

THE AIR FORCE LAW REVIEW



ARTICLES

JURISDICTION OVER QUASI-MILITARY PERSONNEL UNDER UCMJ ARTICLE 2(A)(8)
COLONEL DAVID J. WESTERN AND PROFESSOR GABRIEL J. CHIN

PUTTING THE GENIE BACK IN THE (MUDDY) BOTTLE: CURING THE POTENTIAL
ADA VIOLATION
LIEUTENANT COLONEL (RET.) MICHAEL J. DAVIDSON, S.J.D.

WOMEN IN THE CROSSHAIRS: EXPANDING THE RESPONSIBILITY TO PROTECT TO HALT
EXTREME GENDER-BASED VIOLENCE
MAJOR CHRISTOPHER M. BAILEY

PROPERLY SPEAKING, THE UNITED STATES DOES HAVE AN INTERNATIONAL
OBLIGATION TO AUTHORIZE AND SUPERVISE COMMERCIAL SPACE ACTIVITY
MAJOR JOHN S. GOEHRING

ORDERED TO SELF-INCRIMINATE: THE UNCONSTITUTIONALITY OF SELF-REPORT
POLICIES IN THE ARMED FORCES
MAJOR CARMAN A. LEONE

CHILDREN ARE SPEAKING. IT'S TIME WE LISTEN: THE CASE FOR A CHILD HEARSAY
EXCEPTION IN MILITARY COURTS
MAJOR M. ARTHUR VAUGHN II

THE AIR FORCE LAW REVIEW

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

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

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

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

Cite this Law Review as 78 A.F. L. REV. (page number) (2018).

The Air Force Law Review is available online at <http://www.afjag.af.mil/library>.



THE AIR FORCE LAW REVIEW

VOL. 78

2018

JURISDICTION OVER QUASI-MILITARY PERSONNEL UNDER UCMJ ARTICLE 2(A)(8).....	1
<i>COLONEL DAVID J. WESTERN AND PROFESSOR GABRIEL J. CHIN</i>	
PUTTING THE GENIE BACK IN THE (MUDDY) BOTTLE: CURING THE POTENTIAL ADA VIOLATION	27
<i>LIEUTENANT COLONEL (RET.) MICHAEL J. DAVIDSON, S.J.D.</i>	
WOMEN IN THE CROSSHAIRS: EXPANDING THE RESPONSIBILITY TO PROTECT TO HALT EXTREME GENDER-BASED VIOLENCE	75
<i>MAJOR CHRISTOPHER M. BAILEY</i>	
PROPERLY SPEAKING, THE UNITED STATES DOES HAVE AN INTERNATIONAL OBLIGATION TO AUTHORIZE AND SUPERVISE COMMERCIAL SPACE ACTIVITY	101
<i>MAJOR JOHN S. GOEHRING</i>	
ORDERED TO SELF-INCRIMINATE: THE UNCONSTITUTIONALITY OF SELF-REPORT POLICIES IN THE ARMED FORCES	125
<i>MAJOR CARMAN A. LEONE</i>	
CHILDREN ARE SPEAKING. IT'S TIME WE LISTEN: THE CASE FOR A CHILD HEARSAY EXCEPTION IN MILITARY COURTS	169
<i>MAJOR M. ARTHUR VAUGHN II</i>	

THE AIR FORCE LAW REVIEW

LIEUTENANT GENERAL CHRISTOPHER F. BURNE, USAF
The Judge Advocate General of the Air Force

COLONEL BRYAN D. WATSON, USAF
Commandant, The Judge Advocate General's School

CAPTAIN JEFFREY C. CAMPBELL, USAF
MANAGING EDITOR, THE AIR FORCE LAW REVIEW

MAJOR MICAH C. McMILLAN, USAF
MAJOR JENNY A. LIABENOW, USAF
MS. THOMASA T. PAUL
Editors, The Air Force Law Review

EDITORIAL BOARD

COLONEL SETH R. DEAM, USAF
COLONEL DARREN C. HUSKISSON, USAF
COLONEL JEREMY S. WEBER, USAF
LIEUTENANT COLONEL MICHAEL W. GOLDMAN, USAF
LIEUTENANT COLONEL DANIEL E. SCHOENI, USAF
LIEUTENANT COLONEL CHARLES G. WARREN, USAF
MAJOR SIMONE V. DAVIS, USAF
MAJOR PATRICK A. HARTMAN, USAF
MAJOR ISRAEL D. KING, USAF
CAPTAIN ROBERT J. FRIEDMAN, USAFR
CAPTAIN MICHAEL J. GARCIA, USAF
CAPTAIN SEAN R. MCDIVITT, USAF
CAPTAIN WHITNEY C. HOWE-MENDOZA, USAF
MR. WILLIAM H. HILL, III
MR. MATTHEW J. RUANE

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

JURISDICTION OVER QUASI-MILITARY PERSONNEL
UNDER UCMJ ARTICLE 2(A)(8)

*COLONEL DAVID J. WESTERN** AND *PROFESSOR GABRIEL J. CHIN***

I.	THE CONSTITUTIONAL SCOPE OF JURISDICTION OVER CIVILIANS.....	4
A.	Could Congress Impose UCMJ Jurisdiction over Civilian Organizations?	8
B.	Could Congress Assimilate Civilian Organizations Into the Armed Forces?	10
C.	Could Congress Subject a Quasi-Military Individual to the UCMJ?	15
II.	THE LEGISLATIVE HISTORY PROBLEM.....	20
A.	The Possible Meanings of Article 2(a)(8).....	20
B.	The Legislative History of Article 2(a)(8)	21
III.	CONCLUSION	25

* Colonel David J. Western, Judge Advocate, United States Air Force (LL.M., George Washington University (2007); J.D. and Certificate in Environmental & Natural Resources Law, Northwestern School of Law of Lewis & Clark College (1997); B.A., Linguistics, University of Utah (1994)) currently serves as the Staff Judge Advocate for Headquarters 9th Air Force at Shaw Air Force Base, South Carolina. He is a member of the Oregon Bar. The views expressed herein are solely those of the authors, and do not necessarily express the views of the Air Force, JAG Corps, Civil Air Patrol, or any other officer or agency of the United States. For helpful comments, we thank Jeffrey S. Davis, Stephen P. McCleary, and Gary Solis; none, necessarily, agree with our views. Sherif Gohar provided admirable research assistance.

** Professor Gabriel J. Chin, Edward L. Barrett Jr. Chair and Martin Luther King Jr. Professor of Law, UC Davis School of Law.

“Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces”¹ are subject to the Uniform Code of Military Justice (UCMJ) and to trial by court-martial, pursuant to Article 2(a)(8), UCMJ. Public Health Service (PHS) and National Oceanic and Atmospheric Administration (NOAA) officers wear U.S. Navy-style uniforms, but are not members of the armed forces as defined by Title 10.² Accordingly, Article 2(a)(8) implies that quasi-military³ personnel, based on their duties and functions with the armed forces, can be made subject to military justice.

Article 2(a)(8) has even broader implications because the “and other organizations” clause raises the possibility of jurisdiction over others associated with, but not exactly “in” the armed forces. If this clause applies to any existing organization, it might well apply to the uniformed auxiliaries created by Congress to assist the armed forces. Therefore, for example, it could apply to civilian members of the U.S. Coast Guard Auxiliary (USCGA),⁴ or the Civil Air Patrol (CAP)—the U.S. Air Force Auxiliary⁵ performing duties

¹ UCMJ art. 2(a)(8) (2016).

² 10 U.S.C. § 101(a)(4) (2012). They are, however, considered part of the “uniformed services.” 10 U.S.C. § 101(a)(5) (2012).

³ *United States v. Ryan*, No. ACM 28906, 1992 WL 153610, at *8 n.2 (A.F.C.M.R. June 19, 1992) (James, J., dissenting) (“However, NOAA and PHS personnel are at least quasi-military. See Article 2(a)(8), UCMJ, 10 U.S.C. § 802(a)(8).”). See generally Joseph W. Bishop, Jr., *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964); see also, e.g., 20 C.F.R. § 1002.62 (2017) (“Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a ‘uniformed service’ for some purposes, it is not included in [the Uniformed Services Employment and Reemployment Rights Act’s (USERRA)] definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered ‘service in the uniformed services’ for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.”).

⁴ See 14 U.S.C. § 822 (2012) (“The purpose of the Auxiliary is to assist the Coast Guard as authorized by the Commandant, in performing any Coast Guard function, power, duty, role, mission, or operation authorized by law.”).

⁵ 10 U.S.C. § 9442(b) (2012) provides:

- (1) The Secretary of the Air Force may use the services of the Civil Air Patrol to fulfill the noncombat programs and missions of the Department of the Air Force.
- (2) The Civil Air Patrol shall be deemed to be an instrumentality of the United States with respect to any act or omission of the Civil Air Patrol, including any member of the Civil Air Patrol, in carrying out a mission assigned by the Secretary of the Air Force.

with the armed forces. Indeed, during World War II, CAP pilots flying armed missions were subject to court-martial jurisdiction.⁶

PHS and NOAA regulations provide that their officers are subject to the UCMJ when assigned to military branches.⁷ PHS officers have served as members of courts-martial⁸ and been tried before them.⁹ Accordingly, it is clear that Article 2(a)(8) is operative. However, although the text of Article 2(a)(8) has been part of the UCMJ since its enactment,¹⁰ there has been little discussion of its constitutionality or scope.¹¹ This article explores the constitutional and statutory questions raised by Article 2(a)(8).

Part I explores the limits on subjecting members of quasi-military groups to courts-martial. It concludes that during peacetime in the United States, Congress cannot subject members of even essential non-military organizations to military law unless they could be considered part of the land and naval forces. However, Congress can make particular organizations, not currently assigned to the military, part of the land and naval forces, and subject them to military control. If Congress so acted, even as to groups not

⁶ Seymour W. Wurfel, *Court-Martial Jurisdiction under the Uniform Code*, 32 N.C. L. REV. 1, 39 (1953) (citing SPJGW 1942/1877 (8 May 1942), 1 BULL. JAG 12). *See also* *United States v. Popham*, 198 F.2d 660, 662 (8th Cir. 1952) (during World War II, active duty “members of the Civil Air Patrol... were subject to court martial and to the rules and articles of war”); Brief for the United States at 48 n.22, *Mitchell v. Cohen*, 333 U.S. 411 (1948) (Oct. Term, 1947, nos. 130, 131), 1947 WL 44391 (“Likewise, many civilians, particularly in the Office of Strategic Services and the Civil Air Patrol, performed combat duties with great heroism and at great risk.”).

⁷ *See infra* pp. 18–19 and note 92.

⁸ *United States v. Braud*, 29 C.M.R. 8, 10–11 (C.M.A. 1960). *See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(a) discussion (2016) [hereinafter MCM] (“Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force.”).

⁹ *United States v. Capt. Matthew D. Hall, USPHS*, U.S.C.G. Gen Ct. Martial Order No. 01-14, R. Adm. J.M. Heinz, U.S.C.G. (16 Oct. 2015) (order approving conviction of USPHS Captain by court martial and imposing confinement); *United States v. Capt. William D. Henriques, USPHS*, discussed in CAAFLOG, <http://www.caaflog.com/2012/09/03/jurisdictional-challenge-to-court-martial-of-public-health-service-captain/>

¹⁰ It was originally numbered UCMJ art. 2(8).

¹¹ Note, *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 94, 136 (1957) (“The Uniform Code of Military Justice authorizes the trial by court-martial not only of members of the armed services, but also of numerous classes of civilians closely connected with the military.”).

traditionally part of the military, the groups may properly be subjected to military law. In addition, the Constitution permits the exercise of court-martial jurisdiction over an otherwise non-military individual performing military service under military discipline with the armed forces. On this rationale, in the leading case of *United States v. Braud*,¹² the Court of Military Appeals held that Article 2(a)(8) made military law applicable to a PHS doctor assigned to a military unit to treat military personnel.

Part II examines Article 2(a)(8) and outlines its possible meanings. It concludes that Article 2(a)(8) has been misread. At least as a matter of legislative history, Article 2(a)(8) was not intended to be an independent grant of military jurisdiction over members of specified organizations when they are assigned to and serving with the armed forces. Instead, the officers who drafted it and the Congress that enacted it into law, contemplated that it would apply only when, based on some statute other than Article 2(a)(8), an individual was made part of an armed force, or an existing government organization was made its own branch within the land and naval forces. The normal predicate for such assignment would be armed conflict or other national defense emergency. Accordingly, the cases and regulations allowing for court-martial jurisdiction are in tension with the intent of Congress and the drafters of the UCMJ. Congress should reexamine this section and make a judgment about when jurisdiction is appropriate, and amend the section to make its decision clear.

I. THE CONSTITUTIONAL SCOPE OF JURISDICTION OVER CIVILIANS

Court-martial jurisdiction is limited by the Constitution. One important constraint is that grand jury indictment is required in federal criminal prosecutions, “except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger.”¹³ In addition, the Constitution gives Congress authority to create an army, navy, call forth the militia, and “[t]o make Rules for the Government and Regulation of the land and naval Forces.”¹⁴ The text of the Constitution then, contemplates that

¹² *Braud*, 29 C.M.R. at 10; *see infra* note 10.

¹³ U.S. CONST. amend. V (requiring grand jury indictment “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”). *See Johnson v. Sayre*, 158 U.S. 109, 114 (1895) (“The whole purpose of the provision in question is to prevent persons, not subject to the military law, from being held to answer for a capital or otherwise infamous crime, without presentment or indictment by a grand jury.”).

¹⁴ U.S. CONST. art. I, § 8 grants *inter alia* the following powers to Congress: “[t]o raise and

“the land and naval Forces”¹⁵ may be subject to substantive law and procedural processes distinct from those applicable to civilians. But those not in the land and naval forces cannot be subjected to these special laws and tribunals.¹⁶

In the early 1950s, military courts read the jurisdictional grants of the UCMJ broadly. Accordingly, dependents¹⁷ and civilian employees¹⁸ overseas were regularly prosecuted by court-martial under a provision of the UCMJ granting jurisdiction to those “serving with, employed by, or accompanying the armed forces without the continental limits of the United States.”¹⁹

support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;” “[t]o provide and maintain a Navy;” “[t]o make Rules for the Government and Regulation of the land and naval Forces;” “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;” and:

[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

¹⁵ *United States v. Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012) (“In this case we find the Government’s argument that Article 2(10) was based on clause 14 and that Ali was a member of the ‘land and naval Forces’ unpersuasive, but this is of no moment.”).

¹⁶ Nevertheless, the Court has suggested that during armed conflict, overseas, possibly those not in the land or naval forces may be subject to court martial by virtue of the war power. *Reid v. Covert*, 354 U.S. 1, 33 (1957) (“There have been a number of decisions in the lower federal courts which have upheld military trial of civilians performing services for the armed forces ‘in the field’ during *time of war*. To the extent that these cases can be justified, insofar as they involved trial of persons who were not ‘members’ of the armed forces, they must rest on the Government’s ‘war powers.’”).

¹⁷ *See, e.g., United States v. Smith*, 10 C.M.R. 350, 371 (A.B.R. 1953), *on reconsideration*, 13 C.M.R. 307 (A.B.R. 1953), *aff’d*, 17 C.M.R. 314 (C.M.A. 1954).

¹⁸ *United States v. Rubenstein*, 19 C.M.R. 709, 729–730 (A.F.B.R. 1955) (the accused was convicted of stealing a quantity of whiskey while he was civilian manager of a club at an air base in Japan), *aff’d*, 22 C.M.R. 313 (C.M.A. 1957).

¹⁹ UCMJ art. 2(11) (1951). That section now provides for jurisdiction:

Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

UCMJ art. 2(a)(11) (2016).

The Supreme Court upheld this exercise of jurisdiction in 1956,²⁰ but reversed course almost immediately.²¹ In a series of cases, the Court held the UCMJ unconstitutional as applied to court-martial jurisdiction over civilian employees²² and dependents,²³ even overseas, at least in peacetime.²⁴ The key decision is *Reid v. Covert*,²⁵ a plurality opinion by a short-handed court which was later treated as a holding.²⁶ *Reid v. Covert* held that the spouse of a service member, living on a U.S. military base and enjoying military benefits, was nevertheless not subject to the UCMJ. The Court explained:

There is no indication that the Founders contemplated setting up a rival system of military courts to compete with civilian courts for jurisdiction over civilians who might have some contact or relationship with the armed forces. Courts-martial were not to have concurrent jurisdiction with courts of law over non-military America.²⁷

The Court concluded that “the power granted Congress ‘To make Rules’ to regulate ‘the land and naval Forces’ would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces.”²⁸

²⁰ *Kinsella v. Krueger*, 351 U.S. 470 (1956) (upholding jurisdiction over civilian dependent), *rev'd on reh'g sub nom. Reid v. Covert*, 354 U.S. 1 (plurality opinion) (finding no jurisdiction); *Reid v. Covert*, 351 U.S. 487 (1956) (upholding jurisdiction over civilian dependent), *rev'd on reh'g*, 354 U.S. 1 (1957) (finding no jurisdiction).

²¹ See generally Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015); Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295 (2010).

²² *Grisham v. Hagan*, 361 U.S. 278 (1960) (no jurisdiction over civilian employees for capital offenses); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (no jurisdiction over civilian employees for non-capital offenses).

²³ *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240 (1960) (no jurisdiction over dependents for non-capital offenses); *Covert*, 354 U.S. at 19–20 (1957) (plurality opinion) (no jurisdiction over dependents); *id.* at 42 (Frankfurter, J., concurring in the result) (no jurisdiction in capital cases); *id.* at 65 (Harlan, J., concurring in the result) (no jurisdiction over dependents in capital cases in peacetime).

²⁴ The Court also invalidated a provision of the UCMJ allowing jurisdiction over discharged service members for serious offenses. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14–15 (1955).

²⁵ 354 U.S. 1 (1957) (plurality opinion).

²⁶ *Grisham*, 361 U.S. at 280 (“We are of the opinion that this case is controlled by *Reid v. Covert*.”).

²⁷ *Covert*, 354 U.S. at 30.

²⁸ *Singleton*, 361 U.S. at 240 (quoting *Toth*, 350 U.S. at 15). See also *Solorio v. United*

The Court also concluded “that we must limit the coverage of Clause 14,” the constitutional authority to regulate the land and naval forces, “to ‘the least possible power adequate to the end proposed.’”²⁹

Yet, the Supreme Court did not dogmatically insist that only members of the armed forces, as defined by statute, could constitutionally be subject to court-martial jurisdiction. *Reid v. Covert* recognized that there was a grey area:

Even if it were possible, we need not attempt here to precisely define the boundary between “civilians” and members of the “land and naval Forces.” We recognize that there might be circumstances where a person could be “in” the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.³⁰

This section will examine three scenarios in which members of the PHS, NOAA, or other organizations could be subject to UCMJ jurisdiction. First, Congress might subject members of the organizations to military law, without declaring the organizations to be part of the land and naval forces. Second, Congress might declare the organizations, as a whole, to be part of the armed forces, or land and naval forces, as such, put them in the chain of command and subject each member of those organizations to military law. Third, examining these scenarios will inform the constitutionality of another option, deeming individual members subject to military law only when assigned to and serving with the armed forces.

States, 483 U.S. 435, 439 (1987) (“The test for jurisdiction...is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces.’”) (quoting *Singleton*, 361 U.S. at 240–41).

²⁹ *Guagliardo*, 361 U.S. at 286 (quoting *Toth*, 350 U.S. at 23).

³⁰ 354 U.S. at 22–23. *See also id.* at 43 (Frankfurter, J., concurring in the result) (“The cases cannot be decided simply by saying that, since these women were not in uniform, they were not ‘in the land or naval Forces.’”).

A. Could Congress Impose UCMJ Jurisdiction over Civilian Organizations?

Congress, conceivably, could recognize that the PHS and NOAA are civilian organizations whose mission, duties, and lines of authority will be unchanged, yet conclude that they are sufficiently closely associated with military goals that they should, by statute, be subject to the UCMJ to the same extent as soldiers and sailors. Congress might reason that the knowledge of the environment generated by the NOAA and the PHS's role protecting the health of the people of the United States are essential to the national defense. But there are grave doubts that such a statute would be constitutional.

First, undeniably, many civilian employees of the services, Department of Defense, Department of Homeland Security, and other parts of the federal, state and local government, play critical roles in national defense. However, in *Grisham v. Hagan* and *McElroy v. U.S. ex rel. Guagliardo*, the Court held that, across the board, civilian employees of branches of the armed services or of the Department of Defense could not be subject to court-martial jurisdiction, even overseas, at least in peacetime. It is also clear from those cases that consent, while not necessarily irrelevant, is insufficient to validate a jurisdictional statute; that is, even though the civilian employees and dependents knew the law on the books subjected them to court-martial, that was not enough.

Second, the PHS and NOAA are almost certainly not currently part of “the land and naval Forces.” The PHS is a component of the Department of Health and Human Services; the NOAA is part of the Department of Commerce; they are in no sense part of the military establishment. Their general missions are non-military. Although uniformed, they are generally not armed. As a congressional committee report explained, “[t]he NOAA Commissioned Officer Corps, formerly the Coast and Geodetic Survey, . . . like the Public Health Service is not military in nature.”³¹ The GAO reported: “Like the PHS Corps, the NOAA Corps carries out civilian, rather than military, functions.”³²

³¹ H.R. REP. NO. 107-621, at 16 (2002), reprinted in 2002 U.S.C.C.A.N. 2043, 2046.

³² U.S. GOV'T ACCOUNTABILITY OFF., GAO/GGD-97-10, FEDERAL PERSONNEL: ISSUES ON THE NEED FOR NOAA COMMISSIONED CORPS 2 (1996). See also *id.* at 5 (“The NOAA Corps has not been incorporated into the armed forces since World War II, and DOD’s war mobilization plans envision no role for the Corps in the future.”).

Without disputing that they perform important services for the United States, the PHS and NOAA do not, functionally or operationally, have responsibilities akin to the traditional or modern duties of the land and naval forces. They are no more part of the land and naval forces than are the Federal Emergency Management Agency or U.S. Forest Service Fire Department. Another factor which would ordinarily militate against court-martial jurisdiction is that there is no declared war. Also, their work takes place primarily in the United States, so the exigencies of armies in the field do not exist.

As the Supreme Court said in *Reid v. Covert*, citing the celebrated Colonel Winthrop:

Can [the power of Congress to raise, support, and govern the military forces] be held to include the raising or constituting, and the governing *nolens volens*, in time of peace, as a part of the army, of a class of persons who are under no contract for military service, . . . who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity. . . . In the opinion of the author, such a range of control is certainly beyond the power of Congress under [the Constitution].³³

Based on the logic of existing cases, the Supreme Court should invalidate a statute decreeing UCMJ jurisdiction over essentially civilian organizations.

³³ *Covert*, 354 U.S. at 20 n.38 (alternation in original) (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 106 (2d rev. ed. 1920)).

B. Could Congress Assimilate Civilian Organizations Into the Armed Forces?

Congress, instead, could enact a statute declaring particular organizations to be part of the armed forces, placing them in the chain of command, and making them subject to military jurisdiction.³⁴ Indeed, Congress has provided that the PHS can be made part of the land and naval forces by executive order in the event of war or national defense emergency.³⁵ President Roosevelt issued such an order during World War II.³⁶

This type of provision is almost certainly constitutional. What constitutes “the land and naval forces” should be evaluated practically. The permissible scope of court-martial jurisdiction over organizations might be illuminated by discussing the modern classic question advanced by scholars³⁷ and lawyers: “Is the Air Force constitutional?” The argument for unconstitutionality goes like this: “The land and naval forces” means an Army and a

³⁴ Whether current members of the PHS, NOAA, or other organizations would be entitled to a reasonable time to resign to avoid unwanted military jurisdiction is not addressed here, other than to note that Congress has provided for conscription of people in particular groups with particular related skills. *See* Orloff v. Willoughby, 345 U.S. 83, 85–87 (1953). The courts have, with few exceptions, expressed little doubt about the constitutionality of federal conscription measures. *See, e.g.,* Holmes v. United States, 391 U.S. 936, 936 (1968) (Douglas, J., dissenting) (addressing constitutionality of peacetime conscription).

³⁵ 42 U.S.C.S. § 217 (LEXIS through Pub. L. No. 115-82) provides:

In time of war, or of emergency...involving the national defense proclaimed by the President, he may by Executive order declare the commissioned corps of the Service to be a military service. Upon such declaration, and during the period of such war or such emergency or such part thereof as the President shall prescribe, the commissioned corps (a) shall constitute a branch of the land and naval forces of the United States, (b) shall, to the extent prescribed by regulations of the President, be subject to the Uniform Code of Military Justice [10 U.S.C.S. §§ 801 et seq.], and (c) shall continue to operate as part of the Service except to the extent that the President may direct as Commander in Chief.

³⁶ Declaring the Commissioned Corps of the Public Health Service to be a Military Service and Prescribing Regulations Therefor, Exec. Order No. 9,575 (1945), 10 Fed. Reg. 7895 (June 29, 1945).

³⁷ *The Air Force and the Constitution*, VOLOKH CONSPIRACY (Nov. 18, 2017, 10:19 PM), <http://www.volokh.com/posts/1170032632.shtml>; The Soc’y of the Cincinnati, *Original Intent Debate: Is the Air Force Constitutional?*, FORA.TV, <https://www.amazon.com/Original-Intent-Debate-Force-Constitutional/dp/B00TNI3TVC>.

Navy, the entities identified in the constitutional text. Even if the text of the power “to provide and maintain a Navy” is discarded and rewritten to mean “an unlimited number of Navies” (thus legitimizing the Coast Guard), and the Marine Corps is regarded as a second “Army,” by no stretch is the Air Force (or, by analogy, the PHS and NOAA) a land or naval force.

Notwithstanding whatever cleverness this argument may have, few argue that the “land and naval forces” restrictions in the Constitution actually render the Air Force unconstitutional. Indeed, in the early days of the Air Force and the UCMJ, the Air Force Court of Military Review actually confronted and, rightly, rejected this argument.³⁸

First, it would be silly (and therefore presumably contrary to the framers’ intentions) to have important constitutional issues turn wholly on formal nomenclature. It would also be pointless because if it turned out that the name were constitutionally determinative, Congress could save the Air Force simply by renaming it the “Army Air Force” or “Army of the Air” or something similar. Second, the constitutional issue should turn on substance. Thus, the question should be whether in form and function an entity is part of “the land and naval Forces.” On this basis, the Air Force serves a purpose similar to that of the Army and Navy. The fact that it performs its military functions independently, rather than as a component of “the Army” or “the Navy” does not make it any less a part of the land and naval forces. Therefore, it should be constitutional to subject Air Force members to court-martial jurisdiction.

Much the same can be said of the PHS and NOAA. To the extent that they perform their duties under civilian control and those duties address civilian problems, there is little justification for subjecting their members to court-martial jurisdiction. But if they performed medical and scientific functions under military command, giving first priority to military needs, an interest in military discipline would arise.³⁹ Under those circumstances, it

³⁸ *United States v. Naar*, 2 C.M.R. 739, 745 (A.F.B.R. 1951) (“Any construction of these words which would limit them to their strict and literal meaning would be unrealistic and contrary to the broad purpose of the Constitution.”). *See also Laird v. Tatum*, 408 U.S. 1, 17 (1972) (Douglas, J., dissenting) (“The Army, Navy, and Air Force are comprehended in the constitutional term ‘armies.’”).

³⁹ Jon Cadieux, Comment, *Regulating the United States Private Army: Militarizing Security Contractors*, 39 CAL. W. INT’L L.J. 197, 232 (2008) (“One of the main purposes of the military justice system is to maintain ‘the good order and discipline of the military unit.’ Therefore it is not surprising that members of the [NOAA] would be subject to

would be reasonable to consider them part of the land and naval forces even if they were not formally integrated into the Army or Navy.

Put another way, members of the Army, Navy, Air Force, Marine Corps and Coast Guard performing non-combat, healing or scientific jobs, like those performed by the PHS and NOAA, can uncontroversially be subject to military jurisdiction. Accordingly, members of the Chaplains Corps,⁴⁰ Medical Corps,⁴¹ Dental Corps,⁴² Nurse's Corps,⁴³ space weather forecasters⁴⁴ and other members performing non-combat jobs⁴⁵ have been regularly subject to court-martial.⁴⁶ There has never been a serious question raised that for some reason jurisdiction might be limited to members of the land and naval forces who take a direct part in combat. It should be no different if Congress required, say, every unformed military dentist to continue performing the same duties in the same places in the same way, but transferred them to a new "U.S. Forces Dental Service" treating members of all branches. If the Air Force is constitutional, that suggests that an entity's specialized function does not prevent that entity from being part of the land and naval forces. The USCGA, already part of a military branch, also could be incorporated as an arm of the Coast Guard proper.

The status of CAP is trickier. Although it is, like the USCGA, an auxiliary of a military branch, it has a more complicated status. By federal

military authority when 'assigned to and serving with the armed forces'; their physical proximity to and reliance upon military troops could impact the maintenance of order and discipline of the unit to which they are assigned.'").

⁴⁰ United States v. Ward, 16 M.J. 341 (C.M.A. 1983); United States v. Mack, 56 M.J. 786 (A. Ct. Crim. App. 2002).

⁴¹ United States v. Blaney, 50 M.J. 533 (A.F. Ct. Crim. App. 1999); United States v. Negron, 19 M.J. 629 (N.M. C.M.R. 1984).

⁴² United States v. Johnson, 54 M.J. 32 (C.A.A.F. 2000).

⁴³ United States v. Campbell, 71 M.J. 19 (C.A.A.F. 2012).

⁴⁴ United States v. Honzik, No. ACM 34667, 2003 WL 22862648, at *2 (A.F. Ct. Crim. App. Nov. 26, 2003), *aff'd in part, rev'd in part*, 60 M.J. 339 (C.A.A.F. 2004).

⁴⁵ United States v. Schloff, 74 M.J. 312, 313 (C.A.A.F. 2015) (physician assistant); United States v. Guyton-Bhatt, 56 M.J. 484, 485 (C.A.A.F. 2002) (psychologist).

⁴⁶ *Cf.* United States v. Bartlett, 66 M.J. 426, 428 (C.A.A.F. 2008) (invalidating Army regulation excluding members of Medical and Nurse Corps from court-martial service: "Congress did not see fit to include in Article 25, UCMJ, any limitations on court-martial service by any branch, corps, or occupational specialty among commissioned officers of the armed forces").

statute, “[t]he Civil Air Patrol is a nonprofit corporation.”⁴⁷ There might be reason to doubt that an ostensibly private organization could be part of the land and naval forces. As a matter of constitutional law, however, it turns out that CAP is a government entity.

In *Lebron v. National Railroad Passenger Corp.*,⁴⁸ the Supreme Court held that a statement by Congress that an entity it created was a private corporation was inconclusive for constitutional purposes. The case involved Amtrak; the Court held that “where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government”⁴⁹ for constitutional purposes. The Court later held that because Amtrak was a government entity, it could exercise government powers granted by Congress that would be forbidden to a private actor.⁵⁰

Under *Lebron*, CAP is fairly clearly a government entity for constitutional purposes. Like Amtrak, Congress created CAP by special law, and CAP’s statutory missions of emergency services, cadet programs, and aerospace education⁵¹ further governmental objectives.⁵² CAP is also subject to federal control. By statute, CAP elects four members of its 11-member Board of Governors, the Secretary of the Air Force appoints four, and CAP

⁴⁷ 10 U.S.C. § 9441(a)(1) (LEXIS through Pub. L. No. 115-82). Thus, CAP has been treated as a private entity. *Hall v. Hodgkins*, 305 F. App’x 224, 225 (5th Cir. 2008); N.D. CENT. CODE § 54-45-00.1 (2017) (“‘Civil air patrol’ means the private nonprofit corporation chartered under federal law.”).

⁴⁸ 513 U.S. 374 (1995).

⁴⁹ *Id.* at 400.

⁵⁰ See *Dep’t of Transp. v. Ass’s of Am. R.R.s*, 135 S. Ct. 1225, 1233 (2015) (holding that Amtrak is “the government” for purposes of delegation of government functions and separation of powers analysis; “the practical reality of federal control and supervision prevails over Congress’ disclaimer of Amtrak’s governmental status”). See also *Delano Farms Co. v. Cal. Table Grape Comm’n*, 586 F.3d 1219 (9th Cir. 2009) (as a *Lebron* government entity, grape commission could raise government speaker defense to First Amendment action); *United States ex rel. Wood v. Am. Inst. in Taiwan*, 286 F.3d 526 (D.C. Cir. 2002) (entity chartered by Congress as a nonprofit corporation but performing government functions retained sovereign immunity from suit).

⁵¹ 36 U.S.C.S. § 40302 (LEXIS through Pub. L. No. 115-82).

⁵² *Cf.* U.S. GOV’T. ACCOUNTABILITY OFF., GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2008) (“A purpose of the Civil Air Patrol is to encourage citizen efforts ‘in maintaining air supremacy,’ 36 U.S.C § 40302(1)(a), a governmental purpose if there ever was one.”).

and the Air Force “jointly” appoint the remaining three.⁵³ Arguably, the best understanding of the structure is that CAP and the Air Force each control half of the board appointments; in *Lebron*, the government held a majority. While the Second Circuit has held that government authority to appoint half of the directors is sufficient to render an entity an arm of the government,⁵⁴ there is a more direct reason to conclude that CAP is controlled by the Air Force. Title 10, United States Code section 9448(a) provides that “[t]he Secretary of the Air Force shall prescribe regulations for the administration of this chapter.” Although the statute goes on to say that the regulations shall include provisions addressing specified topics,⁵⁵ the statute defines “includes” to mean “includes but is not limited to.”⁵⁶ Accordingly, the Air Force can regulate the activities of CAP as it likes.⁵⁷ CAP, like Amtrak, is, constitutionally, a government entity that can carry out government responsibilities and duties.

Given the Supreme Court’s recognition of the breadth of Congress’ power over land and naval forces,⁵⁸ it is probable that any reasonable, bona

⁵³ 10 U.S.C.S. § 9447 (LEXIS through Pub. L. No. 115-82).

⁵⁴ *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 153 (2d Cir. 2004). The decision also relied on the fact that the government provided most of the organization’s funding, a fact also true with CAP.

⁵⁵ 10 U.S.C.S. § 9448(b) (LEXIS through Pub. L. No. 115-82) provides:

Required Regulations. The regulations shall include the following:

(1) Regulations governing the conduct of the activities of the Civil Air Patrol when it is performing its duties as a volunteer civilian auxiliary of the Air Force under section 9442 of this title.

(2) Regulations for providing support by the Air Force and for arranging assistance by other agencies under section 9444 of this title.

(3) Regulations governing the qualifications of retired Air Force personnel to serve as an administrator or liaison officer for the Civil Air Patrol under a personal services contract entered into under section 9446(a) of this title.

⁵⁶ 10 U.S.C.S. § 101(f)(4) (LEXIS through Pub. L. No. 115-82).

⁵⁷ U.S. DEP’T OF AIR FORCE, INSTR. 10-2701, ORGANIZATION AND FUNCTION OF THE CIVIL AIR PATROL, para. 1.4 (31 July 2014) [hereinafter AFI 10-2701] (“In accordance with 10 U.S.C. §§ 9441-9448 the SECAF, or his designee, may regulate and impose limitations on CAP.”).

⁵⁸ The Supreme Court seems to have accepted this view. In describing the military powers of Congress, the Court explained:

Alexander Hamilton described these powers of Congress “essential to the common defense” as follows: “These powers ought to exist without limitation, because it is impossible to foresee or define the extent and

fide designation of a governmental organization as part of the land and naval forces would be valid. As a result, its members could be subject to court-martial jurisdiction.

C. Could Congress Subject a Quasi-Military Individual to the UCMJ?

Article 2(a)(8) appears to create jurisdiction by distinct means. It is not that the individual becomes a soldier or sailor, or that the organization of which the individual becomes a part is part of the land and naval forces. Instead, jurisdiction arises because of the combination of membership in a quasi-military organization, coupled with the performance of military duty. Thus, UCMJ jurisdiction exists when a member of a quasi-military organization is “assigned to and serving with” the armed forces.⁵⁹ The Court of Military Appeals has held that Article 2(a)(8) applies when an individual is, for example, detailed from the PHS to the USCG, even though the PHS itself has not become part of the land and naval forces.⁶⁰ USCG regulations and directives indicate that an individually detailed PHS officer is subject to the UCMJ.⁶¹ Similarly, a NOAA officer detailed to a military branch is subject to UCMJ jurisdiction, according to a joint Department of Defense/ Department of Commerce agreement.⁶²

variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them....” ...Are fleets and armies and revenues necessary for this purpose [common safety]? The government of the Union must be empowered to pass all laws, and to make all regulations which have relation to them.”

Solorio, 483 U.S. at 441 (quoting THE FEDERALIST No. 23, 152–54 (E. Bourne ed. 1947)).

⁵⁹ UCMJ art. 2(a)(8) (2016).

⁶⁰ *Braud*, 29 C.M.R. at 10 (in case holding PHS officer could serve as member of court-martial, “Furthermore, it is to be borne in mind that under Article 2(8), Uniform Code of Military Justice, 10 USC § 802, Lieutenant Furgerson was, as a Public Health Service Officer assigned to and serving with the Coast Guard, subject to military law”).

⁶¹ U.S. COAST GUARD, COMMANDANT INSTR., 6010.5, ADMINISTRATION OF UNITED STATES PUBLIC HEALTH SERVICE (USPHS) OFFICERS DETAILED TO THE COAST GUARD para. 11(c) (8 April 2015).

⁶² U.S. DEP’T OF COMM., NAT’L OCEANIC & ATMOSPHERIC ADMIN. COMMISSIONED OFFICER CORPS DIRS. ch. 5, pt. 1, sec. 05102 provides: “A. NOAA Corps officers may serve with DOD during peacetime or during a national emergency....B. NOAA Corps officers assigned to DOD shall be subject to the Uniform Code of Military Justice;” *see also id.* ch. 4, app. 14.1:

4. Personnel

a. Whenever the President determines that a sufficient national emergency exists, commissioned officers of the [NOAA] shall be

Congress has specifically provided for this sort of transformation by statute outside the UCMJ. The NOAA is generally civilian, but in cases of emergency, the President may transfer NOAA officers “to the service and jurisdiction of a military department”⁶³ after which they will be subject to the rules of the receiving service.⁶⁴ President Roosevelt exercised this authority during World War II.⁶⁵ In addition, PHS officers may be detailed to any other government agency, including a military branch,⁶⁶ even in peacetime and in the absence of militarization of the PHS as a whole.

There is, of course, ample precedent for the existence of individuals and organizations that sometimes are part of the land and naval forces, but sometimes are not. The Constitution itself, for example, provides that the

transferred by Executive Order to the service and jurisdiction of the military departments.

b. Whenever the Secretaries concerned consider it to be in the national interest, the Secretary of Commerce shall assign commissioned officers to serve with military departments....

c. Officers assigned to and serving with military departments pursuant to law, whether under subsection (a) or (b) above, shall be subject to the Uniform Code of Military Justice....

⁶³ 33 U.S.C.S. § 3061(a)(1) (LEXIS through Pub. L. No. 115-82) (“Transfers authorized. The President may, whenever in the judgment of the President a sufficient national emergency exists, transfer to the service and jurisdiction of a military department such vessels, equipment, stations, and officers of the Administration as the President considers to be in the best interest of the country.”).

⁶⁴ 33 U.S.C.S. § 3061(c) (LEXIS through Pub. L. No. 115-82) (“Status of transferred officers. An officer of the Administration transferred under this section, shall, while under the jurisdiction of a military department, have proper military status and shall be subject to the laws, regulations, and orders for the government of the Army, Navy, or Air Force, as the case may be, insofar as the same may be applicable to persons whose retention permanently in the military service of the United States is not contemplated by law.”).

⁶⁵ Transfer of Certain Personnel Among the Coast and Geodetic Survey and the War and Navy Departments, Exec. Order No. 9,468 (1944), 9 Fed. Reg. 10295 (Aug. 24, 1944) (“Commissioned officers of the Coast and Geodetic Survey shall, while under the jurisdiction of the War or Navy Department, serve under their commissions in the Coast and Geodetic Survey, and while so serving shall constitute a part of the active military or naval forces of the United States and shall be under direct orders of the War or Navy Department and subject to the laws, regulations, and orders for the government of the Army or Navy so far as they may be applicable.”); Transfer of Certain Personnel of the Coast and Geodetic Survey to the War Department, Exec. Order No. 9,415 (Jan. 20, 1944).

⁶⁶ 42 U.S.C.S. § 215 (LEXIS through Pub. L. No. 115-82). *See also* 42 U.S.C. § 215(a) (“Officers detailed for duty with the Army, [Air Force,] Navy, or Coast Guard shall be subject to the laws for the government of the service to which detailed.”) (alteration in original).

militia is subject to court-martial jurisdiction only “when in actual service, in time of War, or public danger.”⁶⁷ Thus, members of the National Guard and Air National Guard sometimes are, but sometimes are not, subject to the UCMJ. Similarly, members of reserve components are, arguably, sometimes part of the land and naval forces subject to court-martial jurisdiction (when performing duty), but at other times are not. That some categories of persons are sometimes, perhaps usually, not subject to court-martial does not prevent their subjection to military justice when performing federal military duties.

There are strong arguments that this method of imposing UCMJ jurisdiction is constitutional. If a particular NOAA officer is performing scientific duties with, say, the U.S. Navy, that person looks very much like a member of the land and naval forces. Colonel Winthrop had a litany of reasons explaining why a civilian could not be subject to court-martial.⁶⁸ The argument favoring military jurisdiction with respect to that NOAA officer, is Colonel Winthrop’s explanation, reversed, that is, with the no’s removed: the officer “is under a contract for military service, performs military duty, renders military service, and has not remained a civilian in every sense and for every capacity.” The same logic applies to a PHS officer assigned to the armed forces.

Assuming that by statute or court decision it was made clear that the provision applied to them,⁶⁹ the constitutional case for application to the USCGA⁷⁰ and CAP is also straightforward. Both organizations are already

⁶⁷ U.S. CONST. amend. V.

⁶⁸ See *supra* note 33 and accompanying text.

⁶⁹ Current Coast Guard and Air Force regulations reflect an understanding that CAP and USCGA are not subject to the UCMJ. AFI 10-2701, *supra* note 57, para 1.3 (“CAP is not a military service, [and] its members are not subject to the Uniform Code of Military Justice.”); U.S. COAST GUARD, COMMANDANT INSTR. M16790.1G, AUXILIARY MANUAL sect. F (17 Aug. 2011) (“Auxiliarists are not subject to the Uniform Code of Military Justice (UCMJ).”). Generally, people accused of crimes do not have to have mens rea with respect to jurisdictional elements of an offense. See *United States v. Murray*, 52 M.J. 423, 426 (C.A.A.F. 2000) (“We reject appellant’s contention that the Government was required to prove that he knew the pictures passed through interstate commerce, *i.e.*, that the interstate commerce element is more than jurisdictional.”); *cf.* *United States v. Kline*, 21 M.J. 366, 367 (C.M.A. 1986). However, because CAP or USCGA members, if subject to the UCMJ, would be subject to a new set of substantive requirements, due process principles suggest that they should have to know. *United States v. McGraner*, 13 M.J. 408, 416 (C.M.A. 1982) (discussing defense based on governmental misadvice).

⁷⁰ Members of the USCGA can be transferred to the Temporary Reserve, and were, during World War II. They thereby gain military status. But having been transferred,

under the authority of military branches. Like the NOAA and PHS officers, USCGA and CAP members may be assigned to and serve with the armed forces without a declaration of war or presidential order. Among the most obviously military of these duties, U.S. Coast Guard Auxiliary members serve as crewmembers on operational Coast Guard vessels.⁷¹ The Supreme Court has recognized special importance and tradition of commanders being able to regulate those serving on ships.⁷² CAP Chaplains may serve to augment the U.S. Air Force Chaplain's Corps.⁷³ Much of this work takes place on military bases, again, a factor that the Supreme Court has recognized as important in evaluating court-martial jurisdiction.⁷⁴

Other factors suggest that jurisdiction may be constitutional. Recall that in *Reid v. Covert*, the Court “recognize[d] that there might be circumstances where a person could be ‘in’ the armed services...even though he had not formally been inducted into the military or did not wear a uniform.”⁷⁵ Of course, the NOAA, PHS, CAP and USCGA members do wear uniforms; this fact alone is hardly dispositive, but it is suggestive of inclusion in a system of military discipline. The uniform suggests a need for military discipline and makes it fairer to impose it.

their status would be different; they would be subject to jurisdiction as reservists, not as members of the USCGA. 14 U.S.C.S. § 706 (LEXIS through Pub. L. No. 115-82).

⁷¹ U.S. COAST GUARD, COMMANDANT INSTR. M16798.3E, AUXILIARY OPERATIONS POLICY MANUAL sect. E.4.a (5 Apr. 2005) (“Auxiliarists may be qualified and certified in accordance with current Coast Guard standards for any position on a Coast Guard boat or cutter and may be assigned to any position except coxswain.”).

⁷² *Guagliardo*, 361 U.S. at 285 (“[F]rom time immemorial, the law of the sea has placed the power of disciplinary action in the commander of the ship when at sea or in a foreign port.”).

⁷³ 10 U.S.C.S. § 9446(b) (LEXIS through Pub. L. No. 115-82) (“The Secretary of the Air Force may use the services of Civil Air Patrol chaplains in support of the Air Force active duty and reserve component forces to the extent and under conditions that the Secretary determines appropriate.”); U.S. DEP’T OF AIR FORCE, INSTR. 52-101, PLANNING AND ORGANIZING para. 3.7.4 (5 Dec. 2013).

⁷⁴ *Relford v. Commandant*, 401 U.S. 355, 369 (1971) (in the period where courts-martial had jurisdiction only over “service-connected” offenses, the Court concluded that “when a serviceman is charged with an offense committed within or at the geographical boundary of a military pose and violative of the security of a person or of property there, that offense may be tried by a court-martial”).

⁷⁵ 354 U.S. at 22–23. *See also, e.g.*, James Snedeker, *Jurisdiction of Naval Courts Martial over Civilians*, 24 NOTRE DAME L. REV. 490, 511 (1949) (“‘In the land or naval forces’ does not necessarily restrict the application of the exception to the uniformed personnel of the armed services.”).

In addition, there is a tradition, reflected in the current jurisdictional provisions of the UCMJ, of imposing court-martial jurisdiction over people temporarily performing military duty with the armed forces. UCMJ Article 2(a)(1) provides for jurisdiction over “volunteers from the time of their muster or acceptance into the armed forces.”⁷⁶ UCMJ, Article 2(c) provides for jurisdiction over “a person serving with an armed force” who “(1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications...; (3) received military pay or allowances; and (4) performed military duties.” Although designed to address the problem of defective enlistments and other irregularities,⁷⁷ this also reflects a tradition of providing for jurisdiction over people serving with an armed force.⁷⁸

Finally, CAP and USCGA members are unpaid. But Article 2(a)(3) provides for jurisdiction for reservists’ inactive duty training, which can be unpaid.⁷⁹ It does not appear that being paid is an essential attribute of constitutional amenability to military justice.

⁷⁶ See, e.g., *United States v. Cline*, 29 M.J. 83, 85 (C.M.A. 1989) (“A ‘volunteer’ is a person who, for a temporary purpose, fights with the regular military forces.”).

⁷⁷ *United States v. King*, 28 C.M.R. 243 (C.M.A. 1959). Legislatively overruled by this section, the case involved a civilian who procured a uniform, falsified personnel records indicating that he was a U.S. Army Master Sergeant, military transportation to Europe and an assignment there, and entry onto the Army payroll. The Court of Military Appeals reversed his convictions for lack of jurisdiction. While a fraudulent Master Sergeant, he was punished by a summary court-martial which reduced him in grade to Sergeant First Class. *United States v. King*, 27 C.M.R. 732, 734 (A.B.R. 1959), *rev’d*, 28 C.M.R. 243.

⁷⁸ As CAAF has explained:

The phrase “serving with” an armed force has been used to describe persons who have a close relationship to the armed forces without the formalities of a military enlistment or commission. See Article 2(10), UCMJ; Article XXXII, American Articles of War of 1775, *reprinted in* William Winthrop, *Military Law and Precedents* 956 (2d ed. 1920). The question of whether a person is “serving with” the armed forces is dependent upon a case-specific analysis of the facts and circumstances of the individual’s particular relationship with the military, and means a relationship that is more direct than simply accompanying the armed forces in the field. See, e.g., *United States v. Garcia*, 5 U.S.C.M.A. 88, 17 C.M.R. 88 (1954); *United States v. Schultz*, 1 U.S.C.M.A. 512, 4 C.M.R. 104 (1952).

United States v. Phillips, 58 M.J. 217, 220 (C.A.A.F. 2003).

⁷⁹ 10 U.S.C.S. § 101(d)(7)(B) (LEXIS through Pub. L. No. 115-82) (“The term “inactive-duty training” means...special additional duties authorized for Reserves by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which

II. THE LEGISLATIVE HISTORY PROBLEM

For the reasons set out in part I(B), Congress could make quasi-military organizations part of the armed forces, and subject their members to military jurisdiction. As explained in part I(C), Congress could also subject to court-martial individuals who are part of quasi-military organizations and assigned to duty with the armed forces. This part examines the legislative history of Article 2(a)(8) to determine what Congress actually intended.

One thing is clear. Neither in Article 2(a)(8) nor in any other part of the UCMJ did Congress state that it intended to extend jurisdiction to the full extent permitted by the Constitution.⁸⁰ Accordingly, the question of jurisdiction cannot be answered simply by determining what is constitutional, instead, it is necessary to determine what Congress intended.

A. The Possible Meanings of Article 2(a)(8)

As a question of statutory interpretation, the text of Article 2(a)(8) embraces several possible meanings of “and other organizations, when assigned to and serving with the armed forces.” Roughly in order of breadth, from broadest to narrowest, they are these:

Interpretation 1. The terms “other organizations” and “assigned to and serving with” could be read literally or nearly so. Thus, perhaps an “organization” includes, say, the Drug Enforcement Administration, the Red Cross, or the U.S. Department of Commerce. “Assigned to and serving with” could mean any official work. On this view, a DEA agent assigned to a joint operation for a few days with the armed forces would be subject to the UCMJ under Article 2(a)(8). An interpretation this broad would raise substantial constitutional questions, because it is extremely doubtful that, say, a Red Cross worker assigned to and serving with the armed forces in a humanitarian mission in the United States is part of the land and naval forces.

Interpretation 2. “Other organizations” could be read somewhat more restrictively to include members of uniformed organizations that regularly perform military-related services under federal law. Taking on this view, members of the NOAA and PHS would always be subject to the UCMJ when

they are assigned.”).

⁸⁰ Compare, e.g., VA. CODE ANN. § 8.01-184.1 (2017) (imposing jurisdiction over certain government officials “to the extent permitted by the Constitution of the United States”).

working with the armed forces, even if, say, assigned for a week to a military team to prepare a presentation for a technical conference. Similarly, a Coast Guard Auxiliarist serving as a crewmember on a Coast Guard operational vessel would be subject to UCMJ jurisdiction. But an Assistant U.S. Attorney working on that vessel to help plan and advise about law enforcement activity would not.

Interpretation 3. Recall that by statute, NOAA officers may be assigned by the President to an armed force.⁸¹ In addition, PHS officers may be detailed to an armed force.⁸² Perhaps “assigned to and serving with” applies only to assignments or details specifically authorized by federal law, but not to less formal cooperation or assignments.

Interpretation 4. The PHS, but none of the other entities discussed, may, by statute, be made an armed force.⁸³ The most restrictive possible reading is that Article 2(a)(8) applies only to members of an organization that has been made part of the armed forces pursuant to statutory authorization.

B. The Legislative History of Article 2(a)(8)

The legislative history suggests that the most restrictive reading is the one intended by the drafters and by Congress. Jurisdiction exists, as described in Interpretation 4, only if the President exercised specific statutory powers to militarize an organization or particular officers of an organization. That is, Article 2(a)(8) is not an independent grant of military jurisdiction. Instead, it functions to recognize grants of jurisdiction created by other statutes. If this reading is correct, then Article 2(a)(8) should not have been applied to any NOAA or PHS officer since the termination of the World War II militarization. And Article 2(a)(8) never applies to any other organizations (such as CAP or USCGA), because no statute provides for militarization of members of other organizations, or their incorporation into the land and naval forces.

The legislative history is this. In the Spring, 1949 during hearings on the original UCMJ, the House Committee heard testimony from former JAG Robert D. L’Heureux, who presumably learned something about statutory drafting from his position as Chief Counsel for the Senate Banking and Currency Committee. When commenting on the bill, he warned:

⁸¹ 33 U.S.C.S. § 3061(a)(1) (LEXIS through Pub. L. No. 115-82).

⁸² 42 U.S.C.S. § 215(a) (LEXIS through Pub. L. No. 115-82).

⁸³ 42 U.S.C.S. § 217 (LEXIS through Pub. L. No. 115-82).

The bill continues with the words “and other organizations when serving with the armed forces of the United States.” Under this provision of H. R. 2498, the Red Cross in time of peace or war, the U.S.O. hostesses in time of peace; even the Boy Scouts of America when serving with the armed forces, say, for disaster relief within the continental United States; even guards in the Pentagon, could be made subject to court martial.

I am sure you want to restrict that a little and make the words a little less all-inclusive.⁸⁴

He later continued:

The drafters of this bill may contend that under the rule of interpretation called *eiusdem generis*, the provision applies only to other organizations similar to the Geodetic Survey⁸⁵ and Public Health Service, but such important things should not be left to the elastic and often ephemeral rule of *eiusdem generis*. The rule is of uncertain application and has often been ignored by the courts.⁸⁶

But testimony from the drafters made clear that they saw no ambiguity: The provision applied only to organizations that had been militarized by statute. Felix Larkin, Department of Defense Assistant General Counsel, had been a member of the Committee on a Uniform Code of Military Justice appointed by the Secretary of Defense, and chaired the Working Group and the Research Group. Rep. Charles H. Elston questioned Mr. Larkin about the scope of the provision.

Mr. ELSTON. I would like to be enlightened a little bit on what is meant by the expression “and other organizations.”

Mr. LARKIN. Well, that was put in, I believe, Mr. Elston, more as a caution than for any other reason. The situation

⁸⁴ *Unif. Code of Military Justice: Hearings Before a Subcomm. of the Comm. on Armed Servs. H.R., Eighty-First Cong., First Sess. on H.R. 2498*, 81st Cong. 811 (1949) [hereinafter *Hearings*] (statement of Robert D. L’Heureux, Chief Counsel, S. Comm. on Banking and Currency).

⁸⁵ Now the NOAA.

⁸⁶ *Hearings*, *supra* note 84, at 817.

has been heretofore that the Coast and Geodetic Survey, the Public Health Service, and the Lighthouse Service, for instance, do come under the Articles of War or the Articles for the Government of the Navy, with their personnel, when those organizations are transferred to or are serving with the armed services generally in time of war.... But just what other Government agencies or services in the future might be transferred either temporarily for war purposes or permanently we were unable to guess and it was for that reason that it was worded that way....

This subdivision, I recall from some of the witnesses, has been construed to mean that the Boy Scouts or the American Red Cross or other organizations might come under the jurisdiction of the Code. I can say we had no such intention....

Now perhaps it would be clearer if we said, instead of “serving with”: “when transferred to.” It would mean the whole organization.

Mr. BROOKS. I think that would be much better.⁸⁷

Larkin’s reference to “the whole organization” made clear that the Article would be applicable only when an entire organization was assimilated into the armed forces.

Further discussion led to the current formulation of “assigned to and serving with.” Air Force Judge Advocate Colonel Stewart S. Maxey also participated in drafting the UCMJ. He agreed with Larkin’s point, but suggested other language.

Colonel MAXEY. “Transfer” is a word of art to some extent in the services. It means in the nature of a permanent assignment. I think that is not what is intended here. These organizations would not be permanently transferred to. If they were they would become part of it.

Mr. BROOKS. What would you say of “assigned to?”

⁸⁷ *Id.* at 870–71 (statement of Felix Larkin, Assistant Gen. Counsel, Sec’y of Def.).

Colonel MAXEY. I was going to suggest “assigned to,” Mr. Brooks, if you think “serving with” is not clear enough. “Assigned” is not as strong a word as “transfer” within our use of those terms.”⁸⁸

The House and Senate Reports on the UCMJ are consistent with a decision to grant jurisdiction only after exercise of Presidential emergency authority granted by some other statute. The reports provide “Paragraph (8) is based on 33 U. S. C., section 855 [now 33 U.S.C. 3061] and 42 U. S. C., section 217. It provides jurisdiction over certain groups when such groups are serving with the armed forces.”⁸⁹ Significantly, the NOAA provision applies “whenever in the judgment of the President when a sufficient national emergency exists,” and the PHS provision applies “[i]n time of war, or of emergency proclaimed by the President.”⁹⁰ That is, based on the statutory citations in the House and Senate Reports, Article 2(a)(8) was intended to apply in wartime or the equivalent, based on a presidential decision, rather than to mere details or assignments.⁹¹ More recently, several U.S. Courts of Appeal have stated that PHS officers are subject to the UCMJ only when the PHS is made a military service.⁹²

⁸⁸ *Id.* at 872.

⁸⁹ H.R. REP. NO. 81-491 (1949), at 11; S. REP. NO. 81-486, at 7 (1949).

⁹⁰ 42 U.S.C.S. § 217 (LEXIS through Pub. L. No. 115-82).

⁹¹ Similarly, an early article in the *JAG Journal* explained that the provision applied only to “personnel who, *en bloc*, may be assigned to and serve with the armed forces.” Commander E. T. Kenny, *Uniform Code Art. 2-Persons Subject to the Code*, 1950 JAG J. 12, 14 (1950).

⁹² *Middlebrooks v. Leavitt*, 525 F.3d 341, 346 (4th Cir. 2008) (PHS “officers are not subject to the Code of Military Justice unless the President so declares, pursuant to 42 U.S.C. § 217”); *Diaz-Romero v. Mukasey*, 514 F.3d 115, 119 (1st Cir. 2008) (“Importantly, in times of war or emergency the President may transform the PHS into a regular branch of the armed services, subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.”); *Milbert v. Koop*, 830 F.2d 354, 359 (D.C. Cir. 1987) (“Officers of the PHS are not subject to the Code of Military Justice unless the President so declares pursuant to the provisions of 42 U.S.C. § 217.”); *Salazar v. Heckler*, 787 F.2d 527, 530 (10th Cir. 1986) (“In time of war or emergency involving national defense proclaimed by the President, he may declare the PHS to be a military service constituting a branch of the land and naval forces of the United States and subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.”); *see also Castaneda v. United States*, 546 F.3d 682, 685 n.3 (9th Cir. 2008) (“Although ordinarily a part of the Department of Health and Human Services, the PHS, like the Coast Guard, may be called into military service in times of war or national emergency, whereupon its personnel become subject to the Uniform Code of Military Justice. 42 U.S.C. § 217.”), *rev’d on other grounds sub nom. Hui v. Castaneda*, 559 U.S. 799 (2010).

This formulation, admittedly, does not precisely fit either the statutory provision for militarizing NOAA officers or its actual experience of militarization (as the Coast and Geodetic Survey) during World War II. Unlike the PHS, which was militarized as an organization, the statute provided for assignment of particular officers or units to particular military branches. Thus, the NOAA itself was not even temporarily an armed force, but some of its officers became part of the armed forces. But this is a distinction without an important difference. The point remains that Article 2(a)(8) was intended to apply to situations where, by statute, “temporarily for war purposes or permanently” organizations or individuals are actually made part of the armed forces, through the force of law other than Article 2(a)(8).

III. CONCLUSION

What is to be done in the face of the substantial tension between the legislative history and the law as it has developed is a difficult question. It might be argued that Congress has ratified the cases and regulations subjecting individual members to military jurisdiction. As the Court of Military Appeals held, “[i]t is axiomatic that the Congress is presumed to notice how its statutes are interpreted, especially by courts of last resort, and is presumed to be in agreement therewith when it then proceeds to reenact a given piece of legislation in identical form.”⁹³ Article 2(a)(8) was amended to change the name of the Coast and Geodetic Survey to its successor forms, and Article 2 as a whole was amended and renumbered. That Congress chose not amend its substance might be regarded as acceptance. On the other hand, because the interpretation was based on limited caselaw and some relatively obscure regulations, perhaps there was no “supposed judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it.”⁹⁴

Although it is difficult to ask a court to overrule one of its precedents, the general disfavor of exercising court-martial jurisdiction over civilians may warrant it. Colonel Winthrop wrote about another provision granting jurisdiction over civilians that “[t]his Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified. A civil offender who is not certainly within its terms cannot be subjected under it to a military trial.”⁹⁵ A broad interpretation of Article

⁹³ *United States v. Washington*, 1 M.J. 473, 475 (C.M.A. 1976).

⁹⁴ *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005).

⁹⁵ *WINTHROP*, *supra* note 33, at 100. *See also Garcia*, 17 C.M.R. at 95 (citing *United States v. Marker*, 3 C.M.R. 127 (C.M.A. 1952) as support for the proposition that

2(a)(8) is likely constitutional. But because of the grave doubt that a broad reading is what Congress in fact intended, *United States v. Braud* should be overruled, and it should be made clear that 2(a)(8) applies only to individuals or organizations that have been duly militarized by other law, which has not happened since World War II. Alternatively, Congress, and the committees responsible for recommending amendments to the UCMJ, should revisit the statute to make clear when, and to whom, it applies.

“military jurisdiction over civilians is not a matter lightly to be presumed, and must be shown clearly”).

PUTTING THE GENIE BACK IN THE (MUDDY) BOTTLE:
CURING THE POTENTIAL ADA VIOLATION

*LIEUTENANT COLONEL (RET.) MICHAEL J. DAVIDSON, S.J.D.**

I.	INTRODUCTION	28
II.	PURPOSE STATUTE	29
	A. Pure Purpose Violations—Charging Authorized Items to the Wrong Appropriation	29
	1. The Effect of Ratification	32
	2. The <i>De Minimis</i> Exception	38
	B. Purpose Prohibitions—Charging Unauthorized Items to Any Appropriation	42
	1. Waiver Provisions	44
	2. Statutory Prohibitions	46
	3. Outliers: Salary Prohibitions	52
III.	TIME VIOLATIONS	58
	A. Use of Closed Accounts	62
IV.	AMOUNT	68
V.	CONCLUSION	73

* Michael J. Davidson serves as the Deputy Principal Legal Advisor for General and Administrative Law, Immigration and Customs Enforcement (ICE). Prior to assuming his current position, he was the Assistant General Counsel for Appropriations and Fiscal Law, Office of the General Counsel, Department of Homeland Security (DHS). He has been a supervisory and litigation attorney with ICE and with the Department of the Treasury. Before entering the Federal government, he served as a field artillery officer and as an Army Judge Advocate, retiring as a Lieutenant Colonel. Dr. Davidson earned his bachelor degree from the U.S. Military Academy, his J.D. from the College of William & Mary, a LL.M. in Military Law from the Army’s Judge Advocate General’s School, a second LL.M. in Government Procurement Law from George Washington University (GWU), and a Doctor of Juridical Science (S.J.D.) in Government Procurement Law from GWU. He is the author of two books and author or coauthor of over 50 legal articles. The author wishes to thank Neal Swartz for his comments on an earlier draft of this article. The opinions in this article are those of the author and do not reflect the position of ICE, DHS or any other federal agency.

I. INTRODUCTION

The Antideficiency Act (ADA) is a mechanism by which Congress ensures enforcement of the Constitutional principle that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹ The ADA’s requirements apply to federal officials, not to those with whom the federal government deals.² The ADA is enforced through a mandatory reporting requirement and by the potential for administrative and criminal sanctions against offending government employees.³ Although referred to as the Antideficiency Act, the ADA is actually made up of several statutes that have developed and changed over time.⁴ The ADA’s primary provision prohibits an officer or employee of the United States or District of Columbia from making or authorizing “an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]...involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”⁵

Agency violations of purpose, time, and amount restrictions on the use of appropriated funds may result in ADA violations. Fortunately, agencies may cure certain purpose and time violations before they ripen into ADA violations. Indeed, since the late 1800s the Government Accountability Office (GAO), or its predecessor The Comptroller of the Treasury, has recognized an agency’s ability to cure a violation by adjusting the relevant accounts.⁶ The ability to cure amount violations, however, is much more restricted than an

¹ Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation, 25 Op. O.L.C. 33, 33 (2001) (citing U.S. CONST. art. I, § 9, cl. 7) [hereinafter 2001 O.L.C. Opinion]. *Id.* at 49 (“The Antideficiency Act itself is unquestionably intended to enforce Congress’ authority under the Appropriations Clause.”).

² See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (“[T]he Anti-Deficiency Act’s requirements ‘apply to the official, but they do not affect the rights in this court of the citizen honestly contracting with the Government.’”) (citation omitted).

³ 31 U.S.C. §§ 1349(a), 1350, 1351, 1518 (2012).

⁴ 2001 O.L.C. Opinion, *supra* note 1, at 33 (“The Antideficiency Act [is] codified at 31 U.S.C. 1341–1342, 1349–1351, 1511–1519....”), 42–49 (discussing the history of the ADA).

⁵ 31 U.S.C. §1341(a)(1)(A)(B) (2012). See 2001 O.L.C. Opinion, *supra* note 1, at 33 (referring to 31 U.S.C. §1341(a)(1) as the ADA’s “central prohibition.”).

⁶ 2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 6, pt. C, sec. 2, at 6-80 (3rd ed. 2006) [hereinafter GAO Red Book II] (“the concept of ‘curing’ a violation by making an appropriate adjustment of accounts is not new”).

agency's ability to cure purpose and time violations. Both the GAO and the Department of Justice's Office of Legal Counsel (OLC) have issued several decisions concerning potential ADA violations and an agency's ability to cure them, but some of these decisions suffer from a lack of clarity and on occasion the GAO and OLC have issued conflicting opinions. This article will discuss the ability of an agency to cure purpose, time, and amount violations so that such violations do not ripen into violations of the ADA.

II. PURPOSE STATUTE

The Purpose Statute, 31 U.S.C. § 1301(a), provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” In other words, “appropriated funds may be used only for authorized purposes.”⁷ The Purpose Statute “prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation.”⁸ Not all violations of the Purpose Statute, however, will result in an ADA violation.⁹ Certain violations may be cured before they ripen into ADA violations.¹⁰

A. Pure Purpose Violations—Charging Authorized Items to the Wrong Appropriation

The GAO, in *The Honorable Bill Alexander, United States House of Representatives*,¹¹ determined that the Department of Defense (DoD) violated the Purpose Statute when DoD used exercise, operations, and maintenance (O&M) funds for training of Honduran military personnel, for various civic action and humanitarian assistance activities, and for construction projects in Honduras costing in excess of \$200,000.¹² As a remedy, the GAO deter-

⁷ Operation Safe Home, B-285066.2, at 4 (Comp. Gen. Aug. 9, 2000), <http://www.gao.gov/assets/210/200351.pdf>.

⁸ Alberto Mora, Esq., B-248284 et al., 1992 WL 232403, at *1 (Comp. Gen. Sept. 1, 1992).

⁹ 2001 O.L.C. Opinion, *supra* note 1, at 40 (“[T]he Purpose Statute may be violated in circumstances where no violation of the Antideficiency Act occurs.”).

¹⁰ U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 02, at ¶ 020102(C) (Sep. 2015) [hereinafter DoD FMR] (“The use of the wrong appropriation (purpose)...generally will not result in an ADA violation if the error can be properly corrected.”).

¹¹ Hon. Bill Alexander, 63 Comp. Gen. 422 (1984).

¹² *Id.* at 423. Pursuant to 10 U.S.C. § 2805(c), DoD was authorized to fund minor military construction from O&M funds only if the project cost was less than \$200,000. *Id.*

mined that proper funding sources should be used to reimburse the O&M appropriation.¹³

Significantly for purposes of this article, the GAO noted that “[n]ot every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act.”¹⁴ Ultimately, the GAO reasoned, whether the Purpose Statute violation also constituted an ADA violation depended “upon the availability of alternative funding sources.”¹⁵ If an expenditure were charged to an improper appropriation, no ADA violation for incurring an obligation in excess of or in advance of an appropriation would arise “unless no other funds were available for that expenditure.”¹⁶ An ADA violation would arise, however, if no other funds were authorized for such a purpose or, if authorized, the funds had already been obligated.¹⁷ If an adjustment of accounts proved impossible “because alternative funding sources are already obligated,” then the “expenditures improperly charged by DoD to O&M appropriations” would violate the ADA.¹⁸ In addition, the GAO cautioned that any adjustment of accounts was subject to “ordinary rules governing the use of appropriated funds, including fiscal year limitations.”¹⁹

In sum, if any agency violates the Purpose Statute by charging the wrong appropriation account, it may avoid an ADA violation by adjusting the accounts so that the proper account is charged.²⁰ To do so, the proper account must have had sufficient funds available at the time of the purpose violation and at the time the error is corrected.²¹ If the proper account lacks

¹³ *Id.* at 424 (“In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources....”)

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Current year funds were not available to adjust prior year accounts, unless the funds were multi-year funds. *Id.* at 425. No-year funds were not at issue.

²⁰ GAO Red Book II, *supra* note 6, at 6-80.

²¹ *Id.* See also DoD FMR, *supra* note 10, vol. 14, ch. 2., at ¶ 020102(C)(1) (“The use of the wrong appropriation (purpose) can be corrected if the proper funds (appropriation, year, and amount) were available at the time of the erroneous obligation; and the proper funds (appropriation, year, and amount) are available at the time of correction”). The GAO has indicated that an agency may also cure a purpose violation “by transferring the amount from the wrong appropriation account to an available appropriation account,

sufficient funds available to adjust the improperly charged account, then an ADA violation will result.²²

The Department of Justice’s Office of Legal Counsel (OLC) has also acknowledged an agency’s ability to cure a purpose violation.²³ In *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap within an Appropriation*,²⁴ OLC noted that the Purpose Statute may be violated without also triggering an ADA violation.²⁵ The OLC cited the GAO opinions holding that “deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates [the Purpose Statute],” but the ADA would not be violated because funds were legally available for obligation or expenditure for the purpose at issue.²⁶ In other words, an agency could rectify or cure the purpose violation as long as proper funds were available to do so.

provided the agency has statutory authority for the transfer.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-124R, VETERANS AFFAIRS IMPROPERLY FUNDED CERTAIN COST COMPARISON STUDIES WITH VHA APPROPRIATIONS, 8 n.21 (2005).

²² GAO Red Book II *supra* note 6, at 6-80.

²³ Pursuant to 28 U.S.C. § 512 (2012), Executive Department heads may request a legal opinion from the Attorney General on any question of law arising during the administration of that department. The Attorney General has delegated this authority to the Office of Legal Counsel (OLC) pursuant to 28 U.S.C. § 510 (2012). *See* Opinions, THE U.S. DEP’T OF JUSTICE, <https://www.justice.gov/olc/opinions-main> (last updated June 5, 2016). In comparison, the Comptroller General’s authority to issue advanced decisions to certifying officers and to agencies derives from 31 U.S.C. § 3529 (2012) and from its authority pursuant to 31 U.S.C. § 3526 (2012), to settle accounts. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 1, pt. B, sec. 2, at 1-12 (4th ed. 2016). Section 3529(a) permits an agency head to request a decision from the Comptroller General on questions involving agency payments or vouchers pending certification. The GAO views the Comptroller General’s decisions concerning accounts as binding on the Executive Branch, but relies on Congressional appropriations and oversight committees to enforce its decisions. *Id.* at 1-13. In contrast, OLC does not view the Comptroller General’s decisions as binding on the Executive Branch, albeit OLC does treat such opinions as persuasive authority. Miscellaneous Receipts Act Exception for Veterans’ Health Care Recoveries, 22 Op. O.L.C. 251, 254 n.7 (1998).

²⁴ 2001 O.L.C. Opinion, *supra* note 1.

²⁵ 2001 O.L.C. Opinion, *supra* note 1, at 40.

²⁶ 2001 O.L.C. Opinion, *supra* note 1, at 40.

1. The Effect of Ratification

An agency's authority to ratify an unauthorized procurement and its ability to cure an ADA violation differ significantly. Further, as explained below, the presence or absence of contractual authority will determine whether an ADA violation exists.

In *Unauthorized Legal Services Contracts Improperly Charged to Resource Management Appropriation*,²⁷ employees of the Fish and Wildlife Service (FWS) violated the Purpose Statute when they entered into contracts for legal services and then paid for the services by improperly charging its resource management appropriation. All legal work should have been charged to the Department of Interior Office of Solicitor's salaries and expenses appropriation.²⁸ Because the FWS lacked authority to obtain legal services, the contracts were improper and the FWS had no appropriation available for the legal work; thus, the FWS violated the ADA by incurring obligations and making expenditures in excess of available appropriations.²⁹

The GAO offered several options to "correct" the ADA violations; however, these options appeared more designed to liquidate the improper obligation rather than to cure the underlying ADA violation. Indeed, the GAO did not state that FWS had to report an ADA violation *if* it could not correct the improper obligation; it instead found an ADA violation, emphasized the requirement to report it, and only then discussed how to "correct" the violation.³⁰ Its suggestions included obtaining a deficiency appropriation from Congress and agreeing to pay the contractors on a *quantum meruit* basis.³¹

²⁷ *Unauthorized Legal Servs. Contracts Improperly Charged to Res. Mgmt. Appropriation*, B-290005, 2002 WL 1611488 (Comp. Gen. July 1, 2002).

²⁸ "[T]he Office of the Solicitor's appropriation is the exclusive source of funding 'all of the work of the Department.'" *Id.* at *3.

²⁹ *Id.*

³⁰ *Id.* at *3–4. Subsequently, the GAO cited this decision to support its position that "the use of appropriated funds for prohibited purposes violates the Antideficiency Act, because zero funds are available for that purpose." Dep't of Def.—Compliance with Statutory Notification Requirement, B-326013, at 7 n.7 (Comp. Gen. Aug. 21, 2014), <https://www.gao.gov/assets/670/665390.pdf> ("appropriation used to procure unauthorized legal services").

³¹ *Unauthorized Legal Servs.*, 2002 WL 1611488, at *3. Quantum Meruit is "appropriate where there is no enforceable contractual obligation on the part of the government but where the government has received a benefit not prohibited by law conferred in good faith." *Id.* at *4 n.9.

The Solicitor was not authorized to agree to pay the contractor on a *quantum meruit* basis, however, unless sufficient unobligated amounts remained in that fiscal year's appropriations.³²

Further, the GAO suggested that “the Solicitor could ratify the contracts and cover their costs out of unobligated balances of the applicable fiscal year appropriation to the Solicitor.”³³ Again, the GAO cautioned that if it elected to ratify the improper contracts, the Solicitor was still required to “determine whether sufficient unobligated funds remain in the Solicitor’s appropriation for fiscal year 2001.”³⁴ Otherwise, as explained below, ratification of the improper contract could trigger an ADA violation. Neither action would cure the ADA violation; all actions appeared limited to providing a mechanism to liquidate the improper obligation.³⁵

As a general rule, “the government is not bound by unauthorized acts of its officers or agents.”³⁶ Further, “only an authorized officer of the United States government can enter into a contract or other binding commitment on behalf of the government.”³⁷ Within the procurement context, “[c]ontracting officers have the sole authority to legally bind the government to contracts and contract modifications.”³⁸ It follows then that “if someone other than

³² *Id.*

³³ *Id.* at *3.

³⁴ *Id.* at *4 n.8.

³⁵ See The Anti-Deficiency Act Implications of Consent By Gov’t Emps. to Online Terms of Service Agreements Containing Open-Ended Indemnification Clauses, 36 Op. O.L.C. ___, at *9 (Mar. 27, 2012), <https://www.justice.gov/file/20596/download> [hereinafter 2012 O.L.C. Opinion] (“[T]he Comptroller General opined [in *Unauthorized Legal Servs.*] that, even though the Fish and Wildlife Service had entered into a contract for legal services without authority *and in violation of the ADA*, the Solicitor of the Department of the Interior could choose to pay the contractors on a quantum meruit basis, so long as sufficient unobligated funds were available in the applicable appropriation.”) (emphasis added). Although the agency had a proper account otherwise available (i.e., Solicitor), GAO subsequently viewed this as a prohibited purpose violation that resulted in an ADA violation “because zero funds are available for the purpose.” *Dep’t of Def.*, B-326013, *supra* note 30, at 7 n.7.

³⁶ JOHN CIBINIC, JR., RALPH C. NASH, JR. & CHRISTOPHER R. YUKINS, FORMATION OF GOVERNMENT CONTRACTS 81 (4th ed. 2011) (citing *Wilber Nat’l Bank v. United States*, 294 U.S. 120 (1935)).

³⁷ Nat’l Mediation Bd.—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Bds. Under the Ry. Labor Act, B-305484, at 13 (Comp Gen. June 2, 2006), <https://www.gao.gov/assets/380/377297.pdf>.

³⁸ CIBINIC, NASH & YUKINS, *supra* note 36, at 81.

an authorized officer attempts to sign a contract or other agreement committing the government to some action, the commitment is not binding on the government.”³⁹ Further, only an official with the authority to bind the government can ratify an unauthorized commitment.⁴⁰

With regard to the relationship of ratification⁴¹ of unauthorized commitments and the ADA, both the GAO and OLC have provided additional guidance. The GAO has determined that if the agency ratifies an unauthorized action of a prior fiscal year, the ratification “authorizes a charge to the prior year’s funds because the ratification relates back to the time of the initial agreement.”⁴² Once ratified, the obligation “is properly recorded as an obligation of the fiscal year to which the contract would have been charged had it been valid from its inception.”⁴³ As part of the ratification process, the ratifying official must ensure that sufficient unobligated funds exist in the account to be charged.⁴⁴ If not, then the ratified obligation may exceed an amount available and generate an ADA violation. If the agency does not ratify an unauthorized obligation, however, it may be able to waive collection of payments improperly made to a contractor based on *quantum meruit* or

³⁹ *Nat’l Mediation Bd.* B-305484, at 13.

⁴⁰ CIBINIC, NASH & YUKINS, *supra* note 36, at 102 (“The ratifying official must have the power to perform or authorize the unauthorized act.”).

⁴¹ “Ratification is the adoption of an unauthorized act resulting in the act being given effect as if originally authorized.” CIBINIC, NASH & YUKINS, *supra* note 36, at 100. *See also* Fish & Wildlife Serv.-Fiscal Year Chargeable on Ratification of Contract, B-208730, 83-1 CPD ¶ 75, at 1 (Comp. Gen. Jan. 6, 1983) (“The ratification operates upon the act ratified as though the authority of the agent to do the act existed originally.”). “The principle of ratification, like its sister principles, payment under *quantum meruit* or *quantum valebat*, are based on considerations of unjust enrichment.” Econ. Dev. Admin.—Ratification of Grant Acceptance as Obligating Prior Year Appropriation, B-220527, 1985 WL 53681, at *3 (Comp. Gen. Dec. 16, 1985).

⁴² National Science Found.—Potential Antideficiency Act Violation by the Nat’l Science Bd. Office, B-317413, 2009 CPD ¶ 94, at 1 (2009). *See* GAO Red Book II, *supra* note 6, at 7-18 (“If the ratification occurs in a subsequent fiscal year, the obligation is chargeable to the prior year, that is, the year in which the need presumably arose and the claimant performed.”).

⁴³ *Fish & Wildlife Serv.*, 83-1 CPD ¶ 75, at 1. The obligation cannot be recorded until ratified. *Id.*

⁴⁴ *Id.* *See also* GAO Red Book II, *supra* note 6, at 7-18.

quantum valebat,⁴⁵ with similar fiscal consequences—the obligation being charged to the same fiscal year as the contractual performance.⁴⁶

In *Interagency Agreements—Use of an Interagency Agreement Between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space*⁴⁷ the Department of Defense’s Counterintelligence Field Activity (CIFA) entered into an Interagency Agreement (IAA) with GovWorks to procure a service contract for office space and associated facilities management services.⁴⁸ Following the lease, the Office of Inspectors General (OIG) from both the Departments of Interior and Defense determined that neither CIFA nor GovWorks possessed independent leasing authority, and any such authority would require a delegation from the General Services Administration (GSA).⁴⁹ Both OIGs “opined that, because both CIFA and GovWorks acted beyond the scope of their authorities, payments on the lease could result in an Antideficiency Act violation.”⁵⁰

The GAO likewise found that neither CIFA nor GovWorks possessed leasing authority, and thus determined that the government was not contractually bound and the contract was “void *ab initio* and unenforceable.”⁵¹ Only GSA had the requisite leasing authority to ratify the contract, which it refused to do.⁵² Because any payments made pursuant to the void and unenforceable contract were improper, the GAO stated that the agency should recover any improper payments unless it elected to “waive collection of some or all the payments on the basis of the equitable theories of *quantum meruit* or *quantum*

⁴⁵ *Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activity, Dep’t of Def., and GovWorks to Obtain Office Space*, B-309181, 2007 CPD ¶ 163, at 9 n.10 (Comp. Gen. Aug. 17, 2007). *Quantum valebat* involves an implied promise to pay a claimant what the goods were reasonably worth. *Quantum valebat*, Black’s Law Dictionary (5th ed. 1979).

⁴⁶ GAO Red Book II, *supra* note 6, at 7-19 (“The obligational impact is the same as for ratification-payment is chargeable to the fiscal year in which the claimant performed.”).

⁴⁷ *Interagency Agreements*, 2007 CPD ¶ 163.

⁴⁸ GovWorks was a Department of Interior franchise fund, authorized to provide “common administrative support services” to other federal agencies. *Id.* at 3.

⁴⁹ *Id.* at 6. “Without specific statutory authority and absent GSA’s delegation of authority, a federal agency may not enter into a lease on its or the government’s behalf.” *Id.* at 7.

⁵⁰ *Id.* at 6. CIFA had paid over \$26 million on the lease. *Id.*

⁵¹ *Id.* at 9.

⁵² *Id.*

valebat.”⁵³ The agency was further precluded from making any future rent payments.⁵⁴

Responding to the OIG’s inquiry as to whether an ADA violation had occurred, the GAO determined that DoD O&M funds were available for the lease payments.⁵⁵ Although the lease was unenforceable, the CIFA had recorded the obligation and “burdened the appropriation to the same extent” by transferring funds to GovWorks, but had not “transferred or recorded amounts in excess of or in advance of the [O&M] appropriation for any fiscal year since CIFA began occupying the space...”⁵⁶ Accordingly, no ADA violation occurred.⁵⁷

In *The Anti-Deficiency Act Implications of Consent by Government Employees to Online Terms of Service Agreements Containing Open-Ended Indemnification Clauses*,⁵⁸ the OLC discussed the relationship between the ratification of unauthorized commitments and the ADA in the context of a federal employee who agreed to an indemnification provision as part of an online social media terms of service agreement.⁵⁹ Obligations that include open-ended indemnification agreements violate the ADA because an agency may not have sufficient appropriated funds to cover the maximum liability and, thus, the obligation exceeds an amount available in an appropriation or fund.⁶⁰

⁵³ *Id.* To permit payment under these two theories, the agency must determine that “First, the contract would have been a permissible procurement had the proper procedures been followed. Second, the government must have received and accepted a benefit. Third, the claimant must have acted in good faith. Fourth, the amount to be paid must not exceed the reasonable value of the benefit received.” *Id.* at 9 n.10.

⁵⁴ *Id.* at 9.

⁵⁵ *Id.*

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* One commentator suggests that instead of focusing on the availability of funds, the GAO could have determined that no ADA violation occurred because the contracting officer had no authority to award the lease contract, “no obligation of funds occurred at all.” Major Marci A. Lawson, *Antideficiency Act*, 2008 ARMY LAW., 105, 108 (2008).

⁵⁸ 2012 O.L.C. Opinion, *supra* note 35.

⁵⁹ Previously OLC elected not to address this issue. 2001 O.L.C. Opinion, *supra* note 1, at 34 n.1 (“We also do not consider what the legal effect might be of after-the-fact delegations or ratifications (by authorized officials) to cure obligations or expenditures made by persons acting without requisite legal authority.”).

⁶⁰ 2012 O.L.C. Opinion, *supra* note 35, at *2, *5. “It may also ‘involve’ the government in an ‘obligation’ for ‘payment of money before an appropriation is made.’” 2012 O.L.C. Opinion, *supra* note 35, at *5.

The OLC posited that an employee without the requisite authority, who makes an unauthorized obligation, does not violate the ADA because no valid agreement has been created by that employee.⁶¹ “Only a government officer or employee with actual authority to bind the government in contract, however, can authorize or involve the government in such an obligation.”⁶² An unauthorized obligation is not binding on the Government.⁶³ Accordingly, the OLC determined that, because “a government employee without contracting authority cannot bind the United States” to an online agreement containing an impermissible indemnification clause, “that unauthorized employee has neither ‘authorize[d]’ nor ‘involved[d]’ the government in an ‘obligation’ to indemnify the social media company and therefore has not violated the Anti-Deficiency Act.”⁶⁴

A binding contract may be formed if an authorized employee ratifies the agreement.⁶⁵ The OLC cautioned, however, that if an authorized official were to ratify an agreement containing an impermissible indemnification clause, such action would nevertheless be improper and an ADA violation would likely arise.⁶⁶ In the OLC’s view, if an employee with authority (contracting officer or ratifying official) were to improperly enter into an agreement with an illegal indemnification clause, the ADA would have been violated even if the underlying agreement itself were legally unenforceable.⁶⁷ “The mere fact that commitments made in violation of the ADA are not legally enforceable does not somehow erase the ADA violation; otherwise, the ADA could not be violated.”⁶⁸

⁶¹ 2012 O.L.C. Opinion, *supra* note 35, at *5.

⁶² 2012 O.L.C. Opinion, *supra* note 35. *See also* 2012 O.L.C. Opinion, *supra* note 35, at *6 (“It is settled law that the United States is not bound by a contract entered into by a government employee acting outside his authority.”).

⁶³ 2012 O.L.C. Opinion, *supra* note 35, at *5 (citing Nat’l Mediation Bd.—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Bds. Under the Railway Labor Act, B-305484, at 13 (Comp. Gen. June 2, 2006), <https://www.gao.gov/assets/380/377297.pdf> (“Consequently, if someone other than an authorized officer attempts to sign a contract or other agreement committing the government to some action, *the commitment is not binding on the government.*”) (emphasis in original).

⁶⁴ 2012 O.L.C. Opinion, *supra* note 35, at *7.

⁶⁵ 2012 O.L.C. Opinion, *supra* note 35, at *6.

⁶⁶ 2012 O.L.C. Opinion, *supra* note 35, at *7 (“would likely violate the ADA”).

⁶⁷ 2012 O.L.C. Opinion, *supra* note 35.

⁶⁸ 2012 O.L.C. Opinion, *supra* note 35, at *8.

In sum, a distinction exists between procurement authority and fiscal authority. A contracting officer with procurement authority, who enters into a contract or other obligation for which no or insufficient funds are available, violates the ADA upon obligation and expenditure. The fact that a federal employee without procurement authority improperly enters into an unauthorized commitment does not necessarily trigger an ADA violation. Indeed, the OLC posits that a federal employee without the requisite authority to incur an obligation cannot trigger an ADA violation as a matter of law because the *obligation* would be invalid. If a subsequent expenditure of funds occurs, no ADA results if the agency has the proper funds available to cover the expenditure. If the agency lacks proper funds then the unauthorized expenditure will cause an ADA violation. Finally, if a federal employee with the requisite authority ratifies an unauthorized obligation, but the agency lacks sufficient or proper funds to cover the ratified obligation, then an ADA will result.

2. The *De Minimis* Exception

For pure purpose violations, both the GAO and OLC have recognized a *de minimis* exception, such that the purpose violation need not ripen into an ADA violation. Although the GAO and OLC opinions on point have been limited to a discussion of nonreimbursable details, no principled distinction exists to preclude application to other pure purpose violations.

In 2001, the OLC specifically declined to address—or foreclose—the possibility that a general *de minimis* exception existed for ADA violations.⁶⁹ The OLC did note, however, that the GAO had suggested a possible *de minimis* exception in its Red Book discussion of *Southern Packaging & Storage Co. v. United States*,⁷⁰ and that both the GAO and OLC had recognized such an exception for purpose violations involving nonreimbursable details.⁷¹

In *Southern Packaging & Storage* a vendor challenged the award of contracts for Meals-Ready-To-Eat (MRE) that were produced in Canada as having violated the “Berry Amendment” and the Antideficiency Act.⁷²

⁶⁹ 2001 O.L.C. Opinion, *supra* note 1, at 52 n.19 (“This opinion does not address, or foreclose future consideration of, the possibility that the Act may incorporate a *de minimis* exception for inadvertent or negligent violations....”).

⁷⁰ *S. Packaging & Storage Co. v. United States*, 588 F. Supp. 532 (D.S.C. 1984).

⁷¹ 2001 O.L.C. Opinion, *supra* note 1, at 52 n.19.

⁷² *S. Packaging & Storage*, 588 F. Supp. at 535.

Contained in the FY 1982 Department of Defense Appropriations Act, the Berry Amendment provided, in relevant part:

No part of any appropriation contained in this Act...shall be available for the procurement of any article of food... not grown, reprocessed, reused, or produced in the United States or its possessions...; *Provided*, that nothing herein shall preclude the procurement of foods manufactured or produced in the United States or its possessions.⁷³

The court concluded that the expenditure of appropriated funds for the MREs produced in Canada violated the Berry Amendment, but did not violate the ADA.⁷⁴ The court reasoned that there was “no evidence in this case to show that the [Defense Personnel Support Center] authorized expenditures beyond the amount appropriated by Congress for the procurement of the MRE rations and the component foods thereof.”⁷⁵

Pondering this decision in its second edition of the Red Book, the GAO editorialized on the existence of a *de minimis* exception:

In the opinion of the editors, this area requires further careful thought. On the one hand, every expenditure for an unauthorized purpose should not also violate the Antideficiency Act. It does not seem to have been the intent of Congress that every unauthorized entertainment expenditure or every payment for an unauthorized long-distance telephone call be reported to Congress and the President as an Antideficiency Act violation, a result that could be reached by a broad application of the language of 60 Comp. Gen 440.⁷⁶ Yet on the other hand, where Congress has expressly prohibited the use of appropriated funds for some particular expenditure, it seems clear that the “available appropriation” for that item is zero. Further refinement in this area appears necessary.⁷⁷

⁷³ *Id.* (citing Section 723 of the Department of Defense Appropriations Act of 1982, Pub. L. No. 97-114, 95 Stat. 1565, 1582–83).

⁷⁴ *Id.* at 549–550.

⁷⁵ *Id.* at 550.

⁷⁶ See Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act, 60 Comp. Gen. 440 (1981), discussed *infra*, this section.

⁷⁷ 2 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-92-13, PRINCIPLES OF FEDERAL

The language was omitted from the Red Book's third edition.⁷⁸ Regardless, both GAO and OLC opinions have continued to recognize a *de minimis* exception in their opinions.

In *Department of Health and Human Services Detail of Office of Community Services Employees*,⁷⁹ the GAO examined the fiscal ramifications of nonreimbursable details⁸⁰ of employees between agencies⁸¹ which, if not otherwise permitted by law, would violate the purpose statute and would improperly augment the appropriations of the receiving agency.⁸² The GAO noted that nonreimbursable details may be permitted by statute⁸³ and that they are "permissible where they involve a matter similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided."⁸⁴

Significantly, the GAO adopted guidance from the old Federal Personnel Manual, which permitted "details for brief periods when necessary service cannot be obtained, as a practical matter, by other means and the numbers of persons and costs involved are minimal."⁸⁵ Although acknowledging that "the purpose restriction technically applies even in such cases," the GAO stated that it "would not feel obligated to object when the fiscal impact on

APPROPRIATIONS LAW, ch. 6, pt. C, sec. 2, at. 6-46 (2d ed. 1992). The OLC "rejected the holding" of the case that there was no ADA violation and disagreed "with 'the court's apparent conclusion that, even though the appropriation forbade the purchase of non-American food items, there remained funds 'available' in *that* appropriation for such purchases.'" Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 31 Op. O.L.C. 54, 65 n.3 (Apr. 5, 2007) [hereinafter 2007 O.L.C. Opinion] (citation omitted).

⁷⁸ GAO Red Book II, *supra* note 6, at 6-79 to 6-84.

⁷⁹ Dep't of Health & Human Servs. Detail of Office of Cmty. Servs. Emps., 64 Comp. Gen. 370 (1985).

⁸⁰ "A 'detail' is the temporary assignment of an employee to a different position for a specified period, with the employee returning to regular duties at the end of the detail." *Id.* at 376.

⁸¹ GAO determined that its analysis applied to intra-agency details. *Id.* at 380, 381.

⁸² *Id.* at 380.

⁸³ *Id.* at 382. One statute that does not authorize nonreimbursable details is 5 U.S.C. § 3341, which merely permits intra-agency details, but does not serve as authority that they be made on a nonreimbursable basis. *Id.* at 381.

⁸⁴ *Id.* at 380.

⁸⁵ *Id.* at 381 (citation omitted).

the appropriation is negligible.”⁸⁶ In other words, if the purpose violation were small enough, the GAO would overlook it and the agency would not be required to cure the purpose violation in order to avoid an ADA violation.

In a 1989 opinion, *Reimbursement for Detail of Judge Advocate General Corps Personnel to the United States Attorney’s Office for the District of Columbia and the Requirements of the Economy Act*,⁸⁷ the OLC determined that the United States Attorney’s Office was required to reimburse the Army for the services of ten Judge Advocates detailed to that office. The OLC determined that nonreimbursable details were permitted (1) if statutorily authorized, (2) if the detail “involve[ed] ‘a matter [that is] similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which appropriations are provided,’” and (3) if the detail fell within the “*de minimis* exception for details that have a negligible effect on the loaning agency’s appropriations.”⁸⁸ Addressing the *de minimis* exception, the OLC noted that the Comptroller General recognized such an exception, but that OLC had historically “regarded the ‘*de minimis* exception’ with some caution.”⁸⁹ In the instant opinion, the OLC assumed the exception to be lawful for purposes of its analysis, but ultimately determined it inapplicable.⁹⁰

The following year however, in an unpublished opinion, the OLC took a more expansive view of the *de minimis* exception. In an opinion involving the detail of Department of Interior Office of Inspector General (OIG) agents to a United States Attorney’s Office, the OLC determined “that nonreimbursable detail involving 280-man-hours would satisfy [the] *de minimis* exception to [the] Purpose Statute.”⁹¹

⁸⁶ *Id.* In addition, GAO left “open the question whether nonreimbursable details may be permitted when an agency is faced with the choice of implementing those details or carrying out a reduction in force.” *Id.*

⁸⁷ *Reimbursement for Detail of Judge Advocate General Corps Personnel to the U.S. Attorney’s Office for the District of Columbia and the Requirements of the Economy Act*, 13 Op. O.L.C. 188 (1989).

⁸⁸ *Id.* at 189–190. In addition, OLC recognized a training exception for nonreimbursable details. *Id.* at 190.

⁸⁹ *Id.* at 190 n.4.

⁹⁰ *Id.* at 190.

⁹¹ 2001 O.L.C. Opinion, *supra* note 1, at 52 n.19 (citing Memorandum from John O. McGinnis, Deputy Assistant Attorney General, O.L.C., to Margaret C. Love, Associate Deputy Attorney General, subject: Deputation of Interior Department Inspector General Personnel (April 11, 1990)).

For purpose prohibition and ceiling violations,⁹² however, the GAO has taken a less forgiving position.⁹³ In a recent opinion, the GAO indicated that the use of appropriated funds associated with preparing and sending a single e-mail in support of grassroots lobbying—for which no appropriated funds were available—was sufficient to trigger an ADA violation.⁹⁴ More telling, in *Customs Service Payment of Overtime Pay in Excess of Limit in Appropriation Act*,⁹⁵ the GAO found an ADA violation when the Customs Service violated an appropriations act proviso limiting the amount of overtime payable to an employee to \$20,000.⁹⁶ The Customs Service exceeded the statutory ceiling by a mere \$194.17.⁹⁷ These opinions are consistent with the general rule that “If Congress specifically prohibits a particular use of appropriated funds, *any* obligation for that purpose is in excess of the amount available.”⁹⁸

B. Purpose Prohibitions—Charging Unauthorized Items to Any Appropriation

Generally, an agency cannot cure a potential ADA violation arising from a purpose prohibition enacted as part of an appropriation act. Appropriation acts contain numerous such prohibitions. For example, a government-wide General Provision in the Consolidated Appropriations Act of 2016 provides that “[n]one of the funds made available in this or any Act may be used to pay for the painting of a portrait of an officer or employee of the

⁹² The O.L.C. uses the terms “condition” and “internal cap,” respectively. 2001 O.L.C. Opinion, *supra* note 1, at 33–34.

⁹³ See Major Paul D. Hancq, *Violations of The Antideficiency Act: Is the Army Too Quick to Find Them?*, 1995 ARMY LAW. 30, 34 (1995) (“Apparently, there is no *de minimis* exception to an absolute ceiling. When an agency exceeds an absolute ceiling, there are no proper funds ‘available’ for the excess, therefore, no way to correct the violation.”).

⁹⁴ Dep’t of Hous. & Urban Dev.—Anti-Lobbying Provisions, B-325248 (Comp. Gen. Sept. 9, 2014), <http://www.gao.gov/assets/670/665685.pdf>. The HUD OIG did not calculate the cost associated with preparing the e-mail, but the GAO noted that “staff from several offices...collaborated to prepare the e-mail....” *Id.* at 7–8 n.9.

⁹⁵ Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, 60 Comp. Gen. 440 (1981).

⁹⁶ The proviso stated: “Provided, that none of the funds made available by this act shall be available for administrative expenses to pay any employee overtime pay in an amount in excess of \$20,000. *Id.* at 440 (citing the Treasury Appropriations Act of 1980, Pub. L. No. 96-74, 93 Stat. 559, 560).

⁹⁷ *Id.*

⁹⁸ Office of Sci. & Tech. Policy-Bilateral Activities with China, B-321982, at 5 (Comp. Gen. Oct. 11, 2011), <http://www.gao.gov/decisions/appro/321982.htm> (emphasis added).

Federal government....”⁹⁹ If it were to use its appropriated funds to pay for such a portrait, an agency could not cure the improper use of funds for the prohibited purpose because it has no proper funds available to cover the expenditure.

In *Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases*,¹⁰⁰ the GAO determined that the Center for Medicare & Medicaid Services (CMS) violated the publicity and propaganda prohibition contained in its annual appropriation act¹⁰¹ when it provided story packages and scripts to news organizations explaining Medicare changes, without identifying CMS to the target audience as the source of the material.¹⁰² Further, GAO posited that “[b]ecause CMS has no appropriation available for the production and distribution of materials that violate the publicity or propaganda prohibition, CMS has violated the Antideficiency Act.”¹⁰³ Because it had no proper appropriation available to adjust accounts, CMS could not cure the violation.

The OLC examined the effect of purpose prohibition violations of appropriation provisos in *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap within an Appropriation*.¹⁰⁴ The OLC determined that the violation of a “condition” on the use of appropriated funds—that is “when Congress has expressly prohibited the expenditure of any funds for a particular purpose”—generally will result in an ADA violation.¹⁰⁵ When Congress imposes such a condition to limit the amount of funds available for a particular purpose, *no funds are available* and any expenditure

⁹⁹ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 736, 129 Stat. 2242, 2481 (2015).

¹⁰⁰ Dep’t of Health & Human Servs., Ctrs. for Medicare & Medicaid Servs.—Video News Releases, B-302710 (Comp. Gen. May 19, 2004), <http://www.gao.gov/decisions/appro/302710.pdf>.

¹⁰¹ The appropriations proviso stated: “No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by Congress.” *Id.* at 10 (citation omitted).

¹⁰² *Id.* at 13.

¹⁰³ *Id.* at 15 (citation omitted).

¹⁰⁴ *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap within an Appropriation*, 25 Op. O.L.C. 33 (2001).

¹⁰⁵ *Id.* at 35 (“a violation of a condition...within an appropriation would generally constitute a violation of the Antideficiency Act”). O.L.C. qualified its opinion as not extending to “those circumstances in which an internal cap or condition would prevent another branch from discharging its constitutionally assigned functions.”) *Id.* at 42.

for that purpose would constitute “an ‘expenditure or obligation exceeding an amount available in an appropriation.’”¹⁰⁶ If no funds are available for the prohibited purpose, an agency cannot adjust accounts to cure the violation.

1. Waiver Provisions

When the appropriations proviso itself provides for a waiver of the restriction, the GAO may have identified a narrow—and largely unexplained—exception to the rule that a violation of a prohibited purpose provision contained in an appropriations act may not be cured. In *Dash Engineering, Inc.; Engineering Fabrics Corporation*,¹⁰⁷ two contractors protested the Air Force’s decision to retroactively waive the Berry Amendment’s restriction on the procurement of certain items not “grown, reprocessed, reused, or produced in the United States or its possessions. . . .”¹⁰⁸ The Amendment, contained in the DoD appropriations act, provided that “no part of any appropriation” could be used for a procurement noncompliant with the restriction unless the relevant Secretary determined that the item “cannot be procured as and when needed at United States market prices. . . .”¹⁰⁹

The Air Force initially awarded a contract for fuel cells in May 1991 (FY 1991), but GAO determined in July 1992 (FY 1992) that the award violated the Berry Amendment’s restrictions.¹¹⁰ In December 1992 (FY 1993) the Deputy Assistant Secretary of the Air Force (Acquisition) issued a determination waiving the Berry Amendment’s prohibition on the use of appropriated funds.¹¹¹ Among other challenges, Protestor argued that the Berry Amendment waiver violated the ADA, “which prohibits officers or employees of the United States from obligating funds in direct contravention of a specific

¹⁰⁶ *Id.* at 50. Citing to relevant GAO decisions, O.L.C. noted that “where Congress has expressly prohibited the use of appropriated funds for a particular expenditure, ‘it seems clear’ that there are no funds ‘available’ for that item”). *Id.* at 52 n.19 (citation omitted). *See also Dep’t of Def.*, B-326013, *supra* note 30, at 7 n.7 (“We have constantly concluded that the use of appropriated funds for prohibited purposes violates the Antideficiency Act, because zero funds are available for the purpose.”).

¹⁰⁷ *Dash Eng’g, Inc., B-246304.8 et al.*, 93-1 CPD ¶ 363 (Comp. Gen. May 4, 1993).

¹⁰⁸ *Id.* at 2, 2 n.2. The Berry Amendment “has been included in various forms in DOD Appropriations Acts since 1941.” *Id.* at 2.

¹⁰⁹ *Id.* at 2 n.2.

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.* The Air Force issued a “Determination for Waiver of Restrictions on Acquisition of Fuel Cells Applicable to MH-53J Helicopter.” *Id.*

limitation contained in an appropriations act.”¹¹² Rejecting the challenge, GAO noted that the Berry Amendment permits such a waiver, and “[s]ince the waiver in this case was permitted by the Berry Amendment, there has been no Antideficiency Act violation.”¹¹³

Facially, the opinion permitted a retroactive waiver across fiscal years.¹¹⁴ Unfortunately, GAO¹¹⁵ did not actually analyze the Air Force’s ability to waive the prohibited purpose limitation after the fact, within the same fiscal year or in a subsequent fiscal year. Presumably no funds were available to make the award unless the Secretary first waived the restriction, which he had not done. At that point an incurable ADA violation should have been triggered because no funds were legally available at the time of obligation. Further, absent a clear indication to the contrary, the Berry Amendment’s secretarial waiver authority of the prohibition on the use of appropriated funds would only remain in effect for the fiscal year covered by the applicable DoD appropriations Act.¹¹⁶

The contract solicitation contained the Berry Amendment and its waiver provision.¹¹⁷ GAO did not analyze what effect, if any, this fact had on

¹¹² *Id.* at 10.

¹¹³ *Id.* at 10–11.

¹¹⁴ *Cf.* 2001 O.L.C. Opinion, *supra* note 1, at 34 n.1 (declining to address whether an agency may “cure retroactively expenditures that would, in the absence of a reprogramming of funds, violate the Antideficiency Act”).

¹¹⁵ Because the decision was rendered by the GAO’s protest group, rather than its appropriations law group, its effect is unclear.

¹¹⁶ *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-463SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 2, pt. E, sec. 1, at 2-86 (4th ed. 2016) [hereinafter “GAO Redbook 1”] (“Since an appropriation is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered.”); Authority of the Dep’t of Justice to Disclose Statutorily Protected Materials to its Inspector General in Light of Section 540 of the Commerce, Justice, Sci., & Related Agencies Appropriations Act, 2016, 40 Op. O.L.C. ___, at *8, *9, *12 (Apr. 27, 2016), <https://www.justice.gov/opinion/file/847181/download> (repeatedly noting that an appropriations act provision that prohibited the use of appropriated funds to deny disclosure of certain records to the Inspector General was limited to that single fiscal year). *See also* Hon. Joseph I. Lieberman, B-287488, at 3 (Comp. Gen. June 19, 2001), <http://www.gao.gov/decisions/appro/287488.htm> (“Ordinarily, provisions enacted in an appropriations act have effect only for that fiscal year covered by the appropriations act.”).

¹¹⁷ Dash Eng’g, Inc., B-246304.8 et al., 93-1 CPD ¶ 363, at 6 (Comp. Gen. May 4, 1993).

the Air Force's ability to waive the Amendment's restrictions retroactively.¹¹⁸ For example, did the fact that the contract solicitation's inclusion of the waiver authority allow the Air Force to reach back across fiscal years to waive the restriction? The GAO provided little insight into its analysis. Absent further clarification, an agency should be hesitant to rely on this decision to cure a potential ADA violation, particularly across fiscal years, unless the facts mirror those of the *Dash* opinion.

2. Statutory Prohibitions

Whether an ADA violation can arise when a purpose prohibition is contained outside of an appropriations act is unclear. In *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*,¹¹⁹ the OLC determined that "a violation of a statutory restriction on spending does not violate [the ADA] where the restriction is not 'in an appropriation.'"¹²⁰

Specifically, the OLC examined 31 U.S.C. § 1345, which provided, in relevant part: "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting."¹²¹ Basing its conclusion "on the text, structure, and history of the Act, which together establish that the Act proscribes violations of limits in the relevant appropriations, not violations of all statutory law," the OLC

¹¹⁸ The GAO discussed this fact only in the context of its jurisdiction over the bid protest. *Id.* at 6. The opinion stated: "[T]he waiver was not a matter of contract administration, which would place it outside our bid protest jurisdiction. While the Berry Amendment waiver was signed 18 months after the...contract was awarded, it was a precondition for award. The sole purpose of the waiver was to correct the award whose impropriety was called to the agency's attention through our decision..." *Id.* at 6 (citation omitted).

¹¹⁹ *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54 (2007).

¹²⁰ *Id.* at 68. The ADA may be triggered if the statutory restriction is incorporated by reference into an appropriations act. *Id.* at 62.

¹²¹ *Id.* at 55 (citing 31 U.S.C. § 1345 (2000)). The statute did not prohibit "(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; and (2) the Secretary of Agriculture from paying necessary expenses for a meeting called by the Secretary for 4-H Boys and Girls Clubs as part of the cooperative extension work of the Department of Agriculture." *Id.* Another purpose prohibition that is not contained in an appropriations act is 5 U.S.C. § 5946, which prohibits the use of appropriated funds to pay employee membership fees or dues.

concluded “that a violation of section 1345 does not, by that fact alone, also violate the ADA, because section 1345 is not part of an appropriation.”¹²²

Focusing on the text of 31 U.S.C. § 1341(a)(1)(A), the OLC emphasized that the “ADA prohibits ‘an expenditure or obligation exceeding an amount available *in an appropriation*...for the expenditure or obligation” and reasoned “reading the statute to apply to the violation of a codified statute such as section 1345—not part of an appropriation making an amount available for expenditure or obligation—would leave the phrase ‘in an appropriation’ without any clear purpose.”¹²³ Congress could have omitted the phrase “in an appropriation,” which would suggest a broader application of the ADA to “all possible legal constraints” on the availability of funds for obligation or expenditure, but instead included the phrase “in an appropriation,” which “suggests a more restrictive intent....”¹²⁴

Further, the OLC reasoned that the phrase “for the expenditure or obligation” modified the noun “‘appropriation’ or (‘fund’)” so as “to read the statute as referring to amounts ‘available’ in an appropriation that is ‘for the expenditure or obligation’ in question....”¹²⁵ The OLC rejected an alternative reading “essentially stating that the amount must be broadly ‘available for the expenditure or obligation’ and also ‘in an appropriation.’”¹²⁶

For additional support, the OLC pointed to the meaning of the term “appropriation.” “That term refers not to a particular pot of money—such that one might say availability is determined by all laws that apply to that pot—but rather to a particular *legislative authorization* of a federal agency to spend a particular amount of money for some purpose.”¹²⁷ Further, OLC pointed to section 1301(d), which “provides that ‘[a] law may be construed to make an appropriation out of the Treasury or to authorize making a contract for payment of money in excess of an appropriation *only if the law specifically states that an appropriation is made* or that such a contract may be made,’” and pointed out that enabling or organic legislation is not considered to be an

¹²² *Id.* at 62.

¹²³ *Id.* at 65 (emphasis in original).

¹²⁴ *Id.*

¹²⁵ *Id.* at 66.

¹²⁶ *Id.*

¹²⁷ *Id.* The O.L.C. opinion noted that other authorities defined the term similarly, including two other sections of Title 31. *Id.* at 66–67.

appropriation.¹²⁸ That interpretive view should also apply when determining the scope of the ADA.¹²⁹

Next, the OLC looked to the ADA's statutory history since its inception in 1870. It noted that the ADA "always has focused on expenditures in excess of sums in 'appropriations' or 'an appropriation,'" maintaining a "distinction between appropriations and other legislation."¹³⁰ Finally, because the ADA is a criminal statute, it invoked the rule of lenity against finding an ADA violation for any spending restrictions not residing in an appropriations act, to the extent OLC's earlier reasoning left any ambiguity concerning resolution of this issue.¹³¹

The following year, the OLC maintained this position in a second, unpublished decision.¹³² In *Whether the Federal Aviation Administration's Finalizing and Implementing of Slot Auction Regulations Would Violate the Anti-Deficiency Act*,¹³³ the OLC examined whether the FAA's regulations establishing a market-based auction procedure for allocating airport operating authorizations ("slots") would violate the ADA.¹³⁴ The FAA was operating

¹²⁸ *Id.* at 67–68 (emphasis in original). Enabling or organic legislation establishes agencies, programs, and functions, but does not provide budget authority or an appropriation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 2, pt. C, sec. 2, at 2-54 (4th ed. 2016).

¹²⁹ 2007 O.L.C. Opinion, *supra* note 77, at 68.

¹³⁰ 2007 O.L.C. Opinion, *supra* note 77, at 68.

¹³¹ 2007 O.L.C. Opinion, *supra* note 77, at 69. The rule of lenity is "the canon that if ambiguity remains in a criminal statute after textual, structural, historical, and precedential analyses have been exhausted, the narrower construction should prevail." 2007 O.L.C. Opinion, *supra* note 77, at 69. Because sufficient facts were not before it, the O.L.C. did not address the application of section 1341(a)(1)(A) to a fund. 2007 O.L.C. Opinion, *supra* note 77, at 69 n.4.

¹³² DoD FMR, *supra* note 10, vol. 14, ch. 2, at Figure 2-2(B)(1)(b); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 6, pt. C, sec. 2, at 6-12 (Supp. 2015); Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 CPD ¶ 72, at 1 n.1 (Comp. Gen., Mar. 23, 2009).

¹³³ Letter from Steven A. Engel, Deputy Assistant Att'y Gen., to Kerry B. Long, Chief Counsel Fed. Aviation Admin. (Oct. 7 2008) available at http://aci-na.org/static/entransit/doj_slots_nyc_10-07.pdf.

¹³⁴ At the request of the FAA, the OLC responded to, and disagreed with, a GAO decision determining that the FAA lacked authority to issue the regulations "and that to do so would violate an existing appropriations restriction prohibiting FAA from spending appropriations on 'new aviation user fees.'" *Id.* at 1. See generally Fed. Aviation Admin.—Authority to Auction Airport Arrival and Departure Slots and to Retain and

under an appropriations act proviso that stated: “none of the funds in this Act shall be available for the [FAA] to plan, finalize, or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the enactment of this Act.”¹³⁵

The OLC reaffirmed its earlier opinion that “an expenditure that is consistent with existing appropriations, but violates a statutory restriction separate from an appropriations law, does not violate the ADA.”¹³⁶ Further, the OLC reasoned that “[i]f an agency expenditure that violates a separate spending restriction does not violate the ADA, then an agency expenditure exceeding an agency’s non-spending authorities would not do so either.”¹³⁷ The non-spending authorities at issue were the FAA’s statutory authorities to issue the slot auction regulations, which were the subject of pending litigation.¹³⁸ The OLC reasoned further:

So long as the agency’s expenditure is consistent with its available appropriations, then the agency does not “make or authorize an expenditure...exceeding an amount available in an appropriation or fund,” even if a court ultimately concludes that the agency’s actions exceeded the scope of its existing statutory authorities. Indeed, were it otherwise, an agency would be found to violate the ADA each and every time a court found, after a challenge under the Administrative Procedure Act, that its actions were contrary to, or in excess of, its existing statutory authority.¹³⁹

Articulating the better argument, the GAO disagreed with the OLC’s conclusion. In *Antideficiency Act-Applicability to Statutory Prohibitions*

Use Auction Proceeds, B-316796 (Comp. Gen. Sept. 30, 2008), <http://www.gao.gov/assets/390/383986.pdf>.

¹³⁵ Engel, *supra* note 133, at 3. The GAO determined that the FAA lacked authority to auction slots and retain or use any resulting proceeds of such auctions. *Fed. Aviation Admin.*, at 16. Should the FAA go forward with its proposed auction scheme, it would violate both “the ‘purpose statute,’ 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).” *Id.* at 16.

¹³⁶ Engel, *supra* note 133, at 3.

¹³⁷ Engel, *supra* note 133, at 3.

¹³⁸ Engel, *supra* note 133, at 2.

¹³⁹ Engel, *supra* note 133, at 3 (“Neither the Executive branch nor, to our knowledge, the Comptroller General has ever embraced such a conclusion.”).

on the Use of Appropriations,¹⁴⁰ the GAO reviewed OLC’s focus on the phrase “in an appropriation,” first pointing out that “OLC does not define with specificity what it means for a restriction (or prohibition) to be in an appropriation.”¹⁴¹ The GAO noted that Congress enacts laws that both authorize or prohibit spending appropriated funds, which do not appear in appropriations act.¹⁴² “Having enacted such prohibitions or authorizations, Congress need not enact the same or similar language as part of each agency’s annual appropriation.”¹⁴³ Appropriations acts and other statutes are interrelated and must be read in conjunction with each other and “to give effect to statutes of general applicability.”¹⁴⁴

Shifting directly to the OLC’s analysis, the GAO opined that the OLC focused too narrowly on the phrase “in an appropriation, . . . detaching the phrase from the context of the entire subsection . . . [and giving] it a disproportionate, if not controlling, effect.”¹⁴⁵ The GAO then posited that “[w]hen the phrase is read in the context of the entire provision, however, its meaning is apparent: an amount available in an appropriation refers to an amount that Congress has provided to an agency for some legally permissible purpose.”¹⁴⁶ Significantly, the GAO astutely posited that the ADA reached “all provisions of law that implicate the use of agency appropriations” and an agency would not have an amount available in an appropriation if statutorily prohibited from using funds for a particular purpose, regardless of whether the prohibition was contained in an appropriations act or elsewhere.¹⁴⁷ “If

¹⁴⁰ Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 CPD ¶ 72 (Comp. Gen., Mar. 23, 2009). The GAO issued this decision following a Senate Committee on Appropriations request that GAO respond to the 2007 O.L.C. Opinion. *Id.*

¹⁴¹ GAO presumed that “in an appropriation” included “restrictions found under the particular heading enacting an appropriation; restrictions in the agency-specific administrative provisions title of an appropriations act; and restrictions in the administrative provisions generally found in the last title of an appropriations act that apply to all funds appropriated in the act.” *Id.* at 3. Like OLC, the GAO also recognized that a restriction could be “in the appropriation” if the appropriation act incorporated the restriction by reference. *Id.*

¹⁴² *Id.* (citing 31 U.S.C. § 1345 and 5 U.S.C. § 5946 as prohibitions and 5 U.S.C. § 7905 as an authorization).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 5.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* The availability of funds in an appropriation should be determined by all laws

the agency nevertheless incurs an obligation for that purpose, it has incurred an obligation exceeding an amount available in an appropriation in violation of section 1341(a)(1)(A).¹⁴⁸

Reviewing the history of the ADA, the GAO agreed with the OLC that Congress intended that the Act covered “not only deficiencies caused by executive spending in excess of appropriated funds, but also to enforce Congress’s appropriations power by exercising control over the *purposes* for which agencies may use their appropriated funds.”¹⁴⁹ Without pointing to any authority contradicting the OLC’s account of the Act’s history, however, the GAO determined that nothing existed to support OLC’s opinion.¹⁵⁰

Turning to case law inconsistent with the OLC’s opinion, the GAO relied heavily on *OPM v. Richmond*.¹⁵¹ The GAO determined that this case “expressed the view that violating a statutory restriction enacted in other law (*i.e.*, not enacted as part of an agency’s appropriation) would trigger the Antideficiency Act.”¹⁵² In *Richmond*, based on erroneous advice from federal employees, a retired Navy welder lost six months of disability retirement benefits by earning more than was permitted by statute.¹⁵³ The Supreme Court rejected an equitable estoppel argument,¹⁵⁴ holding “that payments of money from the Federal Treasury are limited to those authorized by statute. . . .”¹⁵⁵ As part of its analysis, the Court expressed concern that estoppel in this context

impacting the legal availability of those funds for obligation and expenditure, whether located in an appropriations act or elsewhere.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 5 (emphasis in original).

¹⁵⁰ “Nothing in the statutory history or evolution of the Act suggests that legislated expressions of purpose availability are less deserving for purposes of the Antideficiency Act if they are enacted in an authorizing statute or other law rather than in an appropriations act.” *Id.* at 7.

¹⁵¹ *OPM v. Richmond*, 496 U.S. 414 (1990).

¹⁵² *Antideficiency Act*, 2009 CPD ¶ 72, at 6. The GAO listed several supporting decisions from itself and the Comptroller of the Treasury. *Id.* at 7–8.

¹⁵³ 5 U.S.C. § 8337(d) provided “that the entitlement to disability payments will end if the retired employee is ‘restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement.’” *Richmond*, 496 U.S. at 416.

¹⁵⁴ The specific issue before the Supreme Court was “whether erroneous oral and written advice given by a Government employee to a benefits claimant may give rise to estoppel against the Government and so enable the claimant to a monetary payment not otherwise permitted by law.” *Id.* at 415–16.

¹⁵⁵ *Id.* at 416.

could “render the Appropriations Clause a nullity.”¹⁵⁶ Touching briefly on the ADA, the Supreme Court noted that the ADA was a criminal statute and that “[i]f an executive officer on his own initiative had decided that, in fairness, respondent should receive benefits despite the statutory bar, the official would risk prosecution.”¹⁵⁷ The GAO reasoned that this part of the analysis clearly established that “the Court read the disability retirement statute as a restriction on the use of an appropriation that implicates the Antideficiency Act, even though the restriction was enacted in other law.”¹⁵⁸

In addition, citing to examples of statutory prohibitions on the use of funds, the GAO criticized the OLC’s interpretation of the ADA as permitting an agency that had violated a purpose prohibition to avoid the ADA’s critical reporting requirement simply because Congress elected to place the prohibition outside of an appropriation act.¹⁵⁹ The GAO posited that the “OLC’s interpretation of the Antideficiency Act promotes opacity in government at the expense of transparency and, by so doing, diminishes the ability of Congress to exercise its constitutional power to oversee the use of public money.”¹⁶⁰

3. Outliers: Salary Prohibitions

Appropriation Acts contain prohibitions on paying salaries for certain purposes. For example, Section 562 of the Department of Homeland Security Appropriations Act of 2016 provided:

None of the funds appropriated by this or any other Act shall be used to pay the salaries and expenses of personnel who prepare or submit appropriations language as part of the President’s budget proposal to the Congress of the United States for programs under the jurisdiction of the Appropriations Subcommittees on the Department of Homeland Security that assumes revenues or reflects a reduction from the previous

¹⁵⁶ *Id.* at 428 (“operation of estoppel against the Government in the context of payment of money from the Treasury could in fact render the appropriations Clause a nullity”).

¹⁵⁷ *Id.* at 430.

¹⁵⁸ Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 CPD ¶ 72, at 7 (Comp. Gen., Mar. 23, 2009).

¹⁵⁹ *Id.* at 9. “From Congress’s perspective, the Antideficiency Act’s reporting requirement serves its responsibilities to monitor and oversee federal spending to ensure accountability in government.” *Id.*

¹⁶⁰ *Id.*

year due to user fees proposals that have not been enacted into law prior to the submission of the budget unless such budget submission identifies which additional spending reductions should occur in the event the user fees proposals are not enacted prior to the date of the convening of a committee of conference for the fiscal year 2017 appropriations Act.¹⁶¹

Given the prohibitive language on the use of appropriated funds for salaries and expenses of those federal employees who prepare an offending budget proposal, one would expect GAO to determine that no funds are available for the payment of salaries in such a situation and find an ADA violation when the appropriations provision has been violated. Instead, as discussed below, GAO appears to treat similar violations as mere salary overpayments, at least in the context of Congressional-Executive Branch access to information disputes. To the extent these provision violations should be treated as out of the fiscal mainstream for ADA purposes, the GAO has not revealed its reasoning.

Disputes between Congress and the Executive Branch concerning the production of congressionally requested information and witnesses are long-standing¹⁶² and on-going.¹⁶³ Federal employees enjoy a statutory right to

¹⁶¹ Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, § 562, 129 Stat. 2242, 2521-22 (2015) Although beyond the scope of this article, this provision raises serious concerns as to whether it violates the Recommendations Clause, which provides that the President “shall from time to time...recommend to [Congress] Consideration such Measures as he shall judge necessary and expedient.” U.S. CONST. art II, § 3, cl. 1. *Cf.* Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administrative Policy: H.R. 2997—Agriculture, Rural Development, Food & Drug Administration, and Related Agencies Appropriations Act, 2010 (July 30, 2009) https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/111/saphr2997s_20090730.pdf (expressing “long-standing” Constitution concerns about similar provisions).

¹⁶² Disputes between Congress and the Executive Branch concerning the latter’s obligation to provide Congressionally-demanded information date to at least 1796 when President George Washington refused to provide certain correspondence concerning negotiation of the Jay Treaty, although Washington eventually provided the information. Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 109 n.1 (Winter 1996).

¹⁶³ See, e.g., Elaise Vieback, *Senator Slams Policy Letting Agencies Reject Lawmaker’s Requests*, WASH. POST June 10, 2017, at A6 (agencies have no obligation to respond to individual requests for information); Juliet Eilperin, *2 GOP Leaders Decry HHS Chief for Muzzling Agency Workers*, WASH. POST, May 10, 2017, at A14 (HHS placed restrictions on employees’ ability to communicate directly with Congress); Valerie Richardson, *Senate Panel Issues Subpoena Over Colorado Gold Mine Spill*, WASH. TIMES Apr. 14, 2016, at A2 (“The top members of the Senate Indian Affairs Committee acted Wednesday

go to Congress on their own volition,¹⁶⁴ but agencies have issued policies or other guidance restricting the production of certain information and witnesses when Congress requests it from agency personnel.¹⁶⁵ Not surprisingly, the OLC has issued several decisions concerning the Executive Branch's right to withhold certain information from Congress.¹⁶⁶ As part of this on-going contest between the Executive and Legislative Branches, Congress may seek to rely on its appropriations power.¹⁶⁷ When pulled into the fray, GAO

to subpoena [the] EPA Administrator...after the agency refused to provide witnesses to a field hearing on the EPA-caused Gold Mine spill.”)

¹⁶⁴ 5 U.S.C. § 7211 (2012). *See* 10 U.S.C. § 1034 (2012) (member of the armed forces).

¹⁶⁵ *See, e.g.*, OFFICE OF MANAGEMENT AND BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIR. A-11, PREPARATION AND SUBMISSION OF BUDGET ESTIMATES § 22-COMMUNICATIONS WITH THE CONGRESS AND THE PUBLIC AND CLEARANCE REQUIREMENTS (July 2016). “Executive Branch communications that led to the President’s budgetary decisions will not be disclosed either by agencies or by those who prepared the budget.” *Id.* § 22.2. The GAO has recognized that the “Executive agencies have the right to designate official spokesmen for the agency and institute policies and procedures for the release of agency information and positions to Congress and the public.” Dep’t of Health & Human Sers.—Chief Actuary’s Communications with Congress, B-302911, at 11 (Comp. Gen. Sept. 7, 2004), <http://www.gao.gov/decisions/appro/302911.pdf>. Further, agencies may require “their employees to report on their communications with Congress,” and to request “that agency congressional liaisons be included in employees’ discussions with Congress...” *Id.* at 11 n.18.

¹⁶⁶ *See, e.g.*, Authority of Individual Members of Congress to Conduct Oversight of the Exec. Branch, 41 Op. O.L.C. __ (May 1, 2017), <https://www.justice.gov/olc/file/966326/download> (individual Members of Congress may request information from the Executive Branch, which may comply at its discretion); Immunity of the Assistant to the President and Dir. of the Office of Political Strategy and Outreach From Congressional Subpoena, 38 Op. O.L.C. __ (July 15, 2014), <https://www.justice.gov/file/30896/download> (OPSO immune from subpoena to compel certain testimony); Assertion of Exec. Privilege Over Documents Generated in Response to Congressional Investigation Into Operation Fast and Furious 26 Op. Att’y Gen __ (June 19, 2012), https://www.justice.gov/sites/default/files/olc/opinions/2012/06/31/ag-ff-exec-priv_0.pdf (President may assert Executive Privilege in response to a Congressional subpoena and refuse to disclose certain documents); Authority of Agency Officials to Prohibit Emps. from Providing Information to Congress, 28 Op. O.L.C. 79 (2004) (agency officials can prohibit employees from providing information to Congress); Congressional Requests For Info. From Inspectors General Concerning Open Criminal Investigations, 13 Op. O.L.C. 77 (1989) (OIG should normally decline Congressional requests for confidential information involving open criminal investigations); Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252 (1984) (DOJ should comply with Congressional subpoenas of criminal investigations consistent with the restrictions on release of grand jury material).

¹⁶⁷ *See* Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 326 (2002) (“Presidents may have to surrender documents they consider sensitive or confidential to obtain funds from Congress to implement

interprets the appropriations language at issue, but refrains from deciding any Constitutional challenges.¹⁶⁸

Recently, GAO issued a confusing opinion in which it took a liberal interpretation of a purpose prohibition on salary when finding a violation of the prohibition, but then omitted any discussion of the ADA. In *Department of Housing and Urban Development Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012 (Reconsideration)*,¹⁶⁹ the GAO reversed an earlier decision based on receipt of new information, to “conclude that HUD’s General Deputy Assistant Secretary for Congressional and Intergovernmental Relations (General Deputy Assistant Secretary) and the Associate General Counsel prevented the Regional Director from being interviewed by [a] committee from April 8 to April 23, 2013.”¹⁷⁰

Section 713 of the Financial Services and General Government Appropriations Act of 2012 provided:

No part of any appropriation contained in this or any other Act shall be available for the payment of the salary of any officer or employee of the Federal Government, who...prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct oral or written communication or contact with any Member, committee, or subcommittee of the Congress in connection with any matter pertaining to the employment of such other officer or employee or pertaining to the depart-

programs important to the executive branch.”).

¹⁶⁸ *Dep’t of Health & Human Servs.* B-302911, *supra* note 165, at 2, 9–12. (in the face of “constitutional separation of powers concerns” raised by the HHS OIG and DOJ’s O.L.C., the GAO determined it would go forward “absent an opinion from a federal court concluding that [the relevant appropriations act proviso] is unconstitutional”). *Cf. Dep’t of Def.*, B-326013, *supra* note 30, at 5–6 (“It is not our role or our practice to determine the constitutionality of duly enacted statutes.”); Office of Sci. & Tech. Policy—Bilateral Activities with China, B-321982, at 4 (Comp. Gen. Oct. 11, 2011), <http://www.gao.gov/decisions/appro/321982.pdf>.

¹⁶⁹ *Dep’t of Hous. and Urban Dev.—Application of § 713 of the Fin. Servs. and Gen. Gov’t Appropriations Act, 2012 (Reconsideration)*, B-325124.2 (Comp. Gen. Apr. 5, 2016), <http://www.gao.gov/assets/680/676341.pdf>.

¹⁷⁰ *Id.* at 2 (reversing *Dep’t of Hous. and Urban Dev.—Application of § 713 of the Fin. Servs. and Gen. Gov’t Appropriations Act, 2012*, B-325124 (Comp. Gen. June 19, 2014), <https://www.gao.gov/assets/670/664291.pdf>). The General Deputy Assistant Secretary served as HUD’s “primary liaison between Congress and HUD.” *Id.* at 11.

ment or agency of such other officer or employee in any way, irrespective of whether such communication or contact is at the initiative of such other officer or employee or in response to the request or inquiry of such Member, committee, or subcommittee.¹⁷¹

Considering the legislative history of Section 713's "antecedents in several older pieces of legislation" dating back to 1912, the GAO opined that "Congress intended to advance two goals, . . . one being to preserve the First Amendment rights of federal employees and the other being to ensure that Congress had access to programmatic information from frontline employees."¹⁷² Against the background of the latter goal, the GAO considered Section 713 in light of the more fully developed facts.

After HUD produced various documents, provided a staff briefing, and provided various officials for interviews, HUD and committee staff continued to negotiate the Regional Director's interview.¹⁷³ On April 8, committee staff e-mailed HUD, and the Regional Director, about scheduling an interview.¹⁷⁴ HUD counsel did not direct the Regional Director to refuse to testify, but rather instructed the Regional Director not to communicate with committee staff, because "'it was not normal agency practice to have lower level bureaucrats testify,'" and because HUD was still negotiating with the Committee.¹⁷⁵ After a series of e-mail exchanges with the Committee staff, the General Deputy Assistant Secretary, apparently motivated to protect HUD's career employees, indicated that no "particularized need for the addition interviews sufficient to overcome the long-standing institutional concerns raised by questioning of career line employees" had been shown, causing committee staff to elevate the issue to the Committee Chairman, who in turn authorized issuance of a subpoena.¹⁷⁶ HUD then provided the Regional Director to committee staff for an interview.¹⁷⁷ Treating requests from the committee *staff* as synonymous with requests from a "Member, committee, or subcommittee," the GAO determined that HUD's two employees violated

¹⁷¹ *Id.* at 9 (citing Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 713, 125 Stat. 786, 931-32 (2011)).

¹⁷² *Id.*

¹⁷³ *Id.* at 10-11.

¹⁷⁴ *Id.* at 4.

¹⁷⁵ *Id.* at 11.

¹⁷⁶ *Id.* at 5-6.

¹⁷⁷ *Id.* at 7.

Section 713.¹⁷⁸ The GAO characterized HUD’s period of negotiations with committee staff in April as constituting a “pattern of delay and refusal to schedule the transcribed interview in question” motivated by counsel’s concern that the Committee had not justified the Regional Director’s testimony.¹⁷⁹ The GAO viewed HUD counsel’s actions as assisting the General Deputy Assistant Secretary’s “efforts of delay” as well.¹⁸⁰

Conspicuously absent from the opinion was any discussion of an ADA violation. If “[n]o part of any appropriation contained in this or any other Act shall be available for the payment of the salary” of the two HUD employees that GAO determined violated Section 713, then a natural consequence of that determination would seemingly be a concomitant determination that the agency violated the ADA when it paid the salaries. The GAO noted that “HUD’s appropriation was not available to pay the salaries of these employees from the point in time that the delay became a refusal until the time HUD agreed to schedule the interview with the Regional Director.”¹⁸¹ Instead of finding an ADA violation, however, the GAO treated the matter as a salary overpayment and recommended “that HUD seek to recover these payments, as required by 31 U.S.C. 3711.”¹⁸²

Similarly, in *Department of Health and Human Services-Chief Actuary’s Communications with Congress*,¹⁸³ the GAO determined that HHS’s appropriation was unavailable to pay the salary of a supervisory employee who allegedly ordered his subordinate employee not to provide certain information to congressional members and staff, and who allegedly threatened

¹⁷⁸ *Id.* at 14. The GAO opinion indicates that all e-mail contact with the HUD General Deputy Assistant Secretary and Associate General Counsel between April 8 and April 23 were from committee staff. *Id.* at 4–6. Once the Chairman of the Committee authorized a subpoena, HUD made the Regional Director available. *Id.* On 26 October 2012, the Chairman did send a letter to HUD, however, requesting to interview the Regional Director. *Id.* at 3.

¹⁷⁹ *Id.* at 12. The period prior to April was characterized as a period of “mutual accommodation.” *Id.* at 14.

¹⁸⁰ *Id.* During an interview with committee staff, the Regional Director testified that he had been advised by counsel not to speak with the staff. *Id.* at 7.

¹⁸¹ *Id.* at 15.

¹⁸² *Id.* Section 3711(a)(1) directs an agency to “try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency.” 31 U.S.C. § 3711(a)(1) (2012).

¹⁸³ *Dep’t of Health & Human Sers.* B-302911, *supra* note 165.

to sanction that employee for unauthorized disclosures.¹⁸⁴ Here the request for information and technical assistance came not only from committee staff, but from members as well, and the GAO opinion evidences no period of negotiation between Congress and agency officials.¹⁸⁵ Having found a violation of the HHS appropriations act proviso prohibiting interference with communications with Congress, the GAO posited that HHS's appropriations were unavailable to pay the supervisor's salary.¹⁸⁶ Instead of finding an ADA violation for salary payments when HHS's appropriations were unavailable for that purpose, the GAO instead only opined that "HHS should consider such payments improper," and "seek to recover these payments, as required by 31 U.S.C. § 3711."¹⁸⁷

III. TIME VIOLATIONS

Agencies that commit time violations by charging the wrong fiscal year's appropriation may cure such errors before they ripen into an ADA violation.¹⁸⁸ Similar to the test for curing a pure purpose violation, "[t]he use of the wrong fiscal year (time limitation) can be adjusted if the proper funds (appropriation, year, and amount) are available at the time of obligation and at the time of correction."¹⁸⁹ Thus, for example, an agency that obligates FY 02 funds for a FY 01 *bona fide* need can cure the improper obligation by adjusting the FY 01 and FY 02 accounts, assuming the FY 01 funds were available at the time of improper obligation and at the time of correction.

¹⁸⁴ *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 2. The GAO relied on the factual findings of the HHS OIG. *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 2. Also, the appropriations act provision allegedly violated by the HHS supervisory employee was identical to Section 713, discussed above. *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 4. *But see* Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, 28 Op. O.L.C. 79 (2004) (HHS officials have the authority "to prevent or prohibit their officers or employees, either individually or in association, from presenting information to the United States Congress, its Members or committees, concerning relevant public policy issues.").

¹⁸⁵ *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 2–3.

¹⁸⁶ *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 9.

¹⁸⁷ *Dep't of Health & Human Servs.* B-302911, *supra* note 165, at 12–13.

¹⁸⁸ GAO Red Book II, *supra* note 6, at 6-80 ("charging the wrong fiscal year" may be cured by adjusting accounts). *See also* DoD FMR, *supra* note 10, vol. 14, ch. 2, at ¶ 020102(C) ("The use of the wrong . . . fiscal year funds (time limitation), generally will not result in an ADA violation if the error can be properly corrected.").

¹⁸⁹ DoD FMR, *supra* note 10, vol. 14, ch. 2, at ¶ 020102(C)(2).

The ability to cure a time violation is less clear when the agency obligates FY 01 funds for a *bona fide* need of FY 02. Under such circumstances, the agency has, in effect, obligated funds in advance of the FY 02 appropriation. Using the test articulated above, the agency would not be able to cure the time violation because proper funds (FY 02) were not available at the time of the improper FY 01 obligation. Although not entirely clear on the matter, GAO has issued at least two opinions suggesting that an agency can cure forward as well as cure backwards.

In *Farmers Home Administration (FmHA) Purchase of Office Chairs*,¹⁹⁰ the FmHA obligated erroneously FY 1990 funds for a June 1991 (FY 1991) delivery order for office chairs scheduled to be delivered in November and December 1991 (FY 1992).¹⁹¹ Further, the FmHA made two actual payments to the vendor using FY 1990 funds.¹⁹² Discovering its error, FmHA “change[d] the funding code [for the delivery orders] from fiscal year 1990 to fiscal year 1991,” indicated that all future payments would be made from FY 1991 funds, and “submitted documentation to change the payments made in fiscal year 1990 to fiscal year 1991 and to deobligate any remaining fiscal year 1990 funds.”¹⁹³ Reviewing FmHA’s activities for ADA violations, the OGC found two: (1) using FY 1990 funds to issue a delivery order in June 1991, “unavailable for putative 1991 needs” and (2) “FmHA’s subsequent correction to establish an obligation for the chairs in fiscal year 1991, and to make the remaining payments with fiscal year 1991 funds, violated the Antideficiency Act because the June 1991 order did not reflect a bona fide need of fiscal year 1991, but of fiscal year 1992.”¹⁹⁴

¹⁹⁰ *Farmers Home Administration (FmHA) Purchase of Office Chairs*, 73 Comp. Gen. 259 (1994).

¹⁹¹ *Id.* at 260. Originally, FmHA had obligated FY 1990 funds on September 1991 delivery orders with a delivery date not later than September 28, 1990. *Id.* When office space became unavailable, FmHA reissued the orders in October 1990 with a delivery date of April 1991. *Id.* Subsequently, the Inspector General determined that some orders had been improperly split to circumvent maximum order limitations and other orders lacked specificity as to what had been ordered. *Id.* The Office of General Counsel (OGC) determined that the orders were void *ad initio* and that FY 1990 funds were unavailable to reorder the furniture. *Id.* Further, the OGC recommended that the orders be canceled, that FY 1990 funds be deobligated, and that FmHA use FY 1991 funds for reissued orders. *Id.*

¹⁹² *Id.* at 260.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 261.

The GAO determined that no reportable ADA violations had occurred. The GAO agreed that FmHA's use of the FY 1990 funds for a FY 1991 delivery order and to pay the contractor was improper, but pointed out that FmHA "had sufficient funds in the proper account to be charged, and has adjusted the accounts to correct the mistake."¹⁹⁵ Given the correction, no ADA had occurred because "FmHA has not made or authorized an expenditure or obligation exceeding an amount available in an appropriation of fund for the expenditure or obligation."¹⁹⁶

In addition, GAO disagreed with OGC's conclusion that FmHA committed an ADA violation because FmHA used FY 1991 funds for chairs delivered in FY 1992, in violation of the bona fide needs rule.¹⁹⁷ The GAO determined that FmHA was simply replenishing its stock of office chairs as the offices were being renovated. Thus, FmHA could "issue orders to replace stock items used in the year in which the contract is made, even though the replacement items will not be used until the following fiscal year."¹⁹⁸

More recently, GAO provided additional support for the ability to cure forward in *U.S. Small Business Administration-Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum*.¹⁹⁹ Here, the Small Business Administration (SBA) awarded an indefinite-delivery indefinite quantity (IDIQ) firm fixed-price contract on September 21, 2009 (FY 2009) with a

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* The bona fide needs rule "permits use of annual appropriations only for expenses serving a legitimate need of the year(s) for which the appropriation was made." *Id.* at 262 n.1.

¹⁹⁸ *Id.* at 262. "Thus, stock items ordered from a federal supply schedule contract, such as the office chairs at issue here, are chargeable to the appropriation available in the year ordered." *Id.* This decision has been the object of scholarly criticism. See, e.g., Major Andy Hughes, *Contract Law Notes: The GAO Clearly Makes Time Violations Correctible*, ARMY LAW., May 1995, at 62, 64 ("the GAO's analysis of whether FmHA violated the 'bona fide need' rule by using fiscal year 1991 funds to pay for supplies not delivered until 1992 is more obscure"); *id.* at 65 ("FmHA creates confusion over the exact scope of the 'stock level' exception to the bona fide needs rule as to supply contracts."); Hancq, *supra* note 93, at 36 ("unclear and anomalous reasoning") ("FmHA apparently tried to pay for a new obligation with expired funds that were not available for that obligation, which seems uncorrectable. Furthermore, FmHA apparently violated the Antideficiency Act by contracting before an appropriation, but the Comptroller found no violation. The decision fails to address these issues satisfactorily.").

¹⁹⁹ U.S. Small Bus. Admin.—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum, B-321640, 2011 CPD ¶ 184 (Comp. Gen. Sept. 19, 2011).

\$290,000 guaranteed minimum for the base year, but unilaterally increased the guaranteed minimum on September 28 to \$1,315,000.²⁰⁰ Upon award of the IDIQ contract, the SBA was required to record an obligation for the full amount of the guaranteed minimum.²⁰¹ The SBA obligated \$1,291,000 of FY 2009 appropriations and \$24,000 of no-year funds-funds available for obligation without regard to any fiscal year limitations.²⁰² Next, the SBA exercised the first option year in September 2010 (FY 2009) and obligated \$1,860,000 in FY 2010 funds, followed by the issuance of several task orders during Fiscal Year 2010 funded with a mixture of FY 2009, FY 2010, FY 2009/2010 multi-year and no-year funds.²⁰³

The GAO posited that the guaranteed minimum in an IDIQ contract must “reflect the *bona fide* needs of the agency at the time of execution of the contract,” recognizing that “what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case.”²⁰⁴ The GAO determined that the SBA did not have a *bona fide* need that would justify obligating \$1,295,000 in FY 2009, pointing out that the SBA did not issue any task orders until FY 2010.²⁰⁵ Further, the GAO opined that the SBA did not have a *bona fide* need that would justify obligating \$1,860,000 during FY 2010 because the bulk of those funds were used on task orders issued in the following fiscal year.²⁰⁶

In response, the SBA “adjusted its fiscal years 2009 and 2010 appropriations accounts to correct the *bona fide* needs violation.”²⁰⁷ In other words, the SBA cured forward the time violations. The GAO opinion was devoid

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.* at 2. The SBA unilaterally modified the contract to increase the guaranteed minimum with no apparent objection by the contractor. *Id.* at 2 n.2.

²⁰² *Id.* at 1. No year funds (which are also known as “no year appropriations”) are available for obligation without any time limitation. Gen. Servs. Admin.—Availability of No-Year Appropriations for a Modification of an Interagency Order, B-326945 (Comp. Gen. Sept. 28, 2015), <http://www.gao.gov/assets/680/672767.pdf>.

²⁰³ *U.S. Small Bus. Admin.*, B-321640, 2011 CPD ¶ 184, at 2.

²⁰⁴ *Id.* at 4.

²⁰⁵ *Id.* “[T]ask orders must be funded with appropriations available at the time of the issuance of the task order...” *Id.* at 5.

²⁰⁶ *Id.* at 4.

²⁰⁷ *Id.*

of any discussion of an ADA violation, but instead simply noted that “we approve of SBA’s remedial actions....”²⁰⁸

A. Use of Closed Accounts

Time-limited appropriations must be obligated during their period of availability.²⁰⁹ For five fiscal years following the initial period of availability, funds are in an expired status, retaining their fiscal year identity and remaining available only for “recording, adjusting, and liquidating obligations properly chargeable to that account.”²¹⁰ At the end of five fiscal years, the account is closed “and any remaining balance (whether obligated or unobligated) in the account shall be cancelled and thereafter shall not be available for obligation for any purpose.”²¹¹ Cancelled “appropriations, in effect, no longer exist”²¹² and the “[c]anceled balances are unavailable to pay any obligation” even one otherwise properly incurred prior to the closing of the appropriation.²¹³

Another issue arising in the ADA case law is the impact of the Account Closing Statute, 31 U.S.C. § 1553(b), on an agency’s ability to cure an ADA violation. Although the GAO has issued seemingly conflicting opinions, the statute merely provides a vehicle for paying certain otherwise valid obligations, but does not save the agency from an ADA violation.

The account closing statute provides that “after the closing of an account...obligations and adjustments to obligations that would have been

²⁰⁸ *Id.* at 5.

²⁰⁹ Expired Funds and Interagency Agreements between GovWorks and the Dep’t of Def., B-308944, 2007 CPD ¶ 157, at 10 (Comp. Gen. July 17, 2007) (“a fixed-term appropriation is available only for payment of expenses properly incurred during the appropriation’s period of availability....”)

²¹⁰ 31 U.S.C. § 1553(a) (2012). *See also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ch. 2, pt. C, sec. 2, at 2-29 (4th ed. 2016).

²¹¹ 31 U.S.C. § 1552(a). *See also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-747, CANCELLED DoD APPROPRIATIONS: IMPROVEMENTS MADE BUT MORE CORRECTIVE ACTIONS ARE NEEDED, 1 (July 2002) [hereinafter GAO-02-747]. (“After closing, the appropriations account could no longer be used for obligations or expenditures for any purpose.”)

²¹² GAO Red Book II, *supra* note 6, at 5-75.

²¹³ Election Assistance Comm’n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation, B-318831, at 5 (Comp. Gen. Apr. 28, 2010), <http://www.gao.gov/assets/390/388739.pdf>. *See* DoD FMR, *supra* note 10, vol. 3, ch. 10, at ¶ 1002(B) (“When balances are cancelled, the amounts are not available for obligation or expenditure for any purpose”).

properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account of the agency may be charged to any current appropriation account of the agency available for the same purpose.”²¹⁴ The mere fact that an account closes does not eliminate the agency’s obligation to pay for goods and services.²¹⁵ Invoices, claims or other requests for payment received by an agency after an account closes are payable from current year funds available for the same purpose.²¹⁶ However, “[w]hen a currently available appropriation is used to pay an obligation, which otherwise would have been properly chargeable (both as to purpose and amount) to a closed/cancelled appropriation, the total of all such payments from that current appropriation” is subject to certain limitations.²¹⁷ “The total amount of charges to an account under paragraph (1) may not exceed an amount equal to 1 percent of the total appropriations for that account.”²¹⁸

The GAO has discussed curing an ADA violation involving a closed account. In *The Honorable Andy Ireland*,²¹⁹ GAO noted that an overobligation of a prior year fixed period appropriation is a reportable violation of the ADA. Addressing the account closing statute, which permits payment

²¹⁴ 31 U.S.C. § 1553(b)(1) (2012).

²¹⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 1-06, FINANCIAL MANAGEMENT OPERATIONS, 5-6 ¶ 5-19 (Apr. 15, 2014) [hereinafter FM 1-06]. (“The closure or cancellation of an appropriation does not eliminate the Government’s legal obligation to pay contractors for services rendered or products delivered.”).

²¹⁶ *Id.* at 2-10 ¶ 2-39 (“Any old bills with valid obligations that show up after the account is closed must be obligated against and disbursed from currently available (i.e., in the unexpired phase) budget authority for the same general purpose.”).

²¹⁷ DoD FMR, *supra* note 10, vol. 3, ch. 10, at ¶ 100303(D).

²¹⁸ 31 U.S.C. § 1553(b)(2). See GAO-02-747, *supra* note 211, at 6 n.7 (“agencies may not (1) use more than 1 percent of the current amount appropriated for the same purpose or (2) make any payment otherwise chargeable to the closed account that would cause cumulative outlays to exceed the unexpended balance remaining in the closed account”). Agencies must be able to “[i]dentify the unobligated balance and unpaid obligations of all closed/cancelled appropriations at the time they are closed/cancelled” and further identify “all obligations and payments that are charged to currently available appropriations that otherwise would have been properly chargeable (both as to purpose and amount) to a closed/cancelled appropriation...” DoD FMR, *supra* note 10, vol. 3, ch. 10, at ¶ 100303(E)(2), (3); GAO-02-747, *supra* note 211, at 1 (“Because agencies need to keep accurate records, they may, in limited circumstances, adjust accounting records pertaining to closed accounts to correct unrecorded or improperly charged disbursements.”). See also DoD FMR, *supra* note 10, vol. 3, ch. 10, at ¶ 100303(D).

²¹⁹ Hon. Andy Ireland, 71 Comp. Gen. 502 (1992).

of valid obligations properly chargeable to closed accounts from current appropriations subject to certain limitations, the GAO explained that :

In order for an obligation to be eligible for liquidation with current funds under amended section 1553(b), it must have been “properly chargeable” to the closed account, both as to purpose and in amount. Subsection 1553(b) is not intended to provide an exception to the Antideficiency Act or to permit an agency to cure an incipient Antideficiency Act violation by charging an overobligation to current funds. This section is meant to provide a mechanism for the liquidation only of obligations that would not have caused a violation of the Antideficiency Act had they been charged to the account to which they would have been chargeable had available balances not been rescinded.²²⁰

In *Election Assistance Commission—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*,²²¹ the EAC violated the purpose statute by obligating certain grant programs against the wrong (requirements payments) appropriation in FY 2004, when it should have obligated them against its Salaries and Expenses (S&E) appropriation. To cure the violation, EAC needed to deobligate the amounts improperly charged to the requirements appropriation and charge the S&E account.²²² The S&E account closed on September 30, 2009, however, and all balances were cancelled.²²³

Discussing the closed account statute, GAO noted that a cancelled balance was unable to pay for any obligation, but that “an obligation that would have been properly chargeable to the canceled appropriation must be paid from a current appropriation available for the same purpose” subject to the limitation that “[t]he aggregate total of such obligations may not exceed the lesser of 1 percent of the current appropriation or the unexpended balance of the closed appropriation.”²²⁴ At this point, it appears clear that the GAO was discussing the use of current year funds to liquidate an obligation

²²⁰ *Id.* at Enclosure.

²²¹ *Election Assistance Comm’n—Obligation of Fiscal Year 2004 Requirements Payments Appropriation*, B-318831, at 5 (Comp. Gen. Apr. 28, 2010), <http://www.gao.gov/assets/390/388739.pdf>).

²²² *Id.* at 5.

²²³ *Id.*

²²⁴ *Id.*

chargeable to the closed account, which was unavailable to expend funds in satisfaction of the obligation.

Continuing, GAO noted that “EAC would have to look to its current appropriations when adjusting its accounts to *fix the fiscal year 2004 purpose violation*.”²²⁵ If, after adjusting its accounts, EAC finds that sufficient funds do not exist, EAC must report the overobligation...as a violation of the Antideficiency Act....²²⁶ At this point, GAO appears not to be discussing how to pay the obligation, but rather was discussing how to cure the FY 2004 purpose violation with current year funds so as to avoid an ADA violation. If this interpretation is correct, such a position would be contrary to GAO’s *Honorable Andy Ireland* opinion and would lack support from the plain language of the Account Closing Statute.²²⁷ Clearly, the EAC could have used its current year funds to pay the FY 2004 obligation, and “fix” the FY 2004 purpose violation in that sense. If the EAC had obligated in excess of its FY 2004 appropriations then an ADA violation would have occurred in FY 2004. It is unclear how GAO’s determination as to whether the FY 2004 purpose violation had ripened into an ADA violation would be dependent upon the sufficiency of current-year funds (FY 2010) to satisfy a FY 2004 obligation.

A violation of the purpose statute in the closed account context raises an interesting question as to whether any ADA is even possible once the account closes, if a sufficient amount of the proper funds were available at the time the account closes. The ADA prohibits an officer or employee of the United States from making or authorizing “an expenditure or obligation exceeding *an amount available in an appropriation* or fund for the expenditure or obligation....”²²⁸ A violation of the Purpose Statute, 31 U.S.C. § 1301, does not mature into an ADA violation if the agency had proper funds *available* for the obligation at the time of the purpose violation and had sufficient proper funds available in that account to correct an improper obligation or expenditure.²²⁹ If proper funds are available at both points in time, no ADA arises—and indeed arguably cannot arise—because the officer

²²⁵ *Id.* (emphasis added).

²²⁶ *Id.* at 6.

²²⁷ See GAO-02-747, *supra* note 211, at 2 n.4 (“An adjustment to a closed appropriation account is illegal if the appropriation account being charged (1) was closed before the initial disbursement was made or (2) *had not yet been enacted when the initial disbursement was made.*”) (emphasis added).

²²⁸ 31 U.S.C. § 1341(a)(1)(A) (2012) (emphasis added).

²²⁹ GAO Red Book II, *supra* note 6, at 6-80.

has not exceeded an amount *available* in the appropriation and cannot exceed an amount available once the account closes, so long as sufficient funds were available at the time the account closed. The point of account closure is the last point in time when the agency could have expended funds that would have resulted in actually exceeding the amount available in the appropriation. Once the account closes “any remaining balance (whether obligated or unobligated) in the account shall be cancelled and thereafter shall not be available for obligation or expenditure for any purpose.”²³⁰

Further, for ADA purposes, presumably the adjustment of accounts is designed, at least in part, to properly account for the agency’s money so that an amount is not actually exceeded, rather than merely a ministerial book keeping exercise. If at the point of account closure proper funds are sufficiently available in the account, the fact that an agency had not actually adjusted the accounts beforehand should not preclude a determination that no ADA violation has occurred.

Another issue that has arisen in the ADA context is the impact of subsequently enacted no-year funds. Later-in-time appropriated no-year funds would not likely be available to cure a purpose, time or amount violation arising in a prior fiscal year. In *General Services Administration-Availability of No-Year Appropriations for a Modification of an Interagency Order*,²³¹ the General Services Administration (GSA) inquired whether it could “accept no-year appropriations from a customer agency to fund the increased cost resulting from a modification to an interagency order, even though the no-year funds were appropriated in a fiscal year subsequent to the fiscal year in which the original liability was incurred.”²³² To pay for an in-scope modification to an FY 2011 order with GSA, the customer agency wished to use FY 2015 appropriated no-year funds.²³³

The GAO reasoned that the statutory limitation on the time availability of funds, 31 U.S.C. § 1502(a),²³⁴ and the related *bona fide* needs rule

²³⁰ 31 U.S.C. § 1552(a) (2012).

²³¹ Gen. Servs. Admin.—Availability of No-Year Appropriations for a Modification of an Interagency Order, B-326945 (Comp. Gen. Sept. 28, 2015), <http://www.gao.gov/assets/680/672767.pdf>.

²³² *Id.* at 1.

²³³ *Id.* at 2.

²³⁴ That statute provides: “The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the

applied only to appropriations available for obligation for a fixed period.²³⁵ Further, GAO noted that, in contrast to time-limited funds, “no-year funds are available for periods that are not fixed but, instead, are unlimited” and “all statutory time limits as to when the funds may be obligated and expended are removed.”²³⁶ In GAO’s view, any temporal limits on the availability of the funds were nonexistent.²³⁷ Accordingly, “GSA may accept no-year funds for any need, whether past, present, or future, though of course any such use may also be consistent with any other restrictions (such as to purpose or amount) upon the appropriation’s availability.”²³⁸

GAO’s broad view²³⁹ of the use of no-year funds raises the question as to their availability to retroactively cure a purpose, time or amount violation. Although GAO did not elaborate further on the scope of its decision, it appears that an agency could use currently-appropriated no-year funds to liquidate an obligation in a prior fiscal year, but it is unclear whether currently-appropriated no-year funds could be viewed as retroactively *available* to cure an earlier purpose, time, or amount violation. The GAO has not advanced such a position in any of its opinions and such a position would be inconsistent with the general rule that the ability to cure a purpose or time violation requires the availability of proper funds at both the point of violation and correction.²⁴⁰ Further, as discussed below, an amount violation is generally viewed as incurable.

period of availability or to complete contracts properly made within that period.” *Id.* at 2.

²³⁵ *Id.* at 2–3. The *bona fide* needs rule provides “that a time-limited appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the time period for which the appropriation was made.” *Id.* at 2.

²³⁶ *Id.* at 3.

²³⁷ “Because the appropriation’s temporal availability is unlimited, the temporality of the needs that the appropriation may satisfy is also unlimited.” *Id.* at 3.

²³⁸ *Id.* at 3.

²³⁹ Because the language associated with no-year funds—remain available until expended—suggests no retroactive application, GAO could have determined alternatively that no-year funds existed only once appropriated and were not time-limited only going forward.

²⁴⁰ See GAO Red Book II, *supra* note 6, at 6-80; DoD FMR, *supra* note 10, vol. 14, ch. 2, at ¶ 020102(C)(1)–(2).

IV. AMOUNT

The ADA prohibits an officer or employee of the federal government from obligating or expending an amount in excess of that available in an appropriation or fund,²⁴¹ or in an apportionment.²⁴² With respect to an apportionment, the GAO has opined that “[i]f an agency overobligates its apportionment, even though there may be an adequate appropriation, the agency violates the Antideficiency Act.”²⁴³ The GAO has not been forgiving when discussing amount violations and the general consensus is that an amount violation cannot be cured.²⁴⁴ Once that fiscal genie has left the bottle, an agency cannot put it back in.

In *Forest Service—Apportionment Limitation for Aviation Resources*,²⁴⁵ OMB apportioned funds to the Forest Service on a quarterly basis, but the apportionment contained a footnote providing that “[n]ot more than \$100,000,000 of suppression funds is available for acquisition of aviation resources....”²⁴⁶ The Forest Service interpreted the footnote as applying to the entire year and not to a single quarter.²⁴⁷ The footnote was removed, but reinserted by OMB on July 21, and by the end of the month the Forest Service had exceeded the \$100 million apportioned for aviation resources.²⁴⁸ On August 4, the Forest Service informed OMB that the Service had exceeded the apportionment and requested a reapportionment, which OMB granted on

²⁴¹ 31 U.S.C. § 1341(a)(1)(A) (2012). *See also* 2007 O.L.C. Opinion, *supra* note 77, at 63 (“An officer or employee most clearly would violate the ADA if an appropriation statute appropriated \$X for some account or object, and he spent more than \$X—in other words, ‘excess’ or ‘deficiency’ spending.”).

²⁴² 31 U.S.C. § 1517(a) (2012).

²⁴³ Denali Comm’n—Overobligation of Apportionment, B-316372, at 3 (Comp. Gen. Oct. 21, 2008), <http://www.gao.gov/decisions/appro/316372.pdf>.

²⁴⁴ Matthew H. Solomon, Chad E. Miller, and Wesley A. Demory, *Fiscal Matters: An Introduction to Federal Fiscal Law & Principles*, 10-7 BRPAPERS 1, 14 (2010) (“there is no way to correct an amount violation”). *Cf.* DoD FMR, *supra* note 10, vol. 14, ch. 2, at ¶ 020102(C) (discussing how to cure purpose and time violations, but not amount violations; *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, (2012) (holding the “not to exceed” language precludes an agency from reprogramming other funds to pay for additional costs).

²⁴⁵ *Forest Serv.—Apportionment Limitation for Aviation Resources*, B-310108 (Comp. Gen. Feb. 6, 2008), <http://www.gao.gov/assets/390/382138.pdf>.

²⁴⁶ *Id.* at 2.

²⁴⁷ *Id.* As early as October 2005, the Forest Service considered the amount insufficient for their anticipated needs. *Id.* The footnote was removed, but eventually reinserted. *Id.* at 5.

²⁴⁸ *Id.* at 2, 4.

the same day.²⁴⁹ This did not save the Forest Service from an ADA violation. The GAO reasoned: “at that point, the violation had already occurred, and the fact that funds were subsequently reapportioned to cover the obligations does not alter the conclusion.”²⁵⁰

The GAO took a similarly strict position in *Gloria Joseph*.²⁵¹ There, the National Labor Relations Board (NLRB) received an apportionment of \$1 million, which NLRB and the Office of Management and Budget (OMB) considered to be only a spending floor, with the further understanding that OMB would reapportion if NLRB needed additional funding.²⁵² Subsequently, NLRB informed OMB that additional funding was needed and hand-delivered a reapportionment request.²⁵³ The NLRB budget officer assumed OMB had signed the reapportionment request and authorized an obligation of funds in excess of the original apportionment, when in fact the request had been lost within OMB and never signed.²⁵⁴ NLRB resubmitted the request, which OMB then signed.²⁵⁵ Under these circumstances, the GAO determined that NLRB violated the ADA—“at least technically.”²⁵⁶ Further, conceding that an ADA report “would have only limited utility,” the GAO nevertheless recommended that NLRB submit the required ADA report.²⁵⁷

In *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap within an Appropriation*,²⁵⁸ the OLC determined that the violation of an “internal cap” contained within an appropriations act on the use of appropriated funds generally results in an ADA violation.²⁵⁹ An “internal cap prohibits an agency from expending any of its funds in

²⁴⁹ *Id.* at 4. OMB increased the apportionment limitation to \$175 Million. *Id.*

²⁵⁰ *Id.* at 5.

²⁵¹ Gloria Joseph, B-253164 (Comp. Gen. Aug. 23, 1993), <http://www.gao.gov/assets/670/664216.pdf>.

²⁵² *Id.* at 1.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 2.

²⁵⁷ *Id.*

²⁵⁸ *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap within an Appropriation*, 25 Op. O.L.C. 33 (2001).

²⁵⁹ *Id.* at 35 (“[A] violation of a condition... within an appropriation would generally constitute a violation of the Antideficiency Act.”).

excess of a designated amount for a particular purpose.”²⁶⁰ In this opinion, the OLC addressed an appropriations act provision stating “[t]hat none of the funds available to the Immigration and Naturalization Service [‘INS’] shall be available to pay any employee overtime pay in an amount in excess of \$30,000 during the calendar year beginning January 1, 2000.”²⁶¹

Focusing on the language of 31 U.S.C. § 1341(a)(1)(A), which “prohibits any ‘expenditure or obligation exceeding an amount *available* in an appropriation or fund *for the expenditure of obligation*,’” the OLC interpreted the term “available” to incorporate “the concept of ‘validity,’” and thus read into section 1341(a)(1)(A) “an additional requirement of legal permissibility.”²⁶² Accordingly, for purposes of the INS internal cap, only \$30,000 was available for the purpose of paying employee overtime and any amount expended in excess of \$30,000 for that purpose would violate the ADA even if the expenditure did not cause the INS to exceed the total amount available for that appropriation.²⁶³

A potentially unresolved issue is whether an ADA violation occurs if an agency violates an amount limitation contained in a law other than an appropriations act. As discussed earlier, in *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*,²⁶⁴ the OLC determined that “a violation of a statutory restriction on spending does not violate [the ADA] where the restriction is not ‘in an appropriation.’”²⁶⁵ Although the OLC was analyzing the issue in the context of a purpose violation, the GAO interpreted OLC’s opinion to suggest that its holding extended to amount violations as well. In *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*,²⁶⁶ the GAO disagreed, not only with OLC’s holding in that opinion generally, but also to any extension of the opinion to amount violations. The GAO stated that “[a]lthough the 2007 OLC

²⁶⁰ *Id.* at 34.

²⁶¹ *Id.* For purposes of its opinion, the O.L.C. adopted a “narrow” definition of an internal cap and elected not to address other Congressional limits on appropriations, such as earmarks and ceiling. *Id.*

²⁶² *Id.* at 36 (emphasis in original).

²⁶³ *Id.* at 36.

²⁶⁴ *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54 (2007).

²⁶⁵ *Id.* at 68. The ADA may be triggered if the statutory restriction is incorporated by reference into an appropriations act. *Id.* at 62.

²⁶⁶ *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*, B-317450, 2009 CPD ¶ 72 (Comp. Gen., Mar. 23, 2009).

Opinion focuses on a purpose violation, OLC, in the opinion, also discussed what it called internal caps or amount limitations enacted in appropriations acts, and suggested that a violation of an amount limitation enacted in other laws would not constitute an Antideficiency Act.²⁶⁷ For the same reasons that it disagreed with OLC's opinion concerning the violation of a purpose limitation, GAO disagreed "with OLC's view of amount limitations."²⁶⁸

A potential ADA violation involving an apparent amount violation may be avoided, however, if the agency determines that the amount recorded was in error. Here, the agency would not be curing an amount violation because one does not actually exist. The recording of an obligation is not dispositive for ADA purposes.²⁶⁹ "An ADA violation is not considered to have occurred when an over-obligation or over-expenditure results solely from recording a transaction in an erroneous account or recording an incorrect amount for a transaction."²⁷⁰ For example, an agency may record more than it actually obligates, such as when the agency records a single obligation twice²⁷¹ or records estimated obligations and subsequently determines that the actual obligation was less.²⁷²

²⁶⁷ *Id.* at 3 n.3 (citing 2007 O.L.C. Opinion, *supra* note 77).

²⁶⁸ *Id.*

²⁶⁹ GAO Red Book II, *supra* note 6, at 6-46 ("prima facie evidence of a violation of the [ADA], but is not conclusive"). See *Denali Comm'n*, B-316372, *supra* note 243, at 1 ("Compliance with the Antideficiency Act is measured at the time an agency incurs an obligation, not when it records the obligation."); DoD FMR, *supra* note 10, vol. 3, ch. 8, at ¶ 081505(C) (Feb. 2016) ("If a valid obligation actually had been incurred in excess of available funds, the actual incurrence of the obligation, rather than the recording of the obligation, would be considered to have caused the apparent violation.").

²⁷⁰ DoD FMR, *supra* note 10, vol. 14, ch. 2, at ¶ 020203.

²⁷¹ DoD FMR, *supra* note 10, vol. 3, ch. 8, at ¶ 081505(A) (Feb. 2016) ("If it is determined that the Financial Manager action resulted in a duplicate of an obligation that previously was recorded in the official accounting records, the Financial Manager action immediately must be reversed after the error is identified and no Antideficiency Act violation will be considered to have occurred.").

²⁷² FM 1-06, *supra* note 214, at 5-5 ¶ 5-17 ("When actual obligation amounts become known, reverse and replace estimated obligations with actual obligations"), See also GAO Red Book II *supra* note 6, at 7-23 ("adjust this initial obligation amount up or down periodically as more precise information becomes available"); Cf. Nat'l Mediation Bd.—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Bds. Under the Railway Labor Act, B-305484, 2006 WL 1669294, at *2 (Comp. Gen. June 2, 2006) ("NMB should record an obligation based on its best estimate of the costs of paying the arbitrator and adjust the obligation up or down as more information becomes available.").

In a similar vein, if an agency initially determines that it may have obligated in excess of an appropriation, it may be possible to avoid an ADA violation by deobligating²⁷³ funds from other obligations attributable to the relevant appropriation. “[F]unds deobligated within the original period of obligational availability are once again available for new obligations just as if they had never been obligated in the first place.”²⁷⁴ “Funds deobligated after the expiration of the original period of obligational availability are not available for new obligations [but] may be retained as unobligated balances in the expired account until the account is closed...and are available for adjustments in accordance with 31 U.S.C. 1553(a).”²⁷⁵ The GAO cautions, however, that funds may only be deobligated for a “valid reason,” which does not include “solely to ‘free them up’ for new obligations.”²⁷⁶ Accordingly, if, after it initially records obligations in excess of an amount available, the agency deobligates funds for any valid reason that relates back to that appropriation, the agency should not have an ADA violation. The deobligation would result in a downward adjustment of previously recorded obligations to reflect the agency’s actual obligational amount.

Further, the GAO has simply eliminated most judicial awards as an event that triggers an ADA violation.²⁷⁷ In *Bureau of Land Management—Reimbursement of Contract Disputes Act Payments*,²⁷⁸ the GAO extended this ADA exclusion to “a judicial or quasi-judicial judgment or award,” to include judgments rendered by agency boards of contract appeals.²⁷⁹ The apparent justification for the exclusion is that the agency is largely unable to avoid the overobligation, which is ultimately the result of the actions of a judge and not of federal employees.²⁸⁰

²⁷³ A “deobligation” refers to “an agency’s cancellation or downward adjustment of previously incurred obligations.” GAO Red Book II, *supra* note 6, at 7-59.

²⁷⁴ GAO Red Book II, *supra* note 6, at 7-60.

²⁷⁵ GAO Red Book II, *supra* note 6, at 7-60.

²⁷⁶ GAO Red Book II, *supra* note 6, at 7-60.

²⁷⁷ GAO Red Book II, *supra* note 6, at 6-87. *See also* Hancq, *supra* note 93, at 37 (“Judicial awards, even if they exceed available appropriations, do not violate the Antideficiency Act.”).

²⁷⁸ Bureau of Land Mgmt.—Reimbursement of Contract Disputes Act Payments, 63 Comp. Gen. 308 (1984).

²⁷⁹ *Id.* at 312 (citing Decision of Comptroller General McCarl, 1 Comp. Gen. 540 (1922)).

²⁸⁰ GAO Red Book II, *supra* note 6, at 6-87. *Cf.* Hancq, *supra* note 93, at 37 (“The Antideficiency Act applies only to Executive Branch management of appropriations.”).

V. CONCLUSION

To the extent they exist, legally and factually, it is clear that an agency can cure pure purpose violations and a time violation—at least backwards—before they ripen into an ADA violation, if proper funds were available at the time of the violation and at the time of account correction. Further, an agency does not have the ability to cure an amount violation, at least when the agency exceeds an apportionment or an amount limitation contained in an appropriations act. Beyond this, the clarity of the law in this area quickly begins to muddy.

Clearly, OLC and GAO do not see eye-to-eye on several appropriations issues. These two fiscal pachyderms have butted heads on several matters, most notably whether violations of statutory purpose and amount restrictions not contained in an appropriations act are susceptible to triggering an ADA violation. In addition, the GAO has advanced several significant opinions in the ADA context without adequately explaining its reasoning. The *Dash Engineering* and *Farmers Home Administration* opinions being cases in point. For practitioners in this field, the lack of clarity in the law will present both challenges and opportunities as they strive to cure potential ADA violations.

WOMEN IN THE CROSSHAIRS: EXPANDING THE
RESPONSIBILITY TO PROTECT TO HALT EXTREME
GENDER-BASED VIOLENCE

*MAJOR CHRISTOPHER M. BAILEY**

I.	INTRODUCTION	76
II.	THE GENDER GAP UNDER THE RESPONSIBILITY TO PROTECT (R2P)	80
	A. International Legal Basis for R2P Generally	80
	B. Crimes Subject to R2P	87
III.	WOMEN, PEACE AND SECURITY AGENDA: RECOGNITION WITHOUT AUTHORITY TO ACT.....	90
IV.	MODEL SECURITY COUNCIL RESOLUTION ON THE RESPONSIBILITY TO PROTECT ON BASIS OF GENDER	93
	A. Model Security Council Resolution.....	93
	B. Applying the Model Resolution to Organizations like ISIS, Boko Haram, & Sudanese People’s Liberation Army	97
V.	CONCLUSION	99

*Major Christopher M. Bailey, Judge Advocate, United States Air Force (LL.M., University of Nebraska College of Law (2017); J.D., Chicago-Kent College of Law (2010); B.A., Political Science, Southwestern University (2007)) is currently assigned to 25 AF/JA as the Chief of Intelligence Law. He is a member of the Texas Bar. The views expressed are only those of the author and do not represent the official policy or position of the Department of the Air Force, the Department of Defense, or any other U.S. Government Agency.

I. INTRODUCTION

The world of most Yazidi women living in the Sinjar region of Northern Iraq changed forever the morning of August 3, 2014.¹ In those early hours, hundreds of Islamic State of Iraq and Al-Sham (ISIS) fighters flooded the Sinjar region, rounding up men, women, and children of the Yazidi sect.² The Kurdish Regional Government forces, the only security present, quickly withdrew due to ISIS' superior firepower and the speed of their military maneuvers.³ ISIS fighters, without any meaningful opposition, flooded northern Iraq and over a four-day window proceeded to terrorize anyone in their path.⁴ Although the Yazidis faced the brunt of the targeting, both Sunni Muslims and Christians faced severe restrictions and abuse by ISIS as well.⁵ As ISIS entered Yazidi areas, they began to systematically separate all males over the age of twelve from all females and small children.⁶ ISIS then executed all males over twelve who did not immediately convert to Islam.⁷ The execution of the males facilitated the targeting of females for sexual abuse.⁸ The women, including girls as young as nine, were identified, cataloged, and then taken into northern Syria to be sold as brides and sex slaves across the growing ISIS territory.⁹

¹ See Christine Van Den Toorn, *How the U.S.-favored Kurds Abandoned the Yazidis When ISIS Attacked*, DAILY BEAST (Aug. 14, 2014), <http://www.thedailybeast.com/articles/2014/08/17/how-the-u-s-favored-kurds-abandoned-the-yazidis-when-isis-attacked.html> (last visited Nov. 20, 2017).

² *Id.* The Yazidi sect is a monotheistic religion that blends components of Islam, pre-Islamic traditions and other religious practices. The Yazidi sect has faced discrimination dating back to the late 16th and 17th centuries. Further, the sect is an insular culture that rarely intermarry and do not accept religious converts. Avi Asher-Schapiro, *Who are the Yazidis, the Ancient Persecuted Religious Minority Struggling to Survive in Iraq?*, National Geographic News (Aug. 11, 2014), <https://news.nationalgeographic.com/news/2014/08/140809-iraq-yazidis-minority-isis-religion-history/> (last visited Nov. 20, 2017).

³ *Id.*

⁴ Advance Rep. of the United Nations Human Rights Committee, “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2, ¶¶ 23–27 (June 15, 2016) [hereinafter UNHRC Advance Report].

⁵ *Iraq: Women Suffer Under ISIS*, HUMAN RIGHTS WATCH (Apr. 5, 2016, 11:50 PM), <https://www.hrw.org/news/2016/04/05/iraq-women-suffer-under-isis>.

⁶ UNHCR Advance Report, *supra* note 4, at ¶ 31.

⁷ *Id.* ¶ 33.

⁸ *Id.*

⁹ *Id.* ¶¶ 54–56.

In the weeks following the August 3rd assault, ISIS' actions were met with global condemnation.¹⁰ The international community sought ways to support Kurdish Security Forces, contemplated airstrikes, and widely argued ISIS' assault constituted genocide against the Yazidi ethnic group.¹¹ What was not mentioned was the brazen and horrific treatment of women on the basis of gender.¹² Sadly, women and children are regularly the targets of sexual abuse as a tactic or means of war.¹³ The conflicts in Bosnia, Rwanda, or the Congo, however, are comparatively different than the conflicts in areas impacted by ISIS. ISIS did not explicitly target women solely on ethnicity or religious affiliation. Instead, ISIS' first discriminating factor for attacks on women was gender.¹⁴ It did not matter whether victims were Christians, Yazidis, Shia Muslims, or Sunni Muslims. ISIS forced women from all groups to be sold as sex slaves or in the case of non-Muslim women, convert to Islam and be forcibly married to ISIS fighters.¹⁵ These women, targeted largely based on their gender, were systematically attacked and enslaved on a level not seen before in modern times.

It might be easy to state that ISIS and its tactics are uniquely horrific in modern times, however, ISIS and the widespread enslavement of women across Iraq and Northern Syria is just one example of a new dangerous form of extreme gender-based violence (EGBV). Nearly four months before ISIS' brazen attack in Northern Iraq, the Islamist group Boko Haram kidnapped approximately 276 girls from a boarding school in Northeastern Nigeria.¹⁶ In the dead of night, Boko Haram launched an assault on the Government

¹⁰ Gordon Lubold & Kate Brannen, *Sinjar Surprise: How the U.S. May Have Misjudged the Refugee Situation in Iraq*, FOREIGN POLICY MAG (Aug. 15, 2014, 12:35 AM), <http://foreignpolicy.com/2014/08/15/sinjar-surprise-how-the-u-s-may-have-misjudged-the-refugee-situation-in-iraq/>.

¹¹ *Id.*

¹² *Id.*

¹³ *War's Overlooked Victims*, ECONOMIST (Jan. 13, 2011), <http://www.economist.com/node/17900482>.

¹⁴ United Nations Assistance Mission for Iraq Human Rights Office, *Report on the Protection of Civilians in Armed Conflict in Iraq: 11 September – 10 December 2014*, at 13, http://www.ohchr.org/Documents/Countries/IQ/UNAMI_OHCHR_Sep_Dec_2014.pdf.

¹⁵ *Id.* at 14.

¹⁶ Kevin Sieff, *Boko Haram Kidnapped 276 Girls Two Years Ago. What Happened to Them?*, WASH. POST (Apr. 14, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/04/14/boko-haram-kidnapped-276-girls-two-years-ago-what-happened-to-them/>.

Girls Boarding School in Chibok, Nigeria.¹⁷ After a brief gun battle with government forces, Boko Haram escaped with the students of the boarding school and to this day approximately 219 are still missing and believed to be held by Boko Haram.¹⁸ It is widely believed these girls, and dozens of others kidnapped throughout Northern Nigeria, have been forced into sex slavery, forced marriages, and even used as suicide bombers regardless of their religion or ethnicity.¹⁹ This problem is not just limited to radical Islamist groups like Boko Haram and ISIS.

In July 2016, after ongoing battles between Sudan People's Liberation Army (SPLA) forces loyal to President Salva Kiir and South Sudanese opposition forces loyal to Riek Machar, SPLA forces stormed a UN compound and nearby hotel popular for foreign aid workers, killed several refugees, and attacked and raped several female foreign aid workers.²⁰ This attack on the UN compound is only the latest and most brazen case of rape and targeting of women based on gender. Again, in these cases, the women targeted were not primarily targeted based on ethnicity or religion, but instead were victims of targeted abuses against women.

These incidents and the increasingly blatant targeting of women require a shift in how States, both those engaged in hostilities and the rest of the international community fight to stop such atrocities that constitute EGBV. The best legal tool available, though seldom used, is the concept of responsibility to protect (R2P).²¹ R2P, at its most general, legally obligates States to stop extreme violations of human rights within its territory.²² If a State is unable or unwilling to stop such violations, R2P provides the interna-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Annex to Letter Dated 1 November 2016 from the Secretary-General Addressed to the President of the Security Council, *Executive Summary of the Independent Special Investigation into the Violence which Occurred in Juba in 2016 and the Response by the United Nations Mission in South Sudan (UNMISS)*, U.N. Doc. S/2016/924 (Nov. 1, 2016), http://www.un.org/News/dh/infocus/sudan/Public_Executive_Summary_on_the_Special_Investigation_Report_1_Nov_2016.pdf [*hereinafter* UNMISS Report]. *See also South Sudan: Killings, Rapes, Looting in Juba*, HUMAN RIGHTS WATCH (Aug. 15, 2016, 12:01 AM), <https://www.hrw.org/news/2016/08/15/south-sudan-killings-rapes-looting-juba>.

²¹ Lloyd Axworthy, *RtoP and the Evolution of State Sovereignty*, in *THE RESPONSIBILITY TO PROTECT* 12 (Jared Genser et al. eds., 2012).

²² *Id.*

tional community with the right and obligation to interfere, including using armed force, to stop the violations.²³ Under UN Security Council Resolution 1674, this concept may be used to protect populations from “genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁴

Largely in response to the conflicts in Bosnia and Rwanda, rape and sexual assault as a tactic of war has often been cited and treated as a “crime against humanity.”²⁵ The central issue, and the focus of this article, is that although there is wide consensus that rape and sexual assault are crimes under international humanitarian law (IHL), there is minimal international legal recognition that the use of rape and sexual assault, including forced marriage, outside of an ethnic basis, triggers the international community’s responsibility to protect.²⁶ Women and children, in particular female children, disproportionately suffer during armed conflict, both directly through targeting but additionally through the second and third order effects of conflict (lack of medicine or food and forced migration).²⁷ This disproportionate suffering warrants a more tailored approach by the international community to help slow and stop these gender-based atrocities.

The current international legal framework does not sufficiently protect women who are victim of methodical violence and mistreatment during armed conflict.²⁸ To best tackle the abuses perpetrated by groups like ISIS and Boko Haram, it is important to understand the current legal environment to assess what gaps exist. First, R2P’s most controversial component, the international community’s obligation to use force to stop a predetermined list of extreme crimes, when applied “gender neutral” leaves women and children generally more vulnerable to becoming victims of these crimes. Next, to best overcome the protection gap the UN Security Council should issue a new resolution, building off UN Security Council Resolutions 1674 and 1888, explicitly recognizing gender as a protected class akin to ethnicity,

²³ *Id.*

²⁴ S.C. Res. 1674, ¶ 8 (Apr. 28, 2006).

²⁵ Mohamed S. Helal, *Middle East*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 21, at 222 (Jared Genser et al. eds., 2012), *citing* Rome Statute of the International Criminal Court art. 7, U.N. Doc. A/CONF.183/9 (Jan. 16, 2002) [hereinafter ICC Rome Statute].

²⁶ Eli Stamnes, *The Responsibility to Protect: Integrating Gender Perspectives Into Policies & Practices*, in *RESPONSIBILITY TO PROTECT AND WOMEN, PEACE AND SECURITY: ALIGNING THE PROTECTION AGENDAS 9–10* (Sara E. Davies et al. eds., 2013) [hereinafter R2P & WPS AGENDA ALIGNMENT].

²⁷ *Id.* at 10.

²⁸ *Id.*

nationality, or religion. This new resolution will trigger a responsibility to protect by the host State, and if they are unable or unwilling to stop such violence, authorize the international community to intervene militarily in cases involving EGBV. With an expanded and robust UN Security Council Resolution recognizing gender within the R2P context through the UN Security Council, regional intergovernmental organizations like the African Union, Organization of American States, and the Arab League, can initiate regional monitoring missions to assess ongoing conflicts in their regions to determine if any involve EGBV rising to a level like crimes against humanity or genocide. Finally, with a solid framework at both the international and regional levels recognizing a R2P because of gender, States will be better equipped to pressure offending States to take the necessary actions to protect vulnerable populations or face the risk of legitimate armed force.

II. THE GENDER GAP UNDER THE RESPONSIBILITY TO PROTECT (R2P)

A. International Legal Basis for R2P Generally

Since the inception of R2P as a policy response to grave human rights violations at the International Commission on Intervention and State Sovereignty (ICISS) in 2001, the founding principles have been applied with a gender-neutral lens.²⁹ Spearheaded through the 2000s by then-Secretary General Kofi Annan, the UN pushed for the development of a R2P as an international norm and recognized the legal obligation of States.³⁰ R2P typically consists of three main pillars: (1) the protection responsibilities of the State; (2) the responsibility of the international community to assist States in fulfilling their national obligations; and (3) the commitment to timely and decisive collective action consistent with the UN Charter.³¹

Over the past decade there has been much written generally on R2P, however, practically none of the scholarship has focused on the interaction of gender and R2P or explicitly addressed the gaps in protection for women in the most severe forms of armed conflict.³² This was the case until 2013, when an ambitious group of scholars and practitioners from the Asia Pacific

²⁹ *Id.*

³⁰ Edward C. Luck, *From Promise to Practice: Implementing the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 21, at 92.

³¹ G.A. Res. 60/1, ¶¶ 138–139 (Oct. 24, 2005).

³² Sara E. Davies et al., *The Responsibility to Protect: A Principle for the Women, Peace, and Security Agenda?*, in *R2P & WPS AGENDA ALIGNMENT*, *supra* note 26, at 1–4.

Centre for the Responsibility to Protect attempted to place the UN's parallel Women, Peace, & Security (WPS) agenda within the R2P framework.³³ While novel in tackling the issues of gender-bias in the R2P and humanitarian law prevention and protection mechanisms, the Asia Pacific Centre's research focused on better incorporating gender into pillars one and two of R2P to better address and identify preconditions within societies that tend to lead to extreme gender-based violence (EGBV).³⁴ Thus, the central goal was to stop atrocities before they occur and make the third pillar unnecessary.³⁵ The Centre's focus on pillars one and two, however, leaves a gap in assessing whether there is a sufficient legal basis for a State to use armed conflict under the third pillar of R2P on the basis of gender.³⁶ Groups like ISIS or Boko Haram, non-state actors that have demonstrated the ability to hold and control wide areas of territory, are not influenced by international norms or political pressures.³⁷

From the outset, it is vital to understand what R2P is and what it is not. There has been a constant back and forth between supporters of R2P contending that it is the singular hope for humanitarian prevention and critics who argue R2P is nothing more than violent neo-colonialism dressed up as human rights.³⁸ These two views highlight the constant tension between stopping the most severe forms of atrocities through the use of force and maintaining State sovereignty, "the basic dilemma of humanitarian intervention is... either we intervene to end massacres and so we are liable to violate the prohibition of war and respect for sovereignty, or we do not intervene which means we tolerate the violation of the prohibition of gross human rights abuses."³⁹

The first internationally legally binding recognition of a responsibility to protect was UN Security Council Resolution 1674. It is widely accepted that there are three sources of international law: (1) treaties and other agreements

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *Id.* at 1.

³⁶ Stamnes, *supra* note 26, at 24.

³⁷ Ajit Maan, *ISIS Is Not a Terrorist Organization*, SMALL WARS J. (Dec. 29, 2015), <http://smallwarsjournal.com/jrnl/art/isis-is-not-a-terrorist-organization>.

³⁸ CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT: SECURITY AND HUMAN RIGHTS 19–20 (2011).

³⁹ *Id.* at 19, *citing* Fernando Tesón, *The Liberal Case for Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS (J. L. Holzgrefe & R. Keohane eds., 2003).

among nations; (2) customary international law, and (3) general principles of law.⁴⁰ Further, under the UN Charter, the Security Council is the only body that can issue legally binding obligations that do not fit within one of the sources listed above.⁴¹ Further, the UN General Assembly itself cannot create legally binding obligations on States that do not deal with the procedural operation of the UN.⁴² Studying these sources of law for a legal authorization for R2P requires significant expectations management as there is no binding source of international law that recognizes a general R2P. Under current international law, a State can only use force against another State in two circumstances: (1) individual or collective self-defense⁴³ or (2) with authorization from the UN Security Council to restore international peace and security.⁴⁴ R2P as a legal justification for the use of force is so controversial because it is such a wide departure from the self-defense or UN Security Council authorization for use of force models.⁴⁵

We start our discussion on the legality of R2P and the missing component of gender with UN Security Council Resolution 1674. As explained above, only the Security Council can issue legally binding obligations on States and can authorize the use of force outside of a State's right to individual or collective self-defense. R2P as a coherent concept has its origins in the aftermath of the Rwandan genocide but did not reach something close to an international obligation until 2006 with Security Council Resolution 1674.⁴⁶ Just six months' prior, the UN General Assembly formally recognized R2P with the adoption of General Assembly Resolution 60/1, also known as the 2005 World Summit Outcome.⁴⁷ This resolution created a three-pillar approach to R2P.

Pillars one and two are related to preventing abuses from occurring and are best seen as a continuum between international human rights (during peace time) and international humanitarian law (law governing armed

⁴⁰ Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

⁴¹ U.N. Charter art. 25.

⁴² U.N. Charter arts. 9–22.

⁴³ U.N. Charter art. 51.

⁴⁴ U.N. Charter art. 24, ¶ 1, art. 39.

⁴⁵ Badescu, *supra* note 38, at 48.

⁴⁶ Burke-White, *Adoption of the Responsibility to Protect*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 21, at 29.

⁴⁷ G.A. Res. 60/1, *supra* note 31, ¶¶ 138–139 (Oct. 24, 2005).

conflict).⁴⁸ Pillar one for example is rooted in the concept of State sovereignty and the individual responsibility of each State to take adequate measures to protect its own population.⁴⁹ It is the host State itself that is best situated to identify factors indicating the risk of mass atrocities, typically before or in the initial stages of a civic disturbance leading to armed conflict, where international human rights law will still govern instead of international humanitarian law.⁵⁰ Pillar two reinforces State sovereignty by requiring the international community or individual outside States to assist the host State with aid, personnel, or expertise to arrest the intensity of conflict that can lead to mass atrocities.⁵¹ These two pillars are vital and should not be underestimated because the division of responsibilities across the three pillars is an “aegis against foreign intervention” and sets mandatory steps in order to ensure an escalation of force responsive to the facts in the host country.⁵²

It is pillar three, the use of force in a State that is unable or unwilling to stop mass atrocities, that is rightly the most controversial. From the outset, this article does not endorse a R2P that is independent of UN Security Council authorization. The UN Security Council’s ability to authorize the use of force is based on the body’s authority to maintain international peace and security.⁵³ Specifically, if measures not involving armed force prove to be inadequate to stop any threat to international peace and security, Article 42 of the UN Charter authorizes the Security Council to take any measures “by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”⁵⁴ Although a more conservative approach, the 2005 World Summit Document struck the right balance between State sovereignty and intervention by seating authority to authorize the use of force in the UN Security Council.⁵⁵ Although counterintuitive, this clear delineation in fact

⁴⁸ Nicole George, *Beyond “Cultural Constraint”: Gender, Security and Participation in the Pacific Islands*, in R2P & WPS AGENDA ALIGNMENT, *supra* note 26, at 175–76.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Hitoshi Nasu, *Operationalizing the “Responsibility to Protect” and Conflict Prevention: Dilemmas of Civilian Protection in Armed Conflict*, J. CONFLICT & SECURITY L. 209, 214 (2009).

⁵³ U.N. Charter, art. 42.

⁵⁴ *Id.*

⁵⁵ G.A. Res. 60/1, *supra* note 31. It is important to note that there are criticisms of G.A. Res. 60/1 as being too vague in seating explicit authority in the UN Security Council for R2P responsibilities. See Kish Vinayagamoorthy, *Contextualizing Legitimacy*, 48 TEX. INT’L L.J. 535, 550 (2013).

can speed up the ability for the international community to respond to conflict because disagreement over who has authority to independently intervene is minimized.⁵⁶ This approach encourages States to take meaningful and substantive action to stop atrocities or minimize the conditions that lead to atrocities in order to keep the international community out of local affairs.⁵⁷

Additionally, this approach encourages regional bodies to actively police its own State-members acceptance because State sovereignty and regional integrity are better maintained through pillars one and two. The most controversial pillar, pillar three, is only authorized pursuant to clear UN Security Council authorization and is therefore only used in the most egregious cases.⁵⁸ The utility of this conservative approach is borne out in the 2011 Libyan case. Both China, a UN Security Council permanent member with veto authority, and India, sitting in a UN Security Council non-permanent member position at the time, did not support UN Security Council Resolution 1973, which authorized the use of armed force in Libya under R2P.⁵⁹ While not vetoing the resolution, both countries represented a broader Asian regional outlook that holds the principle of non-intervention and state sovereignty through the territorial principle as an essential value.⁶⁰ Under this principle, exclusive authority to take action within a given State is based on the territory of a State.⁶¹ The territorial principle holds that States have total control over any crime arising within the territory of that State.⁶²

⁵⁶ Kish Vinayagamoorthy, *Contextualizing Legitimacy*, 48 TEX. INT'L L.J. 535, 550 (2013), citing Alex J. Bellamy, *Conflict Prevention and the Responsibility to Protect*, 14 GLOBAL GOVERNANCE 135, 147 (2008). Mr. Bellamy cites how in the case of Darfur, the international community response and collective action was “stymie[d]” by “disagreements about where responsibility [for action] ought to lie—with the host government, the African Union, or the UN Security Council.”

⁵⁷ Vinayagamoorthy, *supra* note 59, at 537, citing Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection: Cote d'Ivoire, Libya, and the Responsibility to Protect*, 87 INT'L AFFAIRS 825, 843 (2011).

Vinayagamoorthy, *supra* note 59, at 537.

⁵⁸ U.N. Charter art. 24, ¶ 1, art. 39.

⁵⁹ Vinayagamoorthy, *supra* note 59, at 537, citing Bellamy & Williams, *supra* note 59, at 843.

⁶⁰ Vinayagamoorthy, *supra* note 59, at 537.

⁶¹ M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 40 (Stephen Macedo ed., 2006).

⁶² *Id.*

This principle is a hallmark of international law because the State is the core actor in the international system in that the State has complete control over its own territory. Thus, a foreign State has no authority outside of the limited exceptions under the UN Security Council to use force in another State without express permission of the UN.⁶³ The limited and rare use of a Security Council Resolution to authorize force in the most egregious human rights abuse cases builds credibility with States like China and India that R2P will not be used as subterfuge to promote interfering in States' domestic affairs.

This tacit compromise between R2P and territorial sovereignty, however, breaks down when facing non-state actors like ISIS and Boko Haram that use asymmetrical warfare tactics against their enemies. UN Secretary-General Ban Ki-Moon, in his 2015 Report on R2P a decade after the 2005 World Summit, addressed the unique threat posed by non-state actors and the challenges R2P has in combating such threats.⁶⁴ He stated that “Pillar III of [R2P] may also be less effectively applied to [ISIS and Boko Haram]. Tools such as public advocacy, fact-finding missions, monitoring missions, and targeted sanctions may have a more limited effect on actors not seeking international legitimacy.”⁶⁵ Both groups demonstrate that the type of warfare waged today has shifted away from traditional large armies and more towards asymmetric warfare within and through civilian populations.⁶⁶ Focusing on ISIS, their tactics and strategies do not fit squarely into a classical “insurgency” or “terrorist group” definition.⁶⁷ Instead, they blend and adapt in order to frustrate their enemies. ISIS holds territory, runs businesses, runs a rudimentary social security program, collects taxes, and creates laws.⁶⁸ At the same time they conduct tactics much like terrorist organizations: they oversee a vast criminal network of illegal antiquities trading, coordinate and inspire terrorist attacks across Europe and the United States, and conduct regular killings and kidnappings for ransoms.⁶⁹ This is all in addition to the widespread sexual abuse and slavery inflicted if caught within their territory. United States Army Major William Hartman defines asymmetric warfare within the broader context of globalization and identifies three key characteristics:

⁶³ *Id.*

⁶⁴ Rep of the S.C., *A Vital and Enduring Commitment: Implementing the Responsibility to Protect*, ¶ 47–49, U.N. Doc. A/69/981-S/2015/500 (2015).

⁶⁵ *Id.* ¶ 49.

⁶⁶ Maan, *supra* note 37.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

Asymmetric warfare is the ability to think and act in a manner that is not defensible with a conventional military force. Asymmetric attacks share certain characteristics that separate them from traditional military operations. First groups or individuals that are not tied directly to a state normally conduct them. Secondly, the targets are not limited to military facilities or combatants, but rather a wide range of targets that have political, economic, and societal significance are attacked. Thirdly, asymmetrical attacks seek a major psychological impact, an attack on one's will and ability to act or freedom of action. Finally, the methods used to conduct these attacks transcend what we would consider traditional even by terrorist standards.⁷⁰

ISIS and Boko Haram operations meet all three characteristics of asymmetric warfare, but the key characteristic for this discussion is the third.⁷¹ ISIS operations against women across several ethnicities and religions, are designed to have a “major psychological impact” and “attack one's will and ability to act.”⁷² ISIS, Boko Haram, and the SPLA have demonstrated an extremely virulent form of gender-based violence that the traditional State on State rules of armed conflict are ill-equipped to address. Thus, when it comes to accountability for non-state actors and state actors alike in these asymmetric conflicts, it is vital that R2P be added as a means for the UN Security Council to timely and sufficiently respond to mass atrocities.

To sum up R2P as a legal and policy framework, it is important to put it in context. First, R2P's legal authority is rooted in the UN Security Council's powers under UN Charter Articles 24 and 39 to authorize all necessary measures to maintain international peace and security. Next, the UN Security Council recognizing and adopting paragraphs 138 and 139 of G.A. Res. 60/1, specifically the use of R2P pillars one through three, demonstrates an international acceptance and a legally binding norm. This recognition, and tacit acceptance even from R2P critics like China, provides a workable framework for host States and the broader international community to take

⁷⁰ William Hartman, *Globalization and Asymmetrical Warfare* (April 2002) (unpublished research report, Air Command & Staff College) (on file with Air Command & Staff College, Maxwell Air Force Base).

⁷¹ Maan, *supra* note 35. See also National Counterterrorism Center, *Boko Haram*, https://www.nctc.gov/site/groups/boko_haram.html (last visited Nov. 14, 2017).

⁷² *Id.* See also Hartman, *supra* note 70, at 26.

proactive preventive steps up to and including force, to avert or stop mass atrocities. The next question is where is the gap based on gender? As we turn to what crimes constitute “mass atrocities” for R2P, it becomes apparent that the devil is in the details.

B. Crimes Subject to R2P

To strike the right balance between the potentially expansive use of R2P and maintaining state sovereignty, R2P only applies to a narrowly tailored list of offenses. A State’s obligation to prevent extreme human rights abuses through the international community’s responsibility to react with measures up to and including force to stop those abuses, applies to four explicit offenses: (1) genocide, (2) crimes against humanity, (3) ethnic cleansing, and (4) war crimes.⁷³ Turning to each crime, it is important to note that each has largely been defined with a “gender neutral” lens, however, this reading misses the unique challenges women face in conflicts with actors such as Boko Haram and ISIS. Unlike R2P itself, the crimes R2P intends to prevent or restrict have largely been defined in both treaty and customary international law.⁷⁴ For simplicity, it is simpler to break these four crimes into two distinct groups: (1) genocide and ethnic cleansing are crimes targeting a particular group on the basis of “national, ethnical, racial, or religious” grounds and (2) crimes against humanity and war crimes are generally any large scale crimes or widespread or systematic attack against any civilian population.⁷⁵ Further, genocide is typically viewed as the most extreme case of ethnic cleansing as crimes against humanity is the most egregious form of war crime.⁷⁶

As demonstrated in the R2P’s founding theory, the intent is to stop the most severe atrocities and so it is vitally important to look at the explicit definitions of both genocide and crimes against humanity. Genocide is defined as the killing; causing serious bodily or mental harm; deliberately inflicting conditions calculated to physically destroy a group in whole or in part; or imposing measures intended to prevent births within a group on the basis

⁷³ G.A. Res. 60/1, *supra* note 31, ¶ 138.

⁷⁴ Tarun Chhabra & Jeremy B. Zucker, *Defining the Crimes*, in *THE RESPONSIBILITY TO PROTECT*, *supra* note 21, at 37.

⁷⁵ ICC Rome Statute, *supra* note 25, arts. 6–8.

⁷⁶ Chhabra & Zucker, *supra* note 74, at 48. The authors highlight that the primary distinction between “war crimes” and “crimes against humanity” is that offenses constituting “war crimes” are committed by military belligerents during armed conflict while violations constituting “crimes against humanity” can occur during peacetime or during armed conflict. *Id.*

of “national ethnical, racial or religious” classification.⁷⁷ In assessing the definition of genocide, at first read it is astounding that there is no mention explicitly of gender when most people are familiar with the systematic campaigns of rape in Rwanda and Bosnia-Herzegovina that brought the concept of genocide into modern consciousness.⁷⁸ The lack of a gender focus, however, is not surprising when looking at the history of the crime itself. In both the experience of the Holocaust and Rwandan genocides, the perpetrators primary goal was the complete extermination of an ethnic group, but this sole focus on extermination is more the exception than the rule in cases of genocide.⁷⁹ Instead, the norm is typically a pattern of strategies aimed at destroying a group’s ability to survive into the future and so the methods used to target men and women are instead based on their “perceived and actual positions within the reproductive process.”⁸⁰

This is evidenced in the case of ISIS through its continual abuse of Yazidi men and women. The UN Human Rights Council’s Advance Report found that ISIS was in fact committing genocide against the Yazidis in Northern Iraq through an explicit campaign of sexual slavery and rape, “the sexual violence being committed by ISIS against Yazidi women and girls, and the serious physical and mental harm it engenders is a clear step in the process of destruction of the . . . group.”⁸¹ The UN Human Rights Council itself, however, admits that this focus on the targeting of Yazidi as a “group” instead of the unique characteristics presented by gender, missed the crucial perspective on ISIS that “rape and sexual violence, when committed against women and girls as part of a genocide, is a crime against a wider protected group, but it is equally a crime committed against a female, as an individual, on the basis of her sex.”⁸² It is this crime “committed against a female as an individual” that the current definition of genocide does not adequately address. Again, the UN Human Rights Council Report cites the broader threat to women as, “The view of females as objects, not specific to ISIS, when backed by radical religious interpretation . . . is the common threat that links ISIS’s forcing Sunni women

⁷⁷ ICC Rome Statute, *supra* note 25, art. 6. The ICC definition is pulled from the Convention on the Prevention and Punishment of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

⁷⁸ Elisa von Joeden-Forgey, *Gender and Genocide*, in *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 62 (Donald Bloxham & A. Dirk Moses eds., 2010).

⁷⁹ *Id.* at 63.

⁸⁰ *Id.*

⁸¹ UNHRC Advance Report, *supra* note 4, ¶ 123.

⁸² *Id.*

and girls to remove themselves from the male gaze...while simultaneously and overtly encouraging its fighters to hold, use, and trade Yazidi women.”⁸³ While it is true that Sunni women are not abused and targeted to the same extent as Yazidi women, the role of the particular ethnic group targeted is secondary to ISIS overall view of gender by its explicit targeting of women.⁸⁴ This is the gap in the current framing of genocide. Rape, sexual abuse, and denial of reproductive freedom during armed conflict can be committed based off gender just as likely as it can be committed because of ethnic or religious identity.

Although the definition of genocide does not fully cover the realities on the ground, another option is to turn to the term “crimes against humanity.” The International Criminal Court defines crimes against humanity is any of the following acts committed as part of a widespread or systematic attack against a civilian population including: “murder; extermination; enslavement; deportation or forcible transfer of a population; imprisonment or other severe deprivation of physical liberty; torture, rape (including sexual slavery, enforced prostitution and other forms of sexual violence); any persecution of a group on the basis of national, ethnical, racial, religious, cultural, or *gender (either male or female)* that is *universally recognized as impermissible under international law* [italics added]; enforced disappearances of persons; crime of apartheid; or any other inhumane act with a similar character causing great suffering or grievous bodily harm.”⁸⁵ Unlike the three other offenses under R2P, the term “crimes against humanity” includes specific mention of gender. This inclusion of gender, as discussed by the ICC, was explicitly included due to the lack of gender-specific offenses enumerated under international law and the intent to end impunity for such crimes.⁸⁶

The ICC itself, however, is a criminal body focused on effective investigation and prosecution of crimes after the end of hostilities and not the immediate protection of at risk populations.⁸⁷ While crimes against humanity includes persecution based on gender in its definition, the use of that definition has not been relied on by either the UN Security Council or international community to argue for the use of force to protect women against EGBV. One might view that the UN Security Council, and the broader international com-

⁸³ *Id.* ¶ 124.

⁸⁴ *Id.*

⁸⁵ ICC Rome Statute, *supra* note 25, art. 7, ¶¶ 1–3.

⁸⁶ INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON RAPE AND GENDER-BASED CRIMES 5 (2014).

⁸⁷ *Id.*

munity, simply needs to enforce the current R2P concept because of gender, citing crimes against humanity. It is this fact that emphasizes the need for an expanded definition of genocide and use of crimes against humanity within the context of R2P for the international community to have the authority to use armed force in the face of EGBV. This option, however, has not been tested in large part because the proponents of R2P have failed to extend their argument to that of gender, and worse, have failed to link the robust protection mechanism of R2P with the parallel Women, Peace and Security (WPS) agenda of the United Nations.⁸⁸

III. WOMEN, PEACE AND SECURITY AGENDA: RECOGNITION WITHOUT AUTHORITY TO ACT

In Section I, the general concept of the responsibility to protect (R2P) was assessed, specifically identifying the limited international legal authority for the use of force to protect at risk populations. Section II shifted focus to the crimes subject to R2P, and focused on both genocide, crimes against humanity, and the limitations both present in confronting EGBV. Despite these limitations, an entirely separate agenda, focused on gender, has pushed the boundaries to protect at risk populations targeted based on gender. This program is known as the Women, Peace, and Security (WPS) agenda.⁸⁹ WPS developed in the mid-1990s as a response to the mass scale atrocities in Rwanda, Bosnia, Kosovo, East Timor, Sudan, and other countries that disproportionately affected women.⁹⁰ The watershed moment for WPS came in 2000 with the passing of UN Security Council Resolution 1325.⁹¹ Resolution 1325 was designed to synchronize multiple legal norms and declarations and “formally integrate women’s rights, equality, and gender concerns into the [Security] Council’s program of peace and security work.”⁹² While not creating binding language, Resolution 1325 set out three pillars that have served as the foundation for the WPS movement: (1) incorporate gender concerns into UN conflict and peacekeeping operations, (2) increase women’s participation in

⁸⁸ Sahana Dharmapuri, *Implementing UN Security Council Resolution 1325: Putting the Responsibility to Protect into Practice*, in R2P & WPS AGENDA ALIGNMENT, *supra* note 26, at 123.

⁸⁹ Stamnes, *supra* note 26, at 9.

⁹⁰ Inger Skjelsbaek, *Responsibility to Protect or Prevent? Victims and Perpetrators of Sexual Violence Crimes in Armed Conflicts*, in R2P & WPS AGENDA ALIGNMENT, *supra* note 26, at 83–85.

⁹¹ C. Cora True-Frost, *The Security Council and Norm Consumption*, 40 N.Y.U. J. INT’L L. & POL. 115, 146 (2007).

⁹² *Id.*

decision-making processes, and (3) include consideration of women's specific needs for protection in conflict.⁹³ While a powerful signal to the international community on the importance of gender within armed conflict, it was largely seen as too broad and too vague to provide any actionable authority.⁹⁴ Over the next ten years, the Security Council created four follow-up resolutions to offer more concrete and pragmatic, but largely minor, measures considering likely scenarios when women, children, and the elderly could be separately preyed upon.⁹⁵ These pragmatic measures, designed to better protect on the basis of gender, included the need for protection and prevention of atrocities as the focus but made no explicit tie to R2P.⁹⁶ Additionally, these measures are geared towards protection and prevention by minimizing "contact" between armed groups and vulnerable populations. Outside of "naming and shaming" perpetrators, increasing reporting mechanisms for UN organs and the broader international community, all the resolutions lack any explicit authorization to use force to stop EGBV once it is occurring.

Why would these resolutions, each developing more explicit protection and prevention mechanisms, not authorize limited use of force to stop the most severe EGBV? This gap can largely be attributed to two causes: (1) there has been no explicit combining of R2P, in particular pillar three allowing for the use of limited force and (2) the WPS agenda's primary goal is stopping EGBV through expanding women's agency by integrating women and women's perspectives in peace processes and redefining the socio-political roles of women within States.⁹⁷ Turning first to cause one, not plainly combining the R2P framework with that of the WPS system is a mistake. Both pillars one and two of R2P are focused on pushing host States and the international community to assist host States, if necessary, in setting conditions to *prevent* mass atrocity crimes from taking place at all. These goals are synonymous with the WPS resolutions and both are consistent with prevention tools that do not include the use of armed force. The true gap then, lies with the third pillar of R2P, the ability and obligation of the

⁹³ True-Frost, *supra* note 94, at 146.

⁹⁴ Skjelsbaek, *supra* note 90, at 86.

⁹⁵ *Id.* The four follow-up resolutions consist of UNSCR 1820, UNSCR 1888, UNSCR 1889, and UNSCR 1960. All four were issued between June 2008 and December 2010.

⁹⁶ *Id.* Ms. Skjelsbaek states that protection measures consisted of requiring lights in dark places in refugee settlements, military presence in areas of tension between rival groups, safe houses for women, documentation and criminal prosecution mechanisms, and training requirements for all parties to conflicts. *Id.*

⁹⁷ *Id.* at 88–89.

international community to use limited force to stop EGBV. As highlighted in Section I, R2P as a theory for use of force has primarily focused on the first two pillars while understandably being cautious about creating an unfettered practice of use of force under the third pillar. The threshold for action under a R2P authority is a contentious component, suffice it to say there is no strict test to apply.⁹⁸ The UN World Summit document does not adopt any specific criteria but “stipulates in rather broad terms that the international community is prepared to take collection action through the Security Council if . . . national authorities are manifestly failing to protect their populations.”⁹⁹ This reluctance, however, has created a gap in possible protection options in the most extreme cases of gender-based violence.

The most startling example of this gap is in the case of ISIS. As the UN Human Rights Council noted, ISIS blitzkrieg-style assault on northern Iraq was a targeted campaign against the Kurdish and Yazidi populations of Northern Iraq, a campaign that while generally along ethnic lines, had as a primary goal the targeting of women for abuse and kidnapping.¹⁰⁰ Despite this reporting, the Resolutions the Security Council issued only call for increasing actions including the use of force to stop or halt ISIS terrorist activities and cultural heritage destruction. Notably, none of these Resolutions authorize member States to “take all necessary measures” to stop or protect at risk populations for EGBV.¹⁰¹ The contention is not that the Security Council, or international community more broadly, are ignoring the gender-specific nature of ISIS’ crimes, but instead the point is that by using non-binding language that condemns ISIS sexual assaults¹⁰² and reserving clear language authorizing States to “take all necessary measures” only to “prevent and suppress ISIS

⁹⁸ Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT’L L. 469, 498 (2010).

⁹⁹ *Id.*

¹⁰⁰ UNHRC Advance Report, *supra* note 4, ¶¶ 23–27.

¹⁰¹ S.C. Res. 2249, ¶ 5 (Nov. 20, 2015). There have been a number of resolutions proceeding S.C. Res. 2249, specifically resolutions 2170 and 2199, condemning the terrorist activities of ISIS and in 2199, explicit condemnation of the use of sexual violence and slavery but none allow States to take “all necessary measures” in response to that sexual violence.

¹⁰² S.C. Res. 2199, Preamble (Feb. 12, 2015). The UN Security Council condemns “in the strongest terms abductions of women and children, express[] outrage at their exploitation and abuse, including rape, sexual abuse, forced marriage . . . committed by ISIL [also referred to as ISIS].”

terror acts” sends a unintended message that gender-based crimes do not warrant armed intervention.¹⁰³

After looking at the authoritative documents of both R2P and WPS agendas, what is missing is a unifying document that ties R2P, and specifically the third pillar of R2P, to the WPS agenda. The most appropriate, and largely pragmatic approach, is the creation of a new UN Security Council Resolution, building off both R2P and WPS, explicitly identifying gender as a classification that warrants the full spectrum of options provided by R2P.

IV. MODEL SECURITY COUNCIL RESOLUTION ON THE RESPONSIBILITY TO PROTECT ON BASIS OF GENDER

A. Model Security Council Resolution

In order for women to be best protected from extreme gender-based violence (EGBV) during armed conflict, the UN Security Council should issue a binding resolution that consolidates the responsibility to protect (R2P) framework adopted in UN Security Council Resolution 1674 with the Women, Peace, and Security (WPS) agenda. The resolution must consider three key components. Before turning to each paragraph, the model resolution should read as follows:

1. *Reaffirming* its commitment to the continuing and full implementation, in a mutually reinforcing manner, of resolutions 1325 (2000) and its successors; 1674 (2005); 1820 (2008); 1888 (2009); and 2122 (2013).¹⁰⁴

2. *Reaffirming* that women’s and girls’ empowerment and gender equality are critical to efforts to maintain international peace and security, and emphasizing that persisting barriers to full implementation of resolution 1325 (2000) will only be dismantled through dedicated commitment to women’s empowerment, participation, and human rights, and through concerted leadership, consistent information and action, and support, to build women’s engagement in all levels of decision-making.¹⁰⁵

¹⁰³ S.C. Res. 2249, *supra* note 101, ¶ 5.

¹⁰⁴ S.C. Res. 2122, Preamble (Oct. 18, 2013).

¹⁰⁵ *Id.* Language modeled directly from S.C. Res. 2122.

3. *Calls upon* Member States to implement the proposals identified by the Committee on the Elimination of Discrimination against Women’s General Recommendation No. 30 (CEDAW/C/GC/30) and comply with their other relevant international obligations to end to impunity and to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law.¹⁰⁶

4. *Recognizes* that consistent with the work of the International Criminal Court, ad hoc and mixed tribunals, that extreme gender-based violence is the systematic and premeditated targeting of men, women, or children based on gender, as defined by the International Criminal Court in its broader definition of crimes against humanity.

5. *Calls upon* Member States that have the capacity to do so to take all necessary measures, up to and including the use of force, only with explicit authorization on a case by case basis from the UN Security Council, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, to stop or lessen extreme gender-based violence.

Model Paragraph 1 explicitly ties the R2P agenda with the WPS agenda by citing all prior relevant resolutions in both areas. Model Paragraph 2 identifies that the WPS agenda rightly focuses on the unique harms women and children face and how a lack of focus on gender creates barriers to adequate protections.¹⁰⁷ One of the success stories in the WPS agenda has been the recognition that pre-conflict empowerment of women can minimize the likelihood of abuses due to the correlation between lack of women’s rights protections and targeting of women for abuse during conflict, “the political and economic causes of war are often closely linked to structural societal problems, including gender and generational disparities that can intensify

¹⁰⁶ S.C. Res. 2122, *supra* note 105, Preamble. Language modeled directly from S.C. Res. 2122. *See also* Comm. on the Elimination of Discrimination against Women, *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations*, U.N. Doc. CEDAW/C/GC/30 (2013) [*hereinafter* CEDAW Recommendation No. 30].

¹⁰⁷ Katrina Lee-Koo, *Translating UNSCR into Practice: Lessons Learned and Obstacles Ahead*, in R2P & WPS AGENDA ALIGNMENT, *supra* note 26, at 40.

conflicts.”¹⁰⁸ By addressing these disparities prior to the start of hostilities, or using the gender disparities as indicators that atrocities may be imminent, Model Paragraph 2 can enable States to identify those gender-specific indicators earlier on in order to respond faster and minimize atrocities committed.¹⁰⁹

Model Paragraph 3 builds upon the general WPS agenda, which advocates for greater State involvement in gender issues during conflict, and seats this agenda squarely with the general Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW, separate from the WPS agenda, is a powerful multi-lateral treaty instituted in 1981 that serves as the core international treaty reflecting women’s rights and has been ratified by over 189 countries.¹¹⁰ This powerful treaty, however, did not explicitly set protection recommendations for women in conflict until 2013.¹¹¹ CEDAW General Recommendation No. 30 explicitly addresses discrimination against women before, during, and after conflicts and reminds State parties that their obligations “continue to apply during conflict or states of emergency.”¹¹² Further, Recommendation No. 30 highlights that women in particular are being targeted on the basis of gender and face a wide range of abuses: “irrespective of the character of the armed conflict, duration or actors involved, women and girls are increasingly deliberately targeted for...arbitrary killings, torture and mutilation, sexual violence, forced marriage, forced prostitution, and forced impregnation to forced termination of pregnancy and sterilization.”¹¹³ Despite this strong recognition of both the WPS agenda and widespread discrimination against women during conflict, General Recommendation No. 30 makes no mention of R2P or use of force to enforce international obligations to protect women.¹¹⁴ Instead, the Recommendation only states that “States parties’ obligations to prevent, investigate and punish trafficking and sexual and gender-based violence are reinforced

¹⁰⁸ John Karlsrud & Randi Solhjell, *Gender Sensitive Protection and the Responsibility to Prevent: Lessons from Chad*, in R2P & WPS AGENDA ALIGNMENT, *supra* note 26, at 107.

¹⁰⁹ SARAH SEWALL, DWIGHT RAYMOND & SALLY CHIN, MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK 114 (2010).

¹¹⁰ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), *Country Reports* (Dec. 28, 2007), <http://www.un.org/womenwatch/daw/cedaw/reports.htm>.

¹¹¹ CEDAW Recommendation No. 30, *supra* note 106, ¶ 1.

¹¹² *Id.* ¶ 2.

¹¹³ *Id.* ¶ 34.

¹¹⁴ *Id.* ¶ 23.

by international criminal law.”¹¹⁵ Citing only the criminal context, General Recommendation No. 30 falls into the same trap as the broader WPS agenda: no enforcement mechanism during armed conflict. Thus, incorporating the Recommendation into the model R2P framework is vital.

Model Paragraph 4, addresses the concerns identified in Section II(b) that States must give weight and credibility to the ICC definitions of crimes against humanity and explicit interpretation on gender.¹¹⁶ Additionally, Model Paragraph 4 is key because the draft resolution must include a clear definition of EGBV as the “systematic and premeditated targeting of men, women, or children on the basis of gender” and narrowly tailor it to cover the gap between genocide and crimes against humanity explained in Section II(b). The phrase “systematic and premeditated” is designed to align with the ICC’s definition of crimes against humanity to identify the severity of abuse that must be present to trigger the application of the model resolution. Finally, Model Paragraph 5, in keeping with the precedence set out in UN Security Council Resolution 1674 affirming R2P¹¹⁷ and Resolution 1325 recognizing the unique consequences faced by women on the basis of gender in conflict,¹¹⁸ clearly states that the authorization for use of force by the Security Council can extend to EGBV, subject to proportionality and necessity, to stop or hinder ongoing violence in a particular State. Further, the phrasing “only with explicit authorization on a case by case basis from the UN Security Council” is in part to address the significant critiques of R2P as a form of neo-imperialism and is designed to first address the norm-creating intent of viewing a State’s obligation to prevent gender-based atrocities.

It is important to note here that in the review of the WPS agenda, most requirements of pillars one and two of R2P are already incorporated and implemented in previous Security Council Resolutions. The key to this provision is the phrasing, “Member States that have the capacity to do so take all necessary measures.” “All necessary measures” is phrasing that is firmly established in the interpretation of UN Security Council resolutions as including measures up to and including force.¹¹⁹ This resolution is not designed to authorize force against any particular organization or State, but instead is designed to create precedent at the Security Council level of tying

¹¹⁵ *Id.*

¹¹⁶ INTERNATIONAL CRIMINAL COURT, *supra* note 86, at 5.

¹¹⁷ Burke-White, *supra* note 46, at 29.

¹¹⁸ Lee-Koo, *supra* note 107, at 40.

¹¹⁹ S.C. Res. 2249, *supra* note 101, ¶ 5.

R2P and gender together. It would be any follow-on resolutions, specifically targeting groups like ISIS or Boko Haram, which would provide precise language on what use of force is contemplated by the Security Council (i.e., no-fly zones, creation of UN safe zones, limited airstrikes against units or personnel conducting abuses, or armed civilian evacuation).

B. Applying the Model Resolution to Organizations like ISIS, Boko Haram, & Sudanese People's Liberation Army

With the model resolution, how would this effectively change or modify current operations against our cases from Section I? The easiest case is that of ISIS. The international community is largely in agreement that ISIS poses a significantly different type of threat for the populations under their control.¹²⁰ Further, there is already a large number of countries that are conducting military operations against ISIS in collective self-defense of Iraq and Syria in addition to Security Council Resolution 2249 authorization.¹²¹ Thus, the effect of the resolution would allow broader targeting of ISIS' slave market system and promote the prioritization of freeing the women currently held by ISIS. The resolution further empowers States to shift from the counter-terrorism focus of Security Council Resolution 2249 and instead prevent abuses through targeting the trafficking networks that ISIS exploits to "distribute" women across the broader Middle East.¹²²

What about targeting Boko Haram? Unlike ISIS that has garnered significant international media coverage and focus by the UN Security Council, the ongoing conflict in Nigeria has had little in the way of any international media coverage or resolutions classifying the conflict from the Council.¹²³ Consequently, unlike the international response garnered by ISIS, Boko Haram has largely been addressed as a "regional" concern requiring strengthened cooperation between Cameroon, Chad, Niger, Benin, and Nigeria.¹²⁴ In

¹²⁰ UNHRC Advance Report, *supra* note 4, ¶¶ 24–28.

¹²¹ Dan Lamothe, *7 Countries Have Entered the Fight Against ISIS*, BUSINESS INSIDER (Jan. 20, 2016, 12:21 PM), <http://www.businessinsider.com/7-countries-have-entered-the-fight-against-isis-2016-1>.

¹²² Anne Speckhard, *ISIS Sex Slave Trade in Gaziantep, Turkey*, HUFFPOST (Apr. 26, 2016, 3:37 PM), http://www.huffingtonpost.com/anne-speckhard/isis-sex-slave-trade-in-g_b_9774610.html.

¹²³ S.C. Pres. Statement, *Boko Haram Condemnation*, U.N. Doc. S/PRST/2016/7 (May 13, 2016).

¹²⁴ *Id.* The Security Council President did note, however, that the Security Council demands the immediate and unconditional release of all women abducted be released and

addition, this regional collective has been primarily focused on maintaining territorial security and attempting to eliminate Boko Haram safe havens in border areas with Nigeria's bordering countries and not on the protection of women from continued abduction.¹²⁵ The model resolution applied to Boko Haram would be useful because it would incentivize Nigeria and its allies to shift away from purely maintaining border integrity and instead focus on proactive measures including humanitarian access and facilitating the restoration of the rule of law in liberated areas. Further, as of this writing, there have been several accounts of women, freed from Boko Haram and living in displacement camps, subjected to wide spread rape at the hands of their Nigerian liberators.¹²⁶ Such a model resolution would put Nigerian and any partner forces on notice that abuses at the hands of government forces is in violation of the resolution and could subject the State to increasing levels of intervention by the international community on behalf of the United Nations.

The most difficult test would be attempting to use the resolution against the SPLA. While the SPLA abuses documented by the Independent Special Investigation of the UN's Mission in South Sudan documented widespread abuses on the July 8-11 2016 attacks, the scope and range of abuses likely would not fit the definition of EGBV.¹²⁷ Specifically the "systematic" and "premediated" pillars would not be met because the facts appear to find that the rapes were perpetrated as a crime of opportunity during the general return to hostilities between SPLA and the Sudan Peoples' Liberation Army in Opposition (SPLA-IO) instead of a deliberate agenda of abuse planned by SPLA.¹²⁸ In this case, the resolution would be less effective for the States to take action, but would have been incredibly useful for the UN Peacekeeping Forces prior to the July 8-11 attacks. The UNMISS Report found that there was a lack of coordination across the different peacekeeping forces and lack of a clear mandate on use of force for their peacekeeping mission.¹²⁹ Further, due to this mismanagement, peacekeeping forces did not anticipate the severity and level of intensity of the SPLA attacks on refugees and the

that the Security Council recognized that the abductions "may amount to crimes against humanity and war crimes."

¹²⁵ *Id.*

¹²⁶ *Nigeria: Officials Abusing Displaced Women, Girls*, HUMAN RIGHTS WATCH (Oct. 31, 2016, 12:00 AM), <https://www.hrw.org/news/2016/10/31/nigeria-officials-abusing-displaced-women-girls>.

¹²⁷ UNMISS Report, *supra* note 20, at 2–4.

¹²⁸ *Id.*

¹²⁹ *Id.*

UN compound.¹³⁰ The model resolution, if incorporated into the UNMISS mandate, would provide an added layer of analysis for commanders and planners to anticipate widespread sexual abuse. Utilizing this resolution, however, would likely do little to improve the overall mismanagement that occurred within UNMISS.

V. CONCLUSION

The future of conflict has been drastically changing over the past three decades. Since the 1990s rise of asymmetrical warfare and global conflicts with difficult-to-define non-state actors, States find the tools they once relied on in the international system too slow to respond. It is this turmoil that has exposed the heightened level of risk that women and children face during armed conflict. The conflicts involving ISIS, Boko Haram, and SPLA provide examples that expose the lack of responsive tools available within the international community to quickly stop EGBV. It is this central breakdown that drives the need for the UN Security Council to expand the (R2P) to unambiguously consolidate the gains reached across the three pillars with the wider WPS regime. The fix is simple and straight forward: expand R2P to allow the use of force to protect women and children who face EGBV. Despite the simplicity, it will take the active engagement of the UN Security Council, diverse groups like NGOs focusing on women's protections, and State militaries focused on humanitarian response to ensure that the abuses we see today are relegated to the past.

¹³⁰ *Id.*

PROPERLY SPEAKING, THE UNITED STATES DOES HAVE
AN INTERNATIONAL OBLIGATION TO AUTHORIZE AND
SUPERVISE COMMERCIAL SPACE ACTIVITY

*MAJOR JOHN S. GOEHRING**

I.	ARTICLE VI—THE REVOLUTIONARY ROAD TO STATE RESPONSIBILITY ..	103
II.	THE NEED FOR A RESPONSE	106
III.	THE UNBEARABLE LIGHTNESS OF INTERNATIONAL OBLIGATIONS	108
IV.	THE UNEXAMINED CONSEQUENCES OF NON-SELF-EXECUTING TREATY PROVISIONS	113
V.	APPLICATION TO COMMERCIAL OPERATORS AND IMPLICATIONS FOR NATIONAL SECURITY	118
VI.	CONCLUSION	123

*Major John S. Goehring (B.A., University of California, Berkeley (2001); J.D., Tulane University Law School (2004); LL.M., McGill University, Institute of Air and Space Law (2016)) is currently assigned to the International and Operations Law Directorate at Headquarters, U.S. Air Force, and previously served as a space law attorney and instructor at Headquarters, Air Force Space Command. He is a member of the California bar.

Recently, the United States' international obligation under the 1967 Outer Space Treaty to authorize and supervise its commercial outer space activities has been called into question. In particular, Laura Montgomery testified before the House Committee on Science, Space, and Technology, Subcommittee on Space, in March 2017 on the topic of U.S. international obligations in light of new and innovative outer space activities. Montgomery, who was counsel for the Federal Aviation Administration (FAA) for many years until 2016, recommended in her testimony that Congress not regulate new commercial space activities on the basis of any perceived legal obligation under Article VI of the Outer Space Treaty.¹ Article VI directs, in part, that “the activities of non-governmental entities in outer space...shall require authorization and continuing supervision by the appropriate State Party to the Treaty.”² Montgomery's reasons are threefold. First, she asserts Article VI allows the U.S. the unfettered discretion to choose which non-governmental activities it would like to authorize and supervise, thereby actually imposing no international obligation at all.³ Second, regardless of whether Article VI imposes an international obligation, it has no domestic effect because it is a non-self-executing treaty provision.⁴ Third, notwithstanding any legal obligations that the Outer Space Treaty may or may not impose on States, most of those obligations apply *only* to States and not to private commercial enterprises.⁵ In sum, her message is straightforward: were Congress to misunderstand any of these positions, it may feel compelled to regulate space activities unnecessarily, thereby creating needless drag on burgeoning commercial space industries. Article VI, in other words, does not actually require the U.S. to regulate its commercial space activities.

This article is a rejoinder to that message. Congress should have a true understanding of the U.S.'s international obligations under the Outer Space Treaty before setting a course for regulating near-future commercial space activities—or not regulating them, as the case may be. Once established, the real question for Congress ought to be how the obligations of Article VI can

¹ *Regulating Space: Innovation, Liberty, and International Obligations: Hearing Before the H. Committee on Science, Space, and Technology, Subcommittee on Space* (March 8, 2017) [hereinafter *Montgomery Testimony*], <http://docs.house.gov/meetings/SY/SY16/20170308/105659/HHRG-115-SY16-Wstate-MontgomeryL-20170308.pdf>.

² Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies art. VI, January 27, 1967, 19 U.S.T. 2410 [hereinafter *Outer Space Treaty*].

³ *Montgomery Testimony*, *supra* note 1, at 4–5.

⁴ *Id.* at 5–6.

⁵ *Id.* at 13–14.

be satisfied for commercial space activities, not whether such obligations even exist. Montgomery attempts to argue the latter. Upon closer examination, however, none of her arguments withstands scrutiny. Congress is not well-served by advice that is not only unsound, but also serves to undermine the U.S.'s long-term national security interest in encouraging responsible behavior in space.

I. ARTICLE VI—THE REVOLUTIONARY ROAD TO STATE RESPONSIBILITY

The U.S. is among over 100 States Parties of the 1967 Outer Space Treaty, the seminal document of international space law.⁶ Article VI of the Treaty states:

States Parties to the Treaty shall bear international responsibility for national activities in outer space, including the Moon and other celestial bodies, whether such activities are carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried out in conformity with the provisions set forth in the present Treaty. The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, shall require authorization and continuing supervision by the appropriate State Party to the Treaty.⁷

Article VI is fundamentally about State responsibility. As expressed by Manfred Lachs, the Chairman of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS) during the negotiation of the Outer Space Treaty, “States bear international responsibility for any activity in outer space, irrespective of whether it is carried out by governmental agencies or non-governmental entities.”⁸ According to Lachs, “[t]his is intended to ensure that any outer space activity, no matter by whom conducted, shall be carried out in accordance with the relevant

⁶ Status of International Agreements relating to activities in outer space as at 1 January 2016, U.N. Doc. A/AC.105/C.2/2016/CRP.3 (2016); *see also* Nandasiri Jasentuliyana, *A Survey of Space Law as Developed by the United Nations*, in PERSPECTIVES ON INTERNATIONAL LAW 349, 359 (Nandasiri Jasentuliyana ed., 1995) (describing the Outer Space Treaty as “the foundation of the international legal order in outer space”).

⁷ Outer Space Treaty, *supra* note 2, at art. VI.

⁸ MANFRED LACKS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW MAKING 113–14 (2010).

rules of international law, and to bring the consequences of such activity within its ambit.”⁹

The joinder of State responsibility with commercial space activity is a result of compromise between the U.S. and the Soviet Union.¹⁰ The U.S. wanted activities in space to be open to private entities, while the Soviet Union wanted to restrict them to States only.¹¹ Article VI constituted a negotiated settlement in which private space activity is permitted but States assume direct responsibility over it.¹² The result “is not merely innovatory...it is almost revolutionary.”¹³ Ordinarily, States can be held responsible for the conduct of commercial actors only vicariously. In outer space, however, the innovation of Article VI is that all commercial activities are “deemed to be...imputable to the State as if it were its own act,” and breach of duty is considered “as if it were a breach by the State itself.”¹⁴

Article VI does more than just establish State responsibility over non-governmental space activities, however. It goes a step further. “The activities of non-governmental entities in outer space, including the Moon and other celestial bodies, *shall require authorization and continuing supervision* by the appropriate State Party to the Treaty,” it says. Ordinarily, how contracting states to a treaty ensure compliance by those under their authority is left to the States themselves to decide, but that is expressly not the case in the Outer Space Treaty.¹⁵ Rather, Article VI “prescribes specifically the requirement of authorization and continuing supervision.”¹⁶ The requirement to authorize and supervise enhances the ability of all States to attribute responsibility. As a consequence of making States responsible for commercial space activities,

⁹ *Id.* at 114.

¹⁰ Bin Cheng, *Article VI of the 1967 Space Treaty Revisited: “International Responsibility”, “National Activities”, and “The Appropriate State,”* 26 J. SPACE L. 7, 14 (1998) [hereinafter *Article VI Revisited*]; see also Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, 32 J. SPACE L. 31, 44 (2006).

¹¹ *Article VI Revisited*, *supra* note 10, at 14; see also Jakhu, *supra* note 10, at 44.

¹² See *Article VI Revisited*, *supra* note 10, at 14; see also Jakhu, *supra* note 10, at 44.

¹³ *Article VI Revisited*, *supra* note 10, at 15; see also P.J. Blount, *Renovating Space: The Future of International Space Law*, 40 DENV. J. INT’L L. & POL’Y 515, 530 (2012) (“It is one of the rare instances recognized in the Draft Articles on State Responsibility wherein states have opted to adopt more responsibility for the actions of their nongovernmental actors than attributed by customary international law.”).

¹⁴ *Article VI Revisited*, *supra* note 10, at 15.

¹⁵ *Id.* at 13

¹⁶ *Id.*

it becomes necessary to supervise that activity “in order to provide assurance to the other Parties that all space activity is conducted in accordance with the principles of the Outer Space Treaty.”¹⁷

Thus, not only do States have direct responsibility for their space activities, but they also have the non-discretionary, affirmative obligation under the treaty to authorize and supervise their space activities, whether governmental or non-governmental.¹⁸ States do, however, have discretion in the means they use to satisfy this non-discretionary obligation to authorize and supervise.¹⁹ In other words, Article VI establishes the obligation, but it does not prescribe any method or standards for meeting the obligation.²⁰ States accomplish this through domestic laws, often through licensing regulatory oversight. The U.S., for example, uses various licensing and regulatory regimes.²¹ Pursuant to the Communications Act of 1934, as amended, the Federal Communications Commission (FCC) regulates satellite communications as well as the orbital slots allocated to the U.S. by the International Telecommunications Union (ITU), a UN body that regulates frequencies and orbital slots in geosynchronous orbit.²² Other agencies regulating U.S. national space activity are the Department of Transportation (DOT), through the FAA/AST, and the Department of Commerce, through the National Oceanic and Atmospheric Agency (NOAA).²³ NOAA, for instance, regulates the licensing, monitoring, and compliance of private remote-sensing satellites pursuant to

¹⁷ Ronald L. Spencer, *State Supervision of Space Activity*, 63 A.F. L. REV. 75, 82 (2009).

¹⁸ See Paul S. Dempsey, *National Laws Governing Commercial Space Activities: Legislation, Regulation, & Enforcement*, 36 NW. J. INT'L L. & BUS. 1, 13 (2016) (“The space treaties also explicitly obligate the States to regulate and supervise national activities in space....”).

¹⁹ See Spencer, *supra* note 17, at 82 (“[T]he Treaty does not provide minimal standards or procedures to satisfy this requirement. Therefore, individual states determine the form and scope of authorization and supervision required for their commercial activities in space.”); see also Dempsey, *supra* note 18, at 14 (“The obligation of States to authorize space activities and provide for continued supervision generally requires the establishment of a licensing and regulatory regime under domestic law, along with a system of enforcement. However, neither the Outer Space Treaty nor any of the other space conventions identify the contours of any particular licensing regime.”).

²⁰ See Spencer, *supra* note 17, at 82; see also Dempsey, *supra* note 18, at 14.

²¹ See generally, Dempsey, *supra* note 18, at 25–27.

²² Communications Act of 1934, 47 U.S.C. § 151 (2012); see also Spencer, *supra* note 17, at 103.

²³ See Dempsey, *supra* note 18, at 25–27.

the Land Remote Sensing Policy Act of 1992.²⁴ Domestic regulations such as these can serve various purposes, like encouraging industry development, decreasing risk, and ensuring predictability, yet “[i]t is important to note... that these are domestic rules, therefore States must be cautious that they still fulfill their obligations under the Outer Space Treaty, specifically Article VI.”²⁵

II. THE NEED FOR A RESPONSE

As the foregoing demonstrates, Article VI is commonly understood to require “a certain minimum of licensing and enforced adherence to government-imposed regulations” for commercial entities.²⁶ This consensus is widespread, which is why the presentation to the U.S. Congress of a contrary position is not only curious, but remarkable. A full response is warranted to set the record straight because Congress is currently assessing whether and how to regulate near-future space activities and should do so with a complete understanding of our international obligations. Additionally, Montgomery’s former position with the FAA lends significant credibility to her opinion, and her common-sense position against unnecessary and burdensome regulations on space activities will, rightfully, be well-received, although with the lamentable consequence of obscuring the underlying misunderstandings of the law within her testimony.

Now is the time to correct any misapprehensions Congress may have of the U.S.’s international obligations under the Outer Space Treaty. In November 2015, President Obama signed into law the U.S. Commercial Space Launch Competitiveness Act which, in part, directed the Office of Science and Technology Policy, in consultation with other agencies such as the Departments of State and Transportation, to prepare a report that would assess current and proposed near-term, commercial non-governmental activities conducted in space, identify appropriate authorization and supervision authorities for those activities, and recommend an authorization and supervision approach that would prioritize safety while minimizing burdens

²⁴ Land Remote Sensing Policy Act of 1992, Pub. L. No. 102-555.

²⁵ Blount, *supra* note 13, at 531.

²⁶ See, e.g., Paul Dembling & Daniel Arons, *The Evolution of the Outer Space Treaty*, 33 J. AIR L. & COMMERCE 419, 437 (1967); Dempsey, *supra* note 18 at 6 (“Collectively, these multilateral conventions require States to adhere to principles of international law, assume responsibility and liability for activities in space (whether governmental or non-governmental), authorize and supervise the activities of their nationals in space, and notify the United Nations, the public, and the scientific community of their activities in space.”).

to the commercial sector and, notably, satisfying the U.S.'s obligations under international treaties.²⁷ The Office of Science and Technology Policy issued its report on April 4, 2016.²⁸ The report identified commercial missions to the Moon and Mars, including plans to operate a lunar habitat, on-orbit satellite servicing vehicles and orbital habitats, and missions to extract resources from the Moon or asteroids as not currently having a regulatory structure.²⁹ As the report itself expressly acknowledged, the U.S. has an international legal obligation pursuant to Article VI of the 1967 Outer Space Treaty to authorize and continually supervise space activities.³⁰ The report included a single proposal for satisfying this obligation while preserving competitiveness. Modelled after the FAA's Payload Review process, the proposed Mission Authorization framework would not impose a comprehensive regulatory framework on the nascent near-future space activities, but rather establish an interagency process to review proposed missions on a case-by-case basis to ensure government interests are met in a manner that is no more burdensome than necessary.³¹ These developments provided the context for the House Committee on Science, Space, and Technology, Subcommittee on Space hearing on March 8, 2017 to examine U.S. international obligations in light of new and innovative space activities such as those considered in the report of the Office of Science and Technology Policy.³²

The witnesses at this hearing, Montgomery among them, are put in the powerful position of being among the few experts afforded the opportunity to influence Congress on these pending decisions. Moreover, Montgomery's opinion has added weight due to her experience as the former manager of the FAA's Space Law Branch and senior attorney for the FAA's Office of the Associate Administrator for Commercial Space Transportation (FAA/AST).³³

²⁷ U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 108, 129 Stat. 703 (2015).

²⁸ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF SCIENCE AND TECHNOLOGY POLICY, LETTER SUBMITTED IN FULFILLMENT OF A REPORTING REQUIREMENT CONTAINED IN THE U.S. COMMERCIAL SPACE LAUNCH COMPETITIVENESS ACT. (April 4, 2016) [hereinafter OSTP Report], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/csla_report_4-4-16_final.pdf.

²⁹ *Id.* at 2.

³⁰ *Id.* at 3.

³¹ *Id.* at 4.

³² *Regulating Space: Innovation, Liberty, and International Obligations: Hearing Before the H. Comm. on Science, Space, and Technology, Subcomm. on Space* (March 8, 2017), <http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=105659>.

³³ *Id.* (Witness Biography of Ms. Laura Montgomery).

Indeed, few are in the position to refute the FAA's former space lawyer in her specialized area of expertise. To an audience lacking familiarity with the law of outer space her views are undoubtedly regarded as influential, or perhaps even authoritative, due to this experience alone.

Finally, it must be acknowledged Montgomery makes some likeable, common-sense arguments that are certain to appeal to a wide swath of policy makers. Who, really, wants to inhibit commercial development with regulations if those regulations are truly misguided and unnecessary? Who could seriously object to Montgomery's oft-repeated insistence that a musician playing the harp on the moon or an astronaut brushing her teeth are emphatically *not* the kind of space activities requiring government oversight?³⁴ While her arguments may be superficially appealing to many, this appeal may serve to obfuscate the pervasive flaws within her arguments. By identifying those flaws it may become possible to reinvigorate Montgomery's sensible policy instincts, but this time grounded upon a firmer legal foothold.

III. THE UNBEARABLE LIGHTNESS OF INTERNATIONAL OBLIGATIONS

It is within the context of this current policy debate that Montgomery's testimony warrants attention and the shortcomings of her claims become evident. Montgomery first posits that Article VI does not say *all* activities require authorization and supervision, nor does it say *which* particular activities require authorization and supervision, so therefore "if our decision makers haven't decided that particular activity needs authorization, (then) that activity does not."³⁵ As evidence, Montgomery offers up the straw men of a lunar harp player and a space bakery.³⁶ Surely Article VI cannot be interpreted as requiring the regulation of what music may be played on the moon or of the imagined threats posed by ovens in space, she argues. Therefore, it should be interpreted to regulate only the activities you would choose to regulate anyway.³⁷ "There are a number of considerations that may lead to legisla-

³⁴ See *Montgomery Testimony*, *supra* note 1, at 3, 4, 8, 11, 12, 14.

³⁵ *Id.* at 4.

³⁶ *Id.* at 5, 10. Indeed, the United States, through various entities, conducts a plethora of scientific experiments on the International Space Station, many of which would serve equally well as straw men examples of things that ought not be regulated by burdensome laws, such as investigations into microgravity to examine salmonella for development of a potential vaccine. In fact, none of these experiments is regulated by the United States Code. See NASA, *Space Station Research Experiments*, https://www.nasa.gov/mission_pages/station/research/experiments_category (last updated August 3, 2017).

³⁷ *Montgomery Testimony*, *supra* note 1, at 5.

tion and regulatory oversight...but they are not in Article VI,” Montgomery asserts.³⁸ With this tenuous logic, she essentially concludes Congress should feel free to disregard Article VI as an international obligation. After all, an obligation to do whatever you want, however you want, is no obligation at all.

What activities actually require authorization and continuing supervision under Article VI? Montgomery’s tactic is to answer with a false dilemma: a strict interpretation of Article VI would lead to the absurd result of regulating, for example, lunar harp playing, therefore the only alternative must be to interpret Article VI so broadly as to impose no obligation at all. While this is an effective rhetorical device, it is not an advisable method of treaty interpretation. According to the authoritative Vienna Convention on the Law of Treaties, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁹ What, then, is the ordinary meaning of “[t]he activities of non-governmental entities in outer space...shall require authorization and continual supervision”⁴⁰ in light of its object and purpose?

Article VI does not specify which non-governmental activities are subject to State responsibility and require authorization and continuing supervision, as Montgomery correctly notes. To reach the ordinary meaning, it is beneficial to look to State practice because it creates a “feedback loop” that both reflects and informs the international community what constitutes compliance under Article VI.⁴¹ Generally speaking, “State practice varies; most States either do not interpret the term ‘space activities’ at all, interpret the term as ‘operation or control’ of space objects’ or interpret the term as aforesaid but also including the general clause ‘or any (other) activity in outer space.’”⁴² Regulated activities, as reflected by State practice, includes the operation and control of a satellite, probe, platform, or space station; the use or application of such objects (such as the use of a remote sensing satel-

³⁸ *Id.*

³⁹ Vienna Convention on the Law of Treaties art 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The United States has not ratified the VCLT but, according to the State Department, it “considers many of the provision of the (VCLT) to constitute customary international law on the law of treaties.” *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Oct 23, 2017).

⁴⁰ Outer Space Treaty, *supra* note 2, at art. VI.

⁴¹ See Blount, *supra* note 13 at 531.

⁴² Michael Gerhard, *Article VI of the Outer Space Treaty*, in COLOGNE COMMENTARY ON SPACE LAW, VOL. 1, OUTER SPACE TREATY 103, 109 (Stephane Hobe et al. eds., 2009).

lite); the launching of a space object; manufacturing of materials and other products in outer space; and the exploration, exploitation, or use of celestial bodies.⁴³ Hence, there is little indication of States interpreting Article VI obligations as wholly discretionary, and as the Supreme Court has noted, the “post-ratification understanding” of signatory nations can aid in interpreting treaty terms.⁴⁴ In the context of regulating space activities, there is little indication of States interpreting Article VI obligations as wholly discretionary.

The United Nations General Assembly (UNGA) has also recently provided a Resolution addressing national space legislation which serves as a helpful indication of what the international community—including the U.S.—regard as space activities falling within the ambit of Article VI. On December 11, 2013, the UNGA passed by consensus and without a vote a non-binding resolution addressing recommendations on national legislation relevant to the peaceful exploration and use of outer space.⁴⁵ It stated in part:

Observing that, in view of the increasing participation of non-governmental entities in space activities, appropriate action at the national level is needed, in particular with respect to the authorization and supervision of non-governmental space activities,

...

Noting the need for consistency and predictability with regard to the authorization and supervision of space activities and the need for a practical regulatory system for the involvement of non-governmental entities to provide further incentives for enacting regulatory frameworks at the national level, and noting that some States also include national space activities of a governmental character within that framework,

...

⁴³ *Id.*

⁴⁴ *See* *Medellin v Texas*, 552 U.S. 491, 507 (2008); *see also* VCLT, *supra* note 39 at art. 31(b) (noting that interpretation shall take into account “any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation”).

⁴⁵ G.A. Res. 68/74 (December 11, 2013).

Recognizing the different approaches taken by States in dealing with various aspects of national space activities...and noting that States have adapted their national legal frameworks according to their specific needs and practical considerations and that national legal requirements depend to a high degree on the range of space activities conducted and the level of involvement of non-governmental entities, *Recommends* the following elements for consideration, as appropriate, by States when enacting regulatory frameworks for national space activities, in accordance with their national law, taking into account their specific needs and requirements:

1. The scope of activities targeted by national regulatory frameworks may include, as appropriate, the launch of objects into and their return from outer space, the operation of a launch or re-entry site and the operation and control of space objects in orbit; other issues may include the design and manufacture of spacecraft, the application of space science and technology, and exploration activities and research.

...

4. The conditions for authorization should be consistent with the international obligations of States...and other relevant interests, and may reflect the national security and foreign policy interests of States; the conditions for authorization should help to ascertain that space activities are carried out in a safe manner and to minimize risks to persons, the environment or property and that those activities do not lead to harmful interference with other space activities ...

5. Appropriate procedures should ensure continuing supervision and monitoring of authorized space activities by applying, for example, a system of on-site inspections or a more general reporting requirement.⁴⁶

This resolution is notable for several reasons. First, the “scope of activities” needing authorization and supervision should be thought of as activities such as launch, re-entry, operation and control of objects in orbit, and the

⁴⁶ *Id.*

application of scientific and technological experiments or tests. Second, it suggests that authorization mechanisms should serve the purpose of ensuring commercial space activities comport with international obligations as well as further considerations of safety to persons, the environment, and property, the prevention of harmful interference to other space activities, as well as State-specific foreign policy or national security interests. Finally, the mechanism for accomplishing authorization and continuing supervision need not be a formal regulatory structure. As the Resolution suggests, supervision could be accomplished through a “general reporting requirement.”⁴⁷ Although not legally binding, the recommendations were reached by consensus among UN Member States and allow for the differing needs and circumstances of States, which suggests they are a fair representation of what States consider to be the ordinary meaning of the requirements of Article VI, as well as of the provision’s commonly understood object and purpose. In other words, the Resolution offers a fair representation of the scope and content of Article VI.

The U.S., too, has recognized Article VI as a separate and independent basis for the obligation to authorize and supervise activities in space. Indeed, the proposal of a Mission Authorization framework which Montgomery criticizes in her testimony is itself an acknowledgment by the U.S. that Article VI obligations are real and must be addressed, not reinterpreted into meaninglessness.⁴⁸ The intent of the proposal is to provide a means to appropriately authorize and supervise “those non-governmental space activities for which the existing licensing frameworks for launch, communications, and remote sensing are not sufficient for full fulfillment of our Article VI obligations,” according to a legal advisor to the State Department.⁴⁹ The question thus raised, and which ought to be posed to Congress, is how to satisfy this requirement, not whether it is required at all. Regrettably, the latter question is easily arrived upon when erroneously interpreting Article VI to mean “the activities of non-governmental entities in outer-space shall require authorization and continuing supervision, *but only if you want to.*” Put simply, this interpretation does not reach the ordinary meaning of “activities” because it reduces the obligation to nothing. The ills of an overly strict interpretation are not cured by rendering the obligation to authorize and supervise space activities completely discretionary and, consequently, meaningless.

⁴⁷ *Id.*

⁴⁸ See OSTP Report, *supra* note 28.

⁴⁹ Brian J. Egan, Legal Advisor, Remarks: The Next Fifty Years of the Outer Space Treaty at the Galloway Symposium on Critical Issues in Space Law (December 7, 2016), <https://2009-2017.state.gov/s/l/releases/remarks/264963.htm>.

IV. THE UNEXAMINED CONSEQUENCES OF NON-SELF-EXECUTING TREATY PROVISIONS

Montgomery also asserts Article VI is not self-executing and, therefore, not enforceable under federal law. Accordingly, she claims, unless and until Congress acts, “regulatory agencies should not treat Article VI as a barrier that applies to commercial actors or claim that it prohibits all or any particular private activity.”⁵⁰ As evidence, Montgomery relies on *Medellin v. Texas*, a 2008 case in which the Supreme Court revisited the question of non-self-executing treaties.⁵¹ The case arose from foreign nationals convicted of capital offenses who challenged their conviction on the grounds that arresting officials violated a treaty obligation by failing to inform them of their right to contact their consulate.⁵² The claim found its way to the International Court of Justice (ICJ), which found the U.S. had breached its obligations and must reconsider the convictions.⁵³ One of the claimants, José Medellin, then filed an application for a writ of habeas corpus that would reach the Supreme Court.⁵⁴ The Supreme Court held that Article 94 of the UN Charter, in which signatories “undertook to comply” with judgments of the ICJ and which formed the basis of the writ, was not self-executing and therefore not enforceable unless implemented through legislation.⁵⁵

The non-self-executing debate is firmly grounded in the Constitution, which declares treaties the supreme law of the land. Article VI, clause 2, also known as the Supremacy Clause, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁵⁶

⁵⁰ *Montgomery Testimony*, *supra* note 1, at 6.

⁵¹ *Id.*

⁵² *Medellin v Texas*, 552 U.S. 491, 505 (2008).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 505–506. See also Oona A. Hathaway, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT’L L.* 51, 53 (2012).

⁵⁶ U.S. CONST. amend. VI, § 2.

In *Foster v. Nielson*, Chief Justice Marshall “felt obliged to read an exception into the Supremacy Clause.”⁵⁷ A treaty is considered self-executing, and hence “equivalent to an act of legislature”, when it “operates of itself without the aid of any legislative provision.”⁵⁸ By contrast, when “either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”⁵⁹ Chief Justice Marshall revisited the concept of non-self-executing treaties four years later in *United States v. Percheman*, in which the Court clarified that a treaty is non-self-executing when it “stipulates for some future legislative act.”⁶⁰ The Court would not take up an extended discussion on the self-execution doctrine until *Medellin*, one hundred and fifty five years later.⁶¹

Montgomery begins with the premise that Article VI of the Outer Space Treaty is non-self-executing, a reasonable position but certainly not one that should be reached lightly. To state the obvious, *Medellin* does not deal with the Outer Space Treaty. Given that the Supreme Court’s interpretive approach in *Medellin* does not “require that a treaty provide for self-execution in so many talismanic words,”⁶² it would appear that self-execution should be determined on a treaty-by-treaty basis, without any presumption of non-self-execution.⁶³ To this author’s knowledge, no U.S. court has taken up the issue of whether the Outer Space Treaty—or particular provisions within it—is or is not self-executing, nor has Congress opined on the matter. Hence, any definitive statements on the matter are purely speculative. Montgomery has elsewhere cited declarations by Ambassador Arthur Goldberg, the lead U.S. negotiator of the Outer Space Treaty, in which he identifies certain provisions as non-self-executing, as evidence that Article VI is non-self-executing.⁶⁴

⁵⁷ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 199 (2d ed. 1996).

⁵⁸ *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

⁵⁹ *Id.*

⁶⁰ Carlos Manuel Vazquez, *Treaties as Law of the Land: the Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 607 (2008) (quoting *United States v. Percheman*, 32 U.S. 51, 89 (1833)).

⁶¹ *Id.* at 601.

⁶² *Medellin v Texas*, 552 U.S. 491, 521 (2008).

⁶³ See Curtis Bradley, *Medellin: Intent, Presumptions, and Non-Self-Executing Treaties*, 10 AM. J. INT’L L. 540, 546 (2008).

⁶⁴ Laura Montgomery, Keynote Speaker Presentation at Space Traffic Management Conference (November 17, 2016), <http://commons.erau.edu/cgi/viewcontent.cgi?article=1141&context=stm>.

However, the record does not reflect that Ambassador Goldberg rendered an opinion on Article VI in particular and, more importantly, when speaking to Congress in 1967 he was using the term “self-executing” to mean “subject to no conditions” and “not subject to further refinement.” For example, Ambassador Goldberg cites Article I, which declares outer space free for all States to use and explore, as subject to further refinement and thus non-self-executing because the negotiating parties had agreed that “terms could be further negotiated” on specific issues like “the whole problem of how communications satellites should be considered at the United Nations.”⁶⁵ Noting the need for further international consultation on certain broad principles of international law was not Justice Marshall’s purpose for articulating an exception to the Supremacy Clause in *Foster*. As the Supreme Court would say decades later in *Medellin*, “[t]he label ‘self-executing’ has on occasion been used to convey different meanings.”⁶⁶ This is worth remembering before looking to Ambassador Goldberg’s testimony for evidence of Article VI being non-self-executing.

Aside from question of whether Article VI is non-self-executing is the far more significant question of what the consequence would be even if it were non-self-executing. Montgomery’s testimony fails to examine or even raise this fundamental concern. Instead, it merely asserts a non-executing status, which is then used as a basis to conclude Article VI, by default, provides no barrier of any kind to commercial space actors.⁶⁷ But can it be true that Article VI is rendered utterly insignificant once deemed non-self-executing? It is one thing to say a non-self-executing treaty provision is not enforceable in a court of law, yet it is entirely another to say the provision has no domestic legal effect at all.

The reason for insisting on applying an overly broad interpretation of *Medellin* perhaps becomes understandable when one considers the idealized scenario Montgomery posits as a “better and more legally sound” payload review.⁶⁸ The commercial space industry craves a solution to the problem of uncertainty, she notes, and what better way to resolve the uncertainty surrounding which space activities do or do not require oversight than to

⁶⁵ Treaty on Outer Space: Hearings Before the S. Comm. on Foreign Relations, 90th Cong. 1st Sess. 12–13 (1967).

⁶⁶ *Medellin*, 552 U.S. at 505 n.2.

⁶⁷ See *Montgomery Testimony*, *supra* note 1, at 6.

⁶⁸ *Id.* at 11.

simply look at the regulations already in place.⁶⁹ Hence, in conducting a payload review, “the FAA could determine that because Article VI is not self-executing, until Congress acts, the U.S. has not determined” that the activity is of the type that requires oversight.⁷⁰ Or, to state the proffered rule more plainly: if Congress has not acted to regulate a space activity, it can be presumed that it is because Congress has concluded no regulation is required. This presumption in which Congressional inaction grants an affirmative authority to approve an activity rests upon interpreting Article VI as not only non-self-executing, but also being completely ineffectual as a consequence. Put another way, recognizing Article VI as having a domestic legal effect outside of courtroom settings would wreck the presumption on which Montgomery’s idealized payload review is based. Montgomery applies the interpretation of *Medellin* that her scenario demands. Rather than the law informing the solution, the solution is informing the law.

To suggest Article VI has no domestic law status even if it is a non-self-executing provision is to adopt an interpretation of *Medellin* that the Supreme Court does not even squarely address, let alone embrace. Admittedly, the majority opinion offers ammunition for both sides of the argument. As one observer has noted:

On the one hand, the opinion contains many statements, including in a footnote purporting to set forth the Court’s view on self-execution, that equate non-self-execution with lack of domestic law status. On the other hand, it also contains statements that equate non-self-execution simply with lack of judicial enforceability, and the Court’s test for self-execution appears to focus on whether a treaty is a “directive to domestic courts,” not whether it has the status of domestic law. This ambiguity, which also appears in the State of Texas’s brief in *Medellin*, may have been carried forward from the brief into the Supreme Court’s opinion-drafting process. Importantly, the solicitor general of Texas, who was counsel of record on the brief and argued the case for the state before the Supreme Court, made clear in an online debate shortly after the decision that he equated non-self-execution only with judicial unen-

⁶⁹ *Id.* at 8 (“What is forbidden or required should be clear and the government must provide adequate notice of what has to be authorized.”).

⁷⁰ *Id.* at 11.

forceability, and that in his view non-self-executing treaties do in fact constitute domestic law.⁷¹

Admittedly, some aspects of the majority opinion lend credence to the notion that the international obligations of treaty provisions have no force as domestic law if those provisions are deemed to be non-self-executing, yet even Ted Cruz, the solicitor general who argued the case for the Texas, would not go so far as to reach this conclusion.⁷² At best, *Medellin* is “highly ambiguous” and “leaves unclear” whether a non-self-executing treaty provision “is simply judicially unenforceable, or whether it more broadly lacks the status of domestic law.”⁷³ How, then, should the legal effects of non-self-executing treaty provisions be regarded after *Medellin*?

Seizing upon a few advantageous quotations in order to unburden the U.S. of any need to recognize its international treaty obligations is not the prudent course. Within the text of the opinion, the broad interpretation espoused by Montgomery is at odds with the majority’s clarification that the combination of a non-self-executing treaty and the lack of implementing legislation does *not* preclude the President from acting to comply with an international treaty obligation, it simply “constrains the President’s ability to comply with treaty commitments by unilaterally making the treaty *binding on domestic courts*.”⁷⁴ More importantly, adopting a broad interpretation of *Medellin* is, quite simply, very difficult to reconcile with the Supremacy Clause of the Constitution.⁷⁵ It is significant, also, that the Court “did not

⁷¹ Bradley, *supra* note 63, at 548; see also Nicholas Quinn Rosenkranz et al., *Medellin v. Texas—Part I: Self-Execution*, THE FEDERALIST SOC’Y (March 28, 2008), <http://www.fed-soc.org/publications/detail/medellin-v-texas-part-i-self-execution> (Solicitor General of Texas, Ted Cruz, states, “The question [before the Court in *Medellin*, 552 U.S. 491] was whether the treaties were ‘self-executing,’ by which the Court meant judicially enforceable in U.S. courts.”).

⁷² Rosenkranz et al., *supra* note 71.

⁷³ Bradley, *supra* note 63, at 548.

⁷⁴ *Medellin*, 552 U.S. at 530 (emphasis added); see also *id.* at 550.

⁷⁵ See Vazquez, *supra* note 60, at 649 (“Only this narrower understanding of *Medellin* avoids a direct conflict with the constitutional text”); OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 44 (2017) (“The framers were concerned that violating treaties that the national government made would invite lawful military responses.”); see also Bradley, *supra* note 63, at 550 (“While...not all supreme law of the land is judicially enforceable, it may be problematic to conclude that a treaty is supreme law of the land and yet has no domestic legal status at all.”). Additionally, the Constitution declared treaties to be the supreme law of the land in part because it was drafted in a time when violating international treaties could provide a

attempt to square the view that non-self-executing treaties lack the force of domestic law with the text of the Supremacy Clause.”⁷⁶ Hence, *Medellin* ought to be interpreted in way that can be reconciled with the Supremacy Clause. It can be reasonably concluded, therefore, that nothing in the majority opinion alters the pre-*Medellin* understanding that:

Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is the supreme law of the land. If it is not self-executing, Marshall said, it is not a “rule for the Court”; he did not suggest that it is not law for the President or Congress. It is their obligation to see to it that it is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts if the treaty requires that it be a rule for the courts, or if making it a rule for the courts is a necessary or a proper means for the United States to carry out its obligations.⁷⁷

Reconciling *Medellin* with the Supremacy Clause requires a narrow interpretation by which non-self-executing treaty provisions are understood to mean the “treaty is enforceable...only indirectly...(it) is still the supreme law of the land, but it is ‘addressed to’ the political branches rather than the courts.”⁷⁸ Accordingly, the obligations set forth in Article VI should not be summarily dismissed even if they are properly deemed non-self-executing.

V. APPLICATION TO COMMERCIAL OPERATORS AND IMPLICATIONS FOR NATIONAL SECURITY

Perhaps the most implausible assertion Montgomery advances is the notion that the obligations placed upon States in the Outer Space Treaty apply only to governmental space activities, and not to commercial actors. As evidence she cites to Article IX, which requires a State Party to consult with another States if it “or its nationals” might interfere with others in the conduct of outer space activity.⁷⁹ This single example demonstrates, Montgomery

just and legal cause for war. The Framers surely intended treaties to have domestic effects in order to avoid war, as an aggrieved State would be utterly unconcerned with whether the broken obligation was addressed to the political branches or to the courts.

⁷⁶ Vazquez, *supra* note 60, at 648.

⁷⁷ HENKIN, *supra* note 57, at 203–04.

⁷⁸ Vazquez, *supra* note 60, at 651.

⁷⁹ *Montgomery Testimony*, *supra* note 1, at 13 (quoting Outer Space Treaty, *supra* note 2,

argues, that when the drafters “intended a particular provision to apply to non-governmental entities they said so.” Montgomery apparently raises this argument in an attempt to prove that Article IX’s planetary protection provision does not apply to commercial space actors.⁸⁰ Only States, supposedly, are obligated to take appropriate measures in conducting space activities so as to avoid harmful contamination.⁸¹ This contention warrants skepticism, not least of all because of the negative implications it would have on U.S. national security.

In fact, the drafters intended all of the rights and obligations in the Outer Space Treaty to apply to commercial actors, and they *did* say so. Montgomery anticipates this retort, yet the plain meaning of the text is a difficult obstacle to overcome.⁸² Article VI clearly states that State Parties have international responsibility to ensure national activities are carried out in conformity with the provisions set forth in the Treaty, and national activities include non-governmental activities.⁸³ As one author notes, “‘National’ here cannot mean solely official State space activities” because “the intention is obviously to ensure that all space activities wheresoever carried on, whether by governmental agencies or by nongovernmental entities, shall become the direct responsibility of one State or another.”⁸⁴ In other words, “any space activity that is within a State’s legal power or competence to control, whether by governmental or non-governmental entities” is national activity under the terms of the Outer Space Treaty.⁸⁵ Accordingly, under the plain meaning of Article VI, States have a clear obligation to ensure the activities of private entities are in conformity with the provisions of the Outer Space Treaty, even if those provisions reference only “States Parties.”⁸⁶ To be clear, the obligation does not apply directly to the private entities, but rather applies indirectly to private entities through States. Put simply, Article VI “assures that the parties cannot escape their international obligations under the treaty by virtue of the fact that the activity in outer space or on celestial bodies is

at art. IX).

⁸⁰ *Montgomery Testimony*, *supra* note 1, at 14.

⁸¹ *See* Outer Space Treaty, *supra* note 2, at art. IX.

⁸² *Montgomery Testimony*, *supra* note 1, at 13.

⁸³ Outer Space Treaty, *supra* note 2, at art. VI.

⁸⁴ *Article VI Revisited*, *supra* note 10, at 20–23.

⁸⁵ *Id.* at 23.

⁸⁶ *See* Jakhu, *supra* note 10, at 45 (“[T]he States Parties to the Treaty are under a clear obligation to ensure that space activities of the private entities are in conformity with the provisions of the Treaty.”).

conducted through the medium of nongovernmental entities.”⁸⁷ This includes the harmful contamination provision contained in Article IX, despite Montgomery’s contrary assertion that the U.S. did not agree to apply the harmful contamination provision to commercial operators.⁸⁸

Interpreting the provisions that address “States Parties” as applying only to States ignores not only the plain language of Article VI, but also the negotiating history of the Treaty. As noted, the Soviet Union originally sought to restrict space activities to States, while the U.S. envisioned a role for private actors.⁸⁹ They reached a compromise with Article VI, permitting non-governmental activity in space provided that the appropriate State have direct responsibility over that activity.⁹⁰ This compromise would not have been possible without a shared understanding that the provisions applied to States apply equally to private actors, because only this understanding alleviated the Soviet Union’s concern.

Also, if it were true that the treaty’s requirements apply only to States except in instances where they are specifically applied to States’ nationals, then this same logic would necessitate the conclusion that, for example, Article II’s prohibition against the appropriation of space or celestial bodies would apply to States but not to commercial actors. After all, Article II does not distinguish between a country and its nationals when it declares “[o]uter space...is not subject to national appropriation by claim of sovereignty, by means of use of occupation, or by any other means.”⁹¹ Commercial companies, then, could assert a private property interest in portions of space or particular asteroids. While some have expressed this interpretation in the past, “the views of the minority are not legally tenable.”⁹² Indeed, the *travaux*

⁸⁷ Paul Dembling, *Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Celestial Bodies*, in 1 *MANUAL ON SPACE LAW* 17 (Nandasiri Jasentuliyana & Roy Lee eds., 1979).

⁸⁸ BIN CHENG, *STUDIES IN INTERNATIONAL SPACE LAW* 638–39 (1997) (concluding that under Article VI, the appropriate States possessing some aspect of jurisdiction over the space activity “will be internationally responsible for...ensuring that the space object or person involved with it, does nothing which may constitute a breach by any of the States concerned of their international obligations under general international law, the Charter of the United Nations and the Space Treaty, which *inter alia* contains provisions against harmful contamination of the environment”).

⁸⁹ See *Article VI Revisited*, *supra* note 10, at 14; see also Jakhu, *supra* note 10, at 44.

⁹⁰ See *Article VI Revisited*, *supra* note 10, at 14; see also Jakhu, *supra* note 10, at 44.

⁹¹ Outer Space Treaty, *supra* note 2, at art. II.

⁹² Jakhu, *supra* note 10 at 44.

préparatoires of the Outer Space Treaty “clearly shows that the draftsmen of the principle of non-appropriation never intended this principle to be circumvented by allowing private entities to appropriate areas of the Moon and celestial bodies.”⁹³ Similarly, in his transmission of the Outer Space Treaty to Congress for ratification in 1967, President Lyndon Johnson reiterated his position that the U.S. did not “acknowledge that there are landlords of outer space.”⁹⁴ He did not distinguish between State and private landlords, and the Treaty does not, either.

Adopting Montgomery’s interpretation may very well benefit commercial space industries in the short-term, but could have longstanding repercussions on national security. It has been observed that “the interpretation and application of international obligations are ultimately dependent upon the actions of various States as they engage in the process of fulfilling their treaty obligations.”⁹⁵ State practice, particularly through domestic legislation, can help to shape the meaning of treaty provisions.⁹⁶ This can be clearly seen in the context of the non-appropriation principle expressed in Article II. The U.S., in the aforementioned Commercial Space Launch Competitiveness Act, now formally recognizes the right of citizens to assert private property rights in space resources in accordance with international law, and by doing so the U.S. declares it “does not thereby assert sovereignty or sovereign or exclusive rights or jurisdiction over, or ownership of, any celestial body.”⁹⁷ While some observers believe Article II prohibits such private property rights, others recognize the U.S. interpretation as legitimate.⁹⁸ If States do not contest this interpretation, then the Act may come to be seen “as legislation that represents a step towards defining the content of Article II and the law concerning the specific activity of space mining.”⁹⁹ National legislation, therefore, can play

⁹³ D. Goedhuis, *Legal Aspects of the Utilization of Outer Space*, 17 NETH. INT’L L. REV. 25, 36 (1970).

⁹⁴ President Lyndon B. Johnson, Special Message to the Senate on Transmitting the Treaty on Outer Space (February 7, 1967), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=28427>.

⁹⁵ P.J. Blount & Christian J. Robison, *One Small Step: The Impact of the U.S. Commercial Space Launch Competitiveness Act of 2015 on the Exploitation of Resources in Outer Space*, 18 N.C. J.L. & TECH. 160, 177 (2016).

⁹⁶ *See id.* at 179.

⁹⁷ U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, § 403, 129 Stat. 703 (2015).

⁹⁸ *See Position Paper on Space Resource Mining*, INTERNATIONAL INSTITUTE OF SPACE LAW (December 20, 2015), <http://iislweb.org/iisl-position-paper-on-space-resource-mining/>.

⁹⁹ Blount & Robison, *supra* note 95, at 182.

a part in developing internationally accepted interpretations—that is, the content—of international law.¹⁰⁰

What does any of this have to do with national security? In light of the ability of the U.S. to shape the meaning of space law through its national legislation, it is fair to ask what effect may result if Congress were to adopt the interpretation that most of the obligations of the Outer Space Treaty apply only to States and not commercial actors, or the interpretation that the obligation to impose responsibility over commercial space activity through authorization and continual supervision was entirely discretionary and depended on whether the desire for oversight happened to comport with a State's self-interested economic policy goals. Is the U.S. prepared for other States to adopt the same interpretations? Almost certainly not. Consider, for instance, the U.S. strategic approach set forth in its current National Security Space Policy, which says:

[T]he United States will promote the responsible, peaceful, and safe use of space as the foundational step to addressing the congested and contested space domain. . . . We will encourage allies, partners, and others to do the same. As more nations, international organizations, and commercial firms field or aspire to field space capabilities, it is increasingly important that they act responsibly, peacefully, and safely in space. At the same time, they must be reassured of U.S. intentions to act likewise. We will encourage responsible behavior in space and lead by the power of our example.¹⁰¹

As this policy expresses, the need for other States to responsibly conduct their space activities, including commercial space activities, as well as the need for the U.S. to reassure others and lead by example, are both regarded as matters of national security. The application of Article VI is imperative for accomplishing this strategic approach because it imputes responsibility for all space activities directly to States and requires authorization and continuing supervision. If the U.S. were to adopt Montgomery's dismissive interpretation of Article VI, other States may contest this approach, or they may simply

¹⁰⁰ See *id.* at 183–84.

¹⁰¹ U.S. DEP'T OF DEF. & OFFICE OF THE U.S. DIR. OF NAT'L INTELLIGENCE, NATIONAL SPACE SECURITY STRATEGY: UNCLASSIFIED SUMMARY 5 (January 2011), https://www.defense.gov/Portals/1/features/2011/0111_nsss/docs/NationalSecuritySpaceStrategyUnclassifiedSummary_Jan2011.pdf.

ignore it. The greater risk, however, is that other States will actually embrace the same interpretation. Potentially, this could be an incremental step towards a modification of the international understanding of the obligations of Article VI with respect to commercial space activities. The obligations could come to be widely regarded as far more permissive, and the need for oversight as merely discretionary. The corollary to reduced government oversight of commercial space activities is reduced accountability for commercial space activities generally. While the former may be beneficial to U.S. commercial space activities in the short-term, the latter would be detrimental to U.S. national security interests in the long-term. The U.S., contrary to its own space security policy, would set an example by encouraging *ir*responsible behavior in space. Congress should think strategically about the actions it can take to encourage responsible behavior in space and consider the national security implications of undermining Article VI as an international obligation.

VI. CONCLUSION

As Congress takes up the question of whether and how to regulate near-future commercial space activities, it should take heed of the U.S.'s international legal obligation to authorize and continually supervise them. Derived from Article VI of the 1967 Outer Space Treaty, this international obligation may overlap the various economic and policy reasons driving the decision to oversee commercial space activities, yet it nevertheless stands as an independent basis for providing oversight. The scope of this obligation extends to space activities as they are ordinarily understood. Congress should reject overly broad interpretations of the scope of activities needing oversight, but so too should it recognize that overly narrow interpretations could be equally illegitimate, especially interpretations rendering the obligation completely meaningless. Congress should also resist the temptation to ignore the obligation on the basis of Article VI being, allegedly, non-self-executing. Treaty obligations are the supreme law of the land, even if not directed at domestic courts. Finally, the drafters of the Outer Space Treaty intended the rights and obligations of States to apply equally to non-governmental entities by imputing their conduct directly to the appropriate State or States. Undermining this principle could have long-term detrimental effects on the U.S.'s national security interest in encouraging responsible behavior in outer space.

ORDERED TO SELF-INCRIMINATE: THE
UNCONSTITUTIONALITY OF SELF-REPORT POLICIES IN
THE ARMED FORCES

MAJOR CARMAN A. LEONE*

I.	INTRODUCTION	126
II.	HISTORY OF THE RIGHT TO AVOID SELF-INCRIMINATION IN THE MILITARY	129
III.	THE SISTER SERVICES' SELF-REPORT POLICIES	132
	A. Navy's Self-Reporting Policies.....	132
	1. <i>United States v. Serianne</i>	132
	2. <i>United States v. Castillo</i>	137
	B. Air Force and Army Self-Report Policies.....	141
	C. Coast Guard Self-Report Policy.....	143
IV.	ANALYSIS OF THE CONSTITUTIONALITY OF THE SELF-REPORT POLICIES..	146
	A. The Right to Avoid Compulsory Self-Incrimination under the Fifth Amendment	146
	1. <i>Does the Policy Compel a Communication that is Testimonial and Incriminating?</i>	147
	2. <i>Does a Regulatory Exception Apply?</i>	151
	a. The <i>Oxford</i> Test	152
	b. The <i>Mendoza-Martinez</i> Test	155
	c. The <i>Castillo II</i> Test	159
	B. Other Problems with Self-Report Policies.....	161
	1. <i>Violation of Ex Post Facto Prohibition</i>	161
	2. <i>Arbitrary and Capricious</i>	163
	C. A Proposed Uniform Policy	164
V.	CONCLUSION	166

* Major Carman A. Leone (B.A., New York University; J.D., Villanova University School of Law) is an assistant professor of law at the United States Air Force Academy. He is admitted to the New Jersey, Pennsylvania, and Minnesota bars. The author thanks Col Jeremy Weber, Lt Col (Ret.) Dan Olson, and Maj John Reid for their contributions to this article. The author also thanks Maj Ben Henley for providing the inspiration leading to this article, who always encouraged his people to defend each client with compassion and humility. The views expressed in this article are those of the author and do not necessarily reflect the official policy or position of the United States Air Force Academy, the Air Force, the Department of Defense, or the U.S. Government.

“*Nemo tenetur prodere seipsum*”¹

I. INTRODUCTION

The National Defense Authorization Act of Fiscal Year 2006 (“NDAA 2006”) introduced a requirement for officers and senior enlisted members of the United States Armed Forces to self-report convictions of criminal law.² Specifically, the legislation requires officers and enlisted members in pay grades above E-6 to self-report convictions.³ Qualifying convictions include any violation of military, federal, state, county, municipal, or local criminal law or ordinance except for minor traffic violations.⁴ The legislation also includes a provision which limits the reporting requirement to apply prospectively only.⁵ The legislative history does not provide the rationale as to why this self-reporting requirement only applies to members in certain pay grades.⁶

In accordance with NDAA 2006, the Army, Navy, and Air Force instituted self-reporting policies.⁷ The Coast Guard instituted a similar policy

¹ A Latin expression meaning, “No man is bound to bewray [accuse] himself.” LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 3 (1968).

² National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 554, 119 Stat. 3136, 3264–65 (2006) [hereinafter NDAA 2006].

³ *Id.* § 554(a)(2), 119 Stat. at 3264.

⁴ *Id.* § 554(c), 119 Stat. at 3264–65.

⁵ *Id.* § 554(h), 119 Stat. at 3265.

⁶ See S. REP. NO. 109-69, at 316 (2005). In their initial proposal of this provision, the Senate’s Committee on Armed Services proposed the provision “require active duty and reserve officers and senior noncommissioned officers and petty officers above the grade of E-6 to report to appropriate military authority their arrest, investigation, charging, detention, adjudication, conviction, or any other legal finding of culpability for offenses other than minor traffic violations.” *Id.* The Committee explained that requiring timely reports would “avoid situations in which information material to...duties and assignments is concealed and individual and unit readiness may be adversely affected.” *Id.* The committee also cited the relevance the reports would have on adjudication of security clearances and determination of administrative and statutory selection boards. *Id.* Ultimately, the final version of the bill did not include a requirement to report “arrest, investigation, charging, detention [and] adjudication,” requiring officers and senior enlisted members to report convictions only. NDAA 2006, § 554, 119 Stat. at 3264.

⁷ See U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-23 (6 Nov. 2014) [hereinafter AR 600-20]; U.S. DEP’T OF NAVY, ALL NAVY MESSAGE 067/08, SELF-REPORTING OF CRIMINAL CONVICTIONS BY OFFICERS AND SENIOR ENLISTED MEMBERS (29 Aug. 2008) [hereinafter ALNAV 067/08] (implementing the reporting requirement

as well.⁸ No one military department's policy exactly matches that of its sister services, but all have generally instituted, at a minimum, the specified requirements under NDAA 2006.⁹ The Navy and Coast Guard go even further by requiring all members, not just those in certain pay grades, to self-report convictions as well as arrests.¹⁰

for "E-7 and above"); U.S. DEP'T OF AIR FORCE, INST. 1-1, AIR FORCE STANDARDS para. 2.10 (7 Aug. 2012) [hereinafter AFI 1-1] (incorporating Change 1 issued on 12 Nov. 2014). The language of the NDAA 2006 actually requires that "[t]he regulations shall apply uniformly throughout the military departments." NDAA 2006 § 554(a)(1), 119 Stat. at 3264. However, the military departments have adopted different policies which enforce the self-report provision in an inconsistent manner. *See infra* notes 107–113 and accompanying text.

⁸ U. S. COAST GUARD, COMMANDANT INST. M1600.2, DISCIPLINE AND CONDUCT para. 1.B. (29 Sept. 2011) [hereinafter COMDTINST M1600.2]. Because the Coast Guard is an entity of the U.S. Department of Homeland Security, it falls outside the purview of NDAA 2006 and, therefore, not subject to requirements issued by it. *See* NDAA 2006, § 554(a)(2), 119 Stat. at 3264.

⁹ *See generally* AR 600-20, *supra* note 7, para. 4-23; AFI 1-1, *supra* note 7, para. 2.10; U.S. DEP'T OF NAVY, UNITED STATES NAVY REGULATIONS art. 1137 (14 Sep 1990) [hereinafter NAVY REGULATIONS 1990], *amended by* U.S. DEP'T OF NAVY, ALL NAVY MESSAGE 049/10, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (21 July 2010) [hereinafter ALNAV 049/10] (amplified by U.S. DEP'T OF NAVY, ADMIN INST. 373/11, CHANGE TO U.S. NAVY REGULATIONS IN LIGHT OF U.S. V. SERIANNE (8 Dec. 2011) [hereinafter NAVADMIN 373/11]); U.S. DEP'T OF NAVY, INSTR. 3120.32D, STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY para. 5.1.6 (15 May 2017) [hereinafter OPNAVINST 3120.32D].

¹⁰ *See* NAVY REGULATIONS 1990, *supra* note 9, art. 1137, *amended by* ALNAV 049/10, *supra* note 9 (requiring naval personnel to "report as soon as possible to superior authority any conviction of such service member for a violation of a criminal law"); OPNAVINST 3120.32D, *supra* note 9, para. 5.1.6; COMDTINST M1600.2, *supra* note 8, para. 1.B.2.a ("Any Coast Guard member arrested or detained by civil authorities shall immediately advise their commanding officer of the day and state the facts concerning such arrest and detention."); *id.* para. 1.B.3.a. (requiring reporting of convictions for members with certain security clearances). The relevant part of OPNAVINST 3120.32D reads:

Any person arrested or criminally charged by civil authorities will immediately advise their commander of the fact that they were arrested or charged. The term arrest includes an arrest or detention, and the term charged includes the filing of criminal charges. Persons are only required to disclose the date of arrest or criminal charges, the arresting or charging authority, and the offense for which they were arrested or charged. No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure of the arrest is required to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force. Disclosure of arrest or criminal charges is not an admission of guilt

Every member of the United States Armed Forces, however, regardless of pay grade, has the constitutional right to be free from compulsory self-incrimination.¹¹ Even though members waive some constitutional rights,¹² they do not give up the right to avoid compulsory self-incrimination.¹³ As a result of NDAA 2006 and its implementing regulations, then, a member who is arrested or convicted in a civilian jurisdiction (and the circumstances are otherwise unknown by command) faces a difficult choice: report the conviction and potentially face administrative and criminal consequences or consciously decline to report and violate the self-reporting policy.

In 2009, an enlisted Seaman challenged the Navy's self-report policy after deciding against reporting his arrest for driving under the influence (DUI) and then being charged under Article 92, Uniform Code of Military Justice (UCMJ) for failing to report.¹⁴ After successfully challenging the constitutionality of the self-report policy at trial, the self-report policy was ultimately

and may not be used as such, nor is it intended to elicit an admission from the person selfreporting. No person subject to the UCMJ may question a person selfreporting an arrest or criminal charges regarding any aspect of the self-report, unless they first advise the person of their rights under UCMJ Article 31(b).

OPNAVINST 3120.32D, *supra* note 9, para. 5.1.6. The Navy had previously implemented a self-reporting requirement for certain alcohol-related offenses in 1999. *See* U.S. DEP'T OF NAVY, INST. 5350.4C, DRUG AND ALCOHOL ABUSE PREVENTION AND CONTROL para. 8.n. (29 June 1999) [hereinafter OPNAVINST 5350.4C]. OPNAVINST 5350.4C was replaced in 2009 by DEP'T OF NAVY, INST. 5350.4D, Navy DRUG AND ALCOHOL ABUSE PREVENTION AND CONTROL (4 June 2009) [hereinafter OPNAVINST 5350.4D], but the reporting requirement in para. 8.i. of the new version was cancelled by NAVADMIN 373/11, *supra* note 9, para. 4.B.

¹¹ U.S. CONST. amend. V; 10 U.S.C. § 831 (2012) (prohibiting compulsory self-incrimination).

¹² *See* Parker v. Levy, 417 U.S. 733, 758 (1974) (finding that “while members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and military mission requires different application of those protections” which render permissible some restriction of rights of service members which would be constitutionally impermissible as applied to civilians).

¹³ 10 U.S.C. § 831 (2012); *United States v. Lopez*, 35 M.J. 35, 41 n.2 (C.M.A. 1992) (finding that service members are entitled to many rights not available to state or federal criminal defendants, including entitlement to be notified of nature of offenses before a member can validly waive the right against self-incrimination).

¹⁴ *United States v. Serianne*, 69 M.J. 8, 8 (C.A.A.F. 2010)

deemed unconstitutional by the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA),¹⁵ prompting the Navy to change its policy.¹⁶

While the Navy's self-reporting policy had the advantage of testing its constitutionality through multiple rounds of judicial review, its sister services' versions of the self-reporting policy have not yet had that benefit. While there are differences between the Navy's original challenged policy and that of its sister services, ultimately there remains a question as to the constitutionality of the regulations currently enforced across the Department of Defense.

This article explores the self-reporting policies adopted by each branch of the military. It will first review the origin of the right against compulsory self-incrimination within the Armed Forces. Next, it identifies and analyzes the constitutionality of the Navy, Army, Air Force, and Coast Guard self-report regulations following the *Serainne* opinion. Ultimately, the article proposes a uniform regulation that helps achieve the regulatory purpose of the policy while eliminating concerns of violating the constitutional rights of those who serve.

II. HISTORY OF THE RIGHT TO AVOID SELF-INCRIMINATION IN THE MILITARY

As early as 1770, the right to avoid compulsory self-incrimination was recognized in America.¹⁷ That year, during an investigation led by the Customs Office in Philadelphia, investigators set out to “question under oath every officer and seaman of a vessel that was supposed to have engaged in the smuggling of tea.”¹⁸ The Attorney General at the time, however, informed the Customs collector that he was “very clear in opinion that the Court of Admiralty cannot with propriety oblige any persons to answer interrogatories which may have a tendency to criminate themselves, or subject them to a penalty, it being contrary to any principle of Reason and the Laws of England.”¹⁹ Similarly, in 1780, Major John André, a British spy who was caught and tried by American patriots, was afforded “the courtesy of being at liberty to answer or deny answer to interrogatories as he chose” at his trial.²⁰

¹⁵ *United States v. Serianne*, 68 M.J. 580, 585 (N-M. Ct. Crim. App. 2009).

¹⁶ *See generally* ALNAV 049/10, *supra* note 9; NAVADMIN 373/11, *supra* note 9.

¹⁷ LEVY, *supra* note 1, at 399.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 414; Maj Andre did testify at his trial. BRIAN KILMEADE & DON YAEGER, GEORGE

Although the Articles of War of 1775 were the first codification of American military law, it was not until 1806 that the right against compulsory self-incrimination was first recognized by the laws governing the Armed Forces.²¹ Article 69 of the 1806 revision of the Articles of War provided that

[t]he judge advocate or some person deputed by him, . . . shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to incriminate himself.²²

In 1878, accused service members were statutorily granted the right to elect to testify or remain silent at trial.²³

In 1949, immediately prior to the creation of the UCMJ, the Articles of War only protected military members who were formally accused of an offense.²⁴ With the establishment of the UCMJ, Congress broadened that protection under Article 31(b) to also protect those who were suspected of an

WASHINGTON'S SECRET SIX: THE SPY RING THAT SAVED THE AMERICAN REVOLUTION 170–71 (2013). Maj Andre argued that

because he had been trapped behind enemy lines and was captured there, he was technically not a spy scouting the territory in the uniform of his service, but was, instead a prisoner of war. All such prisoners, he reasoned, can be expected to at least consider making an escape dressed in civilian clothes.

Id. The argument failed and Maj Andre was sentenced to death. *Id.* at 171. *But see* LEVY, *supra* note 1, at 413–14 (suggesting that American revolutionaries seldom provided Tories (those loyal to the English crown), civilian or military, the privilege to refuse to self-incriminate).

²¹ Manuel E. F. Supervielle, *Article 31(b): Who Should be Required to Give Warnings?*, 123 Mil. L. Rev. 151, 165–66 (1989) (citing W. Winthrop, *Military Law and Precedents* 953-60, 982 (2d ed. 1920)).

²² *Id.* at 166 (citing Winthrop, *supra* note 21, at 982). In fact, the Continental Congress' revision of the Articles of War in 1776 explicitly authorized compelled self-incrimination, requiring "[a]ll persons called to give evidence, in any cause, before a court-martial, who shall refuse to give evidence, shall be punished for such refusal at the discretion of such court-martial." *Id.* at 165–66 (citing Winthrop, *supra* note 21, at 968).

²³ *Id.* at 167 (citing Act of Mar. 16, 1878, ch. 37, 20 Stat. 30.)

²⁴ S. REP. NO. 81-486, at 16 (1949).

offense.²⁵ So inspiring were the protections afforded under Article 31, UCMJ, that the Supreme Court of the United States cited the Article as support in *Miranda v. Arizona*, requiring law enforcement to warn civilian suspects in custody prior to interrogating them.²⁶

Until relatively recently, case law has been silent on when a service member is required to report a conviction. Decades of military jurisprudence, however, clarified the circumstances under which a member was required to self-report underlying *misconduct*. In their article, “Failure to Report: The Right Against Self-incrimination and the Navy’s Treatment of Civilian Arrests after *United States v. Serraine*,” Randall Leonard and Joseph Toth outlined the status of self-report requirements as interpreted by military case law before the 2009 Navy-Marine Corps case.²⁷ In *United States v. Dupree*, for example, the Court of Military Appeals held that the appellant could not be convicted of dereliction of duty for failing to report suspected drug use of others where the appellant would have essentially incriminated himself if he reported the drug use.²⁸ Specifically, the *Dupree* court held that the others’ “[drug] use was inextricably intertwined with the appellant’s misconduct” and because of that, reporting the others would have effectively incriminated himself.²⁹ As such, the conviction was overturned.³⁰

Further, in *United States v. Thompson*, an NCO was convicted of dereliction of duty for failing to prevent a junior airman from wrongfully using marijuana.³¹ The NCO himself was also convicted of using marijuana along with the junior airman.³² The Court found that the NCO could not

²⁵ 10 U.S.C. § 831(b) (2012).

²⁶ *Miranda v. Arizona*, 384 U.S. 436, 489 (1966).

²⁷ See Randal Leonard & Joseph Toth, *Failure to Report: The Right Against Self-Incrimination and the Navy’s Treatment of Civilian Arrests After United States v. Serraine*, 213 MIL. L. REV. 1, 13–14 (2012).

²⁸ *United States v. Dupree*, 24 M.J. 319, 321 (C.M.A. 1987) (“Clearly, it was reasonable for [appellant] to expect that his report . . . would necessarily incriminate him in all these crimes. Accordingly, [appellant’s] conviction for dereliction of duty based on his failure to report these offenses cannot stand.”). See also Leonard & Toth, *supra* note 27, at 15 n.73 (discussing the *Dupree* case).

²⁹ *Dupree*, 24 M.J. at 321. See also Leonard & Toth, *supra* note 27, at 15 n.73 (discussing the *Dupree* case).

³⁰ *Dupree*, 24 M.J. at 321. See also Leonard & Toth, *supra* note 27, at 15 n.73 (discussing the *Dupree* case).

³¹ *United States v. Thompson*, 22 M.J. 40, 40 (C.M.A. 1986).

³² *Id.* at 41.

be convicted of dereliction of duty for failing to prevent the same crime to which he was a principal, ostensibly because it would have required him to self-incriminate.³³

In determining whether a person may be unlawfully compelled to disclose information and self-incriminate, courts have employed a balancing test.³⁴ Specifically, courts have balanced the Government's need for disclosure against the member's right against compulsory self-incrimination.³⁵ In factual scenarios like those of *Thompson* and *Dupree*, the courts have concluded that the Government's need for disclosure of drug abuse amidst its military ranks does not outweigh the importance of protecting against compulsory self-incrimination when the individual is a principal to the illegal activity that he or she fails to report.³⁶ In deciding *Thompson* and *Dupree*, the military's highest appellate court made a strong statement: while discipline in the ranks is of paramount importance, it pales in comparison to preserving individual members' constitutional right against self-incrimination. Despite the stance of the Court of Military Appeals (CMA), the Navy challenged that position in 2009 in the case of *United States v. Serianne*.³⁷

III. THE SISTER SERVICES' SELF-REPORT POLICIES

A. Navy's Self-Reporting Policies

1. *United States v. Serianne*

In 2009, the Navy self-reporting regulation read as follows:

Members arrested for an alcohol-related offense under civil authority, which if punished under the UCMJ would result in

³³ See *id.* (citing *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) and *United States v. Marks*, 11 M.J. 303 (C.M.A. 1981)).

³⁴ *Heyward*, 22 M.J. at 37.

³⁵ *Id.* (citing *California v. Byers*, 402 U.S. 424, 427 (1968)).

³⁶ *Heyward*, 22 M.J. at 37. *But see* *United States v. Medley*, 33 M.J. 75, 77 (C.M.A. 1991) (holding that a member who associated with drug abusers was under obligation to report the drug use to military authorities); *United States v. Bland*, 39 M.J. 921, 924 (N.M.C.M.R. 1994) (holding that an accused who helped assault a man was required to report others' who stole property from the man since it was possible to disclose the larceny without incriminating himself).

³⁷ See generally *United States v. Serianne*, 68 M.J. 580 (N-M. Ct. Crim. App. 2009) (reviewing the constitutionality of the Navy's self-report policy).

a punishment of confinement for 1 year or more, or a punitive discharge or dismissal from the Service (e.g., DUI/DWI), shall promptly notify their [commanding officer]. Failure to do so may constitute an offense punishable under Article 92, UCMJ.³⁸

Aviation Electrician Chief David W. Serianne was charged under Article 92, UCMJ, for willfully failing to report his DUI arrest as required by the regulation.³⁹ At trial, Serianne’s defense counsel successfully moved the court to dismiss the dereliction of duty charge because it violated Serianne’s right against compulsory self-incrimination.⁴⁰

The Government filed an interlocutory appeal challenging the decision of the trial judge, but the NMCCA affirmed the trial judge’s decision.⁴¹ It concluded that the instruction was punitive rather than regulatory in nature and was unconstitutional because it “compell[ed] incriminatory testimonial communication.”⁴² In coming to this conclusion, the *Serianne* court analyzed “whether ordering a service member to inform his or her command of an arrest for driving under the influence compels an incriminatory and testimonial statement and, if so, whether a regulatory exception or military necessity applies to permit such compulsion.”⁴³

The regulatory exception to the Fifth Amendment balances the constitutional interest of the member with the public need for the information.⁴⁴ The exception is premised on the principle that “[i]f the Government requires documents to be kept for a legitimate administrative purpose, neither the content nor the act of production of these documents are protected from the Fifth Amendment.”⁴⁵ In *United States v. Swift*, for example, the accused was

³⁸ *Id.* at 581 (citing OPNAVINST 5350.4C, *supra* note 10, para. 8.n.). *See also* Leonard & Toth, *supra* note 27, at 4–10 (providing a general discussion of the *Serianne* case facts and court decision). At the time, the Navy also had a requirement to report convictions for those in pay grades “E-7 and above”, though this was not at issue in the *Serianne* case. *See* ALNAV 067/08, *supra* note 7, para. 1.

³⁹ *Serianne*, 68 M.J. at 580.

⁴⁰ *Id.* at 581.

⁴¹ *Id.* at 580.

⁴² *Id.* at 584.

⁴³ *Id.* at 581.

⁴⁴ *Id.* at 584 (citing *United States v. Oxford*, 44 M.J. 337, 340-41 (C.A.A.F. 1996) (“[t]he Fifth Amendment is not violated when the Government is allowed ‘to gain access to items or information vested with...[a] public character.’”)).

⁴⁵ *Id.* (citing *United States v. Swift*, 53 M.J. 439, 453 (C.A.A.F. 2000)).

forced to produce a divorce decree by his chain of command which implicated him in a false official statement.⁴⁶ After the trial judge denied the motion to suppress the divorce decree, the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces (CAAF) affirmed the trial judge's decision.⁴⁷ CAAF determined that even if the act of producing the document was testimonial, the divorce decree is required as a regulatory matter to establish and update military records supporting spousal eligibility for government benefits.⁴⁸ Further, CAAF found that the divorce decree is a type of record customarily kept by the party being required to produce it and that it was a matter of public record.⁴⁹ Because there is a legitimate administrative purpose for producing the divorce decree, i.e., determining spousal eligibility for governmental benefits, production of the document falls within a type of regulatory exception to the Fifth Amendment and Article 31(a).⁵⁰

In determining whether the Navy regulation qualified as a regulatory exception, the *Serianne* court considered

(1) whether the disclosure requirement is essentially regulatory as opposed to criminal in nature; (2) whether the regulation focused on a highly selective group inherently suspect of criminal activities; and (3) whether there was more than a mere possibility of incrimination but a significant link in a chain of evidence.⁵¹

⁴⁶ *Swift*, 53 M.J. at 443–44. In *Swift*, the court applied the “required record” regulatory exception test, which is a slightly different type of analysis than that which N.C.C.M.A. employed in *Serianne*. *Id.* at 453. The principle illustrated, however, is that there are regulatory exceptions to Article 31(a), UCMJ as well as the Fifth Amendment to the U.S. Constitution which render compelled documents admissible even if the act of producing the document is testimonial and incriminating. *Id.* at 453–54. *See also Oxfort*, 44 M.J. at 342 (finding that compelling an accused to deliver classified material that were allegedly stolen qualified for an exception to Article 31, UCMJ and the Fifth Amendment to the Constitution qualified under a regulatory exception, or “requires-records” exception, because there was little evidentiary cost to the accused, a clear interest by the Government in protecting the records compelled, and an interest that was not aimed at a highly selective group of inherently suspect criminal activities); Leonard & Toth, *supra* note 27, at 19–20 (discussing the regulatory exception).

⁴⁷ *Swift*, 53 M.J. at 441.

⁴⁸ *Id.* at 453.

⁴⁹ *Id.* at 453–54.

⁵⁰ *Id.* at 454.

⁵¹ *United States v. Serianne*, 68 M.J. 580, 584 (N-M Ct. Crim. App. 2009) (citing *Oxfort*, 44 M.J. at 341).

Ultimately, the court found that the Navy regulation failed the first prong of the test because the Navy regulation was “decidedly punitive” in that it gave commanders the power to punish violations of the regulation and promoted the traditional aims of punishment.⁵² The court further found that the Navy regulation was not “essentially regulatory” in nature because driving under the influence is an activity that is criminalized under the UCMJ as well as civilian state jurisdictions.⁵³ Because the policy was instituted as a result of criminal behavior, the policy was not regulatory in nature.⁵⁴

On appeal by the government, CAAF affirmed the decision of the NMCCA, but did so after employing a non-constitutional analysis of the issue.⁵⁵ It did not address whether the regulation was testimonial communication and incriminating, nor did it analyze the application of the regulatory exception.⁵⁶ Instead, CAAF affirmed NMCCA’s decision because there was a conflict between the self-reporting requirement in the regulation and a “superior competent authority” which provided that members were not required to report observed offenses under the UCMJ if “such persons are themselves already criminally involved in such offenses at the time such offenses first come under their observation.”⁵⁷ Because the self-reporting-requirement did not provide Serianne with the rights afforded by the superior competent authority, there was no legal basis to find Serianne derelict in the performance of his duty.⁵⁸

In response to CAAF’s *Serianne* decision, the Navy amended its self-reporting regulation.⁵⁹ The amended regulation reads in part:

⁵² *Id.* at 584. *See also* Leonard & Toth, *supra* note 27, at 7 (discussing the court’s conclusion that the first prong was not met).

⁵³ *Serianne*, 68 M.J. at 584.

⁵⁴ *Id.*

⁵⁵ *United States v. Serianne*, 69 M.J. 8, 11 (C.A.A.F. 2010) (“We base [the] decision on the nonconstitutional, regulatory ground...without reaching the constitutional questions otherwise noted in this appeal.”).

⁵⁶ *See generally id.* at 8-11.

⁵⁷ *Id.* at 9, 10 (identifying NAVY REGULATIONS 1990, *supra* note 9, art. 1137 as the “superior competent authority” and quoting from that regulation).

⁵⁸ *Id.* at 11.

⁵⁹ *See* ALNAV 049/10, *supra* note 9; NAVADMIN 373/11, *supra* note 9. *See also* *United States v. Castillo*, 74 M.J. 160, 161 (C.A.A.F. 2015) (concluding that the Navy made the changes as a direct result of the *Serianne* ruling).

Any person arrested or criminally charged by civil authorities shall immediately advise their commander of the fact that they were arrested or charged....No person is under a duty to disclose any of the underlying facts concerning the basis for their arrest or criminal charges. Disclosure is required to monitor and maintain the personal readiness, welfare, safety, and deployability of the force. Disclosure of arrest/criminal charges is not an admission of guilt and may not be used as such, nor is it intended to elicit an admission from the person self-reporting. No person subject to the Uniform Code of Military Justice (UCMJ) may question a person self-reporting an arrest/criminal charges regarding any aspect of the self-report, unless they first advise the person of their rights under UCMJ, Article 31(b).

...

Commanders shall not impose disciplinary action for failure to self-report an arrest or criminal charges prior to the issuance of this NAVADMIN. In addition, commanders shall not impose disciplinary action for the underlying offense unless such action is based solely on evidence derived independently of the self-report.

...

Per this NAVADMIN, commanders may impose disciplinary action for failure to report an arrest or criminal charges. However, when a service member does self-report pursuant to a valid self-reporting requirement, commanders will not impose disciplinary action for the underlying offense unless such disciplinary action is based solely on evidence derived independently of the self-report. Commanders should consult a judge advocate prior to imposing disciplinary action.... Commanders shall ensure their instructions do not include additional self-reporting requirements.⁶⁰

⁶⁰ *Id.* at 163 (quoting U.S. DEP'T OF NAVY, INSTR. 3120.32C, STANDARD ORGANIZATION AND REGULATIONS OF THE U.S. NAVY para. 510.6 (30 July 2001) [hereinafter OPNAVINST 3120.32C], amended by NAVADMIN 373/11, *supra* note 9, para. 4.C.). The Navy also added to Navy Regulations 1990, Article 1137 a requirement for service members to report anytime they received a criminal conviction. ALNAV 049/10, *supra* note 9, para.

2. *United States v. Castillo*

In 2014, following the ground-breaking *Serianne* decisions and the Navy's revision of its self-report policy, the revised policy was challenged in the NMCCA case *United States v. Castillo (Castillo I)*.⁶¹ In *Castillo I*, the appellant had been arrested for DUI while driving in Washington in February 2012.⁶² Her command discovered the arrest in August of 2012, despite the fact that she had not disclosed her arrest.⁶³ Castillo was charged under Article 92, UCMJ, for failure to self-report the arrest under the amended regulation, and was subsequently convicted.⁶⁴ The NMCCA affirmed the conviction.⁶⁵

The NMCCA found that the amended regulation “removed any real and appreciable danger of legal detriment for a self-reported arrest or criminal charge.”⁶⁶ Ultimately, the court found that the compelled testimonial statement required by the regulation was not incriminating and ultimately served the need of commanders to be aware of charges which may impact deployability and readiness.⁶⁷ It further found that the immunity the regulation offered reinforced the administrative nature of the regulation and ultimately permitted the government to compel disclosure.⁶⁸

In *Castillo I*, the appellant challenged the policy as being punitive in effect, rather than regulatory, as measured by the seven-factor test set forth by the Supreme Court of the United States in *Kennedy v. Mendoza-Martinez*.⁶⁹ The seven-factor *Mendoza-Martinez* test analyzes: (1) whether

2; NAVADMIN 373/11, *supra* note 9, para. 1-2. *See also* *United States v. Castillo*, No. NMCCA 201300280, 2014 CCA LEXIS 328, at *10–11 (N-M. Ct. Crim. App. Mar. 27, 2014).

⁶¹ *Castillo*, 2014 CCA LEXIS 328, at *1 (discussing the change).

⁶² *Id.* at *6.

⁶³ *Id.*

⁶⁴ *Id.* at *1.

⁶⁵ *Id.* at *2.

⁶⁶ *Id.* at *18.

⁶⁷ *Id.* at *18–19.

⁶⁸ *Id.* at *20. *See also Castillo*, 74 M.J. at 166–67 (discussing the prohibition on disciplinary action contained in the Navy regulation).

⁶⁹ *Castillo*, 2014 CCA LEXIS 328, at *20. Specifically, the *Castillo* court applied the seven-factor test set forth by the Supreme Court in *Kennedy v. Mendoza-Martinez*. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–70 (1963)). The difference between the *Serianne* issue of whether the self-report regulation qualified under a regulatory exception and the *Castillo I* issue of whether the challenged policy was

the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation promotes retribution and deterrence—the traditional aims of punishment; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.⁷⁰

Looking at the first *Mendoza-Martinez* test factor, the *Castillo I* court found that the modified Navy regulation did not create an affirmative disability or restraint because it expressly prohibited the imposition of disciplinary action based upon the self-report of a civilian arrest or pending charge.⁷¹ Further, the court found the appellant’s argument unconvincing that the self-report may lead to administrative separation or poor evaluations, measures that the appellant considered amounted to an affirmative disability or restraint, because such argument was “speculative” and “not dictated by the instruction....”⁷²

Next, the *Castillo I* court determined that compulsory disclosure of a criminal arrest or pending charge is not traditionally punishment.⁷³ Although it conceded that in some cases, losing the right to serve the United States Government can constitute punishment, it reiterated that there is no evidence to support the fact that administrative separation inevitably flows from a self-report required by the instruction.⁷⁴

punitive in effect is, in essence, marked only by which party was challenging the regulation. *Compare Serianne*, 68 M.J. at 584, with *Castillo*, 2014 CCA LEXIS 328, *20. In *Serianne*, the appellant Government sought to establish that the challenged self-report policy qualified as an exception to Article 31, UCMJ and to the Fifth Amendment to the Constitution because it was regulatory in nature, and not criminal or punitive in nature. *Serianne*, 68 M.J. at 584. In *Castillo I*, the appellant Castillo challenged the same regulation, arguing that it did not qualify for the regulatory exception because it was punitive in effect. *Castillo*, 2014 CCA LEXIS 328 at *20.

⁷⁰ *Castillo*, 2014 CCA LEXIS 328, at *20 (citations omitted).

⁷¹ *Id.* at *21.

⁷² *Id.* at *21–22.

⁷³ *Id.* at *22.

⁷⁴ *Id.* In making the argument that the loss of the right to serve the Government was historically considered punishment, the appellant relied on *United States v. Lovett*, 328 U.S. 303, 316 (1946). *Id.* However, the court distinguished *Lovett* from the case at bar in that the *Lovett* case considered a statute which prohibited federal employees who engaged in subversive activities from ever again being compensated for government employment. *Id.* Further, the court noted that there is no evidence that the U.S. Navy would bar separated members from future federal service simply because of a discharge that flowed

Third, the court found that scienter was a non-factor under the regulation.⁷⁵ Fourth, the court found that the revised Navy regulation was not aimed at retribution or deterrence for the criminal activity for which self-reporting members are charged, but rather to “monitor and maintain the personnel readiness, welfare, safety, and deployability of the force.”⁷⁶ The court further justified its position, finding that because commanders are prohibited from disciplinary action based on a self-report, there are no retributive or deterrent aspects of the regulation.⁷⁷

Fifth, in NMCCA’s analysis of whether the regulation applied to criminal behavior, the court conceded that the revised Navy regulation “is invoked as a result of behavior that is already a crime.”⁷⁸ Thus, the court found that this particular factor weighed in favor of Castillo because “the instruction to self-report is triggered if a service member is already arrested or charged with a crime.”⁷⁹

Sixth, the *Castillo I* court found that the Navy regulation’s purpose was focused on readiness, welfare, safety, and deployability of the force.⁸⁰ Because the purpose of the regulation is not punitive in nature, this factor weighed in favor of the Government.⁸¹ Seventh, the court found that the information required to be reported under the regulation was not excessive for the alternative purpose assigned to the regulation.⁸² Ultimately, the court found that a majority of the factors weighed in favor of finding the revised Navy regulation regulatory in nature, not punitive, and therefore constitutional.⁸³

CAAF affirmed the decision of the lower court.⁸⁴ Addressing Castillo’s constitutional argument, the court determined that the factual report of an arrest, accompanied by the safeguards against further questioning and pros-

from the self-reporting regulation. *Id.*

⁷⁵ *Id.* at *23.

⁷⁶ *Id.* (citation omitted).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at *23–24.

⁸⁰ *Id.* at *24

⁸¹ *Id.*

⁸² *Id.* at *24–25.

⁸³ *Id.* at *25.

⁸⁴ *United States v. Castillo*, 74 M.J. 160, 168 (C.A.A.F. 2015).

ecution, did not present a real and appreciable hazard of self-incrimination.⁸⁵ The court emphasized that the language embedded in the regulation, which essentially immunized self-reporting members, allowed the government to compel the disclosure even if the self-disclosure was testimonial and incriminating.⁸⁶

CAAF also addressed whether the self-reporting policy was regulatory or punitive, just as the lower court had done in *Serainne* and *Castillo I*.⁸⁷ Unlike NMCCA, CAAF did not analyze the regulation by applying each of the *Mendoza-Martinez* factors.⁸⁸ Finding the seven-factor test instructive, however, the court boiled down the analysis to whether the challenged provision was grounded in a valid regulatory, as opposed to punitive, governmental purpose.⁸⁹ It ultimately concluded that “while the instruction does provide sanctions for noncompliance, the instruction is drawn for a regulatory or administrative purpose.”⁹⁰ The court emphasized several times that the safeguard against further questioning or military prosecution was integral to its determination.⁹¹

⁸⁵ *Id.* at 166 (citing *Marchetti v. United States*, 390 U.S. 39, 48 (1968)).

⁸⁶ *Id.* at 166–67.

⁸⁷ *Id.* at 167.

⁸⁸ *Id.*

⁸⁹ *Id.* The court also considered the cases of *California v. Byers*, which found no Fifth Amendment violation with a reporting requirement that is “essentially regulatory, not criminal,” *Castillo*, 74 M.J. at 163 (quoting *California v. Byers*, 402 U.S. 424, 433–34 (1971)), and *United States v. Oxfort*, in analyzing the regulatory versus punitive governmental purpose issue. *Castillo*, 74 M.J. at 163 (citing *United States v. Oxfort*, 44 M.J. 337, 341 (C.A.A.F. 1996)).

⁹⁰ *Castillo*, 74 M.J. at 167. In reaching this conclusion, the court primarily relied on the fact that on its face, the instruction states “[d]isclosure is required to monitor and maintain the personnel readiness, welfare, safety and deployability of the force.” *Id.* (quoting OPNAVINST 3120.32C, *supra* note 60). It also loosely applied the regulatory test set out in *Oxfort*, finding that the regulation does not target any highly selective group inherently suspect of criminal activities, but rather applies to all members of the Navy. *Id.* (citing *Oxfort*, 44 M.J. at 341).

⁹¹ *Id.* at 166–68 (mentioning the safeguards against further questioning or military prosecution as justification for its determination that the revised Navy regulation was regulatory in nature four times in two pages of the opinion).

B. Air Force and Army Self-Report Policies

The Air Force's self-report policy emerged in 2012 with the advent of Air Force Instruction (AFI) 1-1.⁹² It reads in pertinent part:

Self Reporting Criminal Conviction. If you are above the pay grade of E-6, on active duty, or in an active status in a Reserve Component and are convicted of any violation of a criminal law, you must report, in writing, the conviction to your first-line military supervisor within 15 days of the date of conviction.⁹³

In November 2014, AFI 1-1 underwent revisions at the direction of the Chief of Staff of the Air Force.⁹⁴ Although not bound to do so, the Air Force decided against revising the compulsory self-reporting policy despite NMCCA's *Serainne* and *Castillo* opinions.⁹⁵

⁹² See AFI 1-1, *supra* note 7, para. 2.10. Since the publication of AFI 1-1 in 2012, two other regulations have since been published, both of which contain self-report requirements that conflict with each other and AFI 1-1. Specifically, Air Force Policy Directive (AFPD) 36-29 requires that

[a]ll commissioned officers and enlisted members who are on active duty or in an active status in a Reserve Component, will report, in writing, any conviction for a violation of criminal law to their first-line military supervisor or the appropriate official designated within 45 days of the date of conviction.

U.S. DEP'T OF AIR FORCE, POLICY DIRECTIVE 36-29, MILITARY STANDARD para. 2.7 (24 Sept. 2014) [hereinafter AFPD 36-29]. Similarly, AFI 36-2406 requires "all commissioned officers and enlisted members who are in the RegAF or in the active status in a Reserve Component" to report to their rater within 72 hours any conviction. U.S. DEP'T OF AIR FORCE, INST. 36-2406, OFFICER AND ENLISTED EVALUATION SYSTEMS para. 1.8.1 (8 Nov. 2016) [hereinafter AFI 36-2406]. Given the contradictory language in the regulations concerning those who are required to report and the timeframe within which the reports must be made, it is difficult to ascertain which regulation controls. Because AFI 1-1 is the only punitive regulation of the three, and because it most closely resembles the language of the NDAA 2006, the author believes the self-report language contained in AFI 1-1 should control.

⁹³ *Id.*

⁹⁴ AIR FORCE NEWS SERVICE, *Air Force Updates AF Instruction 1-1*, News, AF.MIL (Nov. 10, 2014), <http://www.af.mil/News/ArticleDisplay/tabid/223/Article/554096/air-force-updates-af-instruction-1-1.aspx>.

⁹⁵ See AFI 1-1, *supra* note 7, para. 2.10. Additionally, AFI 1-1 is a punitive instruction.

The Army's self-reporting regulation is similar to the Air Force's, but it is much more comprehensive.⁹⁶ Like the Air Force, the Army's regulation requires its soldiers who are in the pay grades above E-6 to notify their chain of command in writing of a civilian conviction.⁹⁷ The policy states in pertinent part:

All U.S. Army commissioned officers, [warrant officers], and enlisted members above the grade of E-6 who are on [Active Duty]... will report, in writing, any conviction of such member for a violation of a criminal law of the United States.... Upon receipt of a report of a criminal conviction, the commander will forward that report to the Special Court Martial Convening Authority (SPCMCA) and will include any statements of extenuation or mitigation, if provided. The SPCMCA, with the assistance of the servicing judge advocate, will obtain an authenticated copy of the conviction and the sentence, if available, from civilian authorities and all available supporting evidence. After review, the SPCMCA will forward the authenticated conviction (and sentence, if available) along with any supporting evidence, and statements of extenuation or mitigation, if provided, to the [General Court Martial Convening Authority] with a recommendation on whether to file the conviction in the Soldier's official military personnel file.... Commanders at all levels may consider the conviction for official purposes, to include, but not limited to, evaluation reports, assignments, selection for schools, awards, initiation of separation, and suspension of security clearance. If the commander initiates separation action, the case will be processed through the chain of command to the separation authority for appropriate action.⁹⁸

Page one of the instruction states, "[t]his instruction is directive in nature and failure to adhere to the standards set out in this instruction can form the basis for adverse action under the Uniform Code of Military Justice (UCMJ). An example would be a dereliction of duty offense under Article 92." *Id.* at 1.

⁹⁶ See AR 600-200, *supra* note 7, para. 4-23.

⁹⁷ *Id.* para. 4-23.a.

⁹⁸ *Id.* paras. 4-23.a., g.

C. Coast Guard Self-Report Policy

The Coast-Guard's self-report requirement is similar to that of the Navy, which was scrutinized by *Serainne*. Currently, the Coast Guard's policy requires, in pertinent part: "Any Coast Guard member arrested or detained by civil authorities shall immediately advise their commanding officer or officer of the day and state the facts concerning such arrest and detention."⁹⁹ Like its sister-services' self-report regulations, the Coast Guard requires the report to be made in writing.¹⁰⁰ Unique to the Coast Guard, however, members are required to also provide a "final action report" following final disposition of the arrest by civilian authorities.¹⁰¹

Similar to the Army's self-report regulation, the Coast Guard's explains that the notice of civilian court conviction "shall be reflected in the performance evaluations of both officer and enlisted members."¹⁰² Furthermore, the Coast Guard mentions in its self-report policy that it is "against trial by court-martial for the same act(s) for which a member has already been tried by a state or foreign country...."¹⁰³ There is no explicit limitation on the Coast

⁹⁹ COMDTINST M1600.2, *supra* note 8, para. 1.B.2.a.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* para. 1.B.2.b. The regulation also permits the commanding officer of the arrested member to notify the member's "parents, spouse, or guardian...of the details considered pertinent and proper under the circumstances" so long as the member is under 21 years of age. *Id.* para. 1.B.2.c.

¹⁰² *Id.* para. 1B.4.b.

¹⁰³ *Id.* para. 1.B.4.a.(1). The Coast Guard Military Justice Manual does not absolutely prohibit prosecution for the same offense that is being prosecuted by another jurisdiction, but as a matter of policy, it will not proceed with punitive action on a matter handled by another jurisdiction unless the Chief Counsel of the Coast Guard gives permission. U.S. COAST GUARD, COMMANDANT INST. M5810.1E, MILITARY JUSTICE MANUAL para. 3.B.4 (May 2011) [hereinafter COMDTINST M5810.1E]. COMDTINST M5810.1E states:

No person in the Coast Guard may be tried for the same acts that constitute an offense against state or foreign law and for which the accused has been tried or is pending trial by the state or foreign country, without first obtaining authorization from the Judge Advocate General. Letter requests for authorization shall contain complete justification as to why deviation from the general policy against second trials [see, RCM 201(d)] is appropriate. This policy is based on comity between the Federal Government and State/Foreign Governments and is not intended to confer additional rights upon the accused. "Pending trial" means that an indictment or information has been brought against the accused or that the accused is being held over for trial based on a judicial probable cause hearing. Any pretrial diversion or similar

Guard's treatment of the notification of arrest in the event the charges are not pursued.¹⁰⁴ In fact, the Coast Guard's Military Justice Manual Commandant Instruction suggests Coast Guard authorities can prefer charges in the event the civilian jurisdiction declines or if it believes it is best handled by the Coast Guard:

[I]f during a federal civilian investigative agency investigation, circumstances arise that favor the exercise of jurisdiction by Coast Guard authorities, the [Officer Exercising General Court-Martial Jurisdiction] will contact the cognizant U.S. Attorney to seek approval for trial by court-martial and inform the Judge Advocate General. If agreement cannot be reached

program does not amount to being "tried" or "pending trial." In any case, close coordination with officials of other jurisdictions may be necessary to ensure that the policy against second trials is followed, and because many such jurisdictions have laws prohibiting second trials for persons tried in federal courts or courts-martial. This requirement for prior approval from the Judge Advocate General applies also to trial by summary court-martial and [nonjudicial punishment] for offenses tried or pending trial by state or foreign country.

Id. The Air Force has a similar policy. See U.S. DEP'T OF AIR FORCE, INST. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 2.6 (6 June 2013) [hereinafter AFI 51-201]. AFI 51-201 states:

When a member is subject to both UCMJ and state or foreign jurisdiction for substantially the same act or omission, the determination of which sovereign shall exercise jurisdiction should be made through consultation or prior agreement between appropriate Air Force and civilian authorities. RCM 201(d). If a state or foreign authority's exercise of jurisdiction will not meet/or has not met the ends of good order and discipline, it may be appropriate to seek permission from [the Secretary of the Air Force] to exercise UCMJ authority. Convening authorities and [staff judge advocates] should foster relationships with local civilian authorities with a view toward maximizing Air Force jurisdiction....[A] member who is either pending trial or has been tried by a state or foreign court, regardless of whether the member was convicted or acquitted of the offense(s), should not ordinarily be tried by a court-martial or subjected to nonjudicial punishment proceedings for the same act or omission....A member may be considered to be pending trial when state or foreign authorities have expressed their intention to try the member, even if formal charges have not been brought, e.g., upon arrest of the member or a representation by civilian authorities that they intend to pursue the case.

Id. para. 2.6.1.

¹⁰⁴ See COMDTINST M1600.2, *supra* note 8, para. 1.B.4.a.

at the local level, the matter shall be referred to the Judge Advocate General for disposition.¹⁰⁵

The Coast Guard has implemented this general self-reporting requirement in other governing policies, too. For example, in the Coast Guard Policy on the Possession of Firearms and/or Ammunition by Coast Guard Military Personnel, members are required to report qualifying convictions for purposes of ensuring compliance with the Lautenberg Amendment to the Gun Control Act of 1968.¹⁰⁶

¹⁰⁵ COMDTINST M5810.1E, *supra* note 103, paras. 3.B.7.c.(2)-(3).

¹⁰⁶ U.S. COAST GUARD, COMMANDANT INST. 10100.1, COAST GUARD POLICY ON THE POSSESSION OF FIREARMS AND/OR AMMUNITION BY COAST GUARD MILITARY PERSONNEL para. 7 (14 Apr. 2009) [hereinafter COMDTINST 10100.1]. The Army has a similar provision specifically requiring members to self-disclose convictions which would trigger the Lautenberg Amendment. *See* AR 600-20, *supra* note 7, para. 4-22.c.(3). The Lautenberg Amendment can be found within 18 U.S.C. § 922 (2017).

¹⁰⁷ NAVY REGULATIONS 1990, *supra* note 9.

Table 1.1 – Summary of DoD Self-Reporting Requirements

	Title of publication	Who must report?	What is required to be reported?	Is immunity offered?	Required timing of report	Use of report by command
Navy	Navy Regulations 1990; ¹⁰⁷ ALNAV 049/10; ¹⁰⁸ OPNAVINST 3120.32D; ¹⁰⁹ NAVADMIN 373/11 ¹¹⁰	All members	Arrests and Convictions	Yes	Immediately	For ensuring readiness and deployability only; punitive action prohibited
Army	AR 600-20 ¹¹¹	Above E-6	Convictions	No	Within 15 days of conviction, effective 1 Mar 08	For any official purpose, including but not limited to evaluation reports, assignments, selection for schools, awards, initiation of separation and suspension of security clearance
Air Force	AFI 1-1 ¹¹²	Above E-6	Convictions	No	Within 15 days of conviction	No uses explicitly listed; no restrictions on use
Coast Guard	COMDTINST M1600.2 ¹¹³	All members	Arrests, detention, convictions for certain individuals, and underlying facts of arrest/detention	No	No timing specified	For performance evaluations (mandatory); no restrictions on discretionary use

IV. ANALYSIS OF THE CONSTITUTIONALITY OF THE SELF-REPORT POLICIES

A. The Right to Avoid Compulsory Self-Incrimination under the Fifth Amendment

To determine whether the self-reporting policies instituted by the Air Force, Army, and Coast Guard are violative of the Fifth Amendment, the analysis must begin with a determination as to whether the policies themselves

¹⁰⁸ ALNAV 049/10, *supra* note 9.

¹⁰⁹ OPNAVINST 3120.32D, *supra* note 9.

¹¹⁰ NAVADMIN 373/11, *supra* note 9.

¹¹¹ AR 600-20, *supra* note 7.

¹¹² AFI 1-1, *supra* notes 7, 92.

¹¹³ COMDTINST M1600.2, *supra* note 8.

are testimonial, incriminating, and compelled.¹¹⁴ If the answer to any part of this question is no, then the policies are constitutional. If the communication is testimonial, incriminating, and compelled, the next step of the analysis is to determine whether a “regulatory exception” applies.¹¹⁵ If so, again the policies are constitutional; if not, they violate the Fifth Amendment.

1. *Does the Policy Compel a Communication that is Testimonial and Incriminating?*

To be testimonial, a communication must “explicitly or implicitly relate a factual assertion or disclose information.”¹¹⁶ To be incriminating, a communication must pose “a real danger of legal detriment.”¹¹⁷ The danger must be “real and appreciable” and not “a danger of an imaginary and unsubstantial character.”¹¹⁸ Incriminating statements include “those which would furnish a link in the chain of evidence needed to prosecute [an individual] for a federal crime.”¹¹⁹

The *Serianne* court found that while production of documents had historically been treated as non-testimonial, the act may actually communicate a fact.¹²⁰ The *Serianne* court found that notifying command of an arrest for DUI under the original Navy regulation – in writing or orally – did, in fact, qualify as testimonial communication.¹²¹ The *Serraine* court determined

¹¹⁴ *United States v. Castillo*, 74 M.J. 160, 165 (C.A.A.F. 2015) (citing *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189 (2004)).

¹¹⁵ *See id.* at 164.

¹¹⁶ *Doe v. United States*, 487 U.S. 201, 210 (1988).

¹¹⁷ *United States v. Serianne*, 68 M.J. 580, 582 (N-M. Ct. Crim. App. 2009) (citing *Rogers v. United States*, 340 U.S. 367, 372–73 (1951)).

¹¹⁸ *Id.* (citing *Brown v. Walker*, 161 U.S. 591, 599 (1896)).

¹¹⁹ *Id.* (citing *Hoffman v. United States*, 341 U.S. 479, 486 (1951)). *See also In re Kave*, 760 F.2d 343, 354 (1st Cir. 1985) (“To invoke the privilege, it is not necessary that the witness show that his testimony would be certain to subject him to prosecution, or that it will prove the whole crime, unaided by other evidence. It is enough if there is a reasonable possibility of prosecution, and if the testimony, although falling short of proving the crime in its entirety, will tend to a conviction when combined with evidence from other sources.”).

¹²⁰ *Serianne*, 68 M.J. at 582. The Supreme Court has noted, as observed by the *Serianne* court, that “[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of statements thus will be testimonial....” *Id.* (citing *Doe*, 487 U.S. at 213).

¹²¹ *Id.*

that, while not wholly dispositive, the privilege against compulsory self-incrimination should have protected the accused from reporting his own arrest which would lead to further disclosure of incriminating evidence.¹²²

In *Castillo I*, NMCCA determined that the revised Navy self-report policy was testimonial and compelled because it required Sailors to disclose to command “the ‘date of arrest/criminal charges, the arresting/charging authority, and the offense for which they were arrested/charged,’” but found that the policy was not incriminating because of the prohibition of commanders from imposing discipline for the underlying offense leading to the arrest/conviction.¹²³ In *Castillo II*, CAAF similarly explained “although a reasonable argument exists that the compelled disclosure of an arrest by civilian authorities is testimonial and incriminating, [because] the reporting requirement prohibits commanders from imposing disciplinary action on the basis of the underlying arrested offense...the functional immunity provided by the instruction allows the government to compel the disclosure.”¹²⁴

The Government also argued in *Castillo II* that because an arrest is a matter of public record, requiring the member to disclose an arrest of public record is not a communication that is testimonial and incriminating.¹²⁵ CAAF agreed, concluding that reporting an arrest is not incriminating because “the mere fact of an arrest is a matter of public record...[which] communicates only that a police officer believed probable cause existed to arrest an individual on suspicion of committing an offense.¹²⁶ This conclusion stands in stark contrast to the principle advanced by the Supreme Court of the United States in *United States v. Hubbell*.¹²⁷ In *Hubbell*, the Court explained that

[w]e have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect. We have held that “the act of production” itself may implicitly communicate “statements of fact.” By “producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or

¹²² *Id.* at 583.

¹²³ *United States v. Castillo*, No. NMCCA 201300280, 2014 CCA LEXIS 328, at *14–15, *18–19 (N-M. Ct. Crim. App. Mar. 27, 2014).

¹²⁴ *United States v. Castillo*, 74 M.J. 160, 166 (C.A.A.F. 2015).

¹²⁵ *Id.* at 164.

¹²⁶ *Id.* at 166.

¹²⁷ *United States v. Hubbell*, 530 U.S. 27 (2000).

control, and were authentic.”...[T]he act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the document themselves are incriminating.¹²⁸

Under *Hubbell*, therefore, while the public record of the written arrest report is not itself a compelled, testimonial, and incriminating statement, forcing a service member to provide the report can constitute a violation of the Fifth Amendment.

Consistent with CAAF’s opinion in *Castillo II*, it is clear that the Coast Guard’s requirement to self-report arrests is unconstitutional because it compels disclosure which is testimonial and incriminating. Like the pre-revision Navy self-report policy at issue in *Serianne*, the Coast Guard policy requires its members to report civilian arrests, detentions, and convictions as well as the underlying facts.¹²⁹ Therefore, because the policy requires the member to divulge information which NMCCA and CAAF have deemed compelled, testimonial, and incriminating, the policy violates the first question of the Fifth Amendment analysis.

The policies at issue in the Army and Air Force reporting requirements, however, are a bit different. Unlike the Navy and Coast Guard, the Army and Air Force require that members report convictions, not arrests.¹³⁰ On one hand, this distinction is significant because when a member reports only an arrest without a final disposition of the matter, the opportunity for command to take criminal action based on the report is arguably higher. Even considering the Coast Guard’s policy which prevents prosecution under the UCMJ for the same offense being prosecuted by a civilian jurisdiction, a member is nevertheless more vulnerable to prosecution under the UCMJ based on the self-report of an arrest prior to civilian disposition because the civilian prosecutor may relinquish jurisdiction to the military.

¹²⁸ *Id.* at 36–37.

¹²⁹ COMDTINST M1600.2, *supra* note 8, para. 1.B.2.a.

¹³⁰ *See* AR 600-20, *supra* note 7, para. 4-23; AFI 1-1, *supra* note 7, para 2.10.

On the other hand, for those services which require reports of conviction, an opportunity exists for the military to prosecute for the same underlying offense which gave rise to the conviction, though the chances of this occurring are significantly lower.¹³¹ In 2006, for example, the Secretary of the Army approved the recall of Master Sergeant (Retired) Tim Hennis to active duty just so that he could be tried at court-martial for charges of rape and murder following his acquittal of the same charges in state court.¹³² Hennis was convicted by a general court-martial in April 2010 and sentenced to death.¹³³ Hennis is one of at least three men since the late 1980's who the Army charged at court-martial despite having already been tried by the state.¹³⁴

Just as important as the testimonial aspect of the self-report policies is whether the policies are incriminating. For the Army and Air Force, one may argue that a conviction, vice arrest, is not truly incriminating because the prospect of “danger” is not as “real and appreciable” as a report of arrest alone, but more suggestive of an “imaginary and unsubstantial character.”¹³⁵ On the contrary, however, a self-report of a conviction may be truly incriminating because the conviction itself may readily furnish a link in the chain

¹³¹ See AFI 51-201, *supra* note 103, para. 2.6.

¹³² Nicholas Schmidle, *Three Trials for Murder*, NEW YORKER, Nov. 14, 2011, <https://www.newyorker.com/magazine/2011/11/14/three-trials-for-murder> (portraying the tale of a man who was tried three times for murder – twice in state court and once by court-martial). In justification for proceeding to court-martial against Hennis despite the policy of the Army to ordinarily not proceed to court-martial against an accused who had been tried in civilian court, Colonel Mike Mulligan, head of the Army's Appellate Division in 2011, stated “In the Army, justice does not have a price.” *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Schmidle wrote in his article:

In 1987, a soldier named Ronald Gray appeared in a North Carolina court and pleaded guilty to two murders and multiple rapes, among other crimes. Despite the fact that he received consecutive life sentences, the Army court-martialled Gray, charging him with two additional murders and several rapes, and secured a death sentence.

Id. Schmidle also wrote:

The Hennis case may well not be the last of its kind, however: the Army has filed charges against a soldier in Kentucky, accusing him of murdering his wife and her former mother-in-law, after state proceedings ended in hung juries and mistrials.

Id.

¹³⁵ *United States v. Serianne*, 68 M.J. 580, 582 (N-M. Ct. Crim. App. 2009) (citing *Brown v. Walker*, 161 U.S. 591, 599 (1896)).

of evidence needed to prosecute a member for a crime under the UCMJ that is not wholly imaginative and unsubstantial, even if the military does not prosecute the specific underlying misconduct at issue in the civilian conviction. Specifically, when a member self-reports a civilian conviction, there is no protection in place to shield the member from prosecution of UCMJ-specific crimes which may be implicated by virtue of the self-report. There are viable circumstances, as discussed in the next section, which illustrate such scenarios. As such, the distinction between requiring service members to report convictions vice arrests alone is not enough to render such policies constitutionally sound.

Therefore, the Coast Guard's current self-report policy requires members to provide information that is both testimonial and incriminating. While the Army and Air Force policies require members to provide testimonial information, it is less clear whether the information is truly incriminating. Assuming that all three policies do require members to report in a way that is testimonial and incriminating, the next step in the constitutional analysis is whether a regulatory exception saves the policies from being unconstitutional.

2. *Does a Regulatory Exception Apply?*

Military courts have applied at least three different tests in determining whether a self-reporting policy qualifies for a "regulatory exception," assuming that a self-reporting policy does compel testimonial, incriminating statements.¹³⁶ In *Serianne*, the court applied the three-pronged *Oxford* test.¹³⁷ In *Castillo I*, the court applied the seven-part *Mendoza-Martinez* test.¹³⁸ Finally, in *Castillo II*, CAAF applied a simplified test which focused on the ultimate question: is "the challenged provision...grounded in a valid regulatory, as opposed to punitive, governmental purpose"?¹³⁹

¹³⁶ See *infra* notes 137–39 and accompanying text.

¹³⁷ *Serianne*, 68 M.J. at 584 (citing *United States v. Oxford*, 44 M.J. 337, 341 (C.A.A.F. 1996)).

¹³⁸ *United States v. Castillo*, No. NMCCA 201300280, 2014 CCA LEXIS 328, at *20 (N.M. Ct. Crim. App. Mar. 27, 2014).

¹³⁹ *United States v. Castillo*, 74 M.J. 160, 167 (C.A.A.F. 2015). CAAF also relied on *California v. Byers* in developing its simplified test. *Id.* (citing *California v. Byers*, 402 U.S. 424, 433–34 (1971)). The *Castillo II* court determined that the seven-part test in *Mendoza-Martinez* was "instructive" but not the "required analysis in evaluating the essential intent of service regulations." *Id.*

a. The *Oxford* Test

The *Oxford* test is derived from *United States v. Oxford*, which held that requiring a person possessing classified documents without authority to deliver them to authorities was not violative of the Fifth Amendment because the act did not have “testimonial significance.”¹⁴⁰ In coming to this conclusion, the court considered:

(1) whether the disclosure requirement is essentially regulatory as opposed to criminal in nature; (2) whether the regulation focuses on “a highly selective group inherently suspect of criminal activities;” and (3) whether there is more than a mere possibility of incrimination but a significant link in a chain of evidence.¹⁴¹

The NMCCA applied the *Oxford* test in *Serianne* to determine whether the Navy’s self-reporting regulation was subject to a regulatory exception.¹⁴² The court concluded that the regulation failed the first prong of the *Oxford* test because the focus of the regulation was “decidedly punitive and attributes great emphasis on the role of commanders in disciplining service members who are involved in ‘alcohol-related misconduct.’”¹⁴³ Specifically, the court noted the language in the regulation which led them to this conclusion: “commands will discipline as appropriate and process for administrative separation.”¹⁴⁴ Because this language is punitive in effect by promoting traditional aims of punishment, like retribution and deterrence, the regulation failed to satisfy the regulatory exception; therefore, the government was unable to carry its burden in convincing the *Serianne* court that all of the *Oxford* prongs were met.¹⁴⁵

While the Air Force’s self-reporting regulation is silent on how the report of conviction may be used against the member, the Army’s policy states “[s]uspension of favorable personnel actions is mandatory when an investigation (formal or informal) is initiated on a Soldier by military or civilian

¹⁴⁰ *Oxford*, 44 M.J. at 340.

¹⁴¹ *Id.* at 341 (citations omitted).

¹⁴² *Serianne*, 68 M.J. at 584.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing OPNAVINST 5350.4C, *supra* note 10, para. 6.e.(1)).

¹⁴⁵ *Id.*

authorities.”¹⁴⁶ The regulation also explains that “[c]ommanders at all levels may consider the conviction for official purposes, to include, but not limited to, evaluation reports, assignments...[and] initiation of separation....”¹⁴⁷ Although the Army regulation’s language concerning the use of the report by authorities is not as forceful as the language in the now rescinded Navy OPNAVINST 5350.4C was,¹⁴⁸ the Army regulation both contemplates separation and offers a non-exhaustive list of uses for the mandated self-report by members. This suggests that the Army policy may be considered punitive in effect, particularly if the member is separated with an unfavorable service characterization for the self-disclosure.¹⁴⁹

Similarly, the Coast Guard’s regulation mandates that the report of a conviction be reflected in the performance evaluation of the member because the “underlying conduct, not merely the fact of conviction, reflects negatively on the Coast Guard.”¹⁵⁰ This language also appears to promote the traditional aims of punishment, namely retribution and deterrence, just as the language of OPNAVINST 5350.4C did in the *Serainne* case.¹⁵¹ Therefore, both the Army and Coast Guard’s policies likely fail the first prong of the *Oxford* test, precluding the application of the regulatory exception to each.

With regard to the second prong of the *Oxford* test, none of the self-reporting regulations of any military branch appear to focus on a highly selective group inherently suspect of criminal activities. The Army and Air Force, however, do selectively apply their self-reporting regulations only to those in the position above E-6.¹⁵² Neither the regulations themselves, nor the legislative history of NDAA 2006, provide any explanation as to why the self-reporting requirements only apply to a highly selective group of individuals. Therefore, while this categorical and focused application of

¹⁴⁶ AR 600-20, *supra* note 7, para. 4-23.f.(3).

¹⁴⁷ *Id.*, para. 4-23.g.

¹⁴⁸ *See generally* OPNAVINST 5350.4C, *supra* note 10.

¹⁴⁹ It should be acknowledged that there is a reasonable argument to the contrary. Quality of force management actions differ from punitive action both in substance and procedure. While there may be a reasonable argument that quality of force measures, such as documenting self-reported misconduct in evaluations is not punitive in effect because they function to simply document performance based on objective criteria, the extent to which the member’s own words lead to his or her ruin should be the measuring stick with which the “punitive effect” is determined.

¹⁵⁰ COMDTINST M1600.2, *supra* note 8, para. 1.B.4.b.

¹⁵¹ *See supra* notes 143–45 and accompanying text.

¹⁵² *See* AR 600-20, *supra* note 7, para. 4-23.a.; AFI 1-1, *supra* note 7, para. 2.10.

the self-reporting rules would likely not fail the second prong of the *Oxford* test, it highlights an inequity that may render the policies unenforceable, as discussed in Part IV.B.2.¹⁵³

Finally, the self-reporting regulations of the Coast Guard, Army, and Air Force each fail to satisfy the final prong of the *Oxford* test. The Coast Guard's self-reporting regulation is the most likely to force members to produce "a significant link in a chain of evidence"¹⁵⁴ that may be used against the member for unfettered purposes because it requires reporting of not only an arrest or detention, but the underlying facts leading to the arrest or detention.¹⁵⁵ Even though the Army and Air Force regulations require report of a conviction vice arrest, the likelihood that a self-report of a civilian conviction would furnish a significant link to a chain of evidence is high. As they currently stand, the self-reporting policies of the Coast Guard, Army, and Air Force offer no protection, such as immunity, prohibiting command from enforcing the policies in a punitive fashion. Army commanders may use the report of conviction for unfettered purposes.¹⁵⁶ Although the Air Force's policy is silent on the matter, there is nothing prohibiting Air Force officials from using a report of conviction for the same unrestricted purposes.¹⁵⁷ Even though policy discourages it, the Air Force could charge the exact same misconduct underlying the reported conviction under the same or similar punitive article of the UCMJ.¹⁵⁸ Because the Coast Guard requires report of arrest, if the command gains jurisdiction over the matter before final disposition, there is nothing preventing prosecution of the member under the UCMJ for the very misconduct he or she was required to report.

Even if the underlying misconduct of the conviction is not charged under the same or similar punitive article of the UCMJ, nothing prohibits command from using the conviction as a springboard to discovering collateral misconduct which may be punishable under the UCMJ. Consider, for

¹⁵³ See discussion *infra* Part IV.B.2.

¹⁵⁴ United States v. Oxford, 44 M.J. 337, 340 (C.A.A.F. 1996).

¹⁵⁵ COMDTINST M1600.2, *supra* note 8, para. 1.B.2.a.

¹⁵⁶ See AR 600-20, *supra* note 7, para. 4-23.

¹⁵⁷ See AFI 1-1, *supra* note 7, para. 2.10.

¹⁵⁸ See AFI 51-201, *supra* note 103, para. 2.6. See also United States v. Kohut, 44 M.J. 245 (C.A.A.F. 1996) (finding that departmental regulation requiring approval to prosecute prior to charging an offense under the UCMJ which has been disposed of by a state jurisdiction does not affect the convening authority's sovereign exercise of jurisdiction as granted by Congress).

example, the following hypothetical: An Air Force Master Sergeant goes on leave to her home state of Colorado. While on leave, she purchases marijuana from one of the many local and authorized dispensaries and smokes it one evening, which Colorado has deemed lawful since 2012.¹⁵⁹ She then drives and causes a vehicle accident, after which she is cited and later convicted for driving while impaired by marijuana, a violation of Colorado state law.¹⁶⁰ The current Air Force, Army, and Coast Guard self-report regulations would compel her to report this conviction, which would then implicate her for an offense under Article 112a, UCMJ for drug use.¹⁶¹ While she may not be criminally liable for her marijuana use under Colorado law, she is subject to a drug abuse charge under the UCMJ.

Therefore, because self-reports of arrests and convictions would likely furnish a significant link in a chain of evidence against members, the self-reporting regulations of the Air Force, Army, and Coast Guard fail the third prong of the *Oxford* test. Consequently, these policies would fail to qualify for a regulatory exception under the *Oxford* test.

b. The *Mendoza-Martinez* Test

Similar to the results of the application of the *Oxford* test, an analysis of the *Mendoza-Martinez* test suggests that the Air Force, Army, and Coast Guard self-reporting policies fail to qualify as “regulatory.”¹⁶² The *Mendoza-Martinez* test is a general framework in which to analyze the regulatory nature vice punitive nature of a statute which is “neither exhaustive nor dispositive.”¹⁶³ The Supreme Court of the United States has referred to the *Mendoza-Martinez* factors as “useful guideposts” in analyzing the punitive nature of a regulation.¹⁶⁴

¹⁵⁹ See COLO. CONST. art. XVIII, § 16.

¹⁶⁰ See COLO. REV. STAT. 42-4-1301 (2015) (prohibiting driving under the influence or while impaired by alcohol or any drug, including marijuana).

¹⁶¹ 10 U.S.C. § 912a (2012)..

¹⁶² Unlike the Government’s burden to prove all factors in an *Oxford* analysis, the court does not need to find all the *Mendoza-Martinez* factors met before determining the regulation is punitive in effect. *United States v. Castillo*, No. NMCCA 201300280, 2014 CCA LEXIS 328, at *25 (N-M. Ct. Crim. App. Mar. 27, 2014). Rather, the court must find that the sum of the factors weigh in favor of finding the regulation punitive in effect before determining whether the policy is regulatory in nature or punitive in effect. *Id.*

¹⁶³ *Smith v. Doe*, 538 U.S. 84, 97 (2003) (citing *United States v. Ward*, 448 U.S. 448 U.S. 242, 249 (1980)).

¹⁶⁴ *Id.* at 97 (citing *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

Applying the first factor (whether the sanction involves an affirmative disability or restraint) to the self-reporting policies enforced by the Air Force, Army, and Coast Guard leads to the conclusion that the self-report policies do involve an affirmative restraint. The term “affirmative disability or restraint” is not defined in case law; however, the Supreme Court has suggested the term refers to something more than the mere denial of a non-contractual government benefit and more akin to imprisonment.¹⁶⁵ Although the Army’s self-report policy does not explicitly authorize imprisonment as a result of a soldier’s self-report of a conviction, it does permit command to use the report of conviction in a number of ways that amount to an affirmative disability to the soldier, including initiation of separation of the member from the Army.¹⁶⁶ The discharge may be characterized less than honorable, precluding the member from receiving many Veterans Affairs benefits.¹⁶⁷

¹⁶⁵ See *Fleming v. Nestor*, 363 U.S. 603, 617 (1960) (“Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the ‘infamous punishment’ of imprisonment....”); *Smith*, 538 U.S. at 100 (identifying the punishment of imprisonment as “the paradigmatic affirmative disability or restraint”).

¹⁶⁶ AR 600-20, *supra* note 7, para. 4-23.

¹⁶⁷ See U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 3-5.b. (19 Dec. 2016) [hereinafter AR 635-200] (“Characterization may be based on conduct in the civilian community.”). AR 635-200 also states at that “[a] discharge under other than honorable conditions is an administrative separation from the Service under conditions other than honorable. It may be issued for misconduct... [and] [w]hen the reason for separation is based upon one or more acts... that constitute a significant departure from conduct expected of Soldiers of the Army.” *Id.* para. 3-7.c.–c. (2). The rules are substantially the same for officers in the Army. See U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 1-22.c.–c.(4) (12 Apr. 2006) [hereinafter AR 600-8-24] (“An officer will normally receive an ‘Under Other Than Honorable Conditions’ when they...[a]re discharged following conviction by civilian authorities.”). Similarly, in the Air Force, administrative separation of an enlisted Airman which is initiated because of a civilian conviction will normally be characterized as under other than honorable conditions. See, e.g., U.S. DEP’T OF AIR FORCE, INST. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN para. 5.48.1 (9 July 2004) [hereinafter AFI 36-3208] (“Usually, discharges [for a civilian conviction] should be under other than honorable conditions.”). Although the Air Force Instruction pertaining to officer discharges does not specifically state which service characterization should apply when an officer is convicted of a crime in a civilian jurisdiction, it does state “a wing commander or other authority may initiate action based on substantive information not available or admitted at trial, or if the court action was terminated for reasons not related to the to the guilt or innocence of the officer.” U.S. DEP’T OF AIR FORCE, INST. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS para. 3.2.2 (9 June 2004) [hereinafter AFI 36-3206]. The Coast Guard’s discharge policy for officers presumptively labels the member’s service as Under Other Than Honorable if the officer is separating due to a civil authority conviction. See U.S. COAST GUARD, COMMANDANT

The *Castillo I* court rejected the argument that the Navy's self-report policy may lead to administrative separation or poor evaluations which could be akin to an affirmative disability or restraint, finding the argument speculative and that "such actions are not dictated by the instruction at issue."¹⁶⁸ Under the Army's self-report regulation, however, such action is explicitly authorized.¹⁶⁹ The explicit uses outlined in the Army's regulation suggest that the *Castillo I* court failed to consider just how realistic it is that a commander in *any* branch of service would use the conviction in a way that amounts to an affirmative disability or restraint. Without language explicitly prohibiting the use of convictions for disciplinary purposes, as the Navy regulation contains, there is nothing to stop commanders in the Army, Air Force, or Coast Guard from using self-reported convictions for disciplinary purposes.

Regarding the second prong of the *Mendoza-Martinez* test (whether the regulation has historically been regarded as punishment), while compulsory disclosure of a conviction has not historically been regarded as punishment, compulsory disclosure of misconduct has been protected against since before the enactment of the Fifth Amendment.¹⁷⁰ To force people to incriminate themselves deprives them of a right they enjoy by virtue of their presence in this country. As a service member, this right is not limited to the right to avoid self-incrimination pertaining to exclusively criminal matters, as the right to remain silent has been extended in a host of administrative functions, too, especially within the context of the military.¹⁷¹ To strip a service

INST. M1000.4, MILITARY SEPARATIONS para. 1.A.2.d.(4) (21 Apr. 2017) [hereinafter COMDTINST M1000.4]. An enlisted member in the Coast Guard may receive an Under Other Than Honorable Conditions service characterization for "misconduct," but the regulation does not explicitly note a distinction with regard to a civilian conviction. *See id.* para. 1.B.2.f.(3). Finally, the Navy has policies similar to its sister services, presuming a discharge characterization Under Honorable Conditions when the separation is because of a civilian conviction. *See* U.S. DEP'T OF NAVY, MAN. 1910-144, SEPARATION BY REASON OF MISCONDUCT – CIVILIAN CONVICTION para. 5.a. (20 Sept. 2011) [hereinafter MILPERSMAN 1910-144]. A service characterization less than honorable may adversely affect the member in the future with respect to veteran's affairs benefits. *See* 38 C.F.R. § 3.12 (2017) (listing the conditions of discharge which bar members from receiving payment of benefits).

¹⁶⁸ *United States v. Castillo*, No. NMCCA 201300280, 2014 CCA LEXIS 328, at *21 (N-M. Ct. Crim. App. Mar. 27, 2014).

¹⁶⁹ AR 600-20, *supra* note 7, para. 4-23.g.

¹⁷⁰ *See* LEVY, *supra* note 1, at 399, 414; *supra* notes 17–20 and accompanying text.

¹⁷¹ *See, e.g.*, AFI 36-3208, *supra* note 167, para. 8.9.4. (granting the rights afforded by Article 31, UCMJ to board-eligible respondents); U.S. DEP'T OF AIR FORCE, INST. 11-402, AVIATION AND PARACHUTIST SERVICE, AERONAUTICAL RATINGS AND AVIATION BADGES para.

member of this right, especially for purposes of imposing adverse action, appears to be nothing short of punishment.

Regarding the third prong of the test, scienter is a non-factor under the regulation.¹⁷² Under the fourth prong (whether the regulation's operation promotes retribution and deterrence), the self-reporting requirements espoused by the Coast Guard, Army, and Air Force are aimed at retribution and deterrence, the traditional aims of punishment. Deterrence is the inhibition of criminal behavior by fear of punishment.¹⁷³ Considering that a service member's chain of command may consider a conviction for initiating a host of actions that are all aimed at adversely affecting the member and his or her career, the goals of the self-reporting requirement are both to punish and to deter members from behaving in a way that would result in a civilian conviction.

The Coast Guard, for example, requires commanders to note civilian convictions in performance evaluations, as opposed to making it discretionary.¹⁷⁴ The mandatory nature of the directive appears to be punitive with the aim of inhibiting criminal behavior. The Coast Guard could have made the inclusion of convictions in performance evaluations discretionary, allowing the commander to take into consideration the impact and surrounding circumstances of the conviction. The requirement to include the conviction, however, suggests an institutional desire to deter criminal behavior, as the impact of a note of conviction in a performance record would likely prevent the member from promoting to a higher rank. Similarly, the Army's *mandatory* suspension of favorable personnel actions clearly is aimed at deterring criminal behavior, too.¹⁷⁵

Concerning the fifth prong (whether the behavior to which the regulation is applied is already a crime), the mandatory self-reporting policy is only "invoked as a result of behavior that is already a crime," which is triggered

4.4.17 (13 Dec. 2010) (prohibiting any person from compelling the Respondent to testify at a flying evaluation board and requiring advisement of Article 31, UCMJ, rights if applicable) [hereinafter AFI 11-402].

¹⁷² *Castillo*, 2014 CCA LEXIS 328 at *22-23.

¹⁷³ *Deterrence*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/deterrence> (last visited Sept. 25, 2017).

¹⁷⁴ COMDTINST M1600.2, *supra* note 8, para. 1.B.4.b.

¹⁷⁵ *See* AR 600-20, *supra* note 7, para. 4-23.f.(3).

if a service member is convicted.¹⁷⁶ The *Castillo I* court conceded that this factor weighed against the policy.¹⁷⁷

The sixth prong is whether an alternative purpose exists to which these regulations may rationally be connected.¹⁷⁸ Here, an alternative purpose to punishment for the self-report policies is to monitor and maintain the personnel readiness, welfare, safety, and deployability of the force, which is the justification set forth by the Navy in support of its current self-reporting requirement.¹⁷⁹ The legislative history of NDAA 2006 specifically emphasizes the need for self-reporting for duty and performance purposes.¹⁸⁰ The concern with giving this factor too much weight is that command can point to these legitimate, alternative purposes and use them as pretext behind a true desire to discipline the member for the misconduct underlying the self-reported conviction. This is why the policy fails the seventh prong of the *Mendoza-Martinez* test (whether the policy appears excessive in relation to the alternative purpose).¹⁸¹ The self-report policy gives commanders too much authority to wield discipline in relation to the alternative legitimate purposes for which commanders need this information, such as readiness and deployability. To tailor the policies, immunity clauses, similar to that of the Navy's, embedded into the self-report policy would both highlight the alternative, legitimate purposes of the policy and prevent the use of these purposes as a pretext for discipline.

c. The *Castillo II* Test

In *Castillo II*, CAAF applied a simplified test to determine whether a regulation qualified as “regulatory” within the context of the Fifth Amendment, which focused on the ultimate question: is “the challenged provision grounded in a valid regulatory, as opposed to punitive, governmental purpose”?¹⁸² Applying the *Castillo II* test to the self-reporting policies instituted by the Coast Guard, Army, and Air Force, each arguably are intended to be regulatory in nature. It is clear from the legislative history of NDAA 2006 that Congress’s intent behind the law was to “avoid situations in which

¹⁷⁶ *Castillo*, 2014 CCA LEXIS 328 at *23–24.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *24.

¹⁷⁹ *Id.*

¹⁸⁰ S. REP. NO. 109-69, at 316 (2005).

¹⁸¹ *Castillo*, 2014 CCA LEXIS 328 at *24–25.

¹⁸² *United States v. Castillo*, 74 M.J. 160, 167 (C.A.A.F. 2015).

information material to an officer's or senior enlisted member's duties and assignments is concealed and individual and unit readiness may be adversely affected."¹⁸³ Congress also envisioned that the self-report requirement would help identify information that is "potentially relevant to adjudications of security clearances and determinations of administrative and statutory selection boards."¹⁸⁴

An example of a legitimate situation in which this regulation might be applied would be for the commander of the recruiting branch of a service requiring all members who drive a government-issued vehicle as part of their daily duties to report convictions leading to the suspension or revocation of his or her driver's license. This self-report requirement is clearly aimed at preventing members from future criminal behavior of driving with a suspended or revoked license, but it also helps protect the government from liability if the member gets into an accident and injures or kills another person while driving a government-issued vehicle while having a suspended license.

The problem, however, with simply applying the "grounded" test as the litmus for whether a policy is more regulatory than punitive is that even if the intent behind the self-reporting provision is administrative, the policy should still fail if there are no safeguards in place to prevent the policy from being used in a punitive fashion. Despite its simplified test in *Castillo II*, CAAF tacitly acknowledged that even though a policy may be intended to be regulatory, if the policy is enforced in a way that is punitive in nature or violative of the Fifth Amendment, it could lend itself to future challenges.¹⁸⁵ Consider, for example, the commander of the recruiting branch who receives a self-report of a revoked license from a technical sergeant due to a conviction for DUI. If, based on the self-report, the commander strips the member of her ability to drive a government-issued vehicle *and* prevents her from promoting, the regulatory aim has been met, but the commander still used

¹⁸³ S. REP. NO. 109-69, at 316 (2005).

¹⁸⁴ *Id.*

¹⁸⁵ *Castillo*, 74 M.J. at 167 n.9. The footnote states in part,

Read as a whole, the clear purpose of the regulation is to require self-reporting of an arrest while providing procedural safeguards against military prosecution for the underlying offense. In the hypothetical case where the government pursues additional questioning and brings a prosecution based on that questioning, the parties remain free to argue whether that questioning infringed on the Fifth Amendment privilege against self-incrimination in view of the required disclosure.

Id.

the self-reported information to serve a disciplinary purpose, too. Because of the nearly unfettered ways command may use the report, such as to punish members for the conviction, the self-reporting policies of the Coast Guard, Army, and Air Force should fail to qualify as “regulatory.”

B. Other Problems with Self-Report Policies

1. *Violation of Ex Post Facto Prohibition*

The Army’s self-report policy only requires members to report convictions that were announced after 1 March 2008.¹⁸⁶ The Air Force’s self-report policy requires members to report convictions “within 15 days of the date of conviction,” but fails to address the requirement, if any, of members who have an old civilian conviction which was never disclosed prior to the implementation of the policy.¹⁸⁷ Even less clear, the Navy requires its members to “immediately advise the commander” of arrests and convictions,¹⁸⁸ while the Coast Guard’s policy simply states “all civilian convictions shall be reported....”¹⁸⁹

Some of these sister services’ self-report policies may be subject to a constitutional challenge under the *Ex Post Facto* clause of the U.S. Constitution.¹⁹⁰ The Supreme Court of the United States clarified the scope of the *Ex Post Facto* prohibition in *Calder v. Bull*, finding it applies to the following scenarios:

¹⁸⁶ AR 600-20, *supra* note 7, para. 4-23.a.

¹⁸⁷ AFI 1-1, *supra* note 7, para. 2.10.

¹⁸⁸ OPNAVINST 3120.32D, *supra* note 9, para. 5.1.6 (“Any person arrested or criminally charged by civil authorities will immediately advise their immediate commander....”). U.S. Navy regulations also require that all persons self-report criminal convictions from foreign jurisdictions in addition to domestic jurisdictions. NAVY REGULATIONS 1990, *supra* note 9, art. 1137, amended by ALNAV 049/10, *supra* note 9, para. 2 (amplified by NAVADMIN 373/11, *supra* note 9, paras. 1-2).

¹⁸⁹ COMDTINST M1600.2, *supra* note 8, para. 1.B.3.a.

¹⁹⁰ U.S. CONST. art I, § 9, cl. 3 (“No bill of attainder or ex post facto Law shall be passed.”). This argument in this section is solely limited to judicial action taken against a member under Article 92, UCMJ, for failure to comply with the self-reporting policy; it does not encompass administrative action taken against a member for failure to comply with the self-report policy, as such policy has been held to not violate the *Ex Post Facto* clause. *See* Smith v. Doe, 538 U.S. 84, 103 (“The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.”).

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.¹⁹¹

The Army's self-report policy appears to be in compliance with the *Ex Post Facto* clause because it only requires report of convictions after the date the law went into effect.

The Air Force's policy suggests a similar application to that of the Army's, but is not explicit. If a member is charged by Air Force authorities for failing to report a conviction which occurred before NDAA 2006 passed, the use of AFI 1-1 as support for the charge could be in violation of the *Ex Post Facto* clause. Suppose, for example, an officer received a DUI conviction years before the promulgation of AFI 1-1 and did not disclose the conviction to command after AFI 1-1 went into effect. Command then discovers the conviction before the statute of limitations runs. If the officer is later charged under Article 92, UCMJ, for failure to report the conviction in accordance with AFI 1-1, paragraph 2.10, it could be vulnerable to a constitutional challenge for violating the *Ex Post Facto* clause because no such rule was in place at the time of the incident or the conviction. Although the policy does not necessarily alter a legal rule of evidence, the policy does, in effect, compel more testimony than the law required at the time of the commission of the offense in order to convict the offender. As such, it would appear to violate one of the four tenets of the *Ex Post Facto* clause as interpreted by *Calder*. The same analysis applies to the Coast Guard policy, but the complete absence of a timeframe in which members are required to report the conviction leaves the Air Force and Coast Guard policies even more vulnerable to a challenge under the *Ex Post Facto* clause.

The Navy's policy, however, is not in jeopardy of violating the *Ex Post Facto* clause because although the policy does not have an implementation timeline like that of the Army's, the immunity clause which was added

¹⁹¹ *Calder v. Bull*, 3 U.S. 386, 390 (1798) (emphasis added).

following *Serianne* prohibits the Navy from using the report of conviction to charge the member under the UCMJ. Therefore, yet again, the immunity clause built into the Navy's self-reporting regulation alleviates any constitutional concern.

2. *Arbitrary and Capricious*

The Air Force tailored its self-report policies to apply only to those members "above the pay grade of E-6."¹⁹² The Army's policy also limits its application to those "above the grade of E-6."¹⁹³ The Navy and Coast Guard, however, require all of their members to report without differentiating between those who have attained a particular rank.¹⁹⁴ The legislative history to NDAA 2006 emphasized the specific need for officers and senior enlisted members to self-report so as to avoid disrupting "individual and unit readiness."¹⁹⁵ What the legislative history lacks, however, is an explanation as to why convictions of junior ranking members of the armed services would not affect individual or unit readiness.

Arguably, the military generally has more of an interest in accurately characterizing the service of its leaders than its followers; under certain circumstances, a leader's blunder will likely carry wider-rippling consequences in the wake of the misconduct which would dwarf the same blunder committed by a subordinate. In some situations, however, the E-3 who receives a conviction could impact unit readiness as much or greater than the E-9's conviction. Take, for example, the case of a senior airman security forces patrolman whose duty includes protection of a high-valued asset. Suppose the senior airman is convicted of a domestic abuse charge unbeknownst to his command. Under the Lautenberg Amendment to the Gun Control Act of 1968,¹⁹⁶ the airman may not arm himself with a firearm, preventing him from accomplishing the very purpose he serves in the Armed Forces. The impact of the domestic abuse conviction for the senior airman would likely have a greater impact on unit readiness than would the same conviction of a second lieutenant serving her first assignment in the base public affairs office.

¹⁹² AFI 1-1, *supra* note 7, para. 2.10.

¹⁹³ AR 600-20, *supra* note 7, para. 4-23.a.

¹⁹⁴ See Navy Regulations 1990, *supra* note 9, art. 1137, amended by ALNAV 049/10, *supra* note 9, para. 2 (amplified by NAVADMIN 373/11, *supra* note 9, paras. 1-2) and COMDTINST M1600.2, *supra* note 8, para. 1.B.2.a.

¹⁹⁵ S. REP. NO. 109-69, at 316.

¹⁹⁶ 18 U.S.C. § 922 (2012).

Similarly, rank differentiation plays no apparent role in individual readiness. Ostensibly, a civilian conviction could jeopardize an E-1's individual readiness the same as it would for an O-6. For example, an E-1 who receives a DUI conviction would have his driving privileges restricted to the same extent an O-6 would, thereby making it equally difficult for both members to travel to and from duty locations. As such, limiting reporting requirements to certain ranks within the Armed Forces appears to be an arbitrary and capricious application of the self-report policy.¹⁹⁷

C. A Proposed Uniform Policy

The self-report policies can be salvaged and implemented in a way that is devoid of constitutional concern. Through careful selection of language from existing policies and by adding safeguard provisions, there can be a comprehensive, uniform policy that meets the intent of NDAA 2006 to ensure individual and unit readiness without infringing on a service member's constitutional rights. The following draft regulation meets these goals:

Report of Conviction. All active duty and reserve members must report to their first-line supervisor, in writing, notice of a qualifying conviction of criminal law by any law enforcement authority within 15 days of verdict. Reporting is required for any criminal conviction received on or after [date regulation goes into effect].

a. *Content of report.* The information that must be disclosed includes the name of the member, rank, unit of assignment, date of conviction, case number, the basis of

¹⁹⁷ See *United States v. Green*, 22 M.J. 711, 716 (A.C.M.R. 1986) (“Orders and directives which only tangentially further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close judicial scrutiny and may be invalid and unenforceable.”). The “arbitrary and capricious test” asks whether governmental decisions are supported by “such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion.” Zygmunt J. B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the “Arbitrary and Capricious” Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 716–17 (1989) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–89 (1951)). See also *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (reviewing a challenge to the death penalty as arbitrary and capricious by determining whether there was any meaningful basis for distinguishing the few cases in which the death penalty was imposed from the many cases in which it was not).

the conviction (e.g., DUI) and disposition/judgment. No person is under a duty to disclose any of the underlying facts concerning the basis for the conviction.

b. *Terms defined.*

1. *Qualifying conviction.* For the purpose of this policy, the term “conviction” includes a plea or finding of guilty, a plea of nolo contendere or plea of no contest (which are pleas of guilt to the charge(s) without admitting guilt), and all other actions tantamount to a finding of guilty, including adjudication withheld, deferred prosecution, entry into adult pretrial intervention programs, and other similar disposition of charges.

2. *Criminal law.* A criminal law under this paragraph includes any military or other federal criminal law; any state, county, or municipal criminal law or ordinance; and such other criminal laws and ordinances of jurisdictions within the United States or in foreign countries. A minor traffic offense which does not require a court appearance does not qualify as a criminal law under this paragraph.

c. *Uses.* A qualifying conviction may be used by the member’s chain of command for administrative and regulatory purposes, including: security clearance adjudication, readiness and deployability purposes, assignments, and potentially separation from the service. No person may use any required report under this section for purposes of taking punitive action against the member under the UCMJ. Further, if a member is administratively separated as a result of the self-report, command may not use the self-report or evidence derived from it when determining service characterization if the sole purpose for administrative separation is based on the self-report. The burden is on the government to prove by a preponderance of the evidence that evidence used in prosecution or separation of a member with any service characterization other than honorable which relate to the reported conviction was independently obtained and not derivative of the self-report.

V. CONCLUSION

The self-report regulations adopted by the Air Force, Army, and Coast Guard violate the right to avoid self-incrimination. Even though the Army and Air Force policies only require members to report convictions as opposed to arrests or charges, these policies still leave members vulnerable to criminal prosecution under the UCMJ for the same underlying misconduct at issue in the civilian conviction in rare cases, and could lead to prosecution for collateral, military-specific misconduct in others. Further, an analysis of the *Oxford*, *Mendoza-Martinez*, and *Castillo II* tests suggest that such policies are generally more punitive than regulatory, and they therefore fail to qualify under the regulatory exception.

The solution for the Army, Air Force, and Coast Guard is to tailor their self-reporting policies so that they are in line with the Navy's regulation, as amended after *Serainne*. Specifically, a comprehensive self-reporting policy needs to first be limited to reporting convictions, as arrests require a lower standard of proof to execute—probable cause—as compared to the beyond-a-reasonable-doubt standard required for convictions, and therefore are less reliable sources of information for command.¹⁹⁸ While an arrest can possibly carry with it pending legal proceedings that might make the member non-deployable, the *Serianne* court made clear that compelling members to report arrests would both “furnish a link in the chain of an investigation” and “trigger an investigation that would lead to incriminating evidence.”¹⁹⁹ Therefore, any self-report policies that *would* require arrests to be reported should include even more robust protection for service members to avoid adverse action stemming from the report.

Second, a comprehensive self-report policy should prohibit command from taking punitive action under the UCMJ based on the self-report. Third, the policy should prohibit command from considering the self-report or evidence derived from it for purposes of service characterization for any member who is administratively separated solely based on the self-report.²⁰⁰

¹⁹⁸ *United States v. Watson*, 423 U.S. 411, 417 (1976) (quoting *Carroll v. United States*, 267 U.S. 132, 156 (1925)) (“The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony....”).

¹⁹⁹ *United States v. Serianne*, 68 M.J. 580, 583 (N-M. Ct. Crim. App. 2009).

²⁰⁰ This would mirror the policy regarding service characterizations based on separation following a command-directed urinalysis. *See, e.g.*, AFI 36-3208, *supra* note 167, paras. 1.21, 1.21.5. The regulation states,

Fourth, the policy should apply the self-report requirement prospectively based on the date the policy is published, requiring only those who have received a conviction after that point in time to report. Finally, the self-report regulation should apply the requirement to all members of the Armed Forces to eliminate an arbitrary and capricious application of the policy.

The Armed Forces must be able to maintain the personnel readiness, welfare, safety, and deployability of its members. Self-reporting policies help serve this goal. The proposed uniform policy guarantees that the information will only be used for administrative and regulatory purposes. It provides the command with the information it needs to ensure a ready unit. Building protective “immunity” language into the self-report policy will increase the likelihood that members will obey the rule without fear of self-incrimination. Finally, the current Navy policy, though not perfect, is a good model. It has been refined by litigation, a process that the Army, Air Force, and Coast Guard are bound to undergo if these departments do not proactively reform their policies.

[Regarding service characterization,] [d]o not use the results of mandatory drug testing for controlled substances if the testing was conducted during a command-directed examination or command directed referral of a specific member to determine the member’s competency for duty and/or need for counseling, treatment or other medical treatment when there is a reasonable suspicion of drug abuse....

Id. See also AR 635-200, *supra* note 167, para. 3-8.g. (“The following information cannot be used against a Soldier on the issue of characterization:...[t]he results of mandatory urinalysis or alcohol-breath tests when such use is prohibited....”). It would also reinforce the policies giving some protection to those service members who self-identify as a drug abuser for purposes of seeking treatment. See, e.g., AFI 36-3208, *supra* note 167, paras. 1.21, 1.21.4. (prohibiting command from considering member’s voluntary self-identification for treatment of drug abuse along with any evidence provided in connection with the self-identification for characterization of discharge); AR 635-200, *supra* note 167, para. 3-8.g. (prohibiting command from considering “a Soldier’s voluntary submission to a treatment and rehabilitation program” for characterization of discharge).

CHILDREN ARE SPEAKING. IT’S TIME WE LISTEN:
THE CASE FOR A CHILD HEARSAY EXCEPTION IN
MILITARY COURTS

MAJOR M. ARTHUR VAUGHN II*

I.	INTRODUCTION	170
II.	WHY IT IS TIME FOR THE MILITARY TO ADOPT A CHILD HEARSAY STATUTE	172
	A. Limit Psychological Effect in Attaining the Truth.....	172
	B. Provide Predictability for All Parties to the Trial.....	175
	C. The Volume of Child Victims Warrants a Hearsay Exception..	179
	D. Public Policy and Precedent.....	181
III.	BACKGROUND ON HEARSAY AND THE CONFRONTATION CLAUSE	183
	A. Hearsay and the Confrontation Clause	183
	B. Analysis of the Statements Made by the Child in the Introduction.....	186
	1. <i>The Spontaneous Statement Made to the Mother Is Nontestimonial</i>	186
	2. <i>The Statements Made During the Forensic Interview Are Testimonial</i>	187
IV.	PROPOSED MILITARY RULE OF EVIDENCE	189
	A. The Definition of “Child” Should Be a Person Under Age Sixteen.....	190
	B. The Rule Should Require a Reliability Test <i>Only</i> If the Witness Is Unavailable.....	194
	C. The Statement Should Be Admissible without Regard to Availability of the Child.....	201
	D. The Corroboration Requirement Is Satisfied within the Reliability Test	203
	E. The Rule Is Constitutional	204
V.	CONCLUSION	205

* Major M. Arthur Vaughn II (B.A., Auburn University (2002); J.D., Appalachian School of Law (2007); LL.M., The Judge Advocate General’s Legal Center and School (2016)) is an instructor in the Military Justice Division at The Air Force Judge Advocate General’s School, Maxwell Air Force Base, Alabama. He is a member of the bars of Alabama; the Northern, Middle, and Southern Districts of Alabama; the Air Force Court of Criminal Appeals; and the Court of Appeals for the Armed Forces.

*Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.*¹

I. INTRODUCTION

An otherwise happy-go-lucky six-year-old boy recently becomes introverted, quiet, and withdrawn. His mother is confused and concerned, but his father attributes it to “just a phase.” However, when the mother begins to question her son about why he is acting differently, he discloses that “daddy touched me.” After the initial shock and tears subside, she contacts the police. Because the parents are active duty military members, the local military authorities take the lead role in investigating the allegations. The father is taken by his First Sergeant² to the investigative division of their military branch. The father does not make a statement and invokes his Article 31, Uniform Code of Military Justice (UCMJ),³ rights and remains silent. Afterward, his commander issues him a no-contact order⁴ and provides him housing on base for the time being. After a couple of days, the investigators schedule what is commonly referred to as a child forensic interview.⁵ During the interview, the child recounts to the interviewer the details about what his father did to him. The facts support UCMJ charges and ultimately result in a court-martial.

When it comes to proving the case, however, trial counsel will face two important questions. First, can the government introduce the statements the child initially made to his mother? Second, can trial counsel introduce

¹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).

² A First Sergeant is a senior noncommissioned officer within a unit that assists the Commander, among other things, with disciplinary issues and unit morale. *See* U.S. DEP’T OF AIR FORCE, INSTR. 36-2618, ENLISTED FORCE STRUCTURE para. 6.1.7 (23 March 2012).

³ 10 U.S.C. § 831 (2012) (“No person...may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.”).

⁴ A “no-contact order” is a tool available to a commander to restrict a service member’s ability to associate with a particular person. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304(a)(1) (2016) [hereinafter MCM].

⁵ “A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process.” U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN 3, (September 2015), <https://www.ojjdp.gov/pubs/248749.pdf>.

the statements made during the forensic interview? A subset of both of these questions is whether the child will have to testify in order for the court to admit the statements.

While this scenario is fictitious, strikingly similar scenarios happen regularly in child sexual abuse cases.⁶ This article will provide a framework for prosecutors and defense counsel to use in evaluating situations where child witness statements serve as the strongest (and sometimes only) evidence in a case. To assist in this endeavor, this article will suggest an additional rule to the Military Rules of Evidence (MRE) that will provide a mechanism for the government, provided certain prerequisites are met, to more easily admit statements made out of court by a child—specifically, statements made by a child that are determined to be nontestimonial—regardless of whether the child is available at trial.⁷

The second part of this article will explore the various reasons why a proposed hearsay exception for child statements is needed in military courts. Ensuring fact-finders are provided with truthful information, while minimizing the traumatic effect the trial process frequently has on children, is paramount in this endeavor. Additionally, cases involving child victims are on the rise in the military services and the addition of an MRE to address statements made by children in these cases may assist in combatting this disturbing trend. Moreover, the current practice of admitting child statements is unpredictable for all parties to a trial. A proposed rule will provide the military with some measure of predictability when confronted with this form of evidence.

The third part of this article will discuss the seminal cases addressing the Confrontation Clause⁸ and hearsay case law, focusing on how these cases impact the practitioner's decision-making and tactical considerations at trial. The fourth part of this article will propose a codified child hearsay exception for incorporation into the MRE. In crafting this rule, this article will focus on the following issues: (1) what age the child should be before the exception applies; (2) whether the statement offered must be corroborated; (3) whether the child should be available as a witness before admission of the statement; and (4) whether a reliability test should be built into the text of the rule.

⁶ See, e.g., *United States v. Fetrow*, 75 M.J. 574 (A.F. Ct. Crim. App. 2016).

⁷ See *infra* Appendix A for a proposed Military Rule of Evidence (MRE).

⁸ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....”).

Finally, part five of this article will conclude by explaining how the proposed rule will assist all parties in the vignette outlined in the introduction of this article. Ultimately, military justice practitioners on both sides would benefit from a codified child hearsay exception.

II. WHY IT IS TIME FOR THE MILITARY TO ADOPT A CHILD HEARSAY STATUTE

The time is ripe for the military to have a codified child hearsay exception. Such a rule would limit the short term psychological trauma children suffer during the trial process. Additionally, many times by *not* placing the child on the witness stand and instead offering a statement made out of court by a child, panel members will receive more truthful testimony. Consequently, panel members can receive more of the facts of the case.

A. Limit Psychological Effect in Attaining the Truth

Embodied in the Confrontation Clause⁹ is the belief that it is much more difficult for a witness to lie in open court in front of the defendant and also more likely that the jury can detect a lie from the demeanor of the witness.¹⁰ Additionally, one of the drafters' overarching reasons for the Confrontation Clause¹¹ is to make the fact-finding process more reliable.¹² However, when applied to children, this belief has its limits.¹³ Facing an accused, especially one who harmed a child victim, or to whom loyalty is felt, can be a traumatic experience.¹⁴ Studies have shown the facets of the

⁹ *Id.*

¹⁰ *Coy v. Iowa*, 487 U.S. 1012, 1017–21 (1988).

¹¹ U.S. CONST. amend. VI.

¹² See *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant.”); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (“The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.”); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (“[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials.”).

¹³ See Ann E. Tobey et al., *Balancing the Rights of Children and Defendants: Effects of Closed-Circuit Television on Children’s Accuracy and Jurors’ Perceptions*, in MEMORY AND TESTIMONY IN THE CHILD WITNESS 214, 223 (1994) (stating studies seem to indicate it is more difficult for children to accurately testify when accused is present as opposed to the Supreme Court’s opinion in *Coy v. Iowa*).

¹⁴ Jodi A. Quas & Mariya Sumaroka, *Consequences of Legal Involvement on Child Victims of Maltreatment*, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 323, 330 (Michael E. Lamb et al. eds., 2d ed. 2011).

legal process that are most distressing to a child all involve the act of testifying.¹⁵ These aspects that are the most distressing also correlate directly with “poorer eyewitness memory performance.”¹⁶ Equally important, placing a child under heightened emotional stimulation can cause the child to refuse to testify or be unable to verbalize answers.¹⁷ These effects of forcing children to testify risk panel members hearing testimony riddled with unintentional inaccuracies.¹⁸ Although the Confrontation Clause¹⁹ attempts to protect the truth, when children are involved as the witnesses, many times the exact opposite occurs. This is an outcome the military cannot accept.

The American Psychological Association discussed child distress from court proceedings in their *Amicus* brief to the Supreme Court in 1990.

The period during which child sexual assault victims are involved in legal proceedings represents a time of special stress for them. Stressors in childhood can slow the course of normal cognitive and emotional development such that stressed children do not advance at the same pace as their unstressed peers. Temporary developmental regressions may even appear. Although adults too may suffer distress from legal involvement, their development is more complete. Thus, the negative impact of legal involvement may be more significant for child than adult victims.²⁰

¹⁵ Graham M. Davies & Lindsay C. Malloy, *Relationship Between Research and Practice*, in CHILDREN’S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 371, 387 (Michael E. Lamb et al. eds., 2d ed. 2011) (“The facets of legal involvement that appear most distressing including providing testimony in open court, testifying while facing the defendant, and undergoing cross-examination.”).

¹⁶ *Id.*

¹⁷ Brief for American Psychological Association as *Amici Curiae* in support of neither party at 18, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478), 1990 WL 10013093, at 18 [hereinafter APA Brief].

¹⁸ At least two separate studies took children between the ages of seven and ten and provided them information in a relaxed setting. See Karen J. Saywitz et al., *Children’s Testimony and Their Perceptions of Stress In and Out of the Courtroom*, 17 CHILD ABUSE & NEGLECT 613, 613–22 (1993); Paula E. Hill, et al., *Videotaping Children’s Testimony*, 85 MICH. L. REV. 809, 809–33 (1987). They then divided the children up between a mock trial setting and a relaxed classroom setting. *Id.* The children in the trial setting performed less well and were more likely to make errors in response to questions. *Id.*

¹⁹ U.S. CONST. amend. VI.

²⁰ APA Brief, *supra* note 17, at 7–8.

The Supreme Court in *Maryland v. Craig* has previously recognized the immense psychological harm that children can suffer in a trial.²¹ “We have of course recognized that a State’s interest in ‘the protection of minor victims of sex crimes from further trauma and embarrassment’ is a ‘compelling’ one.”²² The Court went on to reason that “we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.”²³ The desire to protect children and the recognition of the harm caused to children is not novel to our justice system.

It is important to make the distinction between long-term and short-term psychological trauma caused by children participating in the trial process. While the distress and trauma suffered by children is real, research indicates the *long-term* psychological effects on children are not as detrimental as one might believe.²⁴ In one study, although a majority of children were apprehensive about confronting an accused in a courtroom proceeding,²⁵ most were able to testify, especially if they were prepared and supported.²⁶ In fact, “the great majority of children were very resilient and stood up well to the experience.”²⁷ If prepared correctly, and contrary to popular belief, the *long-term* effect on children is minimal. Nevertheless, the *immediate* harm children suffer while engaged in the trial process is noteworthy. What exacerbates this harm is children are typically not afforded the luxury of deciding when to participate in the litigation process.

In the military criminal justice system, victim preferences whether to prosecute an offender receive great deference.²⁸ However, children are not typically in a position to decide on their own whether they want the case to

²¹ *Craig*, 497 U.S. at 855 (stating there is a growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court).

²² *Id.* at 852 (quoting *Globe Newspaper Co. v. Super. Ct. of Norfolk County*, 457 U.S. 596, 607 (1982)).

²³ *Id.* at 852–53 (quoting *N.Y. v. Ferber*, 458 U.S. 747, 757 (1982)).

²⁴ *See, e.g.*, KATHLEEN MURRAY, *LIVE TELEVISION LINK: AN EVALUATION OF ITS USE BY CHILD WITNESSES IN SCOTTISH CRIMINAL TRIALS* ii (Great Britain, Scottish Office) (1995).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 67.

²⁸ U.S. DEP’T OF DEF. INSTR. 6495.02, *SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES* encl. 4, para. (c)(1) (7 July 2015).

go forward, and, as the Supreme Court has said, “children cannot be viewed as miniature adults.”²⁹ Many times, a parent or guardian is making this choice for the child. While testifying in open court is a nerve-racking experience for anyone involved, adult victims may choose whether to subject themselves to the rigors and distress of trial preparation and testimony. Children, on the other hand, are usually at the whim of their parent or guardian.

While parents and guardians most often attempt to do what is in the child’s best interest, there are certainly some instances when they do not. The proposed MRE addresses this situation by minimizing the trauma inflicted upon a child while also providing a vehicle for admitting truthful information. Even though the proposed MRE does not and cannot take the choice out of the hands of the caretaker, it at least provides a mechanism wherein caretakers have options other than forcing the child to testify. While the trauma a child suffers may not carry long-lasting effects, their limited ability to make their own decisions about participating in litigation further supports the imposition of a means to minimize the traumatic effect. It is one thing for adults to subject themselves to litigation because they choose to; however, it is quite another when it comes to children. Furthermore, the proposed MRE provides predictability to all parties and participants in the trial.

B. Provide Predictability for All Parties to the Trial

Depending on the facts surrounding a child’s outcry, there are options currently available to a proponent for admission of a child’s statement; however, these options are not always workable or ideal. While the excited utterance exception³⁰ and the medical diagnosis exception³¹ remain possible options, neither of these exceptions adequately addresses the questions posed in the introduction—whether the statements to the mother or those to the forensic examiner can be used in court. Because of the time between the occurrence of the event and the statements made to the mother,³² the excited utterance exception would most likely not apply.³³ Moreover, because the

²⁹ *J.D.B. v. N.C.*, 564 U.S. 261, 318 (2011) (citing *Eddings v. Okla.*, 455 U.S. 104, 115–16 (1982)).

³⁰ MCM, *supra* note 4, MIL. R. EVID. 803(2).

³¹ MCM, *supra* note 4, MIL. R. EVID. 803(4).

³² *State v. Jasper*, 677 So. 2d 553, 563 (La. Ct. App. 1996) (“In determining whether a statement was made under the stress of the startling event, the most important factor is time.”).

³³ *See United States v. Lemere*, 22 M.J. 61, 68 (C.M.A. 1986) (holding a twelve hour

statements during the forensic interview were not made for the purpose of a medical treatment or diagnosis and were for the purpose of litigation, the medical diagnosis hearsay exception most likely would not apply.³⁴ Without a specific codified exception, military courts typically rely on MRE 807, the residual hearsay exception.³⁵ While this has occasionally proved workable,³⁶ its applicability is unpredictable for both the government and the defense and it does not represent an ideal solution to the scenario posed in this article.

To begin with, the congressional intent and the general policy behind MRE 807 direct courts to rarely implement its use.³⁷ To have a statement admitted under the residual hearsay exception, the proponent must show that the statement is material, necessary, and reliable.³⁸ This article will address these three criteria for two reasons. First, it will show just how detailed, convoluted, and discretionary the use of the residual hearsay exception can

lapse of time was too long); *United States v. Know*, 1997 WL 214810, 8 (N-M.C.M.R. Mar. 31, 1997) (holding statements made more than a year after the event was too long); *United States v. Spychala*, 40 M.J. 647, 650 (N-M.C.M.R. 1994) (citing *United States v. Arnold*, 25 M.J. 129 (C.M.A. 1987)) (stating that “30 days is well beyond the outer limits of statements previously found admissible as excited utterances”); *United States v. Whitney*, 18 M.J. 700, 702 (A.F.C.M.R. 1984) (finding four days was too long to be admissible under the excited utterance exception).

³⁴ *State v. Jones*, 451 S.E.2d 826, 842 (N.C. 1994) (holding that the exception did not apply because the statements were provided for the purpose of litigation and not medical diagnosis); *United States v. Edens*, 31 M.J. 267, 269 (C.M.A. 1990) (stating that for statements to be admissible under the medical diagnosis or treatment exception, the statement must be made for the purpose of medical diagnosis or treatment *and* an expectation in the mind of the declarant they will receive a medical diagnosis or treatment). In the example described in the vignette in the introduction to this paper, the purpose of the child forensic interview is to collect and preserve evidence because, presumably, the child will have already received medical treatment prior to a coordinated interview between the investigative agency and a forensic interviewer.

³⁵ *United States v. Vazquez*, 73 M.J. 683 (A.F. Ct. Crim. App. 2014); *United States v. Callaway*, 2014 WL 5511335 (A.F. Ct. Crim. App. 2014); *United States v. Provorse*, 2015 WL 5883154 (N-M. Ct. Crim. App. 2015); *United States v. Henderson*, 2014 WL 7494529 (A.F. Ct. Crim. App. 2014); *United States v. Betts*, 2014 WL 6764010 (A.F. Ct. Crim. App. 2014); *United States v. Rich*, 2015 WL 9487921 (N-M. Ct. Crim. App. 2015).

³⁶ *See, e.g., Vazquez*, 73 M.J. 683.

³⁷ *See MCM, supra* note 4, MIL. R. EVID. 807 analysis, at A22-68 (“The [r]ule strikes a balance between the general policy behind the Rules of Evidence of permitting admission of probative and reliable evidence and the congressional intent ‘that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances.’” (quoting S. Rep. No. 93-127 (1974))); *Vazquez*, 73 M.J. 683.

³⁸ *MCM, supra* note 4, MIL. R. EVID. 807; *Vazquez*, 73 M.J. 683.

be at times. Second, it will provide a roadmap for the current practitioner to deal with residual hearsay issues.

The threshold requirement described as “materiality” is encompassed within MRE 401.³⁹ The requirement of necessity, or most probative, is similar yet distinct from the evidentiary rule of availability.⁴⁰ Unlike MRE 804 exceptions, statements falling under the residual hearsay exception do not require unavailability.⁴¹ Indeed, the predecessor provision of MRE 807 explicitly stated, “[t]he following are not excluded by the hearsay rule, *even though the declarant is available* as a witness.”⁴² In 1999, MRE 803(24) was removed and re-promulgated as MRE 807.⁴³ The change had no effect on the meaning of the residual hearsay rule.⁴⁴

The third requirement of “reliability” permits the military judge to consider several factors in weighing and evaluating the circumstantial guarantees of trustworthiness.⁴⁵ In weighing the factors, trial judges are given “considerable discretion.”⁴⁶ Factors the courts have considered include: spontaneity, consistent repetition, mental state of the declarant, motive to fabricate, use of terminology beyond the declarant’s years, and particular circumstances corroborating the statements.⁴⁷ Relatively spontaneous statements by young children, who lack a motive, and express ideas or use terminology beyond their years, are generally reliable as they exhibit “circumstantial guarantees of trustworthiness.”⁴⁸ This criterion is generally the one defense counsel is

³⁹ See MCM, *supra* note 4, MIL. R. EVID. 807(a)(2).

⁴⁰ See MCM, *supra* note 4, MIL. R. EVID. 807(a)(3); *United States v. Czachorowski*, 66 M.J. 432, 436 (C.A.A.F. 2008) (“Often, then, because the direct testimony of the hearsay declarant ordinarily would be judged the most probative evidence, a showing that the out-of-court declarant is unavailable to testify would be helpful to fulfill the requirements of Rule 807(B).” (citing *United States v. W. B.*, 452 F.3d 1002, 1005–06 (8th Cir. 2006))).

⁴¹ See *Czachorowski*, 66 M.J. at 432.

⁴² MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803 (1986) (emphasis added).

⁴³ *Czachorowski*, 66 M.J. at 433 n.1 (referencing the Federal Rules of Evidence 807 advisory committee note).

⁴⁴ *Id.*

⁴⁵ *United States v. Bridges*, 55 M.J. 60, 64 (C.A.A.F. 2001).

⁴⁶ *United States v. Pollard*, 38 M.J. 41, 49 (C.M.A. 1993) (citing *United States v. Powell*, 22 M.J. 141, 145 (C.M.A. 1986)).

⁴⁷ *Idaho v. Wright*, 497 U.S. 805, 821 (1990); *United States v. Donaldson*, 58 M.J. 477, 488 (C.A.A.F. 2003); *United States v. Kelley*, 45 M.J. 275, 281 (C.A.A.F. 1996).

⁴⁸ See, e.g., *Pollard*, 38 M.J. at 49 (stating thirteen year old and nine year old each

most likely to attack.⁴⁹ Although the reliability of residual hearsay statements necessarily must be evaluated on a case-by-case basis, statements from abused children to adults regarding the abuse appear to fall under the unstated purpose of the residual hearsay exception.⁵⁰ Even if MRE 807 is traditionally used for these statements, the rule itself offers no predictability when it comes to preparing for trial and determining the admissibility of testimony.

Furthermore, military judges are granted considerable deference when using the residual hearsay exception. This deference in weighing the factors to be considered with those elements, imbued within a rule that is to be rarely used, provides practitioners with little to no predictability when preparing for a trial. As the Supreme Court has stated, “[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts.”⁵¹ This is a prime example of a lack of predictability. A specific, codified exception for statements made by children without all of the varying elements and factors can alleviate much of this unpredictability, which can prove helpful to both the government and the defense.

describing sexual acts with their father indicate reliability); *People v. Bowers*, 801 P.2d 511, 521 (Colo. 1990).

⁴⁹ See Major Beth A. Townsend, *Defending the “Indefensible”: A Primer to Defending Allegations of Child Abuse*, 45 A.F. L. REV. 261, 285 (1998).

⁵⁰ See *United States v. Peneaux*, 432 F.3d 882, 893 (8th Cir. 2005).

⁵¹ Justice Scalia sums it up best in *Crawford v. Washington*:

Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable; the nine-factor balancing test applied by the Court of Appeals below is representative.... For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was “detailed,” while the Fourth Circuit found a statement more reliable because the portion implicating another was “fleeting.” The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was *not* in custody and *not* a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given “immediately after” the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed. (internal citations omitted).

Crawford v. Washington, 541 U.S. 36, 63 (2004) (internal citations omitted).

C. The Volume of Child Victims Warrants a Hearsay Exception

According to the U.S. Department of Health and Human Services Child Maltreatment report from 2015⁵² the national estimate⁵³ of victims has increased 3.8 percent from 2011 to 2015.⁵⁴ While this is not a substantial increase, a study published in 2014 indicates that by age eighteen, at least one in eight children is the victim of some form of abuse.⁵⁵ A nominal rate increase does not mean the military should not continue to use every avenue available to prosecute these offenses, including taking advantage of a codified exception.

Focusing specifically on the military, the Associated Press has sharply criticized the lack of transparency and plea bargains when it comes to courts-martial.⁵⁶ Specifically, the Associated Press's 2015 investigation revealed that of the 1,233 inmates confined by the military services, 61 percent were convicted of a sexual offense, with more than half of those (375 offenses) involving child victims.⁵⁷ From the beginning of 2015 until November of that year, children were victims in 133 out of 301 sex crimes.⁵⁸ Perhaps most shocking, "the single largest category of inmates in the military prisons [is] child sex offenders."⁵⁹

⁵² This is the latest report available on their website. *Child Maltreatment 2015*, U.S. DEP'T HEALTH & HUM.SERVS., <http://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf>.

⁵³ This includes civilian and military children.

⁵⁴ *Child Maltreatment 2015*, U.S. DEP'T HEALTH & HUM.SERVS., <http://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf>.

⁵⁵ Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among American Children, 2004–2011*, 168 JAMA PEDIATRICS 706, 709 (2014), <https://jamanetwork.com/journals/jamapediatrics/fullarticle/1876686>.

⁵⁶ Richard Lardner & Eileen Sullivan, *Opaque military justice system shields child sex abuse cases*, ASSOCIATED PRESS (November 24, 2015), <http://bigstory.ap.org/article/c7c2772ba05c4241a9bcebcf745d1c71/opaque-military-justice-system-shields-child-sex-abuse> (The article discussed the lack of a PACER-like system in the military that would allow the general public to review court-martial filings and results. Currently, the only way to get this information is through a FOIA request which can take time. Additionally, the article engages in much discussion about the plea bargaining system and plea deals in the military justice system.).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

It is clear the military deals with child sex offenses and child victims on a frequent basis. From 2011 through 2017, the percentage of Army cases tried to completion that involved child victims rose from 9.7 percent in 2011 to over 23.9 percent in 2017.⁶⁰ The Air Force percentages have remained somewhat stable between 2011 and 2017, with a high of 10 percent in 2015 to a low of 5.7 percent in 2012.⁶¹ Finally, the Coast Guard has seen the most erratic numbers in prosecuting cases involving child victims. In 2013, only 4 percent of cases tried in the Coast Guard involved child victims.⁶² This number jumped to 14 percent in 2015 and 2016.⁶³ Thus, at least two of the military services have experienced a noticeable recent rise in child victim cases.⁶⁴

Providing the military a means to continue to combat and prosecute these types of offenses makes sense for two key reasons. First, it gives much-needed support to the child victims and those who prosecute these crimes. Secondly, it ensures that the military justice system is perceived as fair and just.⁶⁵ The military services must get out in front of any belief that they are

⁶⁰ Specifically, the percentages of cases tried to completion in the Army involving child victims from 2011 to 2015 are as follows: 2011 – 9.7%, 2012 – 13.5%, 2013 – 17.5%, 2014 – 16.3%, 2015 – 16.6%, 2016 – 20.1%, and 2017 – 23.9%. The author obtained this information in November 2017 from Office of the Clerk of Court for the Army Court of Criminal Appeals. Notes on file with the Author. It should be noted that these numbers do not necessarily mean *all* of these cases with children specifically involved hearsay statements made by children. They are simply cases that involved child victims.

⁶¹ Specifically, the percentages of cases tried to completion in the Air Force involving child victims from 2011 to 2015 are as follows: 2011 – 7.8%, 2012 – 5.7%, 2013 – 6.4%, 2014 – 7.2%, 2015 – 10%, 2016 – 9%, and 2017 – 7.8%. The author obtained this information in November 2017 from the Headquarters for Military Justice at the Air Force Legal Operations Agency. Notes on file with the Author. It should be noted that these numbers do not necessarily mean *all* of these cases with children specifically involved hearsay statements made by children. They are simply cases that involved child victims.

⁶² Specifically, the percentages of cases tried to completion in the Coast Guard involving child victims from 2013 to 2017 are as follows: 2013 – 4%, 2014 – 6%, 2015 – 14%, 2016 – 14%, 2017 – 5%. The author obtained this information in December 2017 from the Coast Guard office of Military Justice. Notes are on file with the author.

⁶³ *Id.*

⁶⁴ According to the Navy Military Justice Office (Code 20), they do not specifically track this information. The only way to obtain this information is to review each month's case summaries to determine if any cases involved child victims. Similarly, the Marine Corps Trial Counsel Assistance Program (TCAP) does not specifically track this statistic.

⁶⁵ Brigadier General Patrick Finnegan, U.S. Army, Dean of the Academic Board, United States Military Academy, West Point, New York, *Today's Military Advocates: The Challenge of Fulfilling Our Nation's Expectations for a Military Justice System that Is*

not doing everything within their power to address child sex offenses. Without the trust of Congress and society that we are addressing these concerns, the military services run the risk that these same entities lose faith in the services' ability to carry out the mission of military justice. A codified child hearsay exception can go a long way in addressing that perception.

D. Public Policy and Precedent

Enacting a child hearsay rule is not a novel idea. Thirty-eight states have some form of a codified child hearsay statute that allows for admission of child statements in trial. While certainly not dispositive, the volume of jurisdictions that currently have an exception is persuasive. One common form of hearsay exception in child cases involves the use of closed circuit television. In *Maryland v. Craig*, the Court tackled the question of whether the use of closed circuit television (CCTV) for child testimony violated a defendant's confrontation rights.⁶⁶ As part of its analysis, the Court looked to state jurisdictions that allowed children to testify via CCTV.⁶⁷ The Supreme Court noted "[t]hat a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy."⁶⁸ The fact that thirty-seven states had enacted some form of a statute that allowed for children to testify via CCTV had a definite impact on the Court's decision.⁶⁹ The military services should take note of this reasoning, and create a codified hearsay exception for child statements in military courts. By providing a means to help ensure reliable, truthful evidence is presented

Fair and Just, Address Given at the Thirty-Sixth Kenneth J. Hodson Lecture on Criminal Law, 195 MIL. L. REV. 190, 192 (2008) (quoting Justice Oliver Wendell Holmes, who said, "A system of justice must not only be good, but it must be seen to be good.").

⁶⁶ *Maryland v. Craig*, 497 U.S. 836 (1990).

⁶⁷ *Id.* at 853–55.

⁶⁸ *Id.* at 853–54 ("Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; 24 States have authorized the use of one-way closed circuit television testimony in child abuse cases; and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.").

⁶⁹ *Id.* at 853 ("We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy.").

at trial, the President can take meaningful steps to minimize the traumatic effect the court-martial process has on children.

Furthermore, enacting a specific rule or set of rules to address a concern is not a novel idea. Congress has previously created specific rules to assist in the prosecution of specific types of offenses. For example, the Federal Rules of Evidence (FRE) address these concerns by allowing sexual propensity evidence of an accused.⁷⁰ In the federal jurisdiction, Congress enacted this rule over the objection of many practitioners.⁷¹ “The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded [to posed questions] opposed new Evidence Rules 413, 414, and 415.”⁷² Even though the majority of those polled opposed these additions, Congress enacted them anyway. Compounding these objections, these new rules were not even supported by empirical evidence.⁷³ In contrast, there is substantial empirical evidence to support the trauma suffered by children at trial⁷⁴ as well as the concern regarding the veracity of children’s testimony.⁷⁵ Although military courts do not use the FRE, the MRE are based on the FRE.⁷⁶ Thus, even though this same discussion is not found in MRE 414,⁷⁷ the same concerns can be inferred because the MRE are modeled and drafted off of the FREs. Any concerns in one forum will carry over to the other. In spite of these objections to their enactment, MRE 412–414 have proven workable and, most importantly, constitutional.⁷⁸

⁷⁰ FED. R. EVID. 414. Rule 414 allows propensity evidence of an accused. *Id.* In child molestation cases, “the court may admit evidence that the defendant committed any other child molestation.” *Id.*

⁷¹ JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES § III (1995).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *supra* text accompanying notes 13–18, 20–27.

⁷⁵ See *supra* text accompanying note 18.

⁷⁶ MRE 1102 specifically states that amendments to the Federal Rules of Evidence will automatically apply to the Military Rules of Evidence unless acted upon by the President of the United States. MCM, *supra* note 4, MIL. R. EVID. 1102.

⁷⁷ “In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation.” MCM, *supra* note 4, MIL. R. EVID. 414(a).

⁷⁸ See, e.g., United States v. Wright, 53 M.J. 476 (C.A.A.F. 2000); United States v. Dacosta, 63 M.J. 575 (A.C.C.A. 2006).

III. BACKGROUND ON HEARSAY AND THE CONFRONTATION CLAUSE

Turning from why this exception is needed, this article will now focus on the best way to implement an exception. The next section of this article will discuss hearsay and the relationship with the Confrontation Clause.⁷⁹

A. Hearsay and the Confrontation Clause

At the core of criminal trials is the Confrontation Clause of the Sixth Amendment.⁸⁰ It applies to both federal and state prosecutions⁸¹ and stands for the proposition that an accused has a right to confront the witnesses offered against him.⁸² This clause is most frequently cited and litigated in trial with regard to hearsay statements. MRE 801 defines hearsay as an out of court statement offered in court to prove the truth of the matter asserted in the statement.⁸³ Section (d) provides a list of statements that although they may fit the definition of hearsay stated above, are defined in the rule as “not hearsay.”⁸⁴ While hearsay statements are not admissible in trial, MRE 803 and 804 offer numerous exceptions.⁸⁵ Prior to the Supreme Court’s ruling in *Crawford v. Washington*,⁸⁶ statements were admissible and deemed to not run afoul of the Confrontation Clause⁸⁷ as long as they fell within a “firmly rooted hearsay exception” and had “particularized guarantees of trustworthiness.”⁸⁸ The Court required no separate analysis under the Constitution, but only a determination whether a statement fell within a recognized exception.

Post-*Crawford*, for a statement to be admissible at trial, it must first satisfy constitutional requirements of the Sixth Amendment.⁸⁹ Then, and

⁷⁹ U.S. CONST. amend. VI.

⁸⁰ *Id.*

⁸¹ *Pointer v. Texas* 380 US 400, 406 (1965).

⁸² U.S. CONST. amend. VI.

⁸³ MCM, *supra* note 4, MIL. R. EVID. 801(c).

⁸⁴ MCM, *supra* note 4, MIL. R. EVID. 801(d).

⁸⁵ MCM, *supra* note 4, MIL. R. EVID. 804.

⁸⁶ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁸⁷ U.S. CONST. amend. VI.

⁸⁸ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (“Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”).

⁸⁹ *Crawford*, 541 U.S. at 68 (“Where nontestimonial hearsay is at issue, it is wholly

only then, do the hearsay rules become applicable to the statement.⁹⁰ Hearsay statements offered at trial will fall within one of two categories: testimonial and nontestimonial.⁹¹ If a statement is determined to be testimonial, it must first satisfy the Confrontation Clause requirements under the Sixth Amendment.⁹² If the Confrontation Clause is satisfied, or if the statement itself is determined to be nontestimonial, then admission of the statement is predicated on satisfying the hearsay statutes applicable to that particular jurisdiction.⁹³ Justice Scalia first defined testimonial statements in the *Crawford* opinion.⁹⁴ They are, at a minimum, “prior testimony at a preliminary hearing, before a grand jury, or at a former trial, [or] police interrogations.”⁹⁵ The Court provided no further guidance or definition of testimonial statements.⁹⁶ However, subsequent case law has addressed this question.⁹⁷

Perhaps most importantly for the purposes of this article, in 2015 the Court decided *Ohio v. Clark*.⁹⁸ In *Clark*, the Court analyzed a set of facts closely resembling the vignette that began this article. It was confronted with whether accusatory statements made by a three-year-old to his teacher were testimonial and, thus, whether they implicated the Confrontation Clause.⁹⁹ Here, a teacher at school noticed a bloodshot eye and red marks on the

consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts* [448 U.S. 56], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”).

⁹⁰ *Id.*

⁹¹ *Davis v. Washington*, 547 U.S. 813, 821 (2006) (stating nontestimonial statements are subject to traditional hearsay limitations while testimonial statements must first satisfy the Sixth Amendment of the Constitution).

⁹² *Crawford*, 541 U.S. at 68.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

⁹⁷ William M. Howard, Annotation, *Construction and Application of Supreme Court’s Ruling in Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004), with Respect to Confrontation Clause Challenges to Admissibility of Hearsay Statement by Declarant Whom Defendant Had No Opportunity to Cross-Examine, 30 A.L.R. 6th 1 (2017).

⁹⁸ *Ohio v. Clark*, 135 S. Ct. 2173 (2015).

⁹⁹ *Id.* at 2177.

child's face and body.¹⁰⁰ When asked "who did this" and "what happened to you," the child implicated the defendant.¹⁰¹ At the end of the school day, the defendant arrived, denied responsibility for the injuries, and quickly left with the child.¹⁰² After the teacher reported what she saw, a social worker went to the home and took the child to the hospital for evaluation.¹⁰³ Based on the statements of the child made to the teacher and the physical examination, the defendant was indicted.¹⁰⁴ At trial, the court declared the child incompetent to testify under Ohio law,¹⁰⁵ and allowed the statements to be admitted under Ohio's child hearsay statute.¹⁰⁶ Under these facts, the Supreme Court finally addressed "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause."¹⁰⁷ The Court refused to adopt a categorical rule and stated that although these types of "statements are much less likely to be testimonial than statements to law enforcement officers, there are conceivably situations that could implicate the Confrontation Clause."¹⁰⁸ The Court's analysis is simple enough. The Court drew comparisons between the situation in *Michigan v. Bryant*¹⁰⁹ with the facts in *Clark*.¹¹⁰ The fact that Ohio classified the teacher as a mandatory reporter carried little weight with

¹⁰⁰ *Id.* at 2178 ("In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye appeared bloodshot.... When they moved into the brighter lights of a classroom, Whitley noticed '[r]ed marks, like whips of some sort,' on L.P.'s face." (quoting *State v. Clark*, 999 N.E.2d 592 (2013))).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* ("The next day, a social worker found the children at Clark's mother's house and took them to a hospital, where a physician discovered additional injuries suggesting child abuse.").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (stating under Ohio Law, children under ten years of age are incompetent to testify if they "appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly" (quoting Ohio Rule Evid. 601(A) (Lexis 2010))).

¹⁰⁶ *Id.* (stating after a motion hearing declaring the child incompetent to testify, the court ruled the statements made to the teachers were admissible because they "bore sufficient guarantees of trustworthiness to be admitted as evidence").

¹⁰⁷ *Id.* at 2181 (stating that up until this point in Supreme Court jurisprudence, the Court had not answered whether statements made to persons other than law enforcement officers implicate the Confrontation Clause).

¹⁰⁸ *Id.*

¹⁰⁹ *Michigan v. Bryant*, 562 U.S. 344 (2011).

¹¹⁰ *Clark*, 135 S. Ct. at 2181 ("Our holding in *Bryant* [562 U.S. 344] is instructive. As in *Bryant*, the emergency in this case was ongoing, and the circumstances were not entirely clear.").

the Court.¹¹¹ Regardless of whether the teacher is a mandatory reporter, the Court surmised the teacher did what any teacher would do: address an ongoing emergency to determine if the child should be released to the caregiver that afternoon.¹¹² Arguably, one of the most important lines from the decision addresses, without regard to their content, statements made by young children. The Court instructed that “[s]tatements by very young children, will rarely, if ever, implicate the Confrontation Clause.”¹¹³ This determination signals to courts that they should view statements made by young children through the eyes of the child and not a reasonable person merely in the child’s situation.

B. Analysis of the Statements Made by the Child in the Introduction

Before offering how to draft a proposed MRE for child hearsay statements, it is important to first determine whether the statements made by the child raised in the introduction to this paper are testimonial or nontestimonial. Understanding this will further drive the analysis of the proposed MRE and how it would operate.

1. *The Spontaneous Statement Made to the Mother Is Nontestimonial*

With the recent Confrontation Clause decisions by the Supreme Court as background, several facts from this article’s scenario suggest that the child’s statement is nontestimonial. First, this statement occurred between two persons, neither of whom were policemen.¹¹⁴ Second, regardless of whether the motive of the declarant or the motive of the questioner is at issue, neither seemingly intended for their conversation to serve as a substitute

¹¹¹ *Id.* at 2181–82 (indicating the defendant attempted to equate the teachers with the police and their questions with those of official interrogations).

¹¹² *Id.* at 2184.

¹¹³ *Id.* at 2182 (“Few preschool students understand the details of our criminal justice system. Rather, [r]esearch on children’s understanding of the legal system find that’ young children ‘have little understanding of prosecution.’” (quoting Br. for American Professional Society on the Abuse of Children as Amicus Curiae 7, and n. 5)); *see also* United States v. Clifford, 791 F.3d 884, 888 (8th Cir. 2015); Ohio v. Saltz, 2015 WL 4610972 (Ohio Ct. App. 2015).

¹¹⁴ *Clark*, 135 S. Ct. at 2182 (holding statements made to individuals who are not law enforcement officers are much more likely to be nontestimonial than those made to law enforcement officers); United States v. Clifford, 791 F.3d 884, 888 (2015) (holding statements made by young child to mother’s boyfriend about physical abuse he witnessed deemed to be nontestimonial).

for testimony at a court.¹¹⁵ Finally, and perhaps most importantly, as the *Clark* opinion stated, statements made by young children will rarely, if ever, implicate the Confrontation Clause.¹¹⁶ Therefore, whether the child testifies about this statement or not, the statements made by the child should not run afoul of the Confrontation Clause¹¹⁷ and should be nontestimonial statements.

2. *The Statements Made During the Forensic Interview Are Testimonial*

The child's statement to the forensic examiner represents a more difficult Confrontation Clause issue. The forensic examiner works at the direction of the prosecution and the investigators. The formality of the interview and scheduling by investigators supports the notion that the primary purpose of this encounter was to preserve evidence for use at a later prosecution and not to address an ongoing emergency.¹¹⁸ Numerous state and federal jurisdictions have reached the same conclusion, holding that interviews of children conducted by some sort of child protective agency in conjunction with law enforcement are testimonial.¹¹⁹

Following this logic, it is clear the statements made by the young child to the forensic interviewer in the introduction are testimonial. The interview is conducted as part of the investigation and for the purpose of preserving evidence at trial. Additionally, it is hard to imagine a situation where an objective person making such statements as part of the interview would not know their statements are going to be used for prosecution purposes. The Supreme Court's latest holding in *Clark* modifies the analysis by taking into

¹¹⁵ *Davis v. Washington*, 547 U.S. 813, 822 (2006) (holding statements made for the purpose of addressing an ongoing emergency and not preserving evidence for use at trial are nontestimonial).

¹¹⁶ *Clark*, 135 S. Ct. 2173 (2015) (finding statements by a three-year-old child to his teacher about abuse are nontestimonial); *State v. Saltz*, 2015 WL 4610972 (Ohio Ct. App. 2015) (finding statements of four-year-old child did not implicate the Confrontation Clause).

¹¹⁷ U.S. CONST. amend. VI.

¹¹⁸ *Michigan v. Byant*, 562 U.S. 344, 366 (2015) (stating that the formality, or lack thereof, of an encounter provides valuable information about whether there is an ongoing emergency that needs to be addressed).

¹¹⁹ See *Bobadilla v. Carlson*, 575 F.2d 785, 791–93 (8th Cir. 2009); *People v. Sisavath*, 13 Cal. Rptr. 3d 753 (Cal. Ct. App. 2004); *State v. Contreras*, 979 So. 2d 896, 905–12 (Fla. 2008); *In Re T.T.*, 892 N.E.2d 1163 (Ill. App. Ct. 2008); *State v. Hooper*, 176 P.3d 911, 917–18 (Idaho 2007); *State v. Justus*, 205 S.W.3d 872, 880–81 (Mo. 2006); *State v. Blue*, 717 N.W.2d 558, 564–67 (N.D. 2006); *State v. Pitt*, 147 P.3d 940, 943–46 (Or. Ct. App. 2006); *In re S.R.*, 920 A.2d 1262, 1266–69 (Pa. Super. Ct. 2007).

account the age of the child, whereas before they used a reasonable person standard. Regardless, the child's statements made to the forensic examiner are still testimonial.

In *Clark*, it is clear the Court had determined the statements to be non-testimonial *before* it considered the age of the child witness. When mentioning the age of the child, the Court stated, "L.P.'s age *fortifies* our conclusion that the statements in question were not testimonial."¹²⁰ The plain reading of this sentence shows the Court had already determined the statements were nontestimonial before considering the age of the child. They simply used the age of the child to further support their ultimate holding that the statements were not testimonial. Even Justice Scalia notes in his dissent in *Clark* that the child could not form the requisite intent for his statements to be testimonial and the teachers did not "have the primary purpose of establishing facts for later prosecution."¹²¹ This indicates that Justice Scalia also considers the intent of the declarant *and* the intent and purpose of the questioner.

In contrast to *Clark*, the vignette from the introduction of this article provides the classic case of a mixed motive that has yet to be addressed by the Supreme Court. The age of the child in the vignette indicates the motive is nontestimonial. The purpose of the interview is clearly not to address any ongoing emergency, but rather to obtain and preserve evidence for trial. This is the exact problem Justice Scalia lamented in his dissent in *Bryant*.¹²² Specifically, what is the answer when one party is gathering information for a testimonial reason and the other is providing information for a clearly nontestimonial purpose? The law has stated one of the most important facts to consider when looking to whether a statement is testimonial is the existence of an ongoing emergency.¹²³ Were that the only test, the statements made to the examiner are clearly testimonial. However, because the Court directs one to look at the motives of both the listener and declarant, practitioners are left with some uncertainty. But, when other courts' analyses are viewed along with *Clark*, insight is provided as to how this issue will be resolved.

Prior to *Clark*, courts did not take into account the age of the child and simply looked at the situation through the eyes of a reasonable person.¹²⁴

¹²⁰ *Clark*, 135 S. Ct. at 2181 (emphasis added).

¹²¹ *Id.* at 2184.

¹²² *Bryant*, 562 U.S. at 384 (Scalia, J., dissenting).

¹²³ *Id.* at 370–71.

¹²⁴ *Sisavath*, 13 Cal. Rptr. 3d at 758.

However, these decisions were before the Supreme Court decided *Bryant*. Now that courts can consider the entire circumstances surrounding an interview, not just the declarant's intent, they are free to pull back the curtain and look directly at the interviewer or interrogator's purpose and intent. To hold otherwise and say all statements made by young children are nontestimonial and nothing else matters would mean prosecutors and investigators are given carte blanche when it comes to child statements. This cannot be the answer when it comes to protecting an accused's constitutional rights. As the court in *State v. Snowden* explained, "[t]o allow the prosecution to utilize statements by a young child made in an environment and under circumstances in which the investigators clearly contemplated use of the statements at a later trial would create an exception that we are not prepared to recognize."¹²⁵ Pragmatically, the practitioner should prepare as if the statements made to the forensic examiner are testimonial and, therefore, subject to the Confrontation Clause.

IV. PROPOSED MILITARY RULE OF EVIDENCE

As mentioned previously, thirty-eight states have enacted some form of a codified child hearsay exception.¹²⁶ These statutes, while different, have recurring themes. Most of the statutes address, at a minimum, four main points: (1) the age of the child; (2) availability of the witness; (3) corroboration of the statements; and (4) whether a trustworthiness test is outlined within the text of the statute itself. In proposing an MRE, it is important to strike

¹²⁵ *State v. Snowden*, 867 A.2d 314, 329 (Md. 2005).

¹²⁶ ALA. CODE § 15-25-31 (1994); ALASKA STAT. ANN. § 12.40.110 (West 1998) (grand jury proceedings only); ARK. R. EVID. 803(25) (West 1992); CAL. EVID. CODE § 1360 (West 1995); COLO. REV. STAT. ANN. § 13-25-129 (West 2015); CONN. GEN. STAT. § 6-11 (West 2015); DEL. CODE ANN. tit. 11, § 3513 (West 2015); FLA. STAT. ANN. § 90.803(23) (West 2014); GA. CODE ANN. § 24-8-820 (West 2013); HAW. REV. STAT. ANN. § 626-1 (West 2002); IDAHO CODE ANN. § 19-3024 (West 2015); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2015); IND. CODE ANN. § 35-37-4-6 (West 2015); KAN. STAT. ANN. § 60-460 (West 2011); LA. CODE EVID. ANN art. 804 (2010); ME. RE. STAT. ANN. tit. 15, § 1205 (2006); MD. CODE ANN., CRIM. PROC. § 11-304 (West 2011); MASS. GEN. LAWS ANN. ch. 233, §§ 81-83 (West 1990); MICH. R. EVID. 803A (West 1991); MINN. STAT. ANN. § 595.02 (West 2013); MISS. R. EVID. 803 (West 1997); MO. ANN. STAT. § 491.075 (West 2012); NEV. REV. STAT. ANN. § 51.385 (West 2001); N.J. R. EVID. 803 (West 2005); N.D. R. EVID. 803 (West 2014); OHIO R. EVID. 807 (West 1991); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 2013); OR. REV. STAT. ANN. § 40.460 (West 2012); 42 PA. STA. AND CONS. STAT. ANN. § 5985.1 (West 2004); 14 R.I. GEN. LAWS ANN. § 14-1-68 (West 1985); S.C. CODE ANN. § 17-23-175 (2006); S.D. CODIFIED LAWS § 19-19-806.1 (2009); TENN. R. EVID. 803 (West 2009); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2011); UTAH CODE ANN. § 77-35-15.5 (West 2008); VT. R. EVID. 804a (West 2009); VA. CODE ANN. § 63.2-1522 (West 2002); WASH. REV. CODE ANN. § 9A.44.120 (West 1995); WIS. STAT. ANN. § 908.08 (West 1985).

the much-needed balance between ensuring the rights of the accused and the desire to protect children from the trial process. In addition, a proposed rule should be concise, succinct, and workable. Finally, the rule must be constitutional. With this framework in mind, a codified exception should incorporate the same aforementioned criteria addressed by the states.

A. The Definition of “Child” Should Be a Person Under Age Sixteen

Given the varying beliefs as to what constitutes a child, a statute proposing a codified exception for child hearsay must provide a definition of the word “child.” State definitions range from under ten years old¹²⁷ to sixteen years old.¹²⁸ Unfortunately, there is very little legislative history or explanation as to why each state chose their particular age to define a child. The UCMJ defines a child as “any person who has not attained the age of 16 years.”¹²⁹ For reasons explained below, the easiest and most appropriate definition for age of a child is already defined under the Uniform Code of Military Justice. Most of the research conducted on the effects of the trial process on children and their veracity in a trial setting range in ages from infancy to 18 years old.¹³⁰ The studies do not necessarily show one particular age of a child is affected more than another.

Of the thirty-eight states that have a codified child hearsay exception, twelve of them include within the rule itself exceptions for developmentally or cognitively challenged persons.¹³¹ This allows for those specific situations where a child may be physically older than the state’s cutoff for the hearsay exception, yet is developmentally or cognitively under the specific age.

¹²⁷ ALASKA STAT. ANN. § 12.40.110 (West 1998); ARK. R. EVID. 803(25) (West 1992); IDAHO CODE ANN. § 19-3024 (West 2015); MICH. R. EVID. 803A (West 1991); MINN. STAT. ANN. § 595.02 (West 2013); NEV. REV. STAT. ANN. § 51.385 (West 2001); WASH. REV. CODE ANN. § 9A.44.120 (West 1995).

¹²⁸ FLA. STAT. ANN. § 90.83(23) (West 2014); WIS. STAT. ANN. § 908.08 (West 1985).

¹²⁹ MCM, *supra* note 4, pt. IV, ¶ 45b.a.(h)(4) (2012); MCM, *supra* note 4, MIL. R. EVID. 414.

¹³⁰ Angela Brown & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 *Psychological Bulletin*, no. 1, 66 (1986).

¹³¹ FLA. STAT. ANN. § 90.83(23) (West 2014); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2015); IND. CODE ANN. § 35-37-4-6 (West 2015); MINN. STAT. ANN. § 595.02 (West 2013); MO. ANN. STAT. § 491.075 (West 2012); OKLA. STAT. ANN. tit. 12, § 2803.1 (2013); OR. REV. STAT. ANN. § 40.460 (West 2012); S.C. CODE ANN. § 17-23-175 (2006); S.D. CODIFIED LAWS § 19-19-806.1 (2009); TEX. CODE CRIM. PROC. ANN. art. 38.072 (West 2011); VT R. EVID. 804a (West 2009).

Missouri's statute accounts for developmentally or cognitively challenged children within their child hearsay statute. Specifically, that statute allows admission of statements "made by a child under the age of fourteen, or a vulnerable person...."¹³² It defines "vulnerable person" as "a person who, as a result of an inadequately developed or impaired intelligence or a psychiatric disorder that materially affects ability to function, lacks the mental capacity to consent, or whose development level does not exceed that of an ordinary child of fourteen years of age."¹³³ In 2014, the Missouri Court of Appeals heard an appeal from a defendant challenging a trial court's ruling that the child victim, who was sixteen years old, met the "vulnerable person" definition under the statute.¹³⁴ In that case, the biological daughter of the defendant relayed to a child forensic examiner that her father began molesting her and having sexual intercourse with her when she was fourteen years old.¹³⁵ During this same interview, the forensic interviewer at the local child advocacy center estimated the child's mental capacity to be between ten and twelve years of age.¹³⁶ Finally, a Sexual Assault Forensic Examination Nurse performed an exam and also opined that her mental age was between twelve to thirteen years.¹³⁷

As required under the statute, the prosecutor provided notice of his intent to use the statements made by the victim under the child hearsay statute.¹³⁸ At the motion hearing, the state introduced the victim's school records, documents of the guardianship of the victim, and called the victim's court appointed guardian as a witness.¹³⁹ Some of these records indicated the victim's IQ as fifty-eight.¹⁴⁰ Because of the records and the testimony established during the motion hearing and the trial, the appellate court upheld the trial court's finding that the victim, although over the statutory age limit of

¹³² MO. ANN. STAT. § 491.075 (1) (West 2012).

¹³³ *Id.*

¹³⁴ State v. Chandler, 429 S.W.3d 503 (Mo. Ct. App. 2014).

¹³⁵ *Id.* at 505 (finding that during a child forensic interview, the victim explained to the interviewer that the defendant had raped her, explained what rape was, and stated it had been happening since she was fourteen years old).

¹³⁶ *Id.* (stating that after she determined her mental capacity to be between the ages of ten and twelve, she adjusted her questions accordingly).

¹³⁷ *Id.*

¹³⁸ *Id.* at 506 (discussing the notice included their intention to rely on the vulnerable person definition from the statute).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 505.

fourteen, was a vulnerable person and within the framework of the statute.¹⁴¹ Interestingly, the court explained that even if someone is determined to be a vulnerable person, he or she can still be competent to testify at the hearing.¹⁴²

This hearing described in the Missouri court is exactly the type of hearing a military judge should use in a case that involves a developmentally or cognitively challenged victim. The military should not condition the admissibility of a statement solely on physical or chronological age. Even if someone is determined to be cognitively challenged, that should not, as in the Missouri court, automatically make a witness not competent to testify. Furthermore, having this hearing does not create any more of a burden than military judges already employ. The military already has pretrial motion hearings to address using the residual hearsay exception, since notice to the opposing party of the intent to use the residual hearsay exception is required.¹⁴³ If the court is already conducting a hearing, then there is no additional burden created by the proposed rule.

One remaining issue involves whether the relevant age is the child's age at the time the statement is made or at the time the statement is offered into evidence. A few of the states with child hearsay exceptions specifically address this within the statutes themselves,¹⁴⁴ saying that the determination is made at the time the statement is made and not at the time it is offered in evidence. Of those that do not specifically address it within the statutes, the case law within certain states takes the position that the age at the time the

¹⁴¹ *Id.* at 507.

¹⁴² *Id.* The court held the Missouri child hearsay statute “does not require that a ‘vulnerable person’ lack the competency to testify, and it does not require expert testimony. On the contrary, [the statute] contemplates that the ‘vulnerable person’ does testify at the proceeding. Accordingly, the competency of a ‘vulnerable person’ to testify at a criminal proceedings does not render that witness no longer a ‘vulnerable person.’”

¹⁴³ MCM, *supra* note 4, MIL. R. EVID. 807(b) (“The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant’s name and address, so that the party has a fair opportunity to meet it.”).

¹⁴⁴ CAL. EVID. CODE § 1360 (West 1995); MICH. R. EVID. 803A (West 1991); OR. REV. STAT. ANN. § 40.460 (West 2012); 42 PA. STA. AND CONS. STAT. ANN. § 5985.1 (West 2004); S.C. CODE ANN. § 17-23-175 (2006); VT. R. EVID. 804a (West 2009); *But see* ALA. CODE § 15-25-31 (1994); ALASKA STAT. ANN. § 12.40.110 (West 1998); DEL. CODE ANN. tit. 11, § 3513 (West 2015); IND. CODE ANN. § 35-37-4-6 (West 2015); OHIO R. EVID. 807 (West 1991); VA. CODE ANN. § 63.2-1522 (West 2002); WIS. STAT. ANN. § 908.08 (West 1985).

statement is made determines the cutoff.¹⁴⁵ However, as further elaborated below, having the age be determined at the time the statement is offered at trial is the best approach and the one supported by the previously cited research.¹⁴⁶

For purposes of the proposed MRE, the age determination of the child should be based on when the statement is offered into evidence, and not at the time the statement is made. Since the aforementioned research is primarily concerned with short-term psychological trauma and veracity of a child witness *while* testifying, the age of the child at the time they made the statement is irrelevant. While it may seem the best approach is to use the age of the child when they made the statement, the concerns raised in this article are addressed if the operative age of the child is determined at the time the statement is offered into evidence. The proposed MRE takes this same approach; that the operative age of the child is determined at the time the statement is offered into evidence.

Some may argue that this opens the door to gamesmanship in instances where the child is almost sixteen. Strategically in cases like this the defense *could* attempt to delay the proceedings in an effort to bring a statement outside the purview of the child hearsay exception. While this may be a possibility, the professional rules of responsibility and ethics should obviate this concern.¹⁴⁷ Also, the military judge should view any delay request that could potentially make an admissible statement inadmissible based on the age of a victim with a heavy amount of scrutiny and discretion.

¹⁴⁵ Darden v. State, 425 S.E.2d 409 (Ga. Ct. App. 1992) (holding statements made by a child victim who was under fourteen when making the statement were admissible); Blanton v. State, 880 So. 2d 798 (Fla. Dist. Ct. App. 2004) (finding child hearsay exception applies if eleven years old or less at the time the statement is made regardless of the age of the child at the time of trial); Lambert v. State, 101 So. 3d 1172 (Miss. Ct. App. 2012) (indicating the relevant age in determining whether the child hearsay exception applies is the age of the child at the time the statement is made); State v. Celis-Garcia, 420 S.W.3d 723 (Mo. Ct. App. 2014) (holding victim's age at the time of trial was irrelevant to determining admissibility).

¹⁴⁶ See *supra* text accompanying note 13.

¹⁴⁷ See, e.g., U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE, attachment 3, standard 4-1.3 (30 July 2015).

B. The Rule Should Require a Reliability Test *Only* If the Witness Is Unavailable

The tests for reliability of a statement and corroborating evidence of a statement, while closely related, are separate tests.¹⁴⁸ *Idaho v. Wright* first tackled the distinction between these two.¹⁴⁹ In that case, the defense challenged statements admitted by a young child under Idaho's residual hearsay exception.¹⁵⁰ Specifically, they challenged the statements on the basis that they did not possess sufficient indicia of reliability.¹⁵¹ The Court held that only the circumstances surrounding the making of the statement itself can be used to determine the reliability of the statement.¹⁵² By focusing on what makes other forms of hearsay reliable, the Court held that the circumstances surrounding the making of traditional hearsay statements are what makes them inherently reliable, and not other facts unrelated to the making of the statement.¹⁵³ John E.B. Myers, the author of *Evidence in Child Abuse and Neglect Cases*, summarizes the reasoning and holding of the *Wright* Court as follows:

Only hearsay that has circumstantial guarantees of reliability equivalent to those found in specific hearsay exceptions, such as excited utterances, dying declarations, and statements for purposes of diagnosis or treatment, reveals that the indicia of reliability for these exceptions derive from the circumstances in which they were made. That is, excited utterances are reliable because they are made shortly following a startling event and before the declarant has time to fabricate. A dying declaration is reliable because those who know they are about to die will not want to meet their maker with a lie upon their lips. And statements for diagnosis or treatment are reliable because of the patient's incentive to be truthful with

¹⁴⁸ See *Idaho v. Wright*, 497 U.S. 805, 819 (1990).

¹⁴⁹ *Id.* at 820.

¹⁵⁰ *Id.* at 809–10.

¹⁵¹ *Id.* at 813.

¹⁵² *Id.* at 823 (“In short, the use of corroborating evidence to support a hearsay statement’s ‘particularized guarantees or trustworthiness’ would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.”).

¹⁵³ *Id.*

the doctor. Because the reliability of such statements derives from the circumstances in which they are made, and because the residual exception requires that hearsay proffered under this exception possess guarantees of trustworthiness that are “equivalent” to the reliability of the other exceptions, it follows that, like the other exceptions, the reliability of hearsay offered under the residual exception must be gauged by the circumstances in which the statement was made.¹⁵⁴

Because of the *Wright* decision, courts have only been able to use the specifics surrounding the making of a statement when reviewing statements under the residual hearsay exception. These specifics include: prior testimony,¹⁵⁵ testimonial competence when the statement was made,¹⁵⁶ testimonial competence at the time of trial,¹⁵⁷ spontaneity of the statement,¹⁵⁸ whether others overheard the statement,¹⁵⁹ whether the statement was elicited

¹⁵⁴ JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES VOL. 2, at 322 (3d. ed. 1997).

¹⁵⁵ See, e.g., *United States v. Shaw*, 69 F.3d 1249 (4th Cir. 1995) (finding reliability of the hearsay statement came mostly from former testimony from a former trial that was subject to a vigorous cross-examination).

¹⁵⁶ See, e.g., *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) (stating unless the declarant was not mentally competent when the statement was made, it should be admitted under the residual hearsay exception).

¹⁵⁷ See, e.g., *United States v. Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993) (“[T]he declarant’s inability to communicate may be relevant to whether the hearsay statements possessed particularized guarantees of trustworthiness.” (citing *Wright*, 497 U.S. at 825)); *People v. March*, 620 N.E.2d 424, 432 (Ill. App. Ct. 1993) (“[I]ncompetence to testify does not necessarily render the child’s out-of-court statements unreliable.”).

¹⁵⁸ See, e.g., *Doe v. United States*, 976 F.2d 1071, 1080 (7th Cir. 1992) (“[T]he more spontaneous the statement, the less likely it is to be a product of fabrication, memory loss, or distortion.... Yet, a lack of spontaneity is not necessarily fatal to the admission of hearsay, especially in the child abuse context.”); *United States v. Grant*, 42 M.J. 340, 343 (C.A.A.F. 1995) (finding the child “spontaneously initiated the conversation”); *United States v. Clark*, 35 M.J. 98, 106 (C.M.A. 1992).

¹⁵⁹ See, e.g., *United States v. Martindale*, 36 M.J. 870 (N-M.C.M.R. 1993) (finding the fact that child’s statement was taken by two persons who both testified at trial is one particular guarantee of trustworthiness).

by questioning,¹⁶⁰ mental health counseling before the statement,¹⁶¹ whether the statement was tape recorded,¹⁶² whether the statement is consistent,¹⁶³ the state of mind and emotion of the child when the statement was made,¹⁶⁴ gestures made while making the statement,¹⁶⁵ unusual sexual knowledge,¹⁶⁶

¹⁶⁰ See, e.g., *United States v. Grooms*, 978 F.2d 425, 427 (8th Cir. 1992) (“[T]he statements were made to an FBI agent with special training in interviewing child victims. Agent Pritchard testified that he asked the girls open-ended questions and avoided asking them leading questions.”); *Grant*, 42 M.J. at 344 (indicating questions asked by the relative of the child were not suggestive); *Clark*, 35 M.J. at 106 (“[A]lthough Cindy had asked her the question more than once, the question did not suggest in the slightest the nature of the answer that Nikki gave or its details.”); *United States v. Cabral*, 43 M.J. 808, 811 (A.F. Ct. Crim. App. 1996) (“Jessica’s description of the sexual acts was not prompted by leading questions.”).

¹⁶¹ See, e.g., *State v. Carlson*, 812 P.2d 536, 540 (Wash. Ct. App. 1991) (“We hold, therefore, that a trial judge may find child hearsay statements unreliable on the ground that there has been a lapse of time and intervening counseling between the abuse and the statements at issue only when the evidence demonstrates that the lapse or counseling somehow affected the child’s statements.”); *State v. Mayes*, 825 P.2d 1196 (Mont. 1992).

¹⁶² See, e.g., *Cabral*, 43 M.J. 808 (reasoning although the rapport portion of the interview was not videotaped, the tape was reliable for other reasons); *People v. McMillan*, 597 N.E.2d (Ill. Ct. App. 1992) (stating because the interview was not recorded weighed against the credibility of the statements made therein); *State v. Rojas*, 524 N.W.2d 659, 663 (Iowa 1994) (“We also note that the videotape is more reliable than many other forms of hearsay because the trier of fact could observe for itself how the questions were asked, what the declarant said, and the declarant’s demeanor.”); *United States v. Palacios*, 32 M.J. 1047 (A.C.M.R. 1991) (finding proponent failed to convince court of the reliability of the videotape).

¹⁶³ See, e.g., *United States v. Cree*, 778 F.2d 474 n.5 (8th Cir. 1985) (“[T]he fact that [a victim] made such a statement separately to the two school officials and later made similar statements to Chaussee and Agent Hellekson in our view enhances [a victim’s] credibility.”); *United States v. Ureta*, 44 M.J. 290, 196 (C.A.A.F. 1996) *cert. denied*, 117 S.Ct. 692 (1996); *United States v. Morgan*, 40 M.J. 405, 410 (C.M.A. 1994); *United States v. Stivers*, 33 M.J. 715 (A.C.M.R. 1991); *United States v. Lockwood*, 23 M.J. 770, 771 (A.F.C.M.R. 1987); *United States v. Crayton*, 17 M.J. 932 (A.F.C.M.R. 1984).

¹⁶⁴ See, e.g., *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993) (finding victim was “still suffering pain and distress from the assault” when statements were made); *Clark*, 35 M.J. 98 (stating the declarant “was still suffering under the trauma of the event when she made her statements”); *Ureta*, 41 M.J. at 578 (finding “sincere demeanor during interview” supported reliability).

¹⁶⁵ See, e.g., *United States v. Pollard*, 34 M.J. 1008 (A.C.M.R. 1992); *People v. Barger*, 624 N.E.2d 405 (Ill. App. Ct. 1993) (stating during the course of the interview, the child demonstrated fellatio with a doll).

¹⁶⁶ See, e.g., *United States v. King*, 35 M.J. 337 (C.M.A. 1992) (indicating court may allow expert testimony about age when children are able to fabricate sexual acts); *United States v. Dorian*, 803 F.2d 1439, 1445 (8th Cir. 1986) (“It is unlikely that Roxanne could have fabricated the story she told...and repeated..., and ordinary experience suggests that

unique detail of the statement,¹⁶⁷ age of the child,¹⁶⁸ terminology used,¹⁶⁹ statements against interest,¹⁷⁰ motive to fabricate,¹⁷¹ personal knowledge,¹⁷² level of understanding,¹⁷³ and expert testimony.¹⁷⁴ Although as the dissent in *Wright* points out, limiting the evidence to only that surrounding the making of the statement is somewhat flawed, as many times evidence surrounding the making of the statement and evidence corroborating the statement actually overlap.¹⁷⁵

Roxanne would not have engaged in the behavior with the anatomically correct dolls that Monica Whiting observed absent some prior similar experience.” (citing *United States v. Short*, 790 F.2d 464 (6th Cir. 1986)); *Clark*, 35 M.J. at 107 (noting that “the substance of that answer is not within the ken of the average 5-year-old child”).

¹⁶⁷ See, e.g., *State v. Robinson*, 722 P.2d 1379, 1382 (Wash. Ct. App. 1986) (finding statements of a three-year-old that “he had touched her with his tail and that soap had come out of his tail” to be unique details of the statement).

¹⁶⁸ See, e.g., *Farley*, 992 F.2d at 1126 (“D.C.’s youth ‘greatly reduces[s] the likelihood that reflection and fabrication were involved.’” (quoting *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988))).

¹⁶⁹ See, e.g., *People v. Bowers*, 801 P.2d 511, 521 (Colo. 1990) (“In some circumstances the sexual terminology employed by a young child in describing a sexual offense can lend some measure of reliability to the child’s statement.”).

¹⁷⁰ See, e.g., *United States v. Morgan*, 40 M.J. 405, 410 (C.M.A. 1994) (“Ann was a member of the accused’s household and looked up to him for financial support. The social stigma that undoubtedly attached to her as a result of her accusations of sexual abuse must be considered as nothing less than personally devastating.”).

¹⁷¹ See, e.g., *Guam v. Ignacio*, 10 F.3d 608 (9th Cir. 1993) (“The discussion in the child’s presence between the social worker and the child’s mother concerning the suspicion of sexual abuse arguably provided a basis for the child to report inaccurately the abuse and possibly the identity of the abuser in an attempt to please her mother.”).

¹⁷² See, e.g., *United States v. Cabral*, 43 M.J. 808, 811 (A.F. Ct. Crim. App. 1996) (“[A]ppellant did not offer any plausible motive for Jessica to fabricate such a sordid story, and like the military judge, we find none.”); *United States v. Clark*, 35 M.J. 98, 107 (C.M.A. 1992) (finding the five-year-old victim had no motive to lie); *United States v. Miller*, 32 M.J. 843 (N-M.C.M.R. 1991) (finding the child did not have a motive to fabricate).

¹⁷³ See e.g., *State v. Smith*, 384 N.W.2d 546 (Minn. Ct. App. 1986); *People v. Land*, 609 N.E.2d 1010 (Ill. Ct. App. 1993) (stating child was able to distinguish between different forms of abuse and was able to state that certain abuse did not occur).

¹⁷⁴ See, e.g., *In re Jaclyn P.*, 578 N.Y.S.2d 252 (N.Y. App. Div. 1992).

¹⁷⁵ As the dissent in *Idaho v. Wright* points out, these cross over:

But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate “inherent trustworthiness” and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court

Under the proposed MRE, courts will not be restricted to examining only the circumstances surrounding the statement, but will be able to look toward corroborating evidence as well. This will not run afoul of the *Wright* decision because the Supreme Court decided *Wright* on the constitutional issues of Confrontation under the Sixth Amendment.¹⁷⁶ *Wright's* reasoning arguably will not apply if the constitutional concerns (i.e., under the Confrontation Clause) are resolved at trial.¹⁷⁷

The constitutional concerns at trial are resolved in one of two ways. First, if the statement at issue is testimonial, the Confrontation Clause is satisfied if the child witness testifies at trial and is subject to cross-examination.¹⁷⁸ Second, if the statement at issue is nontestimonial, according to *Crawford* and its progeny, the Confrontation Clause is satisfied and jurisdictional hearsay rules will determine admissibility at trial.¹⁷⁹ Under those evidentiary rules, corroborative evidence is relevant.¹⁸⁰ Corroborating evidence, in addition to some of the overlap with the circumstances surrounding the statement,

purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child “use[d] . . . terminology unexpected of a child of similar age.” But making this determination requires consideration of the child’s vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question.

Idaho v. Wright, 497 U.S. 805, 833 (1990) (Kennedy, J., dissenting) (internal citations omitted).

¹⁷⁶ *Id.* at 808 (“This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant’s rights under the Confrontation Clause of the Sixth Amendment.”).

¹⁷⁷ See, e.g., United States v. Ureta, 44 M.J. 290 (C.A.A.F. 1996); United States v. McGrath, 39 M.J. 158 (C.M.A. 1994).

¹⁷⁸ California v. Green, 399 U.S. 149 (1970).

¹⁷⁹ Crawford v. Washington, 541 U.S. 36, 68 (2004) (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts* [Ohio v. Roberts, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”).

¹⁸⁰ *Ureta*, 44 M.J. 290; *McGrath*, 39 M.J. 158; United States v. Lyons, 36 M.J. 183, 188 (C.M.A. 1992) (Crawford, J., concurring); United States v. Clark, 35 M.J. 98, 107 (C.M.A. 1992) (Crawford, J. concurring) (stating restrictions placed on consideration of corroboration does not apply when defendant waives the right to confront the hearsay witness).

can include: medical and physical evidence of abuse;¹⁸¹ changes in behavior of the child;¹⁸² corroborative hearsay statements;¹⁸³ reliability of the person who heard the statement;¹⁸⁴ more than one victim with the same story;¹⁸⁵ defendant's opportunity to commit the act;¹⁸⁶ admission by the defendant;¹⁸⁷ prior uncharged misconduct of the defendant;¹⁸⁸ and expert testimony that the child was abused.¹⁸⁹

In sum, either the child testifies or the statement is nontestimonial. Either way, there are no constitutional roadblocks for a military court to consider the circumstances surrounding the making of the statement as well as corroborating evidence of the statement.

Under the proposed MRE, the reliability test with analysis of the aforementioned factors is required *only* if the child witness is unavailable for testimony. To require a reliability test when the witness is available is not mandated by current legal jurisprudence and is unnecessary when taking into account the ability of the defense. If the witness is available and testifies, the defense can conduct cross-examination as they see fit, and they have the ability to attack the statement in whatever manner allowed under the rules.¹⁹⁰ Nevertheless, when a hearsay statement is offered at trial and the child witness testifies, the military judge, if requested by defense, should provide

¹⁸¹ See, e.g., *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988); *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986); *United States v. Cree*, 778 F.2d 474 (8th Cir. 1985); *United States v. Quick*, 22 M.J. 722 (A.C.M.R. 1986), *aff'd*, 26 M.J. 460 (C.M.A. 1988).

¹⁸² See, e.g., *State v. Robinson*, 735 P.2d 801 (Ariz. 1987); *State v. Richey*, 490 P.2d 558 (Ariz. 1971); *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *State v. Kuone*, 757 P.2d 289 (Kan. 1998).

¹⁸³ See, e.g., *United States v. Martindale*, 36 M.J. 870 (N-M.C.M.R. 1993); *Delacruz v. State*, 734 So. 2d 1116 (Fla. Ct. App. 1999); *State v. Bishop*, 816 P.2d 738 (Wash. App. 1991).

¹⁸⁴ See, e.g., *State v. McKinney*, 747 P.2d 1113 (Wash. App. 1987).

¹⁸⁵ See, e.g., *Murray v. State*, 770 P.2d 1131 (Alaska Ct. App. 1989); *State v. Swan*, 790 P.2d 610 (Wash. 1990).

¹⁸⁶ See, e.g., *Ghelichkhani v. State*, 765 So. 2d 185 (Fla. Ct. App. 2000); *State v. Booth*, 862 P.2d 518 (Or. App. 1993).

¹⁸⁷ See, e.g., *Martindale*, 36 M.J. 870; *State v. Allen*, 755 P.2d 1153 (Ariz. 1998).

¹⁸⁸ See, e.g., *People v. Bowers*, 801 P.2d 511 (Colo. 1990); *Jones v. State*, 728 So. 2d 788 (Fla. Ct. App. 1999).

¹⁸⁹ See, e.g., *Martindale*, 36 M.J. 870; *Bowers*, 801 P.2d 511.

¹⁹⁰ See *California v. Green*, 399 U.S. 149 (1970).

an instruction to the panel members about the statement.¹⁹¹ In essence, this instruction allows the panel members to conduct their own reliability test based on their knowledge of human nature, common sense, and any other factor they believe is relevant. Finally, as with any panel member instruction, the defense is free to argue the facts as they developed in trial, coupled with the member instruction on child hearsay statements.

Turning now to when the child witness is unavailable, the proposed MRE requires a reliability test. If the witness is unavailable, then as discussed above, the statement must be nontestimonial to be admitted at trial. In that case, there is no Confrontation Clause concern. Since there are no constitutional concerns, *Wright*, arguably, would not apply in this case, leaving one to believe that a reliability test may not be required at all. Even so, the Due Process Clause¹⁹² would most likely still require some sort of reliability test. Simply allowing unfettered admission of a statement without allowing the defense the ability to confront the witness could still run afoul of the constitution.¹⁹³ At the end of the day, it is all about fairness. Affording prosecutors the best ammunition to deal with child victim cases must not be done at the expense of the defendant's rights and abilities to defend themselves. The text of the proposed rule would include language requiring the judge to conduct a reliability test prior to admission of the statement. A few states include the specific factors the court should consider when determining the reliability of the statement to be admitted.¹⁹⁴ For purposes of the proposed MRE, this is unnecessary as it allows for the possibility of restricting a court's ability to look at factors that may not be specifically enumerated within the statute.

¹⁹¹ For example, the possible instruction could be the following: Members of the panel, you have heard statements from (name), a child aged XX years old. In evaluating this testimony, you and you alone are to determine the weight and credit to be given the statement. In making this determination, you should consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor you believe warrants consideration using your common sense, knowledge of human nature, and ways of the world. *See, e.g.*, KAN. STAT. ANN. § 60-460 (West 2011).

¹⁹² U.S. CONST. amend. V (“No person shall be...deprived of life, liberty, or property, without due process of law....”).

¹⁹³ *Michigan v. Bryant*, 562 U.S. 344 n.13 (2011) (“Of course the Confrontation Clause is not the only bar to admissibility of hearsay statements at trial. State and federal rules of evidence prohibit the introduction of hearsay, subject to exceptions. Consistent with those rules, the Due Process Clauses of the Fifth and Fourteenth Amendments may constitute a further bar to admission of, for example, unreliable evidence.”) (internal citations omitted).

¹⁹⁴ *E.g.*, DEL. CODE ANN. tit. 11, § 3513 (West 2015).

On the other hand, to include all possible factors that a court can use to judge reliability of a statement would make the rule entirely too lengthy and convoluted. Including a non-exhaustive list of factors within the discussion section of the rule would serve to provide courts possible factors to consider while not making the statutory language of the rule too burdensome.

Some might argue this will result in prosecutors placing children on the witness stand who should not testify. If the rule is followed correctly, it will not. Under the proposed rule, proponents of child hearsay statements are required to provide notice similar to that required in the residual hearsay exception. This notice allows the opponent of the evidence to prepare for the statement as well as contemplate and file the requisite motions prior to trial.¹⁹⁵ This same process already occurs, using the residual hearsay exception. If the opponent of the evidence files a motion to exclude, the court will order a motion hearing to determine whether the statement will be admissible by conducting the reliability test required under the rule. If the court determines the statements inadmissible, the proponent of the statement can then make a decision, after consulting with possible experts and guardians, whether the child will actually testify. The procedure of the rule ensures that children testify only if it is the last option.

C. The Statement Should Be Admissible without Regard to Availability of the Child

The previous section discussed whether the courts should conduct a reliability test. This section will focus on the availability of the child and whether the admission of the statement should be conditioned on the same. As addressed above, all of the discussion about admission of a statement under the proposed exception presupposes that the court has determined the statement is either nontestimonial *or* the child is available for cross examination.¹⁹⁶ Codified within the rule itself, most states' child hearsay exceptions allow for admission of the statements without regard to the child's availability.¹⁹⁷

¹⁹⁵ From the author's personal experience, this is typically done through a motion *in limine*.

¹⁹⁶ This addresses the inevitable Confrontation Clause concerns.

¹⁹⁷ ALA. CODE § 15-25-31 (1994); CAL. EVID. CODE § 1360 (West 1995); COLO. REV. STAT. ANN. § 13-25-129 (West 2015); DEL. CODE ANN. tit. 11, § 3513 (West 2015); FLA. STAT. ANN. § 90.83(23) (West 2014); IDAHO CODE ANN. § 19-3024 (West 2015); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2015); IND. CODE ANN. § 35-37-4-6 (West 2015); ME. RE. STAT. ANN. tit. 15, § 1205 (2006); MD. CODE ANN., CRIM. PROC. § 11-304 (West 2011); MINN. STAT. ANN. § 595.02 (West 2013); MISS. R. EVID. 803 (West 1997); MO. ANN. STAT.

This seems to make the most sense. If the statement has already cleared the Confrontation Clause hurdle, there should be no restriction on whether the child is available as a witness or not. Under the proposed MRE, the admission of the statements should not hinge on whether the child is available for testimony. However, further analysis on this point is required to help practitioners determine whether corroboration evidence will be required at trial.

While the military rules of evidence define what makes a witness unavailable, those situations are relatively easy to recognize at trial. Under MRE 804, a witness is deemed to be unavailable when a privilege applies, the witness refuses to testify despite an order to do so, he or she testifies to not remembering the subject matter, or the witness cannot be at trial because of sickness or death.¹⁹⁸ However, outside of these instances, it is not as simple as whether someone takes the witness stand or not.¹⁹⁹ Courts should determine a child is unavailable if there is evidence that they will suffer psychological harm or trauma if they testify.

Some jurisdictions have taken this very position, indicating evidence that the child will suffer psychological harm if they testify is enough to render a child unavailable at trial.²⁰⁰ In fact, several states have included within their child hearsay statutes language allowing courts to declare a child witness psychologically unavailable.²⁰¹ In Alabama, for example, the statute defines unavailability to include a “[s]ubstantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of closed circuit television.”²⁰² Considering that the research, as well as the

§ 491.075 (West 2012); NEV. REV. STAT. ANN. § 51.385 (West 2001); N.J. R. EVID. 803 (West 2005); N.D. R. EVID. 803 (West 2014); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 2013); OR. REV. STAT. ANN. § 40.460 (West 2012); 42 PA. STA. AND CONS. STAT. ANN. § 5985.1 (West 2004); 14 R.I. GEN. LAWS ANN. § 14-1-68 (West 1985); S.D. CODIFIED LAWS § 19-19-806.1 (2009); TENN. R. EVID. 803 (West 2009); UTAH CODE ANN. § 77-35-15.5 (West 2008); VA. CODE ANN. § 63.2-1522 (West 2002); WASH. REV. CODE ANN. § 9A.44.120 (West 1995).

¹⁹⁸ MCM, *supra* note 4, MIL. R. EVID. 804(a).

¹⁹⁹ *See, e.g.*, State v. Foell, 416 N.W.2d 45, 46 n.3 (S.D. 1987) (stating “the terms ‘available’ and ‘present’ are clearly not synonymous”).

²⁰⁰ *See* State v. Castaneda, 621 N.W.2d 435 (Iowa 2000); State v. Kuone, 757 P.2d 289 (Kan. 1988).

²⁰¹ ALA. CODE § 15-25-31 (1994); CAL. EVID. CODE § 240(c) (West 1995); FLA. STAT. ANN. § 90.803(23)(a)(2)(b) (West 2014); MISS. R. EVID. 804(a)(6) (West 1997); UTAH CODE ANN. § 77-35-15.5(1)(h) (West 2008).

²⁰² ALA. CODE § 15-25-32(2)(6) (1994).

law, have recognized the trauma a child can suffer from testifying, it only makes sense that a codified exception for the military courts include language similar to Alabama's. Military judges should have the authority to declare a child witness unavailable for purposes of a codified child hearsay exception if they are presented with sufficient evidence that the child witness *will* suffer psychological harm or trauma if required to testify. Since each person is different, there should be a specific finding that the child *will* suffer harm as opposed to possibly suffer harm.²⁰³

D. The Corroboration Requirement Is Satisfied within the Reliability Test

As discussed above, reliability of a statement and corroborating evidence of a statement are separate tests.²⁰⁴ However, the proposed rule has the corroboration requirement satisfied within the reliability test itself. Most states that have a child hearsay exception require corroboration of the statement if the child is unavailable as a witness.²⁰⁵ It is a scary proposition to allow a simple statement made by a child not available for cross examination to be the only statement used to convict an accused. Many states have built into the text of their rule the requirement for a reliability test as well as corroboration.²⁰⁶ This, most likely, is a reaction to the holding in *Wright* that explains the difference between the two. Arguably, the distinction between a reliability test and corroborating evidence is unneeded as long as the constitutional concerns have been addressed. Therefore, the proposed MRE would not have a separate requirement for the evidence to be corroborated since the court can consider evidence surrounding the making of the statement as well as other evidence that corroborates the statement. This will make the process of admitting a statement less convoluted for the practitioner.

²⁰³ *E.g.*, *In Re Tayler*, 995 A.2d 611 (2010).

²⁰⁴ *See supra* note 148 and accompanying text.

²⁰⁵ CAL. EVID. CODE § 1360 (West 1995); COLO. REV. STAT. ANN. § 13-25-129 (West 2015); FLA. STAT. ANN. § 90.83(23) (West 2014); IDAHO CODE ANN. § 19-3024 (West 2015); 725 ILL. COMP. STAT. ANN. 5/115-10 (West 2015); MD. CODE ANN., CRIM. PROC. § 11-304 (West 2011); MINN. STAT. ANN. § 595.02 (West 2013); MISS. R. EVID. 803 (West 1997); N.J. R. EVID. 803 (West 2005); N.D. R. EVID. 803 (West 2014); OHIO R. EVID. 807 (West 1991); OKLA. STAT. ANN. tit. 12, § 2803.1 (West 2013); OR. REV. STAT. ANN. § 40.460 (West 2012); S.D. CODIFIED LAWS § 19-19-806.1 (2009); WASH. REV. CODE ANN. § 9A.44.120 (West 1995).

²⁰⁶ *See, e.g.*, CAL. EVID. CODE § 1360 (West 1995).

E. The Rule Is Constitutional

As long as the statement is nontestimonial or the witness is available to testify, any challenge to the rule based on the Confrontation Clause²⁰⁷ will not succeed.²⁰⁸ In addition to confrontation challenges, defendants have challenged child hearsay statutes based on a violation of the Equal Protection Clause²⁰⁹ and have met with little success.²¹⁰ If a statute “operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution”²¹¹ the statute “receives strict judicial scrutiny to ascertain whether the classification is necessary to a compelling state interest.”²¹² The Supreme Court has stated “a classification neither involving fundamental rights nor proceeding along suspect lines...cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.”²¹³ Fundamental rights include the right to vote,²¹⁴ free exercise of first amendment freedoms,²¹⁵ right to privacy,²¹⁶ and the right to travel.²¹⁷ As long as an accused can present a complete defense at trial and has a “reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.”²¹⁸ In a rational basis review, the burden of proving

²⁰⁷ U.S. CONST. amend. VI.

²⁰⁸ *E.g.*, *King v. State*, 929 So. 2d 1032 (Ala. Crim. App. 2005); *Pantano v. State*, 138 P.3d 477 (Nev. 2006).

²⁰⁹ U.S. CONST. amend. XIV (“No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”).

²¹⁰ *E.g.*, *State v. Wright*, 751 S.W.2d 48 (Mo. 1988); *In Matter of W.D.*, 709 P.2d 1037 (Okla. 1985).

²¹¹ *Belton v. Bd. of Police Comm’rs.*, 708 S.W.2d 131, 139 (Mo. 1986) (en banc) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

²¹² *Id.*

²¹³ *Cent. State Univ. v. Am. Ass’n of Univ. Professors*, *Cent. State Univ. Chapter*, 526 U.S. 124, 127–28 (1999) (quoting *Heller v. Doe*, 509 U.S. 312, 319–21 (1993)).

²¹⁴ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

²¹⁵ *San Antonio Indep. Sch. Dist.*, 411 U.S. 1.

²¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

²¹⁷ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²¹⁸ *Mobile, J & K.C.R. Co., v. Turnipseed*, 219 U.S. 35, 43 (1910); *See also California v. Trombetta*, 467 U.S. 479 (1984) (stating criminal defendants must be afforded a reasonable opportunity to present a complete defense).

a violation of the Equal Protection Clause²¹⁹ rests with the moving party.²²⁰ Because there is no fundamental right infringed upon by the enactment of a child hearsay exception, there must only be a rational relationship between the enactment of the statute and a legitimate governmental need.

V. CONCLUSION

As the Supreme Court has said, “[I]t is the odd legal rule that does not have some form of exception for children.”²²¹ There are multiple benefits of a specific, codified, child hearsay exception. First, it helps ensure that the statements received into evidence are truthful. As detailed in this article, numerous studies have shown children have a difficult time relaying the facts while subject to the rigors of the trial process. Presumably, an adult victim will have a choice when it comes to whether they will participate in the trial process. Although testifying in trial is stressful for anyone involved, sadly, children are not usually the ones making the determination as to whether they will participate in the proceedings. This rule attempts to shield them as much as possible from the rigors of trial testimony and, at the same time, ensuring the fact-finder is presented with reliable information.

Second, it provides all parties a predictable and workable rule when preparing for litigation that involves a child witness. If a child is available, both parties understand the bounds of the rule and can prepare accordingly, including requesting a potential panel instruction regarding any statement admitted where the child also testified. Although there is still a reliability test when a child is unavailable, certain issues should not and cannot be avoided. The U.S. Constitution mandates, and an accused is entitled to, the right to a fair trial. Requiring a reliability test if the child does not testify, but not requiring one when they do, strikes the much-needed balance between an accused’s constitutional rights and the prosecution of those who may have harmed children.

Statistics show the prosecution of these offenses in the military is on the rise. Providing prosecutors and commanders with a specific rule that allows them to further root out and prosecute the members of their units who commit child offenses also provides a shield to protect the child from the process.

²¹⁹ U.S. CONST. amend. XIV.

²²⁰ *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911).

²²¹ *Miller v. Alabama*, 567 U.S. 460, 481 (2012).

Finally, this article will address the vignette questions posed in the introduction. Since the statements made to the mother are nontestimonial, there are no Confrontation Clause concerns. If the prosecutor chooses to have the child testify, the mother and the child can simply state under oath what the child told her, using the proposed exception. There is no need for a lengthy hearing about the reliability of the statement. The defense is free to cross-examine the child and the mother on the particulars of the statement and the circumstances surrounding the making of the statements. Additionally, they may request a panel member instruction that allows the panel members to use their common sense with regard to the veracity of the statement. If the child is unavailable as a witness, the court will conduct a hearing outside the presence of the panel members to determine admissibility. The court will no longer be constrained by a rule that is to be rarely used or by an illogical holding in *Idaho v. Wright*. Whether the child testifies or not, the statement is admissible, provided the prosecutor complied with the notice requirement and satisfied the reliability test.

The statement made to the forensic examiner is testimonial. As discussed above, when applying the tests enumerated by courts prior to *Clark* along with the *Clark* holding, it is clear these statements will be testimonial. Prior to the statements being admitted, the child would have to testify. Once the Confrontation Clause has been satisfied, the analysis is the same as the statements made to the mother or for any other hearsay exception. The statement is admitted and the defense can request the aforementioned panel member instruction regarding the evidence they heard. If the child does not testify, the Confrontation Clause is not satisfied and the court will not admit the statement.

The proposed rule is succinct. The discussion section after the proposed rule would illuminate the reasoning behind the rule as well as specific cases that have dictated the reasons for the drafting and wording of the rule. Children are the smallest, most vulnerable members of our society. They are speaking. It is time the military listens.

Appendix A Proposed Military Rule of Evidence

Rule 803A: Admission of Child Statements

a. *In General.* An out of court statement made by a child is admissible, provided that if the declarant is unavailable as a witness, the military judge determines the statement has particularized guarantees of trustworthiness.

b. *Definitions.*

1. *Child.* For purposes of this section, a child is defined as a person who physically, cognitively, or developmentally has not attained the age of sixteen at the time the statement is offered into evidence.

2. *Unavailability.* In addition to the criteria listed in MRE 804, unavailability includes a substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding.

c. *Notice.* The statement is admissible only if, before the trial or hearing, the proponent gives the adverse party reasonable notice of the intent to offer the statement and its particulars.

Draft Discussion:

This rule is applicable to statements made by a child only after the Confrontation Clause requirements of the U.S. Constitution have been satisfied. See *Crawford v. Washington*. This rule accounts for certain situations wherein the person making the statement is physically sixteen years of age or older, yet has the cognitive or mental capacity of a person under sixteen years of age. This can be proven by expert testimony, other relevant documents, or a combination of both testimony and documents. Although expert testimony may be helpful, it should not be required. Additionally, there is no specific reliability test that must be conducted by the trial judge. Rather, courts should look to the applicable case law about corroboration and extrinsic evidence for guidance on potential appropriate factors to determine guarantees of trustworthiness and should not feel restrained by *Idaho v. Wright* and its limitation on corroborative evidence. See *United States v. Ureta*, 44 M.J. 290 (C.A.A.F. 1996) and *United States v. McGrath*, 39 M.J. 158 (C.M.A.. 1994) *cert. denied*, 513 U.S. 961 (1994). This rule is subject to MRE 403. Finally, if a statement made by a child is admitted and the court determined the child to be unavailable, the use of a member instruction regarding the statement may be advisable.

INFORMATION FOR CONTRIBUTORS

The Air Force Law Review publishes articles, notes, comments, and book reviews. The Editorial Board encourages readers to submit manuscripts on any area of law or legal practice that may be of interest to judge advocates and military lawyers. Because the *Law Review* is a publication of The Judge Advocate General's Corps, USAF, Air Force judge advocates and civilian attorneys are particularly encouraged to contribute. Authors are invited to submit scholarly, timely, and well-written articles for consideration by the Editorial Board. The *Law Review* does not pay authors any compensation for items selected for publication.

Manuscript Review. Members of the Editorial Board review all manuscripts to determine suitability for publication in light of space and editorial limitations. Manuscripts selected for publication undergo an editorial and technical review, as well as a policy and security clearance as required. The Editor will make necessary revisions or deletions without prior permission of, or coordination with the author. Authors are responsible for the accuracy of all material submitted, including citations and other references. The *Law Review* generally does not publish material committed for publication in other journals. In lieu of reprints, authors are provided two copies of the issue containing their work.

Manuscript Form. Manuscripts may be submitted by disc or electronic mail in Microsoft Word format. Please contact the Editor at (334) 953-2802 for submission guidelines or contact the Editor at afloa.afjags@us.af.mil and provide your electronic contact information. Authors should retain backup copies of all submissions. Footnotes must follow the format prescribed by THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION (20th ed. 2015). Include appropriate biographical data concerning the author(s), such as rank, position, duty assignment, educational background, and bar affiliations. The Editorial Board will consider manuscripts of any length, but articles selected for publication are generally less than 60 pages of text. The *Law Review* does not return unpublished manuscripts.

Distribution. *The Air Force Law Review* is distributed to Air Force judge advocates. In addition, it reaches other military services, law schools, bar associations, international organizations, foreign governments, federal and state agencies, and civilian lawyers.

