetes are able to go free because the country does not have a functioning judicial system. See Nick Cumming-Bruce, *U.N. Warns of Anti-Muslim Violence in Central African Republic*, N.Y. TIMES, Mar. 20, 2014, <http://www.nytimes.com/2014/03/21/world/africa/un-central-african-republic.html>.

¹³⁸ This section addresses agreements that encompass A&T status alone, without other provisions. A&T status is also negotiated into all mini-SOFAs and full Global SOFAs.

¹³⁹ VCDR, *supra* note 94, Art. 37.

¹⁴⁰ Robert Chesney, *Corn and Glazier on the US-Afghanistan SOFA and Jurisdiction to Prosecute SSG Bales*, LAWFARE BLOG, (Mar. 20, 2012, 12:32 AM), <http://www.lawfareblog.com/2012/03/corn-and-glazier-on-the-us-afghanistan-sofa-and-jurisdiction-to-prosecute-ssg-bales/>.

¹⁴¹ VCDR, *supra* note 139.

¹⁴² Chesney, *supra* note 140 (discussing the fact that A&T status is not uncommon in SOFAs used in an operational environment).

¹⁴³ *A Sharing of Sovereign Prerogative*, *supra* note 27, at 141; see also Arthur C. Bredemeyer, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F. L. Rev. 101, 104-105 (1997). Both sources also assert that A&T status is acceptable for military exercises.

in which a very limited number of DoD personnel are stationed in the host nation on a permanent basis, similar to embassy staff.¹⁴⁴ For example, A&T status may be negotiated for DoD individuals permanently assigned to a location such as an Office of Defense Cooperation or a medical research unit in countries without a SOFA.¹⁴⁵

While there are many positive aspects to A&T status, it is diplomatic immunity, therefore, not specifically tailored to visiting forces. Accordingly, A&T status SOFAs do not contain provisions that facilitate military operations, such as exemptions from passport and visa requirements or wearing of uniforms and carrying weapons. There are some potential legal issues to be aware of with A&T status as well. One significant concern (anytime A&T status is included in a SOFA) is whether the receiving state has filed a reservation to VCDR, Article 37(2), or has a domestic law that would affect the extent of immunities that can be honored. Three African countries have filed such reservations: Botswana, Morocco and Sudan. Morocco does not recognize A&T status at all. Its reservation states, “[t]he Kingdom of Morocco accedes to the Convention subject to the reservation that paragraph 2 of Article 37 is not applicable.”¹⁴⁶ Sudan’s and Botswana’s reservations to the Convention indicate Article 37 is only applicable on the basis of reciprocity, thus cannot be honored unless the United States extends A&T status in return.¹⁴⁷

Sudan is one of the three countries with which the United States currently has an A&T status SOFA.¹⁴⁸ Since it does not appear the United States agreed to terms of reciprocity,¹⁴⁹ that agreement may not be honored should U.S. forces enter Sudan. A&T status was also accorded to U.S. forces by Rwanda in 2006¹⁵⁰ and by South Sudan upon its recognition as a new state by the United States in 2009.¹⁵¹

¹⁴⁴ Erickson, *supra* note 27, at 141.

¹⁴⁵ *Id.*

¹⁴⁶ VCDR, *supra* note 139, Morocco Reservation.

¹⁴⁷ Based upon information in the Treaties in Force, the United States has agreed to reciprocity with Botswana; however, it does not appear to have the same agreement with Sudan. *See* Treaties in Force, *supra* note 21.

¹⁴⁸ Agreement on Defense: Status of Military Personnel, U.S.-Sudan, Dec. 27, 1981, 33 U.S.T. 4513 [hereinafter U.S.-Sudan SOFA].

¹⁴⁹ Treaties in Force, *supra* note 21.

¹⁵⁰ Agreement on Status of Forces, Nov. 1, 2006, U.S.-Rwanda, unpublished [hereinafter U.S.-Rwanda SOFA] (on file with AFRICOM).

¹⁵¹ The South Sudanese government agreed to fulfill obligations arising from treaties between Sudan and the United States. Accordingly, the DoD recognizes the U.S.-Sudan

The United States does not currently have a strong partnership with Sudan and current conditions in South Sudan appear to have limited U.S. operations to noncombatant evacuations.¹⁵² But, up until recently, Rwanda was a long-standing military partner to the United States and the recipient of U.S. military training and funding. This history begs the question, why isn't there a better SOFA in place? In late 2013, the U.S. Government blocked military aid to Rwanda because its government was providing support the Congolese rebel group, M23. As of November 2013, however, the U.S. Government was considering lifting those sanctions.¹⁵³ If that happens and the military training resumes, the United States should attempt to renegotiate its SOFA to include the additional provisions found in a mini-Global SOFA, which are better suited to military operations.

A&T status agreements as seen in Rwanda ensure the United States maintains jurisdiction over most offenses and tax exemptions, but otherwise do not adequately address issues necessary for deployment of U.S. forces into a foreign country. As a result of their limited purpose, A&T status agreements are quickly becoming obsolete in favor of more robust SOFAs.¹⁵⁴ The United States still seeks A&T status protections, but the trend is to do so in mini-Global SOFAs and Global SOFAs.¹⁵⁵

2. Mini-Global SOFA

Mini-Global SOFAs do not possess all of the provisions found in the Global SOFA, but they do contain those that are important for periodical visits without a continuous DoD presence.¹⁵⁶ In addition to providing A&T

A&T status SOFA as applicable to South Sudan.

¹⁵² Marie-Louise Gumuchian, Barbara Starr and Antonia Mortensen, *Marines Poised to Enter South Sudan*, CNN, Dec. 24, 2013, <http://www.cnn.com/2013/12/23/world/africa/south-sudan-violence>.

¹⁵³ David Smith, *US Blocks Military Aid to Rwanda over Alleged Backing of M23 Child Soldiers*, THE GUARDIAN, Oct. 4, 2013, <http://www.theguardian.com/global-development/2013/oct/04/us-military-aid-rwanda-m23-child-soldiers>. See also Arshad Mohammed, *U.S. May Consider Easing Sanctions on Rwanda: Envoy*, REUTERS, Nov. 6, 2013, <http://www.reuters.com/article/us-congo-usa-idUSBRE9A512I20131106>.

¹⁵⁴ See Bredemeyer, *supra* note 143, at 106 (discussing the blurred line between A&T and the mini-SOFA).

¹⁵⁵ See Bredemeyer, *supra* note 143, at 106 (discussing what he refers to a “blurring of the distinction” between requests for A&T status and mini-SOFAs).

¹⁵⁶ Other writers have indicated that mini-SOFAs are adequate for permanent presence. However, their categories do not line-up with the categories in this paper. As previously indicated, Col Erickson's mini-SOFA category is equivalent to this paper's full-Global

status, which provides for criminal and civil jurisdiction, mini-Global SOFAs contain provisions that help facilitate mission accomplishment.¹⁵⁷ These provisions include: entry and exit of forces with DoD identification (ID) cards and orders; wearing of the uniform and carrying of arms, tax and duties exemptions, death and damage waivers and vessel and vehicle privileges. These provisions are discussed in detail below.

a. Mini-Global SOFA provisions

i. Entry and exit with DoD ID cards and individual or collective orders

An important provision included in many SOFAs is one that permits the entry and exit of U.S. personnel into and out of a receiving state with DoD identification (ID) cards and collective travel orders. Ordinarily, passports and visas are required when traveling to countries in Africa. Obtaining these instruments can be impractical for military requirements, since military operations often require speed and flexibility. In addition to being expensive, obtaining passports and visas takes time that the mission often does not allow.¹⁵⁸

A typical clause usually includes language stating, “United States personnel may enter and exit the [host country name] with United States identification and with collective movement or individual travel orders.”¹⁵⁹

SOFA. Accordingly, his mini-SOFAs contain more provisions that allow for consistent presence. Those provisions include: definitions, respect for laws, entry and exit, arms, criminal and civil jurisdiction, claims, import and export duty exemptions, tax exemptions, local procurement, duration and termination clause. See Erickson, *supra* note 27; see also Manuel E.F. Supervielle, *The Legal Status of Foreign Military Personnel in the United States*, in DEPT. OF THE ARMY PAMPHLET 27-50-258, 3, 12 (1994) (indicating that mini-SOFAs are used when forces are permanently present, or for periodic visits).

¹⁵⁷ Voetelink, *supra* note 35, at 246 (arguing that under the military operational law perspective, SOFAs should create a feasible framework for mission accomplishment).

¹⁵⁸ INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY, OPERATIONS LAW HANDBOOK 123 (2012) [hereinafter OPERATIONS LAW HANDBOOK], http://www.loc.gov/tr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf.

¹⁵⁹ For example, see Agreement on Defense: Facilities, Feb. 19, 2003, T.I.A.S. 03-219. [hereinafter U.S.-Djibouti SOFA].

ii. Wearing of uniforms

Military uniforms are worn for identification purposes, as well as for protection.¹⁶⁰ Given the importance of uniforms to military forces, SOFAs often contain provisions permitting visiting forces to wear their uniforms in the host country under prescribed circumstances, usually while performing official duties. In U.S.-African SOFAs, the terms are generally reduced to one sentence. The U.S.-Niger agreement, for example, simply states that United States personnel are “authorized to wear uniforms while performing official duties.”¹⁶¹

iii. Carrying of weapons

Given the nature of their mission or country conditions, U.S. military personnel may be authorized to carry weapons. This is especially important in some African countries where security concerns are an issue. To ensure service members are permitted to carry arms, a clause is frequently included in a SOFA permitting U.S. military personnel to carry weapons if authorized on their orders. Commonly, the phrasing simply states, “members of a force may possess and carry arms, on condition that they are authorized to do so by their orders.”¹⁶² Granting this right is a fairly significant concession to a receiving state’s territorial sovereignty, so there may be conditions beyond authorization on orders.¹⁶³ For example, the NATO SOFA includes additional language that states “[t]he authorities of the sending State shall give sympathetic consideration to requests from the receiving State concerning this matter.”¹⁶⁴ In Africa, however, the United States’ SOFAs containing this provision all permit carrying of weapons with authorization on orders with no other conditions.

¹⁶⁰ HANDBOOK, *supra* note 29, at 85.

¹⁶¹ Agreement on Defense: Status of Forces, Jan. 28, 2014, U.S.-Niger, T.A.I.S. 13-128, at 5 (stating “United States personnel be authorized to wear uniforms while performing official duties. . .”).

¹⁶² NATO SOFA, *supra* note 52, Art. VI.

¹⁶³ Conderman, *supra* note 34 A(2)(b)(ii)(24).

¹⁶⁴ NATO SOFA, *supra* note 49, at Art. VI.

iv. Tax and duties exemptions

U.S. visiting forces must pay for goods and services rendered in host nations, but sovereigns do not ordinarily tax other sovereigns.¹⁶⁵ Accordingly, U.S. SOFAs often contain an agreement that U.S. forces will not pay host nation customs, duties and taxes on goods or services obtained in the host nation's territory.¹⁶⁶ The U.S.-Mozambique SOFA, for example, includes a provision indicating U.S. military personnel are exempt from income and sales tax, as well as import or export taxes or duties.¹⁶⁷

v. Death and damage waivers

Military deployments are often followed by complaints of damages, personal injury and sometimes, death.¹⁶⁸ It follows that this problem is frequently addressed in SOFAs. The NATO model, which is borrowed by many U.S. SOFAs, includes a mutual waiver of claims by the host country and the sending state for damages arising in connection to NATO duties and establishes claim guideline for damages occurring otherwise.¹⁶⁹ The claims provisions in U.S.-African SOFAs are much less detailed. For example, the U.S.-South Africa SOFA simply states, "the governments waive any and all claims (other than contractual claims) against each other for damage, loss or destruction of the other's property or injury or death to personnel of the parties arising out of the exercises and activities."¹⁷⁰

vi. Vessel and vehicle operations

Visiting forces often bring their own vehicles and equipment into a host nation, which poses the problem of drivers' licensing, vehicle registration and insurance. These requirements can be time-consuming and expensive,

¹⁶⁵ OPERATIONS LAW HANDBOOK, *supra* note 158, 123.

¹⁶⁶ *Id.*

¹⁶⁷ Agreement Between the United States of American and Mozambique, Mar. 7, 2000, U.S.-Mozambique, T.I.A.S. (unnumbered), at 1 [hereinafter U.S.-Mozambique SOFA].

¹⁶⁸ OPERATIONS LAW HANDBOOK, *supra* note 158, at 123.

¹⁶⁹ HANDBOOK, *supra* note 29, at 552.

¹⁷⁰ Agreement Regarding the Status of Military Personnel and Civilian Employees of the U.S. Department of Defense Who May Be Present in the Republic of South Africa in Connection with Mutually Agreed Exercises and Activities, Jun. 10, 1999, U.S.-South Africa, State Dept. No. 99-84, at 2 [hereinafter U.S.-South Africa SOFA].

thus should be avoided if the host nation is agreeable.¹⁷¹ Thus the U.S. often negotiates SOFA provisions wherein the host nation accepts as valid licenses issued by the sending state. This rule has become fairly standard in all SOFAs. For example, the provision was first included in the NATO SOFA, where the sheer numbers of visiting personnel and dependents necessitated rule.¹⁷² It is also seen, however, in countries like Botswana¹⁷³ or Chad¹⁷⁴ where the U.S. has minimal military presence.

b. Operations applied to mini-global SOFAs

The mini-Global SOFA is ideal for DoD's "flexible operating concepts" and small footprint strategy in Africa.¹⁷⁵ In most cases, DoD forces visit African partner nations for short durations for specific tasks and training.¹⁷⁶ The provisions in mini-Global SOFAs adequately anticipate military exercises, training or other small deployments not requiring a large amount of support services.¹⁷⁷ They reduce regulatory and legal delays by enabling regular entry and exit of visiting forces and their equipment free of custom fees and inspections.

Once in country, the mini-Global SOFAs establish a framework that allows mission accomplishment. Specifically, A&T status allows U.S. forces to perform their duties independently of receiving state interference.¹⁷⁸ If authorized on their orders, U.S. forces may carry weapons for protection or other mission purposes; they can wear their uniforms for identification; and they are able to operate vehicles and vessels, which can be significant in an

¹⁷¹ OPERATIONS LAW HANDBOOK, *supra* note 158, 123.

¹⁷² HANDBOOK, *supra* note 29, at 75.

¹⁷³ Agreement Regarding Matters Related to U.S. Military and Civilian Personnel of the U.S. Department of Defense Temporarily present in Botswana for the Purpose of Carrying out Exercises, Training, Humanitarian Assistance, or other Activities, Feb. 13, 2001, U.S.-Botswana, T.I.A.S. (unpublished) [hereinafter U.S.-Botswana SOFA] (on file with AFRICOM).

¹⁷⁴ Agreement on Defense: Status of Forces, Jul. 5, 2005, U.S.-Chad, T.I.A.S. No. 05-705, at 2 [hereinafter U.S.-Chad SOFA].

¹⁷⁵ Jim Garamone, *DoD Seeks 'Small Footprint' in Africa*, AMERICAN FORCES PRESS SERVICE, Oct. 12, 2012, <http://www.defense.gov/news/newsarticle.aspx?id=118199>.

¹⁷⁶ *Id.* (quoting Amanda Dory, Deputy Assistant Secretary of Defense for African Affairs).

¹⁷⁷ Bredmeyer, *supra* note 143, at I(C).

¹⁷⁸ Sari, *supra* note 31, at 356.

exercise or operation. Further, the mini-Global SOFA recognizes that U.S. service members are not ordinarily residents in the host nation and exempts them from local taxes.¹⁷⁹

Assuming partner cooperation, mini-SOFAs are appropriate for most U.S. deployments within Africa, which appear to be mostly short-term training missions, joint exercises or operations not requiring significant support.¹⁸⁰ Currently, 17 of the 32 SOFAs the United States has concluded in Africa are mini-Global SOFAs. The list includes: Benin (1998), Botswana (2001), Cameroon (2000), Cote d'Ivoire (1998), Ethiopia (2002), Gabon (1999), Ghana (1998), Guinea (1998), Madagascar (2000), Malawi (1997), Mali (1997), Mauritania (2005), Mozambique (2000), Nigeria (2000), Senegal (2001), South Africa (1999) and Uganda (1997).

Interestingly, with one exception, all of these SOFAs were concluded prior to 9/11 as part of the DOS-managed Africa Crisis Response Initiative (ACRI).¹⁸¹ Fortunately, the mission scope envisioned by the ACRI also involved small-scale military training.¹⁸² Thus, most mini-Global SOFAs still provide sufficient provisions for U.S. operations, with two exceptions: Ethiopia and Uganda, where U.S. presence appears to be continuous.

Though few details are available, the United States reportedly upgraded the airport in Arba Minch, Ethiopia, and uses that location to house drones used in surveillance missions.¹⁸³ The United States also allegedly bases unmanned surveillance aircraft in Entebbe, Uganda.¹⁸⁴ If accurate, the reported activities imply U.S. troops maintain a constant presence at both locations

¹⁷⁹ Conderman, *supra* note 34 (asserting that individual tax exemptions are based on the notion that the visiting forces are not residents in the host nation and not on the basis of sovereign immunity).

¹⁸⁰ See generally USAFRICOM NEWSROOM, <http://www.africom.mil/newsroom> (last visited Oct. 15, 2016).

¹⁸¹ *Many African nations saw the ACRI as evidence of the United States' decision to disengage from Africa. The African Crisis Response Initiative: Hearing Before the H. Subcomm. on Africa of the Comm. on International Relations*, 105th Cong. 1 (Oct. 8, 1997).

¹⁸² The White House, Office of the Press Secretary, Fact Sheet: African Crisis Response Initiative (ACRI) (Apr. 1, 1998), <http://clinton2.nara.gov/Africa/19980401-20179.html>.

¹⁸³ *US Flies Drones from Ethiopia to Fight Somali Militants*, BBC NEWS AFRICA, Oct. 28, 2011, <http://www.bbc.com/news/world-africa-15488804>.

¹⁸⁴ Craig Whitlock and Laris Karklis, *The African Network*, WASHINGTON POST, Jun. 13, 2012, http://www.washingtonpost.com/world/national-security/the-african-network/2012/06/13/gJQAmozvaV_graphic.html.

to support the mission. While DoD considers these locations Cooperative Security Locations (CSLs)¹⁸⁵ and not “bases” due to the temporary nature and the small number of personnel,¹⁸⁶ the level of support required increases the necessary SOFA provisions. Mini-Global SOFAs are not sufficient for continuous presence requiring support, either from the United States or the host nation. When a military’s presence expands to an access arrangement¹⁸⁷ where the U.S. is using a host nation’s facilities, the political relationship between the parties is likely at a point where greater SOFA provisions are appropriate.¹⁸⁸

3. Global SOFA

The Global SOFA template is the preferred agreement for U.S. SOFAs in Africa.¹⁸⁹ Though it is not as comprehensive as the NATO SOFA or other “full SOFAs”¹⁹⁰ which contemplate permanent stationing of DoD personnel and their dependents, the Global SOFA contains a comprehensive list of provisions that is adequate for the current U.S. base and CSLs in Africa.¹⁹¹

In addition to A&T Status and the provisions included in the mini-Global SOFA, a Global SOFA includes provisions affording exclusive criminal jurisdiction to the United States, freedom of movement, freedom to use the radio spectrum, freedom in local procurement, tax exemptions for government contractors, acceptance of U.S. professional licenses¹⁹² and security cooperation.

¹⁸⁵ Garamone, *supra* note 16; *see also* Ploch, *supra* note 3, at 9-10.

¹⁸⁶ Nick Turse, *Tomgram: U.S. Africa Command Debates TomDispatch*, TOMDISPATCH.COM (Jul. 26, 2012, 9:45 AM), <http://www.tomdispatch.com/blog/175574/>.

¹⁸⁷ Woodliffe, *supra* note 78, at 169 (explaining that access agreements are different than SOFAs. Specifically, they establish the rights and responsibilities of the parties).

¹⁸⁸ Supervielle, *supra* note 156, at 12.

¹⁸⁹ ACI 5800.08 *supra* note 50, at para. 4.

¹⁹⁰ *See* Erickson, *supra* note 27, at 143.

¹⁹¹ *See also* U.S. AIR FORCE, AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR AND SPACE FORCES, (1st ed. 2002), http://web.law.und.edu/Class/militarylaw/web_assets/pdf/AF%20Ops%20&%20Law.pdf (stating that more comprehensive agreements are reserved for circumstance where military bases and installations used by U.S. forces and dependents in a host nation which require a full range of support).

¹⁹² A small number of SOFAs in this category do not contain the provision accepting professional licenses.

a. Global SOFA provisions

i. *Exclusive criminal jurisdiction*

Though all of the U.S.-African SOFAs grant U.S. forces A&T status, the Global SOFAs all include a provision affording the United States exclusive jurisdiction over its forces, as well. While this appears to be unnecessary given the full immunity provided by the A&T status, the Army Operational Law Handbook provides some insight as to why this provision may have been included. When discussing the ICC,¹⁹³ it explains, “in addition to Article 98 Agreements,¹⁹⁴ an applicable SOFA in which the United States has exclusive or primary jurisdiction for offenses committed in the course of official duties may also protect U.S. members.¹⁹⁵ All of the Global SOFAs in Africa were concluded after 2002, the year that the ICC was created. Though not applicable to the existing Global SOFAs in Africa, this provision may have also been added to the Global SOFA template as a result of reservations to the VCDR.¹⁹⁶

ii. *Freedom of movement for personnel*

Freedom of movement is a necessary provision in an operational context where freedom to maneuver is critical to military operations.¹⁹⁷ These provisions frequently lay out agreements regarding entry and exit of the visiting force’s vehicles, vessels and aircraft.¹⁹⁸ For example, the U.S.-Djibouti SOFA allows for U.S. aircraft, vessels and vehicles to enter, exit and otherwise move freely within Djibouti.¹⁹⁹ In other cases, freedom of movement may also entail rights to use host nation facilities.²⁰⁰ An example of this type of provision is seen in the U.S.-Seychelles SOFA, which allows U.S. personnel “freedom of movement and access to and use mutually agreed transportation, storage, training and other facilities required in connection with [the] agreement.”²⁰¹

¹⁹³ Rome Statue, *supra* note 94.

¹⁹⁴ *Id.*

¹⁹⁵ OPERATIONS LAW HANDBOOK, *supra* note 158, at 123.

¹⁹⁶ VCDR, *supra* note 139.

¹⁹⁷ *Id.* at 546.

¹⁹⁸ *Id.*

¹⁹⁹ U.S.-Djibouti SOFA, *supra* note 159, Art. XII.

²⁰⁰ HANDBOOK, *supra* note 29, at 546.

²⁰¹ Agreement Regarding the Status of United States Personnel who may be Temporarily

iii. Freedom to use the radio spectrum

Communication is critical to command and control of military operations.²⁰² Without an agreement, visiting forces would be subject to host nation laws regulating use of frequencies within the electro-magnetic spectrum, including radio and television airwaves.²⁰³ Since this can have a detrimental effect upon military operations, U.S. Global SOFAs regularly include an agreement with the host nation permitting freedom to use the radio spectrum. For example, the U.S.-Swaziland SOFA authorizes the United States to operate its own telecommunication systems. It further provides that the United States has the right to use the radio spectrum for that purpose, free of charge.²⁰⁴

iv. Freedom in local contracting decisions

Visiting forces are usually not self-sufficient and often must rely on the local economy of their host nations. Accordingly, another important provision for Global SOFAs is freedom in local contracting decisions. In situations where the host nation has not given its specific authority to contract on the local economy for goods and services, a provision authorizing local contracting should be included in Global SOFAs.²⁰⁵ An example of this type of agreement is found in the U.S.-Mauritania SOFA, which permits the U.S. to purchase materials without limitation as to its choice of contractor, supplier or service provider.²⁰⁶

v. Tax and duties exemptions for contractors

Beginning in the 1990s, many positions formerly held by military members have been outsourced to private contractors as a means of reducing government costs.²⁰⁷ In order to make outsourcing financially feasible, host nation cooperation is needed by way of exemption from taxes, customs,

Present in Seychelles, Sep. 9, 2009, U.S.-Seychelles, T.I.A.S. (unpublished), at 7 [hereinafter U.S.-Seychelles SOFA].

²⁰² OPERATIONS LAW HANDBOOK, *supra* note 158, at 123.

²⁰³ *Id.*

²⁰⁴ Agreement Between the United States of American and Swaziland, Jul. 24, 2009, U.S.-Swaziland (unpublished), at 7 [hereinafter U.S.-Swaziland SOFA].

²⁰⁵ OPERATIONS LAW HANDBOOK, *supra* note 158.

²⁰⁶ Agreement of Cooperation Regarding the Pan-Sahel Initiative Project, Jun. 3, 2005, U.S.-Mauritania, T.I.A.S. No. 05-138, at 2 [hereinafter U.S.-Mauritania SOFA].

²⁰⁷ Conderman, *supra* note 34, at C(2).

duties and other regulatory requirements.²⁰⁸ Since the United States employs government contractors at various locations in Africa,²⁰⁹ a provision according tax and customs exemptions afforded to DoD personnel to the civilian contractors working with them is included in Global SOFAs.

vi. Professional licensing

Many Global SOFAs also include a provision whereby the host nation agrees to accept professional licenses issued by the United States. The language commonly states that the host nation “shall accept as valid all professional licenses issued by the United States, States thereof, or their political subdivisions to United States personnel for the provision of services to authorized personnel.”²¹⁰ This provision is useful with a variety of professions, ranging from medical doctors to machine operators.²¹¹

vii. Security

The Global SOFAs contain statements that, “the governments shall cooperate to take such measures as may be necessary to ensure the security and protection of the United States personnel, property, equipment, records, and official information...” This provision appears to recognize the United States’ right to self-defense, but does not define the extent and implications of the United States’ rights of self-defense.²¹² While it is very likely that details regarding U.S. police powers are contained in a separate agreement, it should be noted that the language used in the Global SOFAs leaves many important details unresolved. For example, a distinction should be made regarding whether the right of self-defense is exercised inside or outside the premises used by the United States, and whether the United States can take measures to uphold its right to self-defense against U.S. personnel only or host country nationals as well.²¹³

²⁰⁸ *Id.*

²⁰⁹ Criag Whitlock, *Contractors Run U.S. Spying Missions in Africa*, WASHINGTON POST, Jun. 14, 2012, http://www.washingtonpost.com/world/national-security/contractors-run-us-spying-missions-in-africa/2012/06/14/gJQAvC4RdV_story.html.

²¹⁰ See U.S.-Seychelles SOFA, *supra* note 201; U.S.-Swaziland SOFA, *supra* note 204.

²¹¹ Email from AFRICOM/JA to Yvonne Brakel (Apr. 15, 2014, 01:41 AM) (on file with author) [hereinafter Apr. 15 Email].

²¹² HANDBOOK, *supra* note, at 89.

²¹³ *Id.* at 29

b. Operations applied to global SOFAs

Global SOFAs are needed with states in which the U.S. military maintains a continuous presence requiring more support services. In Africa, the Global SOFAs have been negotiated with Burkina Faso (2007), CAR (2010), Chad (2005), DRC (2008), Djibouti (2003), Liberia (2005), Niger (2013), Seychelles (2008) and Swaziland (2009). Unconfirmed news reports indicate the United States has CSLs in Burkina Faso, Ethiopia, Kenya, Seychelles and Uganda, most of which may base unmanned surveillance aircraft.²¹⁴ Since confirmed information regarding CSLs is unavailable, this paper will not speculate on the adequacy of their existing SOFAs.²¹⁵ Instead, it will focus on the U.S.-Djibouti SOFA and Camp Lemonnier for purposes of discussion. Assuming the United States is in fact maintaining personnel, aircraft and other equipment at the various CSLs, the discussion should be largely applicable to those facilities as well.

Camp Lemonnier is the only established U.S. base in Africa.²¹⁶ It houses the Combined Joint Task Force – Horn of Africa (CJTF-HOA), an ad hoc headquarters commanded by the U.S. Navy,²¹⁷ and supports approxi-

²¹⁴ Craig Whitlock and Laris Karklis, *The African Network*, WASHINGTON POST, Jun. 13, 2012, http://www.washingtonpost.com/world/national-security/the-african-network/2012/06/13/gJQAmozvaV_graphic.html.

²¹⁵ Craig Whitlock, *U.S. Expands Secret Intelligence Operations in Africa*, WASHINGTON POST, Jun. 13, 2012, http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html (The author asserts that approximately a dozen bases have been established in Africa since 2007. He states that the U.S. flies unarmed spy planes out of a base near Ouagadougou, Burkina Faso, and Predator and Reaper drones out of Ethiopia and the Seychelles. He also reports that General Ham, the former AFRICOM Commander, wanted to establish a base in South Sudan for additional surveillance flights.); see also John Vandiver, *An increasing US focus on Africa—but is it a ‘Pivot’?*, STARS AND STRIPES, Oct. 17, 2013, <http://www.stripes.com/news/an-increasing-us-focus-on-africa-but-is-it-a-pivot-1.247488> (reporting that there is “a growing constellation of small U.S. drone outposts.” He states these outposts are located in Djibouti, Niger and Ethiopia).

²¹⁶ AFRICOM, Fact Sheet: History of U.S. Military Involvement in Africa (Jun. 12, 2008), <http://www.africom.mil/NEWSROOM/Article/6220/fact-sheet-history-of-us-military-involvement-in-a>; see also Craig Whitlock, *Remote U.S. Base at Core of Secret Operations*, WASHINGTON POST, Oct. 25, 2012, http://www.washingtonpost.com/world/national-security/remote-us-base-at-core-of-secret-operations/2012/10/25/a26a9392-197a-11e2-bd10-5ff056538b7c_story.html.

²¹⁷ CAMP LEMONNIER, DJIBOUTI, AFRICA, WELCOME ABROAD OVERVIEW, http://www.cnmc.navy.mil/regions/cnreurafswa/installations/camp_lemonnier_djibouti.html (last visited Apr. 21, 2014).

mately 4,000 joint and allied military forces, civilian personnel and DoD contractors.²¹⁸ Though few details regarding its mission are available, generally “CJTF-HOA conducts operations in the region to enhance partner nation capacity, promote regional security and stability, dissuade conflict, and protect U.S. and coalition interests. CJTF-HOA is critical to U.S. AFRICOM’s efforts to build partner capacity to counter violent extremists and address other regional security partnerships.”²¹⁹ In short, they coordinate the partner training, joint exercises and military operations throughout Djibouti and other African countries.

The U.S.-Djibouti SOFA,²²⁰ which was concluded in 2003 by executive agreement, is sufficient for the level of DoD operations currently in Djibouti. The CJTF-HOA mission and the size of the Camp Lemonnier require Global SOFA provisions. Unlike the short-term presence in the countries requiring mini-Global SOFAs, the enduring presence in Djibouti warrants additional provisions such as freedom in local procurement and tax exemptions for government contractors. For example, the U.S. Government has invested hundreds of millions of dollars upgrading the facilities transforming Camp Lemonnier from a makeshift, temporary location into a permanent facility.²²¹ The DoD currently has multiple construction projects underway, including taxiway improvement, a new special operations compound and headquarters buildings, and new living quarters.²²² The DoD also has plans to build a new facility to house recreational and support services.²²³ The U.S. Government hires government contractors to complete these types of construction projects.²²⁴ As discussed previously, tax exemptions are needed for government contractors to ensure the projects are cost effective.²²⁵ Con-

²¹⁸ WELCOME TO CAMP LEMONNIER, DJIBOUTI, http://www.cnic.navy.mil/regions/cnreurfswa/installations/camp_lemonnier_djibouti.html (last visited Apr. 21, 2014).

²¹⁹ ABOUT THE COMMAND, USAFRICOM, <http://www.africom.mil/about-the-command> (last visited Apr. 21, 2014).

²²⁰ U.S.-Djibouti SOFA, *supra* note 159.

²²¹ Shashank Bengali, *U.S. Military Investing Heavily in Africa*, LA TIMES, Oct. 20, 2013, <http://www.latimes.com/world/la-fg-usmilitary-africa-20131020,0,4805969.story#axzz2zWjimUyT>.

²²² John Vandiver, *Accompanied Tours in Djibouti? US Military Looks at Options as it Settles in for the Long-Term*, STARS AND STRIPES, Apr. 14, 2014, <http://www.stripes.com/news/accompanied-tours-in-djibouti-us-military-looks-at-options-as-it-settles-in-for-the-long-term-1.277526>.

²²³ *Id.*

²²⁴ Vandiver, *supra* note 222.

²²⁵ See Section III(B)(3)(a)(vii) above.

struction projects also require supplies, which are often purchased from the local economy. Freedom in local procurement allows the U.S. Government to secure competitive pricing for construction supplies or for any other goods or services needed to support the base population.

Unlike exercises or training missions in other locations, U.S. forces in Djibouti conduct multiple military operations that also justify the need for additional SOFA provisions. Ground operation information is largely unavailable due to its special operations nature. However, it is reported that Camp Lemonnier hosts drones, fighter jets, and transport and refueling aircraft. Air operations require freedom of movement so missions can be completed expeditiously without interference from the host nation. Freedom of the use of the radio spectrum is also invaluable to air operations to enable communication between pilots and command and control, air traffic control and other pilots. Security agreements are needed to ensure the United States has the right to defend its personnel and assets.

The U.S.-Djibouti SOFA includes all of the provisions in the Global SOFA, with one exception. The SOFA does not include a provision in which the Djiboutian government accepts U.S. professional licenses. Generally, this provision pertains to a wide variety of professional licensing, ranging from truck drivers to physicians. It helps facilitate exercises or other engagements, and provides additional protection from liability.²²⁶ It is unclear what effect this absence has on U.S. operations in Djibouti. However, provisions, such as waiver of claims and A&T status that include immunity for civil offenses committed within the scope of official duty, should effectively limit potential liability.

Overall, the Global SOFA provisions, as discussed above, adequately address the current requirements in Djibouti and other CSLs. Potential changes on the horizon in Djibouti, however, may affect the adequacy of the existing SOFA. As previously stated, the Global SOFA is not as comprehensive as a full SOFA like the one concluded by NATO. Specifically, the Global SOFA does not currently provide for accompanied tours where visiting forces are authorized to bring their dependents.

Recent reports indicate that the DoD is considering making Camp Lemonnier an accompanied assignment, similar to the French military sta-

²²⁶ Apr. 15 Email, *supra* note 228.

tioned nearby and the U.S. embassy staff.²²⁷ If this proposal comes to fruition, the United States would have to renegotiate the SOFA to account for the added dependents. In particular, dependents would need to be considered in the “definitions,” “respect for host nation laws,” “entry and exit,” “vehicle operations” and “licenses,” “criminal jurisdiction” and “customs” provisions. A change this dramatic would require a new SOFA.

Another matter that may need to change with long-term U.S. presence is the criminal jurisdiction arrangement. Currently, the U.S.-Djibouti SOFA allows the United States to exercise exclusive criminal jurisdiction over its forces and accords A&T status.²²⁸ Exclusive criminal jurisdiction is important in an operational context as it provides commanders maximum authority to address misconduct in their units, which is critical to the maintenance of good order and discipline.²²⁹ Generally speaking, operational deployments do not permit normal non-duty activities. Life in Djibouti doesn’t fall neatly into the operational category. U.S. forces are not confined to the base and can leave the installation in their downtime, which gives them a chance to interact with the local population.²³⁰

Unfortunately, this freedom allows U.S. forces more opportunity to violate host nation laws. There are all too many examples of U.S. troops committing serious crimes that have incited outrage in receiving states and damaged country relations. Though not in Africa, a recent example occurred in Iraq in 2006, where five U.S. soldiers were involved in the rape of a 14 year-old girl and the murder of her and her family.²³¹ At the time the offenses were committed, the U.S-Iraq SOFA accorded exclusive jurisdiction of U.S. forces to the United States.²³² A new U.S.-Iraq withdrawal agreement, which was negotiated shortly after the atrocity, included a provision in which the Iraqi government maintained primary jurisdiction over members of the U.S. forces for all “grave premeditated felonies” committed outside of duty

²²⁷ Vandiver, *supra* note 222.

²²⁸ U.S.-Djibouti SOFA, *supra* note 159.

²²⁹ Chesney, *supra* note 140.

²³⁰ For example, the Camp Lemmonier Facebook website indicates the MWR organizes scuba diving trips, other tours. See Camp Lemmonier Facebook, FACEBOOK, <https://www.facebook.com/CampLemmonier> (last visited Sep. 12, 2016).

²³¹ Jenks, *supra* note 73, at 429.

²³² *Id.*

status.²³³ The United States was afforded primary jurisdiction over essentially all other offenses.²³⁴

With the United States' commitment to Camp Lemonnier and the potential permanent facility in the near future, it may be wise to negotiate a favorable form of shared jurisdiction, such as the one negotiated with Iraq, to safeguard relations either way. That agreement is consistent with U.S. policy in that the United States would maintain jurisdiction over all but the most heinous crimes committed outside of duty status. The agreement is also consistent with partnership since it shows respect for the Djiboutian government and trust in its legal system.

In conclusion, the Global SOFA is adequate for current operations in Djibouti and CSLs. While some information is available regarding the size and scope of the operations at Djibouti, similar reliable information is not available to accurately identify or discuss current CSLs. What can be said is the United States should work to negotiate, or renegotiate, Global SOFAs with countries in which it has bases or CSLs with a continuous U.S. presence to ensure adequate protections are in place. The United States should also anticipate significant changes and negotiate full SOFAs in locations growing to accommodate dependents.

C. No SOFAs in Place

Currently, there are approximately 22 African countries²³⁵ with whom the United States has not concluded a SOFA, many of which U.S. military forces frequently visit for training and exercises. For reasons already discussed in this paper, there are multiple reasons why this practice is not a good one. First, operating in territories without a SOFA leaves U.S. forces

²³³ U.S.-Iraq Withdrawal Agreement, *supra* note 81, Art. 12(1): Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, which such crimes are committed outside agreed facilities and areas and outside duty status.

²³⁴ Jenks, *supra* note 73 (arguing that the U.S.-Iraq SOFA does not, in practice, lead to shared criminal jurisdiction since the U.S. maintains criminal jurisdiction over all acts committed in duty status).

²³⁵ The author is currently aware of three classified agreements and has included those documents in the SOFA totals in this paper. She fully acknowledges there may be additional classified SOFAs she is unfamiliar with that would affect the numbers cited in this paper.

fully exposed to criminal and civil jurisdiction of the host nation pursuant to current international law.²³⁶ SOFAs also facilitate mission accomplishment by specifying the legal framework under which U.S. troops will operate, providing clarity and reducing disputes. Engaging U.S. forces in these situations is also contrary to DoD's stated policy that the United States will not engage in "the full range of military-to-military activities" in a host nation unless U.S. visiting forces are granted adequate status protections.²³⁷ Conducting missions in countries that have not agreed to a SOFA sends an inconsistent message to foreign governments and provides reluctant governments with a disincentive to conclude status agreements.²³⁸

While SOFAs provide important protections, the DoD has indicated not every situation warrants or allows time for negotiation of status of forces protections.²³⁹ For example, the U.S. government generally will not seek status protections for senior-leader visits to countries without a SOFA.²⁴⁰ Nor will the United States seek protections for individuals or small groups traveling to attend conferences, seminars or other activities of short duration.²⁴¹ In other cases, situations require U.S. military forces to move quickly and do not allow time for the negotiation of a SOFA. For example, U.S. forces are frequently called to conduct noncombatant evacuations or to provide disaster or emergency relief efforts.²⁴²

There are also instances where an agreement cannot be reached, despite the host nation's willingness to receive visiting U.S. forces for military training, joint exercises or operations. In those cases, the AFRICOM Commanding Officer (CDRUSAFRICOM) must make a determination whether or not to approve a deployment without protections.²⁴³ The AFRICOM status protection waiver program helps advise CDRUSAFRICOM in making this determination.²⁴⁴

²³⁶ Lepper, *supra* note 42, at 171.

²³⁷ SECDEF Memo, *supra* note 19.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Risk assessments are conducted by DIA and State Department. ACI 5800.5 *supra* note 50.

A planned deployment meets the AFRICOM threshold for seeking a waiver if it involves 20 or more personnel, the activity will be 15 days or longer, or the activity is one that poses significant risk or exposure based upon its nature.²⁴⁵ AFRICOM will not seek a waiver in cases when:

1. Its personnel will remain on a U.S. vessel in the sovereign territory of another nation;
2. For senior level visits;
3. When an unexpected vessel or aircraft emergency has caused the presence;
4. Contingency operations such as a NEO, combat or humanitarian effort;
5. Unplanned port calls based upon operational considerations; or for service members traveling on unofficial travel.²⁴⁶

Where a deployment has reached the threshold, a waiver must be sought. That process involves several steps. First, it must be determined that inadequate protections are in place.²⁴⁷ Various intelligence agencies must conduct additional risk assessments. An operational necessity assessment must be made and a country law study must be conducted.²⁴⁸ The country law study, which is ordered by the designated commanding officer (DCO), provides an analysis of the substantive and procedural criminal laws in the foreign nation.²⁴⁹ Specifically, these studies address 17 specific questions to determine what fair trial safeguards or guarantees are in effect.²⁵⁰

1. Criminal statute alleged to be violated must set forth specific and definite standards of guilt.
2. Accused shall not be prosecuted under an ex post facto law.
3. Accused shall not be punished by bills of attainder.
4. Accused must be informed of the nature and cause of the accusation and have a reasonable time to prepare a defense. Accused is entitled to have the assistance of defense counsel.
5. Accused is entitled to be present at the trial.

²⁴⁵ *Id.* at § B-2, para. 2(a).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at § B-A-1, para. 3.

²⁴⁸ *Id.*

²⁴⁹ 32 C.F.R. § 151.4(d).

²⁵⁰ 32 C.F.R. § 151.7.

6. Accused is entitled to confront with hostile witnesses.
7. Accused is entitled to have compulsory process for obtaining favorable witnesses.
8. Use of evidence against the accused obtained through unreasonable search or seizure or other illegal means is prohibited.
9. Burden of proof is on the Government in all criminal trials.
10. Accused is entitled to be tried by an impartial court.
11. Accused may not be compelled to be a witness against him or herself; and shall be protected from the use of a confession obtained by torture, threats, violence, or the exertion of any improper influence.
12. Accused shall not be subjected to cruel and unusual punishment.
13. Accused is entitled to be tried without unreasonable (prejudicial) delay.
14. Accused is entitled to a competent interpreter when the accused does not understand the language in which the trial is conducted and does not have counsel proficient in the language both of the court and of the accused.
15. Accused is entitled to a public trial.
16. Accused may not be subjected to consecutive trials for the same offense that are so vexatious as to indicate fundamental unfairness.

The DCO's legal staff will complete an evaluation of the host nation's laws to determine the probability of each safeguard. AFRICOM country law studies follow the C.F.R format precisely.²⁵¹ In accordance with DoD instructions, the country law study should examine the substantive and procedural criminal laws in the country at issue and determine what fair trial safeguards are in place. The DCO will then determine whether an accused would receive a fair trial in that country.

While the C.F.R. criteria and the country law study provide an evaluation of the fair trial rights, they do not appear to take into consideration substantive differences in the host nation's law, which can be quite different from U.S. laws. For example, many African legal systems are based in part on Islamic law which is embodied in the sharia.²⁵² While marriage

²⁵¹ DODI 5525.1, *supra* note 61, at Encl. 2.

²⁵² CIA WORLD FACT BOOK, *Field Listing: Legal System*, <https://www.cia.gov/library/>

and divorce are the most significant concerns of sharia, the criminal laws are the most controversial.²⁵³ The crimes and punishments in sharia can be dramatically different than those found in the United States. For example, sexual intercourse outside of marriage or drinking alcohol, both of which are *hadd* offenses, are punishable by flogging, stoning, amputation, exile or execution.²⁵⁴ It goes without saying, there is significant risk that U.S. forces will engage in these activities even when they are issued an order forbidding from them from doing so.²⁵⁵

U.S. troops are obligated to respect the laws of the host nation, but some falter. When that happens, it is DoD policy to punish them under the Uniform Code of Military Justice (UCMJ),²⁵⁶ which is a set of legal obligations by which they have agreed to abide. Under the military justice system, it is believed that the commander is best suited to consider all of the facts and circumstances of an offense and determine a fair disciplinary course of action that is consistent with U.S. punishment standards. A SOFA facilitates that policy. Without a SOFA in place, U.S. forces risk exposure to a host nation's jurisdiction and, potentially, to the jurisdiction of International Criminal Court.²⁵⁷

publications/the-world-factbook/fields/2100.html (last visited Sep. 12, 2016).

²⁵³ Toni Johnson and Lauren Vriens, *Islam: Governing Under Sharia*, THE COUNCIL ON FOREIGN RELATIONS, Jan. 9, 2013, <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

²⁵⁴ *Id.*

²⁵⁵ Depending on the location and nature of a deployment, a commander may issue an order prohibiting consumption of alcohol or other conduct. Uniform Code of Military Justice, Art. 92(1), 10 U.S.C.A. § 892 (failure to obey order or regulation).

²⁵⁶ *Id.*

²⁵⁷ Pursuant to Rome Statute, Article 98(1), a SOFA affording DoD personnel A&T status may limit the ICC's ability to request surrender of a U.S. service member from a receiving state without consent of the United States. Article 27(2) appears to strip away all state official immunities. *See* Rome Statute, *supra* note 80. *See also* Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 420 (2004). "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." *See* Rome Statute, *supra* note 80, Art. 27(2). However, the matter does not end there. Since the ICC does not possess independent arrest powers, it must rely on states to arrest and surrender wanted persons. If the Court is seeking a national of the requested state, Article 27 operates as a waiver of national immunity. If, instead, the ICC is requesting surrender of an official outside his state and entitled to immunity under international law, Article 98(1) limits the Court's ability to request his surrender without waiver of the sending state. *See* Akande, *supra* note 257, at 420. Specifically, Article 98(1) states, the court may not proceed

The SOFA waiver process should be used sparingly. Politically speaking, it provides reluctant nations with further disincentive to negotiate status protections. It leaves U.S. troops exposed to the criminal jurisdiction of foreign nations and the ICC. Engaging in continuing activities in foreign nations where there are inadequate status protections undermines the importance the U.S. Government places on the protection of its forces.²⁵⁸ The waiver process

with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. *See Rome Statute, supra* note 89, Art. 98(1).

^{When} U.S. forces are accorded A&T status by a receiving state, they are entitled to privileges and immunities equivalent to administrative and technical staff of the U.S. Embassy. *See VCDR, supra* note 94. Accordingly, the ICC may not request their surrender without U.S. waiver since doing so would violate the receiving state's obligation under international law with respect to diplomatic immunity. *Contra* Dieter Fleck, *Are Foreign Military Personnel Exempt from International Criminal Jurisdiction Under Status of Forces Agreements?* 1 JICJ 650, 663-664 (2003) (asserting that the core rules of functional immunity follow visiting forces into foreign territories, therefore, ICC would have to seek waiver from sending state regardless of A&T status). *But see* Rome Statute, *supra* note 80, Art. 98(2).

^{Article} 98(2) may also serve as a limit on the ICC's ability to request surrender of U.S. forces abroad without U.S. consent if a SOFA is in place conferring criminal jurisdiction to the United States. As mentioned previously, Article 98(2) addresses situations where a request for surrender conflicts with an existing obligation that the requested state has with another state pursuant to an international agreement. *See* Rome Statute, *supra* note 80, Art. 98(2). Legal scholars and commentators have deduced that the international agreements envisioned by Article 98(2) were SOFAs. *See* Chet J. Tan, Jr., *The Proliferation of Bilateral Non-Surrender Agreements Among Non-Ratifiers of the Rome Statute of the International Criminal Court*, 19 AM. U. INT'L REV. 1115, 1124, 1136-37 (2004) (stating that Article 98 agreements can exceed the scope of Article 98(2) and potentially frustrate the object and purpose of the Rome Statute); *see also* Akande, *supra* note 257, at 426).

^{There} are two schools of thought regarding whether a request for surrender would interfere with the requested state's obligations under an existing international agreement, if that agreement is a SOFA. The majority of articles surveyed indicate that a surrender request would interfere with obligations under a SOFA granting criminal jurisdiction to the sending state, therefore, requiring sending state consent. *See also* Chimene Keitner, *Crafting the International Criminal Court: Trials and Tribulation in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215, 237, (2001); Akande *supra* note 257, at 426. Others argue that Article 98(2) and SOFAs relate to different issues, specifically Article 98(2) relates to surrender, while SOFAs establish criminal jurisdiction agreements. Thus, no conflict exists and a surrender request could be made (but for Article 98(1)). *See* Fleck, *supra* note 257, at 656.

²⁵⁸ SECDEF memo, *supra* note 19.

also undermines the process of partnership building, as it provides *partners* with a disincentive to fully commit to the *partnership*.

The existing U.S.-African SOFAs appear to correspond to the level of operations in their respective host nation fairly well. However, a handful of existing agreements, including the SOFAs with Ethiopia, Sudan, Rwanda and Uganda, appear ripe for renegotiation. Additionally, the potentially dramatic changes in Djibouti indicate that it may be time to negotiate a full SOFA to accommodate dependents and permanent U.S. presence. The most significant problem with U.S.-African SOFAs, however, is where they do not exist. Accordingly, the DoD and DOS must work together to sway hesitant partners to conclude agreements to ensure the protection of U.S. forces. In the meantime, the DoD should limit deployments to those countries to missions that are necessary to protecting U.S. national security.

IV. POTENTIAL MULTILATERAL SOFA IN AFRICA

Negotiation of bilateral agreements based upon operational necessity does not completely resolve the issue of inconsistent SOFAs in Africa. In response to the unpredictability of coverage, some military officials have advocated for regional multilateral SOFAs in Africa²⁵⁹ to take the guesswork out of mission planning and strengthen partnerships.²⁶⁰

Dealing with the inconsistencies is particularly challenging when a deployment involves travel to more than one foreign nation. Mission planners must be aware of the SOFA provisions (or lack thereof) in all locations. Take, for example, recent operations in Burundi. U.S. Army planners planned and coordinated the deployment of 850 Burundian infantry soldiers to CAR for a peacekeeping mission.²⁶¹ U.S. Air Force C-17s flew to Burundi from Uganda, picked up Burundian soldiers, transported them to CAR, and then returned to Uganda.²⁶² This particular sampling of countries highlights the inconsistencies in SOFA coverage that mission planners have to work with.

²⁵⁹ Palmer, *supra* note 21, at 80.

²⁶⁰ *Id.*

²⁶¹ AFRICOM Press Release, US Burundian Military Choose to go Far Together (Dec. 26 2013), <http://www.africom.mil/Newsroom/Article/11602/us-burundian-military-choose-to-go-far-together>.

²⁶² Jon Harper, *US Airlift of Burundian Troops to Central African Republic Under Way*, STARS AND STRIPES, Dec. 11, 2013, <http://www.stripes.com/news/us-airlift-of-burundian-troops-to-central-African-republic-under-way-1.257143#>.

Currently, there is no SOFA in place in Burundi,²⁶³ the SOFA with CAR offers maximum protections,²⁶⁴ and the U.S.-Uganda SOFA is best characterized as a mini-SOFA, but does not allow for freedom of movement. A multilateral SOFA would make the process simpler for planning and resolve legal and practical issues raised by visiting forces in a consistent manner.²⁶⁵

The United States is currently only a member to one multilateral SOFA- the NATO SOFA. Despite its age, it is still considered the model for peacetime SOFAs. The following section briefly discusses the creation of the NATO SOFA, its benefits and its continued vitality. It then evaluates the potential application of a similar agreement within TSCTP.

A. The NATO SOFA as a Multilateral Model

Twenty-six countries formed the NATO alliance in 1949 with common goals of deterring Soviet expansion, preventing the return of nationalistic militarism and encouraging European political integration.²⁶⁶ At the core of this agreement is the principle of collective defense. Almost 70 years later, the principle still stands strong, binding all NATO members together in a commitment to protect each other.²⁶⁷ In order to achieve this objective, the United States and its allies maintained an unparalleled amount of armed forces in foreign, friendly territories following the creation of NATO.²⁶⁸ Given the sheer number of visiting forces, it was apparent that a formal SOFA would be necessary to determine the legal framework under which they would operate.²⁶⁹

The first problem to be resolved was whether the SOFA requirement would be best fulfilled by multiple bilateral agreements or by one multilat-

²⁶³ Noted by lack of listing on the DOS Treaties in Force. *See* Treaties in Force, *supra* note 26.

²⁶⁴ Agreement Regarding the Status of United States Personnel who may be Temporarily Present in Central African Republic, Jun. 3, 2010, U.S.-Central African Republic, T.I.A.S. (unpublished) [hereinafter U.S.-CAR SOFA].

²⁶⁵ Sari, *supra* note 31, at 388 (asserting that a multilateral agreement that applies to all EU member states settles important legal and practical questions created by the deployment of forces in a coherent manner throughout the EU).

²⁶⁶ A SHORT HISTORY OF NATO, <http://www.nato.int/history/nato-history.html> (last visited Sep. 12, 2016).

²⁶⁷ COLLECTIVE DEFERENCE – ARTICLE 5, http://www.nato.int/cps/en/natohq/topics_110496.htm (last visited 15 Oct. 2016).

²⁶⁸ Voetelink, *supra* note 35, at 236.

²⁶⁹ Lazareff, *supra* note 38 at 63.

eral agreement.²⁷⁰ The former would allow agreements specially tailored between individual nations, yet it had the disadvantage of varied status protections from one country to the next.²⁷¹ A multilateral agreement, on the other hand, was seen as an equalizer, granting the sending and receiving states' forces the same statuses in all member countries (and likely preventing many disputes).²⁷² The multilateral agreement also relieved the practical difficulties involved with a series of differing bilateral SOFAs between the partner nations.²⁷³ Finally, five of the ratifying States were already party to another multilateral SOFA, the Brussels Treaty. They brought that model with them, and it eventually became the template for the NATO SOFA.²⁷⁴ Ultimately, the benefits of a multilateral SOFA vastly outweighed the idea of several bilateral agreements.

The NATO SOFA was drafted so that statuses applied within the territory of all member countries. Its reciprocal qualities offered its members great advantages.²⁷⁵ Former Chairman of the Joint Chiefs of Staff, General Omar Bradley, summed up the SOFA's benefits when testifying before the Senate Foreign Relations Committee:

The status of forces agreement is of primary interest to the Department of Defense in so far as it affects the United States as a sending state. From this point of view, its advantages are twofold: First, it enables the commander of a United States military force to engage in peacetime NATO operations in NATO countries without undue hindrance from the authorities of those countries. Second, it confers upon individual members of the United States forces certain rights which are essential to their morale and well-being.²⁷⁶

The operational efficiency, flexibility and maneuverability gained by having a standing multilateral SOFA in place between all members of NATO should not be underestimated. Sixty-five years later, the NATO SOFA is still in use by its members during joint operations around the globe. A recent example demonstrating its continued vitality is Operation Unified Protector

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 64.

²⁷⁵ *A Sharing of Sovereign Prerogative*, *supra* note 27, at 137-153.

²⁷⁶ Hearing before the Comm. on Foreign Relations on the Status of North Atlantic Treaty Organization, Armed Forces, and Military Headquarters, 83d Cong., 33-34 (1953).

(OUP), the NATO intervention in Libya in 2011.²⁷⁷ During OUP, approximately 18 NATO countries accomplished the NATO mission, all utilizing a limited number of base locations throughout southern Europe.²⁷⁸ Italy, for example, hosted air forces from the United States, Canada, Denmark, the Netherlands, Spain and the U.K, among others, throughout the operation.²⁷⁹ The multilateral SOFA allowed entry into Italy without delay while privileges and immunities were negotiated.

The NATO SOFA continues to be essential to the NATO alliance. Not only does it allow for consistent protections and peace of mind for visiting forces, it allows rapid deployment of those forces and their equipment across friendly borders. The NATO SOFA model could potentially be applied on a smaller scale within the TSCTP.

B. Multilateral SOFA within the TSCTP

A multilateral SOFA within the TSCTP could be very useful to the United States and TSCTP countries. It would provide consistent protections, fluid movement of troops and their equipment and allow military operations to proceed without avoidable legal delays.²⁸⁰ These benefits assist U.S. forces traveling throughout the TSCTP region on partner capacity building missions. A multilateral SOFA can also promote partnership building and cooperation by preventing disputes between the countries.²⁸¹

Building partnerships among African states holds a high priority in the DoD strategy and national security strategy.²⁸² A guiding principle

²⁷⁷ OUP was a NATO operation in Libya to protect civilians and civilian-populated areas under attack or threat of attack in Libya pursuant to United Nations Security Council Resolutions 1970 & 1973 on 31 March 2011. See NATO AND LYBIA: OPERATION UNIFIED PROTECTOR, <http://www.nato.int/cps/en/natolive/71679.htm> (last visited Sep. 12, 2016) [hereinafter OPERATION UNIFIED PROTECTOR].

²⁷⁸ Simon Rogers, *Nato Operations in Libya: Data Journalism Breaks Down Which Country Does What*, THE GUARDIAN, Oct. 31, 2011, <http://www.theguardian.com/news/datablog/2011/may/22/nato-libya-data-journalism-operations-country>.

²⁷⁹ OPERATION UNIFIED PROTECTOR, *supra* note 277.

²⁸⁰ Palmer, *supra* note 21, at 81.

²⁸¹ Lazareff, *supra* note 38, at 63 (Author explains that a multilateral SOFA permits an “equalisation” since the forces of a receiving state enjoy the same status when being on friendly foreign territory. This idea prevents resentment and jealousy by giving all partners the same status).

²⁸² Benjamin, *supra* note 119.

behind both strategies is the idea that, ultimately, it will be best for Africans to manage African security challenges.²⁸³ Thus, the United States aims to enable its African partners to work together to meet their common security challenges.²⁸⁴ One way the U.S. attempts to build partnerships in Africa is through counterterrorism partnerships. Though there are currently several DOS-initiated counterterrorism programs, this paper focuses on TSCTP.²⁸⁵

TSCTP is a DOS-sponsored program aimed at countering violent extremism and limiting terrorist organizations within the Sahel and Maghreb.²⁸⁶ Participating countries include Algeria, Burkina Faso, Chad, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Tunisia and the United States.²⁸⁷ TSCTP aspires to defeat terrorist organizations by increasing local counterterrorism capabilities, increasing security cooperation among member nations, promoting democracy, undermining terrorist ideals and reinforcing military ties with the United States.²⁸⁸ DOS, DoD, the Department of Justice (DOJ) and the U.S. Agency for International Development (USAID) all play critical roles in the program, but the DoD is responsible for military partnerships.²⁸⁹

²⁸³ Charles W. Hooper, *Going Farther by Going Together: Building Partner Capacity in Africa*, 67 JOINT FORCE Q. 9 (2012).

²⁸⁴ *Id.* at 9-10 (asserting that Africans are best suited to handle African security issues, and that AFRICOM best promotes this scenario by focused security engagements with African partners and a limited U.S. footprint).

²⁸⁵ PROGRAMS AND INITIATIVES, *supra* note 17.

²⁸⁶ The Maghreb nations include Algeria, Morocco and Tunisia. The Sahel nations include Burkina Faso, Chad, Mali, Mauritania and Niger. PROGRAMS AND INITIATIVES, *supra* note 17. The TSCTP's predecessor program was the Pan-Sahel Initiative (PSI). The PSI was military training program instituted following the attacks of 9/11 that trained and equipped African soldiers from Chad, Niger, Mali and Mauritania. In addition to adding new partners, the TSCTP grew from a military only program to one that incorporates other U.S. agencies. Mary J. Choate, *Trans-Sahara Counterterrorism Initiative: Balance of Power?* U.S. Army War College (2007).

²⁸⁷ PROGRAMS AND INITIATIVES, *supra* note 17.

²⁸⁸ AFRICOM, *Trans Sahara Counterterrorism Partnership Program*, <http://www.africom.mil/Doc/7432>.

²⁸⁹ Aside from the State Department, the main agencies involved are the Department of Defense and USAID, and, to a lesser extent, the Department of Justice." LESLIE ANN WARNER, *THE TRANS SAHARA COUNTER TERRORISM PARTNERSHIP: BUILDING PARTNER CAPACITY TO COUNTER TERRORISM AND VIOLENT EXTREMISM*, CNA ANALYSIS & SOLUTIONS 27 (2014), <http://www.cna.org/sites/default/files/research/CRM-2014-U-007203-Final.pdf>.

The DoD component of TSCTP is called Operation Juniper Shield (OJS).²⁹⁰ OJS, which falls under the umbrella of AFRICOM's North West Africa Campaign Plan, incorporates and coordinates DoD counterterrorism efforts in the region. These efforts include training to improve infantry and special forces skills, communication capabilities and intelligence.²⁹¹ Additionally, DoD facilitates conferences designed to improve regional relationships and trust. It also sponsors Flintlock, an annual multi-country counterterrorism exercise promoting regional cooperation.²⁹² The DoD does not permanently station U.S. armed forces within the TSCTP,²⁹³ but instead, accomplishes its mission through temporary deployment of its forces who rotate into the region for periods generally ranging between one to six months.²⁹⁴

TSCTP countries also send their militaries to other participant countries as part of the initiative. For example, Mauritania recently took the lead in military operations training of 210 troops from African partner nations and sent selected military officers to Algeria and Morocco for training.²⁹⁵ Cameroon, Chad and Nigeria work together in the Lake Chad Basin task force to confront shared threats. Though these are limited examples, they show that TSCTP is promoting some interstate cooperation. Building upon these existing relationships could increase chance of success of a regional SOFA.²⁹⁶

While the NATO and TSCTP situations are dramatically different, a similar multilateral SOFA could still be useful in the TSCTP. Similar to NATO, the TSCTP countries face common threats and have agreed to confront it together.²⁹⁷ There is no indication that the United States or any TSCTP

²⁹⁰ *Id.* at 28.

²⁹¹ *Id.* at 36-37.

²⁹² *Id.* (Author explains that Flintlock is directed by the Chairman of the Joint Chiefs of Staff-directed, sponsored by AFRICOM, directed by Joint-Special Operations Task Force-Trans Sahara, and conducted by Special Operations Forces. The location of Flintlock rotates annually throughout the Sahel region of Africa. The joint exercises are designed to develop both capacity and collaboration among African security forces to protect civilian populations.).

²⁹³ *Id.* at 29.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 80.

²⁹⁶ Palmer, *supra* note 21, at 80.

²⁹⁷ Warner, *supra* note at 289, 71-72 (explaining that despite some varying individual perceptions of threat, the entire TSCTP region faces the challenges of violent extremist organizations such as AQUI, Ansar al-Dine, MUJOA Boko Haram, Ansaru, Ansar al-Sharia, and the al-Mulathamun Battalion; spill over from other conflicts in Africa,

country intends to permanently station its forces in another TSCTP country's territory,²⁹⁸ but that factor is not a requirement for a multilateral SOFA.²⁹⁹ As describe above, the United States and TSCTP countries are crossing borders to train, exercise and operate with each other. A multilateral SOFA would make it easier for their forces to get from one location to another and would provide consistent protections wherever those activities might be held.

A multilateral SOFA would provide consistency and reduce the practical difficulties involved with a series of differing bilateral SOFAs between the TSCTP countries.³⁰⁰ The United States, for example, operates with inconsistent protections within the TSCTP region. Currently, it has concluded bilateral SOFAs with Burkina Faso, Chad, Mali, Mauritania, Morocco,³⁰¹ Niger, Nigeria and Senegal, the provisions of which differ dramatically.³⁰² Additionally, the United States currently does not have a SOFA with Algeria or Tunisia.³⁰³ Negotiating a multilateral SOFA with comprehensive provisions that ensures visiting forces receive the same protections wherever they travel within the TSCTP could rectify the confusion created by inconsistencies.

A multilateral SOFA would also reduce legal hindrances encountered with inadequate SOFAs and promote fluid movements of troops and their equipment to deployment locations.³⁰⁴ Prior to any deployment, commanders must ensure a SOFA is in place and that it provides adequate protections for U.S. forces.³⁰⁵ Where there is a critical mission, but no SOFA, a SOFA waiver must be sought, which takes a significant amount of time.³⁰⁶ SOFAs also contain provisions regarding entry and exit, customs exemptions and freedom of movement, all of which promote seamless movement of troops, equipment

including Libya, Mali, Sudan, and Nigeria; the return of thousands of Tuaregs from Libya and foreign fighters from Mali and Syria; and illegal trafficking).

²⁹⁸ AFRICOM operates in Africa with a light footprint. While there is one base located at Djibouti, AFRICOM does not permanently assign forces to any location in Africa. Hooper, *supra* note 283, at 10.

²⁹⁹ *See generally* Section III of this paper (explaining that SOFAs vary in length, content, and formalities).

³⁰⁰ Lazareff, *supra* note 38, at 63.

³⁰¹ Classified.

³⁰² Treaties in Force, *supra* note 22.

³⁰³ *Id.*

³⁰⁴ Palmer, *supra* note 21, at 81.

³⁰⁵ SECDEF Memo, *supra* note 19.

³⁰⁶ ACI 5800.08, *supra* note 50, para. 6((a)(4) (stating that a waiver must be processed "outside the six months window").

and supplies. Without these provisions, forces are essentially treated like tourists and can experience significant delay getting to their assignment. A comprehensive multilateral SOFA expedites the movement of forces.

C. Obstacles in TSCPT

There are obviously several advantages to a multilateral SOFA. As highlighted above, it would offer consistency, reduce disputes, permit the fluid movement of visiting forces and could help reduce the legal and regulatory delays involved with crossing territories. While a multilateral SOFA could benefit the TSCTP, the TSCTP program currently faces serious challenges that prevent it from being a viable idea. Obstacles include instability, partner hesitancy, existing bilateral agreements, potential for reduction in protections and securing the advice and consent of the Senate.

1. No collective defense agreement and partner hesitancy

Unlike the NATO SOFA, the TSCTP does not contain a collective defense agreement and it does not appear such an agreement is likely any time soon. All members of the TSCTP voluntarily joined the partnership, but participation generally involves individual military-to-military capacity building between the United States and individual partners.³⁰⁷ While interstate cooperation is also encouraged, it does not appear to be compelled by membership.³⁰⁸ A multilateral SOFA adds a level of partnership to the TSCTP that many states would not want, since many are involved in ongoing disputes with one or more of their neighbors. For instance, Chad and Nigeria have a history of frequent border clashes.³⁰⁹ Morocco and Algeria have been involved in an

³⁰⁷ LIANNE KENNEDY BOUDALI, THE TRANS-SAHARA COUNTERTERRORISM PARTNERSHIP, THE NORTH AFRICA PROJECT, THE COMBATTING TERRORISM CENTER 5-6 (2007) (explaining that the TSCTP aims to defeat terrorism and to expand capacity of African partners to fight terrorism. The TSCPT uses a combination of military to military assistance and other developmental programs. Since every state's need is different, the package of assistance provided through the TSCTP is determined state by state).

³⁰⁸ The author's FOIA request for specific information regarding country rights and obligations under the TSCTP was not answered, but the available documentation about the TSCTP indicates that states are not required to cooperate. For example, Algeria has refused to invite Morocco to participate in regional counterterrorism activities. See Warner, *supra* note 318, at 79.

³⁰⁹ Adedoyin J. Omede, *Nigeria's Relations With Her Neighbors*, 4(1): 7-17 STUD. TRIBES TRIBALS 12 (2006), <http://www.krepublishers.com/02-Journals/T%20&%20T/T%20&%20T-04-0-000-000-2006-Web/T%20&%20T-04-1-001-076-2006-Abst-PDF/T%20&%20T-04-1-007-017-2006-066-Omede-A-J/T%20&%20T-04-1-007-017-2006-066->

ongoing conflict lasting over 40 years that stems from a dispute over the status of Western Sahara.³¹⁰ Mali has drawn significant criticism from its neighbors, who believe the Malian government was allowing AQIM to conduct illegal activities within its borders in exchange for a payment and a promise to not attack the capital city of Bamako. There were also allegations that Mali's security and intelligence services alerted AQIM to military operations.³¹¹

2. Instability in the region

Political instability within the TSCTP is arguably the single greatest obstacle preventing a multilateral SOFA. In addition to external threats from AQIM, Boko Haram and other violent extremist organizations, many of the TSCTP countries have seen recent internal struggles, including coups, protests and corruption. In 2008, Mauritanian troops seized the country's first freely-elected leader, President Sidi Ould Cheikh Abadallahi, after he attempted to fire the country's top military commanders.³¹² Two years later, a military coup in Niger captured then-President Mamadou Tandja after he amended the constitution to allow him to remain in power.³¹³ Most recently, Malian soldiers overthrew the democratically elected government approximately one month prior to national elections.³¹⁴

In addition to military coups, the region is also experiencing what is called the Arab Spring, a revolutionary wave that began in Tunisia in late 2010 and led to the ousting of President Zine El Abidine Ben Ali. This movement has incited protests and civil unrest throughout Africa, including other TSCTP countries (Morocco, Algeria, Mauritania). Overall, the Arab

Omede-A-J-Abstract.pdf (explaining that Nigeria's "most persistent threat" to national security is the border clashes with neighboring Chad and internal religious and ethnic conflicts among factions in Chad).

³¹⁰ After Spain left West Sahara, it divided the territory between Morocco and Mauritania, despite the ICJ recognition of the Saharawis' right to determination. Though Algeria did not assert a claim to the territory, it continues to support the Saharawis' quest to be an independent nation. See BBC WESTERN SAHARA COUNTRY PROFILE, <http://www.bbc.com/news/world-africa-14115273> (last visited Jan. 7, 2014).

³¹¹ Warner, *supra* note 289, at 77.

³¹² *Troops Stage Coup in Mauritania*, BBC NEWS, Aug. 6, 2008, available at <http://news.bbc.co.uk/2/hi/7544834.stm>.

³¹³ David Smith, *Military Junta Seizes Power in Niger Coup*, THE GUARDIAN, Feb. 19, 2010, <http://www.theguardian.com/world/2010/feb/19/niger-military-junta-coup>.

³¹⁴ Adam Nossiter, *Soldiers Overthrow Mali Government in Setback for Democracy in Africa*, N.Y. TIMES, Mar. 22, 2012, http://www.nytimes.com/2012/03/23/world/africa/mali-coup-france-calls-for-elections.html?pagewanted=all&_r=0.

Spring has brought positive changes to the region, but it has also had some collateral consequences, such as the coup in Mali, which have undermined regional stability.

In a region where military coups are an ongoing threat, leaders of many countries do not trust their own militaries, let alone another country's military. In Chad, for example, the United States trained the country's Special Anti-Terrorism Group (SATG). Up until Opération Serval,³¹⁵ SATG was not given any logistic support capability because President Idriss Deby feared a coup.³¹⁶ After recent protests and military mutinies in Burkina Faso, President Blaise Compaore ordered all security forces weapons be kept in an armory and required Presidential Guard to supervise their use. Fear of coups, combined with the distrust between many of the TSCTP, make it unlikely the partners would agree to granting privileges and immunities to each other's military forces.

3. Existing bilateral agreements create a disincentive

Another significant obstacle in the way of a regional multilateral SOFA is the existing bilateral SOFAs between the United States and eight of the ten TSCTP countries. Assuming these agreements correspond to the level of operations, bilateral SOFAs are likely adequate since most interaction within the TSCTP involves the U.S. military visiting individual countries to conduct military-to-military training and exercises.³¹⁷ Cooperative efforts between the other countries, without U.S. prompting, are limited. Accordingly, there does not appear to be an urgent demand for multilateral SOFA within the TSCTP.

Further, if a multilateral SOFA was successfully concluded within the TSCTP, bilateral SOFAs might still be needed to ensure adequate protections are available in all countries. As recognized during the negotiations for the

³¹⁵ SATG deployed to Mali to support French-led Opération Serval in 2013. SATG, specially trained in desert combat, was reportedly instrumental in assisting the French in the mountainous north Kidal region against AQIM. SATG supported French forces in Mali during some of the heaviest fighting. Concerned about the battle's shift toward guerilla warfare in northern Mali, however, Chad's president made the decision to withdraw his forces approximately three months after the start of the mission. See Associated Press in Bamako, *Chad Pulls its Troops from Mali*, THE GUARDIAN, Apr. 15 2013, <http://www.theguardian.com/world/2013/apr/15/chad-pulls-troops-from-mali>.

³¹⁶ Warner, *supra* note 289, at 77.

³¹⁷ Boudali, *supra* note 307, at 5-6.

NATO SOFA,³¹⁸ balancing the interests of the sending states and the receiving states is a difficult process that results in everyone having to compromise. Despite having a multilateral SOFA with all members of NATO, the United States still concluded approximately 25 bilateral agreements supplementing the NATO SOFA that were needed to tailor the agreement to specific countries' needs.³¹⁹ Turning to the TSCTP, a compromise would likely result in a reduction of coverage in countries like Burkina Faso where the United States has a concluded Global SOFA. As a result, the United States may still need to conclude bilateral agreements to facilitate mission accomplishment in some countries.³²⁰ Since specifically tailored bilateral agreements are already in place with most countries, it seems unlikely any country would agree to work through the cumbersome process of negotiating a multilateral SOFA between eleven countries with competing interests and agendas. Unlike the NATO situation, the mutual need for a multilateral treaty does not appear to be present within the TSCTP.

4. Securing advice and consent of the senate

A multilateral SOFA would likely require the advice and consent of two-thirds of the Senate given the nature of the agreement. When determining the appropriate form for an agreement, be it a treaty or an international agreement other than a treaty, the State Department has identified eight factors to consider:³²¹

- a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
- b. Whether the agreement is intended to affect state laws;
- c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
- d. Past U.S. practice as to similar agreements;
- e. The preference of the Congress as to a particular type of agreement;
- f. The degree of formality desired for an agreement;

³¹⁸ Lazareff, *supra* note 38, at 67.

³¹⁹ Mason, *supra* note 63, at 21.

³²⁰ Voetelink, *supra* note 43, at 232.

³²¹ Foreign Affairs Manual, *supra* note 107, at §§ 721 (indicating the State Department derived these factors from the substance of Department Circular 175), 723.3.

- g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
- h. The general international practice as to similar agreements.

While most U.S. bilateral SOFAs have been negotiated as executive agreements,³²² there are significant factors that favor a multilateral treaty over a multilateral executive agreement. First, if the SOFA were reciprocal between all parties (including the United States), African partner forces would be afforded the same rights and privileges as U.S. forces are granted in their countries. While a mass deployment of African visiting forces to the United States is unlikely, the U.S. does host many African troops for training who wish to have a greater status than they currently enjoy. A reciprocal agreement would require the United States to make commitments granting these visiting forces privileges and immunities. Second, this multilateral agreement would potentially look very similar to the NATO SOFA,³²³ which was concluded by a treaty. Accordingly, there is a past practice that must be considered in the determination. Another concern would be the formality desired for such an agreement.³²⁴ Some partners may prefer a more formal treaty as opposed to an executive agreement since the former has the aura of importance and special significance attached.³²⁵ Finally, the effort to create a multilateral agreement between parties would be a significant undertaking and would likely be concluded for a long-term partnership. Executive agreements, by contrast, could be secured much faster.

A treaty may be the most appropriate form for a multilateral SOFA, but securing the approval of the Senate is not a simple undertaking. The Constitution requires a two-thirds majority to consent to a treaty, meaning 34 percent of the Senate could effectively reject a treaty.³²⁶

³²² Dr. Richard Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45, 70 (1995) [hereinafter *An Agenda for Progress*] (noting that only in rare exceptions has the U.S. concluded SOFAs or basing agreements as other than executive agreements).

³²³ See NATO SOFA, *supra* note 49.

³²⁴ Lazareff, *supra* note 38, at 63.

³²⁵ *An Agenda for Progress*, *supra* note 322, at 62 (noting that only in rare exceptions has the U.S. concluded SOFAs or basing agreements as other than executive agreements).

³²⁶ COMM. ON FOREIGN RELATIONS, 106TH CONG. TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 19 (2001).

Successfully negotiating a multilateral treaty may be difficult given that multiple countries are involved, each protecting and promoting their own interests. To reach an agreement, which can take several years, states must grant concessions to receive concessions.³²⁷ Even if successfully concluded, the result of the negotiation process would be a package that the Senate must “take or leave in its entirety” due to impossibility or impracticability of renegotiation.³²⁸

Multilateral SOFAs are beneficial to partnerships. They provide consistency, fluid movement and efficiency for their parties. Unfortunately, the TSCTP is probably not in a position where a multilateral agreement could be successfully negotiated and utilized. The region is currently working through instabilities and conflict among members. Additionally, there is little incentive for the United States or other TSCTP countries to conclude a multilateral SOFA when there are already bilateral SOFAs between the United States and eight of the ten TSCTP members. Even if the TSCTP countries were interested, the Senate would not likely approve a multilateral SOFA. Given the improbability that a multilateral SOFA could be concluded in the TSCTP, the United States should work to ensure bilateral SOFAs with all partner nations, within the TSCTP and elsewhere, are as consistent as possible and match U.S. operations.

V. CONCLUSION

With widespread corruption, conflict, disease and violent extremism in many locations, Africa can be a very dangerous place. U.S. forces are often sent to some of the most troubled spots to assist partner nations in the interest of national security and foreign relations. Given the significant risks involved, the DoD and DOS must ensure adequate SOFAs are in place to protect U.S. forces. In addition to providing privileges and immunities, the U.S. Government should attempt to conclude SOFAs that establish a legal framework tailored to DoD operations in that country.

Despite the increased involvement in Africa, adequate SOFAs have not been negotiated between the United States and many African countries. One proposed solution is a multilateral SOFA between the TSCTP countries. A Multilateral SOFA would offer consistency across borders and help reduce disputes by clearly identifying the privileges and immunities each nation

³²⁷ *Id.* at 16.

³²⁸ *Id.* at 16.

can expect its forces to receive within the territory of a partner nation. The United States, in particular, could benefit from a multilateral SOFA between the TSCTP countries since it would homogenize the existing patchwork of protections found within existing bilateral SOFAs, or lack thereof.

Unfortunately, because significant obstacles prevent the conclusion of a multilateral SOFA within the TSCTP, the DoD and DOS should focus their efforts instead on improving or negotiating bilateral SOFAs. Global SOFAs must be negotiated in countries where U.S. operations include basing or continuous presence. Mini-Global SOFAs should be negotiated in locations in which U.S. troops exercise, train or operate frequently. A&T status should be required for all other situations to ensure U.S. forces are insulated from host nation criminal prosecution. Finally, the DoD SOFA waiver process should be used sparingly to ensure U.S. forces are adequately protected.

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