

THE AIR FORCE LAW REVIEW



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NDAA 2012: CONGRESS AND CONSENSUS
ON ENEMY DETENTION

*COLONEL LINDSEY O. GRAHAM** AND *COLONEL MICHAEL D. TOMATZ***

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I. INTRODUCTION

Order without liberty and liberty without order are equally destructive.¹

-- Theodore Roosevelt

Late Saturday night, a British military intelligence officer received a stunning report from a trusted human intelligence source working in Waziristan. At least three al-Qaeda-trained personnel will enter the United States within the next week for the purpose of carrying out a coordinated attack on multiple industrial targets. The plan involves the use of previously positioned fertilizer-based explosives against rail lines, with the specific objective of targeting rail cars containing volatile chemical compounds. If the plan succeeds, secondary explosions will result in the release of lethal clouds of gas into highly populated urban areas. Even more concerning, two of the three known operatives are American citizens, one of whom may already be in the United States.²

This scenario is entirely fictional, but it is emblematic of the very real threat the United States faces from an enemy intent on harming this nation and its vital interests whenever and wherever it can. Thousands of military, intelligence, law enforcement, judicial, and homeland security personnel have dedicated themselves to preventing precisely this kind of attack. Despite at times titanic disagreements about how best to approach the, dare one say, *global war on terrorism*, it is precisely the desire to protect the American people from another devastating attack that has spurred all three branches of Government to take necessary and prudent steps to protect the nation from harm. While security remains a paramount consideration, Congress, the President and the Federal Courts at the same time remain committed to the preservation of liberty and to the values, principles, and requirements enshrined in the Constitution of the United States.

As the whole of government works through a myriad of issues related to counterterrorism, one particularly vexing area remains detention operations. Yet there is reason for optimism. The National Defense Authorization Act for Fiscal Year 2012 represents a critical milestone in America's fight against al-Qaeda and the Taliban.³ The counterterrorism provisions provide the United States Government

¹ Theodore Roosevelt, *Miscellaneous Writings*, c. 1890s (appears on the memorial tablets at the Theodore Roosevelt Island park).

² The views expressed in this article are those of the authors, and do not necessarily represent the views of, and should not be attributed to, the U.S. Department of the Air Force or the Department of Defense. This article is intended to contribute to the ongoing scholarly debate regarding detention under the law of war. Principal drafting of the article took place in the spring of 2012, and therefore, it may not contain references to more recent case law or legislative proposals.

³ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81(2012) (hereafter

with clear authority to detain al-Qaeda, Taliban or associated forces under law of war authority.⁴ Through this bipartisan legislation, the United States Congress in a very real sense renewed and reinforced its commitment to the continued fight against enemy forces determined to harm this country.⁵ The new law reinforces the President's the legal authority to protect and defend the nation, including where necessary through the military detention of enemy personnel.

This article discusses the new counterterrorism provisions in the 2012 NDAA, keying in on those sections dealing with the affirmation of the authority of the armed forces to detain specified covered persons, the requirements related to the military custody of foreign al-Qaeda terrorists, and procedures applicable to persons held in long-term detention. Next, it focuses on the legislative debates, including proposed amendments to the legislation that were ultimately unsuccessful but nevertheless helped shape an understanding of the legislation, and on the myriad of criticisms levied against the new law. Because the NDAA provisions build directly upon the foundation of the Authorization for the Use of Military Force (AUMF) passed by Congress in 2001, this article will examine the AUMF, placing it in proper historic context. It will then delve into a number of court decisions that have reviewed and considered the military detention authority available to the Government under the AUMF and the U.S. Constitution. Though not a primary focus, this paper will briefly consider the evolving procedural requirements related to preventive detention.

Debates within and outside the Government over virtually every aspect of detention have been rancorous, which is unfortunate given the collective desire shared by most everyone to ensure the nation and its citizens, along with our most cherished values, remain secure. A close review of current law and judicial precedent suggests there is reason for optimism. Various strands of the thinking within the Legislative, Executive, and Judicial branches of Government provide a reasonably strong indication of a coalescing of views. To the extent there is a burgeoning consensus, it centers on very pragmatic considerations, ones that give the President broad authority where the nation is most acutely threatened but also ones that temper the detention authority of the Executive with tailored Constitutional safeguards and legislative commands designed to balance security and liberty interests. Both are vital to a free society.

NDAA of 2012).

⁴ *Id.*, § 1021-§ 1034.

⁵ 157 Cong. Rec. S8664 (daily ed. December 15, 2011). The U.S. Senate approved the NDAA by a vote of 86 Yeas to 13 Nays. Final Vote Results for Roll Call 932, HR 1540, *available at* <http://clerk.house.gov/evs/2011/roll932.xml>. The U.S. House of Representatives passed the NDAA by a vote of 283 Ayes and 136 Noes. For a detailed breakdown see <http://www.govtrack.us/congress/vote.xpd?vote=s2011-230>.

II. 2012 NDAA COUNTERTERRORISM PROVISIONS—THE KEYS TO MILITARY DETENTION

This part contains a broad overview of the detention-related counterterrorism provisions of the 2012 NDAA.

A. Section 1021

In the immediate aftermath of the attacks on the United States on September 11, 2001, Congress enacted the Authorization for the Use of Military Force (AUMF).⁶ Through the AUMF, Congress authorized the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁷

Section 1021(a) affirms the authority of the Armed Forces to detain specified covered persons pursuant to the AUMF.⁸ While the courts have broadly interpreted the AUMF as encompassing military detention authority,⁹ here for the first time, the law explicitly affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force “includes the authority for the Armed Forces of the United States to detain covered persons (as defined in [§ 1021(b)]) pending disposition under the law of war.”¹⁰ While there is no question that the AUMF itself authorized military detention of enemy personnel, that Congress chose to explicitly reaffirm this authority over ten years after 9/11 clearly demonstrates the nation’s vigorous and continuing commitment to confront and defeat al-Qaeda and any associated forces or persons who pose an enduring threat to the United States.

Central to the statutory scheme is § 1021(b). It defines certain categories of individuals to which military law of war detention authority applies.¹¹ Under the statute, covered persons include any person:

⁶ Authorization for Use of Military Force, Pub. L. No. 107-40 (2001) (hereafter AUMF).

⁷ *Id.* § 2(a).

⁸ NDAA of 2012, § 1021.

⁹ *See infra* Part IV.

¹⁰ NDAA of 2012, §1021(a).

¹¹ *See id.* § 1021(b).

(1) . . . [W]ho planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those acts.¹²

(2) . . . [W]ho was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.¹³

In simplest terms, the statute authorizes military detention of al-Qaeda, the Taliban or associated forces enemy personnel, as well as any persons committing belligerent acts or directly supporting hostilities in aid of the enemy. If ten years of experience have taught us anything, it is that this is a unusual conflict where enemy forces fail to distinguish themselves from civilians, where terrorist enemies may be U.S. citizens or citizens of friendly countries, where the battle space defies geographic delimitation, and where it is difficult to define with particularity how the conflict will end. When legislating, Congress necessarily paints with a broad brush, and it would be impractical and likely counterproductive for Congress to define with precise granularity who may be subject to detention, particularly when this legislation is future-oriented and meant not only to apply to those who planned, committed or aided in the attacks of 9/11 but also to al-Qaeda, the Taliban or associated forces engaged in hostilities now or in the future against the United States in Afghanistan and throughout the world. Section 1021(b) does, however, tailor the statute's scope of application by excluding other recognized terrorists groups that are not a part of and have never substantially supported or associated with al-Qaeda or the Taliban. It also limits covered persons and would exclude, for example, al-Qaeda sympathizers and others who may profess extremist beliefs but have otherwise not directly supported hostilities or committed any belligerent acts in support of al-Qaeda or associated enemy forces.¹⁴

Section 1021(c) provides for the disposition of persons held under law of war authority described in § 1021(a). Such individuals may be detained “under the law of war without trial until the end of hostilities [as] authorized by the [AUMF].”¹⁵ Those subject to the Military Commissions Act (MCA) of 2009 may be tried under that Act.¹⁶ Individuals may be transferred for trial to an alternative court or competent tribunal having lawful jurisdiction.¹⁷ This could include, for example, an appropriate

¹² *Id.* § 1021(b)(1).

¹³ *Id.* §1021(b)(2).

¹⁴ *See id.* § 1021(b).

¹⁵ *Id.* § 1021(c)(1).

¹⁶ *Id.* § 1021(c)(2). The Military Commissions Act of 2009, Pub.L. 111-84, H.R. 2647, 123 Stat. 2190, enacted Oct. 28, 2009, [hereafter MCA]. The MCA establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and for other offenses triable by military commission.

¹⁷ NDAA of 2012, §1021(c)(3).

civilian court. Covered persons may also be transferred to their country of origin, or another foreign country or foreign entity.¹⁸

Finally, Section 1021 contains two provisions that together depict the relationship between the NDAA and other detention authorities relevant to citizens, lawful resident aliens or others captured or arrested in the United States.¹⁹ § 1021(d) makes clear that nothing in the section is intended to “limit or expand the authority of the President or the scope of the [AUMF].”²⁰ Section 1021(e) recognizes that existing law and other authorities provide a number of mechanisms to detain citizens, lawful resident aliens, or other persons captured or arrested in the United States, and § 1021 should not be construed to affect these existing authorities.²¹

In one sense, the AUMF and § 1021 constitute an “all-in” approach. They provide full authority for the Armed Forces of the United States to detain certain enemy persons domestically or in foreign areas under the law of war, yet they do not prevent the exercise of other statutory authorities for law enforcement agencies, including the FBI and U.S. Customs and Border Protection, to arrest and detain suspected terrorists.

B. Sections 1022 and 1029

Section 1022 focuses on a subset of potential law of war detainees—foreign al-Qaeda terrorists—and requires that those captured in the course of hostilities be held in military custody pending disposition under the law of war.²² The subset of covered persons subject to the § 1022(a)(1) military detention requirement is comprised of “any person whose detention is authorized under section 1021 who is determined—

(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda;²³ and

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.²⁴

¹⁸ *Id.* § 1021(c)(4).

¹⁹ *Id.* §§ 1021(d) and (e).

²⁰ *Id.* § 1021(d).

²¹ *Id.* § 1021(e).

²² *Id.* § 1022(a).

²³ *Id.* § 1022(a)(2)(A).

²⁴ *Id.* § 1022(a)(2)(B).

The most obvious examples of foreign al-Qaeda terrorists are the men who carried out the 9/11 attacks.²⁵ The Congressional requirement for military detention expresses a strong legislative preference that such persons be dealt with by the military under the laws of war. The covered person provisions here underscore a belief that this nation and our coalition partners face a grave and continuing military threat from al-Qaeda and that attacks or plans to attack the United States or our friends under the direction of or in coordination with al-Qaeda fundamentally require a military response, including disposition of detainees under the law of war.²⁶ Thus, if in the course of the scenario posited at the outset of this article, a foreign al-Qaeda operative were captured, whether in Dubai or Detroit, the legislation ordinarily favors military detention. Even as to the narrow category of foreign al-Qaeda terrorists, however, this requirement is not absolute. The President may waive the military detention requirement upon submission to Congress of “a certification in writing that such a waiver is in the national security interests of the United States.”²⁷ For example, a third country might detain an al-Qaeda operative and agree to release that person to the United States subject to certain conditions. If one condition were prosecution in the civilian courts, the President might decide it is in the national interest to waive the military detention requirement in order to gain custody of a known al-Qaeda terrorist.

Section 1022(b) further limits the application of the mandatory military detention provisions as regards U.S. citizens and lawful resident aliens.²⁸ The provision does not extend to citizens or lawful resident aliens on the basis of conduct taking place in the United States except as permitted by the Constitution.²⁹ Thus, while the authority to hold covered persons in military detention under § 1021 applies broadly and covers citizens, lawful resident aliens and foreign nationals, § 1022(b) limits the mandatory military detention requirement to foreign al-Qaeda terrorists and a limited set of lawful resident aliens, e.g., a resident alien member of al-Qaeda who plans an attack on the United States in Yemen, or a resident alien who carries out an attack in the United States where military detention is consistent with the Constitution.

Section 1022(c) contains a series of implementation requirements and directs the President to issue procedures within 60 days.³⁰ These procedures will

²⁵ See generally The 9/11 COMMISSION REPORT, available at <http://www.911commission.gov/report/911Report.pdf> (last accessed June 9, 2012).

²⁶ See *infra* Part III; NDAA of 2012, §1022(a)(3). For purposes of this subsection, the disposition of a person under the law of war has the meaning given in §1021(c), except that no transfer otherwise described in paragraph (4) of that section shall be made unless consistent with the requirements of §1028—Requirements for Certification Relating to the Transfer of Detainees at United States Naval Station, Guantanamo Bay, Cuba, to Foreign Countries and Other Foreign Entities. NDAA of 2012, §1028.

²⁷ NDAA of 2012, § 1022(a)(4).

²⁸ *Id.* § 1022(b).

²⁹ *Id.* § 1022(b)(1)-(2).

³⁰ *Id.* § 1022(c)(1). See *infra* Part III.A. (discussing the President’s signing statement).

designate an official responsible for making covered person determinations and delineate how such determinations will be made.³¹ The procedures will ensure the military detention requirement does not interrupt ongoing surveillance or intelligence gathering with regard to persons not already in custody.³² New procedures will also prevent the disruption of ongoing interrogations,³³ and make clear that mandatory military detention does not apply when U.S. intelligence, law enforcement or other officials are merely granted access to individuals in custody of a third country.³⁴ Future procedures will also enable Presidential certification under § 1022(a)(4) to facilitate the transfer of covered person from third countries when in the national interests and when such transfer could not otherwise be accomplished.³⁵ As with § 1021(e), § 1022(d) provides that nothing in the section shall be construed to affect existing criminal enforcement or national security authorities of domestic law enforcement agencies vis-à-vis covered persons.³⁶ For persons held in detention under the AUMF, the NDAA details requirements for status determinations and mandates consultation regarding prosecution.

Related to § 1022, § 1029 establishes a consultation requirement regarding the prosecution of certain terrorists.³⁷ The provision mandates that before seeking an indictment the Attorney General “consult with the Director of National Intelligence and the Secretary of Defense about—

(A) whether the more appropriate forum for prosecution would be a Federal court or a military commission;³⁸ and

(B) whether the individual should be held in civilian custody or military custody pending prosecution.”³⁹

The consultation requirement applies in cases involving persons subject to § 1022 and meeting the covered person requirements in § 1022(a)(2).⁴⁰ Thus, in the introduction’s hypothetical scenario, if the foreign al-Qaeda operative were caught at an airport in Pakistan, at an airport in the United States, or at the train yard placing explosives, there is a statutory preference that he be held in U.S. military custody and cannot be indicted by the Attorney General without advance consultation. Additionally, pre-indictment consultation applies to cases where a person is held in military detention outside the United States pursuant to the authority affirmed in §

³¹ *Id.* § 1022(c)(2)(A).

³² *Id.* § 1022(c)(2)(B).

³³ *Id.* § 1022(c)(2)(C).

³⁴ *Id.* § 1022(c)(2)(D).

³⁵ *Id.* § 1022(c)(2)(E).

³⁶ *Id.* § 1022(d).

³⁷ *Id.* § 1029.

³⁸ *Id.* § 1029(a)(1).

³⁹ *Id.* § 1029(a)(2).

⁴⁰ *Id.* § 1029(b)(1).

1021.⁴¹ This could include, for example, persons substantially supporting al-Qaeda without necessarily meeting the stricter membership requirements of § 1022(a)(2). While both sections preserve flexibility for the Executive, they unquestionably impose additional requirements designed to tip the scales in favor of military detention and military commissions trials of foreign al-Qaeda terrorists. Recently promulgated implementing regulations narrowly apply § 1022, suggesting continued close Congressional oversight likely will be a priority in the foreseeable future.

C. Section 1024

Section 1024 requires the Secretary of Defense to provide a report to Congress setting forth “procedures for determining the status of persons detained pursuant to the [AUMF] for purposes of section 1021.”⁴² The procedures will apply in the case of any unprivileged enemy belligerent held in long-term detention under the AUMF,⁴³ except the process is not required in the case of a person for whom habeas corpus review is available in a Federal court.⁴⁴ The procedures developed by the Secretary of Defense are required to provide that “a military judge shall preside” at these status determination proceedings,⁴⁵ and the unprivileged belligerent may, if they choose, elect to be represented by military counsel at the status determination proceedings.⁴⁶ The purpose of this section is as simple as it is profound. It will ensure that in the future of the ongoing conflict with al-Qaeda, no person will be held in long-term military detention by the United States without an independent review, either pursuant to a habeas petition as provided in specified cases by the Federal Courts or by a military judge, assisted by counsel if requested, under this section.⁴⁷

⁴¹ *Id.* § 1029(b)(2).

⁴² NDAA of 2012, § 1024(a). *See also* CONGRESSIONAL RESEARCH SERVICE [hereafter CRS] Report R41920, *Detainee Provisions in the National Defense Authorization Bills*, Jennifer K. Elsea and Michael John Garcia (2011). This report contains a detailed overview of the NDAA legislation as it was pending in late 2011. The report raises the issue of whether the “for purposes of section [1021]” language means a determination of whether a detained individual is a covered person subject to section 1021, or whether it is meant to refer to the disposition of such a person under the law of war, or to both.” Since §1021 is intended to comprehensively affirm the detention authority of the Armed Forces under the law of war, the “for purposes of” language arguably should be read comprehensively to include all persons subject to military detention under the law of war. The report also raises the issue of new captures and questions how it is to be determined prior to the status hearing whether a detainee is one who will be held in long-term detention and thus trigger the requirements in §1024(b). Regarding the status determination process, the statute affords the Executive branch flexibility to prescribe procedures under §1024. Because review by the military judge and access to counsel is intended for cases of long-term detention, it need not be conducted immediately.

⁴³ NDAA of 2012, § 1024(b).

⁴⁴ *Id.* § 1024(c).

⁴⁵ *Id.* § 1024(b)(1).

⁴⁶ *Id.* § 1024(b)(2).

⁴⁷ The final Conference report provided:

Because this provision is prospective, the Secretary of Defense is authorized to determine the extent, if any, to which such procedures will be applied to detainees for whom status determinations have already been made prior to the date of the enactment of this Act. The conferees expect that the procedures issued by the

D. Other Provisions

The NDAA also contains a number of provisions specifically related to detention at Guantanamo Bay. These provisions reinforce prior statutory requirements. While a review of these provisions is not the primary focus of this article, this section provides a brief overview. Section 1023 requires the Secretary of Defense to report to Congress on procedures for the periodic detention review of individuals detained at Guantanamo.⁴⁸ The review process will not focus on the legality of detention under the law of war but instead will require discretionary determinations on whether detainees represent a continuing threat.⁴⁹ Section 1026 calls for a report on security protocols governing communications to and from detainees at Guantanamo.⁵⁰ The NDAA also limits the use of funds to transfer detainees from Guantanamo Bay to the United States or its territories or possessions.

Section 1027 continues the prohibition on the use of funds for the transfer or release of individual detainees to or within the United States.⁵¹ The NDAA contains certification requirements that must occur prior to transferring Guantanamo detainees to their country of origin or a foreign country or foreign entity. Section 1028 requires that the Secretary of Defense provide written certification, with the concurrence of the Secretary of State and Director of National Intelligence, that the foreign country or foreign entity to which a given detainee is to be transferred is not a state sponsor of terrorism, maintains control of the intended detention facility, is not facing a threat that would substantially affect its ability to control the individual, has agreed to take actions to ensure the individual cannot threaten the United States or engage in future terrorist activity, and has agreed to share information with the U.S. related to the individual or any associates that could affect the national security of the United States.⁵² These provisions demonstrate a continued Congressional

Secretary of Defense will define what constitutes “long-term” detention for the purposes of subsection (b). The conferees understand that under current Department of Defense practice in Afghanistan, a detainee goes before a Detention Review Board for a status determination 60 days after capture, and again 6 months after that. The Department of Defense has considered extending the period of time before a second review is required. *The conferees expect that the procedures required by subsection (b) would not be triggered by the first review, but could be triggered by the second review, in the discretion of the Secretary* (emphasis added).

H.R. REP. NO. 112-329, 112th Cong, 1st Sess. 696-97 (2011).

⁴⁸ *Id.* § 1023.

⁴⁹ *Id.* § 1023(a)-(b).

⁵⁰ *Id.* § 1026.

⁵¹ *Id.* § 1027.

⁵² *Id.* § 1028(a)-(b). Section 1028 also contains a prohibition on transfer in cases of prior confirmed recidivism. There is, however, a national security waiver process to allow transfers even in cases of recidivism. NDAA of 2012, § 1028(c)-(d). This waiver process also allows the Secretary of Defense, with the concurrence of the Secretary of State and Director of National Intelligence, to waive the certification requirements in subparagraphs (D) and (E) of subsection (b)(1), i.e., the certification requirements that the foreign state has agreed to take effective action to ensure the individual cannot threaten the U.S. or reengage in terrorist activities.

commitment to protecting the United States at home and to ensuring the Government takes prudent steps to prevent those released from Guantanamo taking actions that could harm U.S. interests here or abroad. To understand the import of the NDAA provisions and the controversy surrounding it, this paper now considers differing views on the new legislation.

III. THE DEBATE

A. Public Criticism

The counterterrorism provisions in the NDAA have generated massive controversy among civil liberties groups. The American Civil Liberty Union's (ACLU's) senior legislative counsel described the bill as "an historic threat to American citizens and others because it expands and makes permanent the authority of the president to order the military to imprison without charge or trial American citizens."⁵³ Human Rights Watch called President Obama's refusal to veto the detainee bill a "historic tragedy" and indicated it would cause "enormous damage to the rule of law both in the United States and abroad."⁵⁴ George Washington University professor Jonathan Turley called the law "one of the greatest rollbacks of civil liberties in the history of our country," and apropos to the times, rather colorfully claimed that "for civil libertarians, the NDAA is our Mayan moment."⁵⁵ Congressman Ron Paul has urged repeal of the legislation, arguing Section 1021 "provides for the possibility of the U.S. military acting as a kind of police force on U.S. soil, apprehending terror suspects, including American citizens, and whisking them off to an undisclosed location indefinitely."⁵⁶

The central objection, as framed by the ACLU, is that Section 1021 authorizes "indefinite detention" and "endless worldwide war" and authorizes the military to "pick up and imprison people, including U.S. citizens, without charging them or putting them on trial."⁵⁷ Critics hearken to the Due Process provisions and

⁵³ See *Senate Poised to Pass Indefinite Detention Without Charge or Trial Published*, American Civil Liberties Union [hereinafter ACLU], December 1, 2011, available at <http://www.aclu.org/national-security/senate-poised-pass-indefinite-detention-without-charge-or-trial>.

⁵⁴ See *U.S.: Refusal to Veto Detainee Bill A Historic Tragedy for Rights*, Human Rights Watch, December 14, 2011, available at <http://www.hrw.org/news/2011/12/14/us-refusal-veto-detainee-bill-historic-tragedy-rights>.

⁵⁵ See *Final Curtain: Obama Signs Indefinite Detention of Citizens Into Law As Final Act of 2011*, Jonathan Turley, January 2, 2012, available at <http://jonathanturley.org/2012/01/02/final-curtain-obama-signs-indefinite-detention-of-citizens-into-law-as-final-act-of-2011/>.

⁵⁶ See Ron Paul, *Speech on Unconstitutional NDAA*, Revolutionary Human Media, January 18, 2012, available at <http://coupmedia.org/legislation/ron-paul-s-speech-on-unconstitutional-ndaa-1801>.

⁵⁷ See *Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act*, ACLU, December 5, 2011, available at <http://www.aclu.org/indefinite-detention-endless-worldwide-war-and-2012-national-defense-authorization-act>. See also "Politics Over Principle", NY TIMES, December 16, 2011, A4, available at <http://www.nytimes.com/2011/12/16/opinion/politics-over-principle.html>.

the Suspension Clause of the U.S. Constitution.⁵⁸ They point to the Non-Detention Act and the protections it affords American citizens.⁵⁹ Some argue that the current detention regime is akin to the arbitrary process used to detain thousands of Japanese-Americans during World War II.⁶⁰ Others cannot understand why military detention is needed when U.S. federal, state, and local courts are open and functioning.⁶¹ One District Court Judge recently took up the banner, essentially enjoining enforcement § 1021 on First and Fifth Amendment grounds in a suit brought by a group of reputed journalists.⁶² The quixotic opinion glosses over the problems with standing given that the journalists obviously fall outside the definition of terrorists contemplated by the legislation.⁶³ Some of the rhetoric in the broader public debate borders on political grandstanding and manifests a tendency to genuflect to the civilian criminal justice model as the sole mechanism, even during armed conflict, to prosecute and imprison suspected terrorists. But resident at the center of the critique is a serious-minded view about the Constitutional limits of Executive and Congressional power and a belief that the current legislation tilts too far in the direction of national security. Critics suggest the law places at risk cherished liberty rights enshrined in the Constitution. If past is prologue, there is little doubt that law review journals across the country will dedicate voluminous attention to this point of view.

Viewed from another vantage point, the legislation treads upon executive authority and fails to go far enough to protect the United States from emerging threats. One argument is that merely codifying and confirming existing practices means that new and emerging, dangerous terrorist organizations are not fully encompassed by the legislation.⁶⁴ Further, the new provisions, some argue, hinder executive flexibility by requiring mandatory military custody of foreign al-Qaeda terrorists and disposition under law of war authorities. In Defense Secretary Panetta's 15 November 2011 letter to the Senate Armed Services Committee Chairman, he argued that § 1022 "restrains the Executive Branch's options to utilize, in a swift and flexible fashion, all the counterterrorism tools that are now legally available."⁶⁵ In a similar vein, some suggest the Guantanamo detainee transfer restrictions act as arbitrary disincentives to transfer detainees to third countries "because of the

⁵⁸ U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. amend. V & amend. VI.

⁵⁹ 18 U.S.C. § 4001(a).

⁶⁰ See, e.g., Carolyn Lochhead, *Feinstein to Challenge Indefinite Detention Law*, SAN FRANCISCO CHRON., February 29, 2012, available at <http://readersupportednews.org/news-section2/335-156/10209-feinstein-to-challenge-indefinite-detention-law>.

⁶¹ See Jennifer K. Elsea, *Detention of American Citizens as Enemy Combatants*, CRS REPORT, available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31724.pdf>.

⁶² Christopher Hedges, et al v. Obama, 12 Civ. 331 (S.D.N.Y. May 6, 2012), available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=174>.

⁶³ *Id.*

⁶⁴ See Charles Stimson, *Common-Sense Principle for Detainee Policy*, HERITAGE FOUND. WEB MEMO No. 3397, Oct. 17, 2011, available at http://thf_media.s3.amazonaws.com/2011/pdf/wm3397.pdf.

⁶⁵ Letter from Secretary of Defense Leon Panetta to Senator Carl Levin, Chairman Committee on Armed Services (Nov. 15, 2011). References in the text have been changed to reflect the number scheme in the final NDAA. In Secretary Panetta's letter he refers to § 1032. This was the number as it initially appeared in the Senate Bill.

onerous certification requirements.”⁶⁶ Additionally, the significant requirements and funding limitations tied to Guantanamo also “create the incentive not to bring more detainees to Guantanamo.”⁶⁷ As the objections from all sides make clear, these statutory provisions carry important public policy implications for the nation. For all the debate, suffice it say that the boisterous dialogue in the public sphere was very much echoed and considered in the halls of Congress. The resulting legislation strikes a balanced approach to detention and in many ways affirms existing practice over the last decade.

One particularly surprising critique emerged in the waning days of 2011 when some claimed Congress was surreptitiously rushing this legislation to passage. In the case of the detention provisions, some alleged these were negotiated “in secret, and without proper congressional review.”⁶⁸ Nothing is further from the truth. As Congressman Adam Smith underscored, the House held hearings on the detention issue as early as February and March 2011 and included detention language in the bill passed in May.⁶⁹ Congressman Buck McKeon similarly underscored that the NDAA passed the House Armed Services Committee by a vote of 60-1 and the House passed its version of the bill by a vote of 322-96. “This was a bipartisan product from start to finish, with a wide base of support.”⁷⁰ A close reading of the House Conference Report likewise makes it obvious that those members opposed to these provisions vociferously objected and articulated the full range of concerns oft found in journal articles, news reports and web-based reporting.⁷¹

The key sponsors of the bill also were not shy about reaching out to the public. In a November 27, 2011, Washington Post article, Senator Carl Levin (D) and Senator John McCain (R), publically explained the true import of pending legislation:

The United States has struggled to craft laws and procedures to prosecute the unprecedented kind of war that came to our shores on Sept. 11, 2001. The courts, Congress, and two presidential

⁶⁶ See Stimson, *supra* note 63 at 2-3. See also FBI Oversight Hearing Before the Senate Committee on the Judiciary, 112th Cong., 2d Sess. (Dec. 14, 2011)(Statement of FBI Director Robert Mueller). See also Letter from Secretary of Defense Leon Panetta, *supra* note 64. Secretary Panetta argues: § 1033 transfer restrictions “are largely unworkable and pose unnecessary obstacles to transfers that would advance our national security interests . . . Section 1035 shifts to the Department of Defense responsibility for what has previously been a consensus-driven interagency process that was informed by the advice and views of counterterrorism professionals from across the government.” Again, the referenced section numbers do not match the final consolidated bill.

⁶⁷ See Stimson, *supra* note 63, at 2-3.

⁶⁸ See *Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act*, ACLU, December 5, 2011, available at, <http://www.aclu.org/indefinite-detention-endless-worldwide-war-and-2012-national-defense-authorization-act> (last viewed Jan. 24, 2012).

⁶⁹ 157 CONG. REC.H8933 (daily ed. Dec. 14, 2011) CONFERENCE REPORT ON H.R. 1540, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012.

⁷⁰ *Id.*

⁷¹ *Id.*

administrations have gradually, often ad hoc, developed a system that seeks to uphold our values and honors our Constitution while protecting national security. Congress—in particular the Senate Armed Services Committee—has worked hard to establish in law this important balance rather than rely solely on court orders and executive orders that can change with administrations.⁷²

As Senators Levin and McCain emphasized, the statute “codifies detention authority that has been adopted by two administrations and upheld in the courts.”⁷³ While the law clearly requires military custody of a narrowly defined group of al-Qaeda operatives (expressly excluding U.S. citizens), it preserves executive flexibility by including a national security waiver. These leaders from both parties argued the statute addresses concerns of the Executive branch by ensuring it does not impede ongoing surveillance or interrogations.⁷⁴ Finally, they emphasized the new law does not create new restrictions on transfer from Guantanamo Bay, but instead maintains existing limits while strengthening procedural flexibility.⁷⁵ Of course, some members of Congress and the public strongly disagree, but there is simply no logical basis to conclude these provisions were subject to anything other than a rigorous, highly publicized debate. The next section of this article delves into some of the key discussions in Congress, with a view toward explaining how the legislative branch ultimately reconciled a myriad of competing views and achieved bipartisan consensus on the new law.

B. Legislative Debate Highlights

When writing laws, facts matter, and events do not occur in a vacuum. On December 25, 2009, Umar Farouk Abdulmutallab attempted to detonate an explosive device on Northwest Airlines Flight 253 from Amsterdam to Detroit.⁷⁶ While it was within the prerogative of the Executive branch to treat this act as a law enforcement matter, the decision to do so triggered a strong reaction. The Chairman and Ranking Member of the Senate Committee on Homeland Security and Government Affairs wrote the Attorney General and the Assistant to the President for Homeland Security and Counterterrorism, urging Abdulmutallab’s immediate transfer to the Department of Defense for detention as an unprivileged enemy belligerent.⁷⁷ The letter noted

⁷² See Senator Carl Levin and Senator John McCain, *Defense bill offers balance in dealing with detainees*, WASH. POST, NOV 27, 2011, available at, http://www.washingtonpost.com/opinions/defense-bill-offers-balance-in-dealing-with-detainees/2011/11/27/gIAf2Qn2N_story.html.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ SENATE SELECT COMM. ON INTELLIGENCE, UNCLASSIFIED EXECUTIVE SUMMARY OF THE COMMITTEE REPORT ON THE ATTEMPTED TERRORIST ATTACK ON NORTHWEST AIRLINES FLIGHT 253, S. Doc. No. 1225, available at, <http://intelligence.senate.gov/100518/1225report.pdf>. “The Committee found there were system failures across the Intelligence Community (IC), which contributed to the failure to identify the threat posted by Abdulmutallab.”

⁷⁷ Letter from Senator Joseph Lieberman and Senator Susan Collins to Attorney General Eric Holder,

that the President has repeatedly said the United States is at war with al-Qaeda and that Abdulmutallab was trained and sent by al-Qaeda to “ruthlessly and mercilessly kill hundreds of innocent civilians, including the Americans on Flight 253 and many more on the ground.”⁷⁸ The letter expressed grave concern that his actions were treated as a criminal matter and that the subject reportedly was read his Miranda rights after being questioned for just under an hour:

The decision to treat Abdulmutallab as a criminal rather than [an unprivileged enemy belligerent] almost certainly prevented the military and the intelligence community from obtaining information that would have been critical to learning more about how our enemy operates and to preventing future attacks against our homeland . . . [We reject] the unilateral decision by the Department of Justice to treat Abdulmutallab—a belligerent fighting for and trained by an al-Qaeda franchised organization—as a criminal rather than a UEB and to forego information that may have been extremely helpful to winning this war.”⁷⁹

The fact of this near miss, coupled with the Times Square bomber episode in May 2010, had a significant impact on the Congress.⁸⁰ Shortly after the May threat, Senator Dianne Feinstein, Chairwoman of the Intelligence Committee, pointed out that foreign terrorists seem to have started recruiting subjects who will not arouse much suspicion. “These are American citizens living here and going to school here, and then they leave the country to be trained . . . These terrorists are smart. They think they’ve found a soft chink in our armor, with these ‘lone wolves.’ And it wouldn’t surprise me if there aren’t more in the country right now.”⁸¹ In remarks on December 15, 2011, Senator Kelly Ayotte demonstrated how these recent near misses informed the debate over the NDAA. She reiterated her firm conviction that “we are at war with Al Qaeda” and that treating the Christmas Bomber as a criminal suspect “is not good policy to gather intelligence to protect our country.” This is

Jr. and The Honorable John O Brennan (Jan 25, 2010).

⁷⁸ *Id.*

⁷⁹ *Id.* Additionally, the letter makes the point that

“ . . . during a hearing before our Committee last week titled [‘Intelligence Reform: The Lessons and Implications of the Christmas Day Attack,]’ we were told that the Department of Justice did not consult with leadership in the intelligence community and the Department of Defense for their input on whether or not to treat Abdulmutallab as a criminal and read him his *Miranda* rights. In addition, in the aftermath of the hearing, we learned that the so-called High Value Detainee Interrogation Group, which the Department of Justice announced last August - more than four months ago - is not yet operational.” *Id.*

⁸⁰ See J. Taylor Rushing, *Senators demand terror fixes after near miss with Times Square bomb attempt*, THE HILL, May 8, 2010, available at, <http://thehill.com/homenews/senate/96775-another-close-call-has-senators-calling-to-fix-the-system-again?tmpl=component&print=1&layout=default&page=>.

⁸¹ *Id.*

particularly risky where the suspect was told he had the right to remain silent and after invoking his rights, officials “did not get to question him again until 5 weeks later, after law enforcement officials tracked down his parents in another country.”⁸²

In a colloquy with the senior author of this article, Senator Lieberman made several critical points related to military detention under the NDAA, including that of American citizens. First, al-Qaeda recruits and radicalizes Americans and others with easy access to the United States.⁸³ Second, the United States is part of the battlefield, precisely “because our enemies have declared it part of the battlefield” and conducted its most successful attack against the United States on U.S. soil.⁸⁴ Third, Congress has recognized an armed conflict with al-Qaeda. Senator Lieberman concluded that during this conflict “anybody who is an enemy combatant . . . as a matter of principle ought to be held in military custody and tried by military tribunal.”⁸⁵ While he wished the Senate had not accepted any waiver provisions offered by the President, he recognized that the Levin-McCain-Graham waiver compromise offered the only viable solution.⁸⁶ Indeed, the totality of the detention provisions represents a bi-partisan compromise intended to meet the Executive branch’s concerns about interference with ongoing intelligence or interrogation activities and the concerns of many in Congress that believe strongly that the ongoing armed conflict with al-Qaeda and associated forces requires fundamentally a military response.

In bringing the conference report to the Senate floor, which all 26 Senate conferees signed, Senator Carl Levin emphasized the depth and breadth of flexibility left to the Executive branch. As he explained, the final bill does not restrain law enforcement agencies from conducting investigations or interrogations.⁸⁷ “If and when a determination is made that a suspect is a foreign al-Qaeda terrorist, that person would be slated for transfer to military custody under procedures written by the Executive branch.”⁸⁸ Importantly, even after transfer “all existing law enforcement tools remain available to the FBI and other law enforcement agencies.”⁸⁹ Military detention and military commissions trials for foreign al-Qaeda terrorists may enjoy Congressional preference, but are not the only means of dealing with foreign terrorists in what is fundamentally an all-in approach designed to give the Executive primary and residual authorities to deal with a complex threat. A preference for military detention ensures the availability of established tactics, techniques and procedures not necessarily present in the civilian justice system, and is ultimately meant to enhance intelligence gathering and prevent dangerous enemy forces from returning to the fight.

⁸² 157 CONG REC. S8661 (daily ed. Dec. 15, 2011).

⁸³ 157 CONG REC. S8054 (daily ed. Nov. 30, 2011).

⁸⁴ *Id.*

⁸⁵ *Id.* at S8056.

⁸⁶ *Id.*

⁸⁷ 157 CONG REC. S8633 (daily ed. Dec. 15, 2011).

⁸⁸ *Id.*

⁸⁹ *Id.*

Senator Levin addressed the very sensitive issue of military detention of U.S. citizens:

“The issue of indefinite detention arises from the capture of an enemy combatant at war. According to the law of war, an enemy combatant may be held until the end of hostilities . . . I believe that if an American citizen joins a foreign army or a hostile force such as al-Qaeda that has declared war and organized a war against us and attacks us, that person can be captured and detained as an enemy combatant.”⁹⁰

This does not mean citizens lack access to U.S. courts. As Congressman Bishop emphasized in the House, before there is authority to act under the NDAA (and the AUMF), one must show a connection to al-Qaeda, the Taliban or associated forces. There is a process for legal review which includes habeas review for any citizen detained in the United States.⁹¹

Beyond the question of who can be detained, Congress carefully considered another challenging aspect of detention. Senator Levin described it as “one that goes to the heart of the concern over the detention policy—and that issue is when does the detention end?”⁹² Congress and the Executive branch have grappled with this issue for over a decade. Neither the AUMF nor the NDAA provisions contain temporal limits on law of war detention authority, which should be unsurprising given that the law of war authorizes detention until the cessation of hostilities.⁹³ In the post-World War II model, when there is a classic international armed conflict between state parties, detention for the duration of hostilities makes perfect sense. In those circumstances, one immediately envisions a conflict of finite duration, with the likelihood of a peace treaty or formal cessation of hostilities at the end. Such an event would then precipitate a mutual repatriation of prisoners of war as required by the Geneva Conventions.⁹⁴ After ten years of fighting in multiple nations around the globe against an amorphous non-state actor, it is abundantly clear that this conflict is unlikely to so end.

No one realistically expects a peace treaty with al-Qaeda. No one expects a voluntary cessation of hostilities. Even significant victories, like the discovery and killing of Osama bin Laden, do not mean this conflict is at an end. Nor should anyone discount the very real and evolving threat posed by al-Qaeda and its affiliates.

⁹⁰ *Id.* See *infra* Part IV.B.

⁹¹ 157 CONG. REC.H8920 (daily ed. Dec. 14, 2011) CONFERENCE REPORT ON H.R. 1540, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012.

⁹² 157 CONG REC. S8633 (daily ed. Dec. 15, 2011).

⁹³ See *generally* Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 118 provides that prisoners of war shall be released and repatriated after the cessation of active hostilities.

⁹⁴ *Id.*

As the 9/11 Commission Report emphasized, this is “an enemy who is sophisticated, patient, disciplined, and lethal.”⁹⁵ Recent assessments tout a string of important successes, but “al-Qaeda’s core leadership and structure is intact in Pakistan.”⁹⁶ Al-Qaeda in the Arabian Peninsula (AQAP) remains a potent and aggressive threat. “AQAP was, for example, behind the failed December 2009 attempt to blow up a Detroit-bound airliner, and a 2010 plot to destroy several US-bound cargo planes.”⁹⁷ Al-Qaeda continues to receive support from anti-U.S. regimes and to pursue the means to commit a chemical or biological attack against the United States, and as Secretary Napolitano recently underscored, “the recent threat surrounding the 10th anniversary of the September 11th attacks and the continued threat of homegrown terrorism demonstrate how we must constantly remain vigilant and prepared.”⁹⁸ The reality that the enemy remains determined to strike us means that the conflict, and the law of war detention authority incident to the conflict, continues. What many in and out of government realize, though, is that the legal availability of law of war detention should not, by itself, end the inquiry. It may be a sufficient condition to authorize detention, but the nature of this conflict requires adaptive thinking regarding prolonged law of war detention.

In World War II, no one seriously argued with the notion of detaining personnel fighting with or accompanying the Germans, whether SS officers, impressed soldiers from conquered states in Eastern Europe, or low-level cooks and cleaners with little interest in fighting. The Allied forces, however, did not have to account for what do with enemy forces over the course of a decade-long, potentially multi-generational conflict. Government officials have now been forced to confront hard questions: What happens in the current conflict if a person is detained by mistake? What happens if a person was legitimately detained as part of the enemy force but with a decade of time gone by may no longer be a threat?

⁹⁵ THE 9/11 COMMISSION REPORT, preface xvi, *available at*, <http://www.911commission.gov/report/911Report.pdf>.

⁹⁶ See D. Souza, *A Decade Later, Al-Qaeda Threat Real*, THE DIPLOMAT, Sep. 09, 2011, *available at*, <http://the-diplomat.com/2011/09/09/decade-later-al-qaeda-threat-real/> (last accessed Feb. 15, 2011). See also R. Nelson & T. Sanderson, *A Threat Transformed: Al Qaeda and Associate Movements in 2011*, A Report of the CSIS Homeland Security and Counterterrorism Program and the CSIS Transnational Threats Project, CSIS, Feb. 2011, *available at*, http://csis.org/files/publication/110203_Nelson_AThreatTransformed_web.pdf (last accessed Mar 27, 2012); B. Jenkins, *Al Qaeda in Its Third Decade: Irreversible Decline or Imminent Victory*, RAND CORP., 2012, *available at*, http://www.rand.org/pubs/occasional_papers/OP362.html.

⁹⁷ *Id.*

⁹⁸ *Id.* “On July 28, documents filed by the US Treasury Department accused Iran of facilitating an al-Qaeda-run support network that transfers large amounts of cash from Middle East donors to al-Qaeda’s top leadership in Pakistan’s tribal region . . . Mike Leiter, who stepped down as director of the US National Counterterrorism Centre in July, said that despite the killing of bin Laden, there are ‘pockets of al-Qaeda around the world who see’ the use of chemical and biological weapons ‘as a key way to fight us, especially the offshoot in Yemen.” *Id.* Written testimony of DHS Secretary Janet Napolitano for a Senate Committee on Homeland Security and Governmental Affairs hearing on The President’s Fiscal Year 2013 budget request for The Department of Homeland Security, Mar. 21, 2012, *available at*, <http://www.dhs.gov/ynews/testimony/20120321-s1-fy13-budget-request-hsgac.shtm>.

Experience has thus far demonstrated a strong preference for individualized reviews of detainee cases. In advocating final passage of the bill in mid-December, Senator Levin said, “it is appropriate for us to provide greater procedural rights to enemy detainees than we might in a more traditional war . . . Enemy combatants who will be held in long-term military detention are told, for the first time, they will get a military judge and a military lawyer for their status determination.”⁹⁹ This process and others like it are not required by the law of war, but for reasons that will be explored in more depth later, are wholly appropriate in the circumstances of the present conflict. The next section addresses key proposed amendments to the NDAA related to enemy detention.

C. Proposed Amendments

Senator Feinstein offered two important amendments to Sections 1031 and 1032 of the Senate bill, Sections 1021 and 1022 of the final NDAA. While both were defeated in their original form, they nevertheless shaped and clarified the debate over the NDAA provisions. In proposed amendment 1126, Senator Feinstein offered additional language to Section 1031 stating: “The authority described in this section for the Armed Forces of the United States to detain a person does not include the authority to detain a citizen of the United States without trial until the end of hostilities.”¹⁰⁰ Senator Feinstein argued the amendment is consistent with “past practice and with traditional U.S. values and due process.”¹⁰¹ As evidence of this past practice, Senator Feinstein noted that over the past ten years when American citizens have been detained “they have eventually been transitioned to the criminal justice system.”¹⁰² She cited the cases of John Walker Lindh and Jose Padilla, both

⁹⁹ 157 CONG. REC. S8664 (daily ed. Dec. 15, 2011). See *supra* Section II.C.

¹⁰⁰ 157 CONG. REC. S7962.

¹⁰¹ 157 CONG. REC. S7963. Senator Feinstein argued:

“It is hard for me to understand how any Member of this body wouldn’t vote for this amendment because, without it, Congress is essentially authorizing the indefinite imprisonment of American citizens without charge or trial.

As I said on the Senate floor previously, 40 years ago Congress passed the Non-Detention Act of 1971 that expressed the will of Congress and the President that America would never repeat the Japanese-American internment experience--something that I witnessed as a child up close and personal--and would never subject any other American to indefinite detention without charge or trial.”

¹⁰² *Id.* According to his original indictment:

John Walker Lindh, after learning about the terrorist attacks against the United States on or about September 11, 2001, remained with a group of foreign fighters in Afghanistan. He did so despite having been told that Bin Laden ordered the attacks. From October through early December 2001, he stayed with his fighting group after learning that United States military forces and United States nationals had become directly engaged in support of the Northern Alliance in its military conflict with Taliban and al Qaeda forces. In or about November 2001, his fighting

of whom received lengthy prison sentences in Federal Court.¹⁰³ Those who opposed the amendment worried about the limitations it would impose on the authority to detain Americans who choose to wage war against America.

Senator Chambliss raised several points reflective of why the amendment ultimately failed to gain support. First, “citizenship in the United States as an enemy belligerent does not relieve him from the consequences of belligerency.”¹⁰⁴ Second, the amendment potentially prohibited the long-term military detention of Americans overseas who committed terrorist acts outside the United States. This would have created “the perverse effect of allowing American belligerents overseas to be targeted in lethal strikes but not [be] held in U.S. military detention until the end of hostilities.”¹⁰⁵ Third, there was some concern about ambiguous language in that “the end of hostilities” could be interpreted either as precluding all military detention of American citizens or as limiting detention for some undefined time period short of the end of hostilities.¹⁰⁶ By rejecting this amendment and the characterization of law of war detention as “imprisonment” without charge or trial, Congress preserved law of war detention authority. It affirmed that preventive detention is a necessary incident of warfare, not punishment for a crime.¹⁰⁷ While the final bill rejected limitations on law of war detention authority vis-à-vis U.S. citizens, this debate led to a compromise amendment and inclusion of the language in Section 1021(e) clarifying that nothing in this section would be construed to affect existing law or authorities relating to the detention of U.S. citizens, lawful resident aliens, or any other person captured or arrested in the United States.¹⁰⁸ In other words, the NDAA preserved the AUMF status quo ante regarding detention in the United States.

group retreated from Takhar to the area of Kunduz, Afghanistan, and ultimately surrendered to Northern Alliance troops. Lindh and other captured fighters were trucked to Mazar-e Sharif and then to the nearby Qala-i Janghi (“QIJ”) prison, the site of notorious uprising where CIA employee Johnny Michael Spann was shot and killed.

U.S. v. Lindh, Indictment in the U.S. District Court for the Eastern District of Virginia, *available at* <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html> (last accessed Feb. 5, 2012). In 2002, Lindh pled guilty under a plea agreement and was sentenced to twenty years in prison. Press Release, Statement from the Attorney General Regarding John Walker Lindh’s Guilty Plea, Jul. 15, 2002, *available at*, http://www.justice.gov/opa/pr/2002/July/02_ag_400.htm (last accessed Feb. 5, 2012). While Lindh’s case was disposed of in Federal Court, he came into the custody of the U.S. military and was held in military custody at Camp Rhino and later aboard the U.S.S. Peleliu and U.S.S. Bataan for a period of seven weeks. The case of Jose Padilla is discussed in some depth in Part IV.B.

¹⁰³ *Id.*

¹⁰⁴ 157 CONG. REC. S8110 (Dec. 1, 2011).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Amendment 1126 was defeated by a vote of 45 to 55. S.Amdt. 1126 to S. 1867. Record Vote Number: 214, 157 CONG. REC. S8125 (Dec. 1, 2011).

¹⁰⁸ See *supra* Part II.A. Senator Feinstein’s compromise Amendment 1456 was approved by a vote of 99 to 1. S.Amdt. 1456 to S. 1867. Record Vote Number: 215, 157 Cong. Rec. S8125 (Dec. 1, 2011).

Senator Feinstein's other amendment 1125 was designed to limit the mandatory military custody requirement to terrorists captured outside the United States. Functionally, the amendment would have added one word, "abroad," to the text of Section 1022.¹⁰⁹ This amendment enjoyed the support of the Director of National Intelligence, Secretary of Defense, and Director of the FBI.¹¹⁰ In effect, the amendment would avoid the presumption of military custody for terrorists detained in the United States, and would have allowed, for example, a customs agent to follow established processes to surrender a suspect to the FBI without having to affirmatively consider whether a waiver of military custody is required.¹¹¹

Under both the NDAA statutory scheme and that proposed by Senator Feinstein, all parties conceded the Executive branch has the authority to pursue federal arrest, detention and criminal prosecution or military detention and military commission prosecution. The difference boils down to a presumption in favor of the military option preferred by the Congress. In urging rejection of this amendment, Senator Ayotte highlighted the absurd result that would flow from an amendment predicated on geographic location of capture.¹¹² It would result in a presumption of military custody for an Al Qaida operative found overseas, yet if the same operative actually achieved his goal of entering the country, say to blow up rail cars and release poisonous gases, the presumption would evaporate. The amendment, Senator Ayotte argued, "misses the point" that in addition to "getting that person away from where he can threaten us," "we need to gather intelligence."¹¹³ While Congress remained committed to the presumption in favor of military detention, the President expressed deep concern about executive prerogative and ultimately issued a detailed signing statement.

¹⁰⁹ 157 Cong. Rec. S7961. Amendment 1125 was defeated by a vote of 45 to 55. S.Amdt. 1125 to S. 1867. Record Vote Number: 213, 157 CONG. REC. S8107 (Dec. 1, 2011).

¹¹⁰ *Id.*

¹¹¹ *Id.* at S7962. Senator Feinstein explained:

"The administration has threatened to veto this bill and said it 'strongly objects to the military custody provision of section 1032' in its official Statement of Administration Policy because it would, and I quote, 'tie the hands of our intelligence and law enforcement professionals' . . .

If something had gone wrong, if there had been mistakes, if there hadn't been over 400 cases tried successfully in civilian Federal criminal courts in the last 10 years and 6 cases and a muffed history of military prosecution in these cases, I might agree. But the march is on here in Congress: militarize this thing from stem to stern . . . Mr. President, there are rapid reaction teams part of the HIG--or High-Value Interrogation Group--who can deploy on a moment's notice, who can rapidly assess a suspect, who can carry out a proper and effective interrogation, and the executive branch then has an opportunity to decide whether the facts and the evidence really are best suited for a Federal criminal prosecution in Article III courts, or the facts and the evidence are really best suited for a military commission prosecution." *Id.*

¹¹² 157 CONG. REC. S8097 (Dec. 1, 2011).

¹¹³ *Id.*

D. The President's Signing Statement (and a few words about Section 1022 procedures)

President Obama signed the NDAA “despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists.”¹¹⁴ While the Administration voiced concerns throughout the legislative process, those concerns were addressed and ultimately resulted in a bill that preserves the flexibility needed to adapt to changing circumstances and upholds America's values. The President reiterated his support for language in Section 1021 making clear that the new legislation does not limit or expand the scope of Presidential authority under the AUMF or affect existing authorities “relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”¹¹⁵

The President underscored his Administration “will not authorize the indefinite military detention without trial of American citizens” and will ensure any authorized detention “complies with the Constitution, the laws of war, and all other applicable law.”¹¹⁶ Yet understanding fully the Administration's position requires recourse to its prior insistence that the Senate Armed Services Committee remove language in the original bill which provided that U.S. citizens and lawful resident aliens captured in the United States would not be subject to Section 1021.¹¹⁷ There appears to be a balancing process at work here. On the one hand, the Administration is in lock-step with Congress that the NDAA should neither expand nor diminish the President's detention authority. On the other hand, policy considerations led the President to express an intention to narrowly exercise this detention authority over American citizens.

The overriding point is that the legislation preserves the full breadth and depth of detention authority existent in the AUMF, to include the detention of American citizens who join forces with Al Qaida. This is a dynamic and changing conflict. If a home-grown terrorist destroys a U.S. target, the FBI gathers the evidence, and a U.S. Attorney prosecutes, traditional civilian criminal laws govern, and the military detention authority resident in the NDAA need never come into play. This is a reasonable and expected outcome in many cases. The pending strike on rail targets posited in this paper's introduction, where intelligence sources reveal an inchoate attack involving American and foreign nationals operating overseas and at home, however, may be precisely the type of scenario where military detention is not only preferred but vital to thwarting the attack, conducting interrogations about known and hidden dangers, and preventing terrorists from continuing the fight.

¹¹⁴ Statement by the President on H.R. 1540, Dec. 31, 2011, *available at*, <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> (last accessed Feb. 11, 2012).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 157 Cong. Rec. S7657 (Nov. 17, 2011). The record in the pertinent part refers to Section 1031, which became Section 1021 on reconciliation.

The biggest tussle with the Administration occurred over the mandatory military custody provisions in Section 1022, which even in its final form the President described as providing the “minimally acceptable amount of flexibility to protect national security.”¹¹⁸ The signing statement repeatedly emphasized “flexibility” in determining military custody procedures and interpreted the statute to provide “full and unencumbered ability to waive any military custody requirement, including the option of waiving appropriate categories of cases when doing so is in the national security interests of the United States.”¹¹⁹ The President is determined “to remain relentlessly practical, guided by the factual and legal complexities of each case and the relative strengths and weaknesses of each system.”¹²⁰ Concomitantly, the Bill’s sponsors emphasized flexibility in crafting the NDAA’s provisions.

In creating an avenue for military custody that can be waived, Senator Levin explained, “the facts are in this bill, there is flexibility . . . The President will lay out the procedures and notify the Congress of those procedures. But the point is, we do provide the very flexibility that the President of the United States has sought.”¹²¹ Though one cannot miss the waiver provisions in the plain text of the NDAA, flexibility clearly remains in the eyes of the beholder. While the President rightly perceived that an inflexible system, handled poorly, could create serious problems for counterterrorism professionals, those who developed and defended the mandatory military custody requirements (along with all the appropriate waivers and caveats) rightly perceived that the relentless practical calculus can become skewed in favor civilian modalities when military ones are equally, if not more, appropriate.

On February 28, the Administration released the Section 1022 implementing procedures in the form of a Presidential Policy Directive.¹²² Under the procedures a federal law enforcement agency must notify the Attorney General when there is probable cause to believe someone is a covered person under the statute.¹²³ In such cases, a review commences to determine if there is “clear and convincing” evidence that the custody requirement applies and to determine if the requirement should be waived in the interest of national security. The Attorney General will only issue a final determination that an individual is a “covered person” with the “concurrence of the Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence.”¹²⁴ The Director of the FBI must also determine that transfer will not disrupt “ongoing interrogation” or ongoing intelligence collection or compromise any national security investigation.¹²⁵ These procedural requirements are inapplicable to persons

¹¹⁸ Statement by the President *supra* note 112.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ 157 CONG. REC. S7670 (Nov. 17, 2011).

¹²² Presidential Policy Directive/PPD-14, Feb. 28, 2012, *available at*, <http://www.whitehouse.gov/the-press-office/2012/02/28/presidential-policy-directive-requirements-national-defense-authorization>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* See also Fact Sheet: Procedures Implementing Section 1022 of the National Defense

detained by the Department of Defense, state and local law enforcement, or a foreign government.¹²⁶ The President also delimited a number of categories where he determined waivers are in the interest of national security.¹²⁷ Whether these procedures, and in particular the lugubrious process for determining who is and is not a “covered person,” will be acceptable to Congress remains to be seen. Certain restrictive aspects of the new process likely will engender close Congressional scrutiny, and over time Congress will need to decide whether further legislative intervention is necessary. Much will depend on how these procedures are applied in specific cases. There undoubtedly remains deep-seated Congressional concern that foreign al-Qaeda operatives pose a military threat and should be treated as such. While not for one moment discounting the vital, important and successful efforts of federal law enforcement authorities, if Congress perceives a persistent imbalance in favor of civilian law enforcement modes to the exclusion of essential military tools, further action is certainly a possibility.

In other sections of the signing statement, the President underscored the Administration’s intention to broadly interpret what status determinations in Afghanistan are subject to the military judge/access to counsel requirements in Section 1024.¹²⁸ While the concern from the Administration centered on the potential for interference with executive prerogative, less attention has been paid

Authorization Act for Fiscal Year 2012, Feb. 28, 2012, *available at*, http://www.whitehouse.gov/sites/default/files/ndaa_fact_sheet.pdf.

¹²⁶ *Id.* See also Letter from the General Counsel of the Department of Defense, Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, Feb. 28, 2012.

¹²⁷ Waiver categories include:

- When placing a foreign country’s nationals or residents in military custody will impede counterterrorism cooperation;
- When a foreign government indicates that it will not extradite or transfer suspects to the United States if the suspects may be placed in military custody;
- When an individual is a U.S. lawful permanent resident who is arrested in this country or arrested by a federal agency on the basis of conduct taking place in this country;
- When an individual has been arrested by a federal agency in the United States on charges other than terrorism offenses (unless such individual is subsequently charged with one or more terrorism offenses and held in federal custody in connection with those offenses);
- When an individual has been arrested by state or local law enforcement, pursuant to state or local authority, and is transferred to federal custody;
- When transferring an individual to military custody could interfere with efforts to secure an individual’s cooperation or confession; or
- When transferring an individual to military custody could interfere with efforts to conduct joint trials with co-defendants who are ineligible for military custody or as to whom a determination has already been made to proceed with a prosecution in a federal or state court.
- When a national security waiver is issued or applies, standard operating procedures would continue to be followed, and the terrorist suspect would remain in law enforcement custody.

¹²⁸ Statement by the President *supra* note 112.

to the more robust process requirements actually required by this section. Under current procedures in Afghanistan, there is no requirement for a status review by a military judge in long-term detention cases.¹²⁹ The 1024 statutory requirement means that in the future all persons subject to long term military detention under the AUMF framework will either have access to habeas review or to a status review by a military judge. Section 1024 fulfills a commitment that for the first time in the history of American warfare, belligerents held by the government in long-term detention during this unusual and enduring conflict will *have their day in court*.¹³⁰

In the final sections of the signing statement, the President renewed objections to the “unwise funding restrictions” related to Guantanamo Bay detainees.¹³¹ It is not the objective of the paper to revisit this well-worn path of diverging views. Regarding Section 1029, requiring that the Attorney General consult with the Director of National Intelligence and Secretary of Defense prior to filing criminal

¹²⁹ See *supra* Part II.C.

¹³⁰ There is some confusion about the position of military judge and whether such judges maintain sufficient indicia of independence to conduct independent judicial reviews. In the ordinary course of military justice involving U.S. service personnel, a military judge is detailed to each general court-martial and subject to regulations of the Service Secretary concerned to special courts-martial. Uniform Code of Military Justice (UCMJ), Art. 26, 10 U.S.C. 826(a).

Under the UCMJ:

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member of detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

10 U.S.C. 826(b)-(c). Like their civilian counterparts, military judges routinely decide motions before the court, the guilt or innocence of U.S. military accused who elect to have their cases decided before a military judge sitting alone, and they routinely impose sentences for crimes, including serious crimes, committed by service personnel. While they do not carry lifetime tenure like Article III judges, this does not serve as an impediment to their service as judges over courts-martial, with the requisite independence and judicial authority under the law.

¹³¹ Statement by the President *supra* note 112.

charges against certain individuals, the President indicated his understanding, an accurate one, “that apart from detainees held by the military outside the United States under the 2001 [AUMF], the provision applies only to those individuals who have been determined to be covered persons under Section 1022 before the Justice Department files criminal charges or seeks an indictment.”¹³² The President remains concerned this provision “intrudes into the functions” of the Justice Department. Notwithstanding this objection, Congress remained convinced that a consultative process that induces a holistic review of both trial options was entirely appropriate. Ultimately, it is still up to the Attorney General, after consultation, “to determine whether a suspect will be tried in Federal Court or before a military commission.”¹³³

IV. AUMF, DETENTION & THE COURTS

The U.S. Supreme Court has famously interceded in a number of terrorist detention cases. Section IV will explore the major Supreme Court cases. Because U.S. citizen detention remains a timely and hotly contested topic in relation to detention and the NDAA, it will also explore historic cases related to citizen detention, and consider federal appellate cases related to citizen detention that did not ultimately reach the Supreme Court. Finally, it will trace the broad contours of the recent habeas litigation before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). There is a dense body of legal literature based on this recent case law, which successfully delves into every nuanced aspect of the case law. The intent here is to focus on major aspects of the cases as they relate to the NDAA, and to review the cases in sufficient depth to enable a further discussion about the growing consensus among the three branches of government discussed in the final section of this paper. Before reviewing the case law, this Section presents a brief, general overview of detention authority in armed conflict.

A. AUMF & Detention in Conflict

The Constitution of the United States provides Congress the power to declare war, to raise and support armies, and to maintain a Navy.¹³⁴ It vests Executive power in the President,¹³⁵ who serves as Command in Chief of the Armed Forces.¹³⁶ These defined responsibilities are central to the Constitutional scheme of shared powers. The critical importance of Congress in preserving American liberty through the raising and supporting of armies and the Navy was well understood at the time the country was founded.¹³⁷ Likewise, the founders recognized the necessity of strong executive authority in war—“of all the concerns of government, the direction of war most peculiarly demands those qualities which distinguish the

¹³² *Id.*

¹³³ 157 CONG. REC. S8633 (Dec. 15, 2011)(comment by Senator Levin).

¹³⁴ U.S. CONST. art. 1, § 8, cl. 11- 13.

¹³⁵ U.S. CONST. art. 2, § 2, cl. 1.

¹³⁶ U.S. CONST. art. 2, § 1, cl. 1.

¹³⁷ THE FEDERALIST No. 41 (J. Madison). *See also* THE FEDERALIST No. 25 (A. Hamilton).

exercise of power by a single hand.”¹³⁸ It should be no surprise, therefore, that in the aftermath of devastating terrorists attacks on the United States, Congress broadly authorized the use of military force, and two Presidents have relied on that authority to pursue, detain and destroy the enemies of the nation. Despite the natural logic of both branches of government acting in concert to defend the nation under this Constitutional scheme, the exact nature and scope of the AUMF has been the subject of much confusion and debate.

To unravel this puzzle, one must first understand that Congress has authorized recourse to military force in two fundamentally different ways. There have been eleven separate formal declarations of war and a dozen instances in which Congress authorized military force without making a formal declaration.¹³⁹ Both are legitimate Constitutional mechanisms with well-established historic precedent. Formal declarations occurred during the War of 1812, the War with Mexico in 1846, the War with Spain in 1898, World War I, and World War II.¹⁴⁰ Authorizations for the use of military force have similarly underpinned U.S. military action to defend U.S. commerce against predation by French vessels in 1798, to defend against the Barbary pirates in 1802, to protect against Algerine cruisers in 1815, to protect Formosa and the Pescadores against the Chinese Communists in 1955, to promote peace in the Middle East in 1957, as well as in Vietnam in 1964, Lebanon in 1983, Iraq in 1991 and 2002, and of course in response to 9/11 through the AUMF passed on September 18, 2001.¹⁴¹

While early authorizations for the use of force were often narrow, modern authorizations have been very broad, and encompass massive and often enduring military commitments such as those in Iraq and Vietnam. Another key point in the transition to use of authorizations vice declarations of war occurred as a result of developments in international law. In the Kellogg-Briand Peace Pact signed in 1929, State Parties condemned “recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another.”¹⁴² Following World War II, the Nuremberg Tribunal found “that the Pact rendered aggressive war illegal under international law and makes those who

¹³⁸ THE FEDERALIST NO. 74 (A. Hamilton).

¹³⁹ Jennifer K. Elsea & Richard F. Grimmett, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CRS REPORT RL31133 (2007). This comprehensive and thoughtful study thoroughly documents the history of formal declarations of war and authorizations for the use of military force. The complete text of all 11 declarations and 12 authorizations for the use of military force are available in Appendix 1 and 2. Further, this report details the broad range of domestic and statutory implications that flow from a declaration of war.

¹⁴⁰ *Id.* at 83-89. While there were 11 declarations in total, two occurred during World War I against Germany and Austria-Hungary and six occurred during World War II against Japan, Germany, Italy, Bulgaria, Hungary, Romania.

¹⁴¹ *Id.* at 90-109. AUMF, P.L. 107-40, 115 Stat. 224, September 18, 2001 [S. J. Res. 23].

¹⁴² CRS Report RL31133 at 25, *citing*, Treaty Providing for the Renunciation of War As an Instrument of National Policy, 46 Stat. 2343 (1929); TS 796; 2 Bevans 732.

plan and wage such a war guilty of a crime.”¹⁴³ The Charter of the United Nations requires its Member States to “refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations.”¹⁴⁴ In the modern era of collective security embodied most prominently by the U.N. Security Council and the U.N. Charter, states have not declared war in the traditional sense, and since 1945 they have “resisted describing a conflict as war.”¹⁴⁵ Furthermore, the Hague and Geneva Conventions, the two major international legal regimes that broadly underpin the law of war, may apply even in the absence of a formal declaration of war.¹⁴⁶ Taken together, historic U.S. practice and these evolutionary developments in international law make clear why the United States has not formally “declared war”, but make equally clear that the AUMF is a historically appropriate and expected mechanism for Congress to fully authorize military action.

The plain text of the NDAA 2012 detention provisions explicitly grant to the Executive military detention authority, but such authority has in reality existed since 2001 under the AUMF. Detention authority naturally flowed from historic use of force authorizations even without language directly granting such authority. Beyond this domestic authority, there is the matter of international law. In state-on-state conflicts, international law provides for the detention of enemy soldiers under the Third Geneva Convention, requiring release only upon “cessation of hostilities.”¹⁴⁷ Logically, the military detains enemy soldiers for the duration of hostilities lest they return to the fight. The image this naturally conjures up is the Viet Cong fighter or the SS trooper captured on the front lines. What has proven challenging in the present conflict is understanding how to apply military detention away from a “hot battlefield” in an armed conflict not of an international character—including the possibility of detaining United States citizens as part of the enemy force. While an armed conflict against a terrorist organization with global reach challenges current paradigms, there is relevant historic precedent to draw upon to demonstrate law of war detention under the AUMF comports with domestic and international legal standards. What follows is a short discussion about the wide and varied nature of military detention during previous military conflicts.

The picture of military detention is far more complicated than the simple notion of picking up hardened enemy fighters off an active battlefield. The Allied surge in the European continent during World War II resulted in Allied Forces

¹⁴³ CRS Report RL31133 at 25, *citing*, “International Military Tribunal (Nuremberg): Judgment and Sentences,” 41 Am. J. Int’l L. 172, 218 (1947).

¹⁴⁴ U.N. CHARTER art. 2, para. 4.

¹⁴⁵ CRS Report RL31133 at 25, *citing*, Dieter Fleck, ed., *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* (1995), at 39.

¹⁴⁶ *Id.* at 26-27. For example, Common Article 2 to the Geneva Conventions of 1949 states that the Conventions shall “apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Geneva Convention relative to the Treatment of Prisoners of War, art. 2, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 [hereinafter G.C. III].

¹⁴⁷ *Id.* at Art. 118.

sweeping up and detaining thousands of prisoners. Not all were nationals of the Axis Powers. In a fascinating account of the D-Day invasion, Stephen Ambrose described the significant number of opposing forces along the French coastline who were actually nationals of territories occupied by the Third Reich impressed into service.¹⁴⁸ Many were happy to surrender, but no one seriously argued against detaining these reluctant soldiers as military prisoners.

There are even accounts of German-Americans fighting for the Nazis during the war,¹⁴⁹ including a series of rather bizarre stories of American citizens becoming wholly enmeshed with the Germans. While these stories are rare, they bear a marked resemblance to cases in which Americans have become involved with al-Qaeda. In one fascinating case, Martin James Monti enlisted in the Army Air Force and was later commissioned as a Flight Officer.¹⁵⁰ He stole an F-5E Lightning and defected to a German base in Milan. He joined a propaganda unit of the SS and created leaflets distributed to Allied forces and German-held POWs. The plane he stole was used as a training tool for Luftwaffe pilots (and apparently found in Austria at the end of the War). Monti was captured and held by the U.S. military in Italy and subsequently tried for desertion. After the war, U.S. authorities learned of Monti's propaganda activities and prosecuted him for treason.¹⁵¹

The famous German saboteurs case, discussed *infra*, is well known in legal circles, but it is not the only instance of German efforts to penetrate the U.S. mainland using Americans. In November 1944, the German U-Boat U-1230 succeeded in spirited William Curtis Colepaugh and Eric Gimpel into the United States.¹⁵² Colepaugh was a maladjusted American who offered his services to the Germans and subsequently met with the Schutzstaffel (S.S.). The S.S. placed him with the organization that trained spies and saboteurs, where he learned about radios, firearms and explosives. Within a month of his arrival in the U.S., Colepaugh surrendered. He provided the FBI with information that led to Gimpel's arrest. "On instructions from the Attorney General, the FBI turned Colepaugh and Gimpel over to military authorities in New York City."¹⁵³ They faced trial by Military Commission at Governor's Island and were sentenced to be hanged.

¹⁴⁸ Stephen E. Ambrose, *D-DAY, JUNE 6 1944: THE CLIMATIC BATTLE OF WORLD WAR II* (1995).

¹⁴⁹ Warth, Columnist recounts tale of German-American fighting for Nazis, *JournalStar.com*, July 8, 2006, *available at*, http://journalstar.com/lifestyles/article_66492ff6-2d6c-5bf0-a1a4-4997e5b9d578.html (last visited Jan. 26, 2012).

¹⁵⁰ Urban Exploration Resource, *The Strange Tale of the Only USAAF Pilot to Desert to the Germans*, *available at*, http://www.uer.ca/forum_showthread.asp?fid=1&threadid=65945 (last visited Jan. 26, 2012), *citing*, Wainright, "DESERTER", *Air Classics*, Mar. 20, 2009.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ National Intelligence Center, *Counterintelligence in World War II*, Chapter 1, *A Counterintelligence Reader*, *available at*, http://www.fas.org/irp/ops/ci/docs/ci2/2ch1_a.htm.

After his sentence was commuted to life imprisonment, Colepaugh challenged his military conviction in Federal Court.¹⁵⁴ The judge found the charges “clearly state an offense of unlawful belligerency, contrary to the established and judicially recognized law of war--an offense within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn.”¹⁵⁵ The petitioner’s citizenship did “not divest the Commission of jurisdiction over him, or confer upon him any constitutional rights not accorded any other belligerent under the laws of war.”¹⁵⁶ Further, the court noted “the jurisdiction of the civil courts was never invoked for treasonable offenses, and . . . [i]t does not derogate from the supremacy of the civil law or the civil courts to accord to the military tribunal the full sweep of the jurisdiction vested in it under the Constitution and the laws thereunder.”¹⁵⁷ In short, military detention does not extend only to those found on the hot battlefield, nor in this case did it preclude detention of an American citizen who allied himself with the forces of the enemy.

Detention during conflicts not of an international character poses a particularly vexing set of challenges. Traditional law of war detention for the duration of hostilities in a Common Article 2 international armed conflict arises from the Third Geneva Convention, which comprises a rigorous regime of treatment

¹⁵⁴ Colepaugh v. Looney, 235 F.2d 429 (1956), *citing*, Ex parte Quirin, 317 U.S. 1, 37, 63 S.Ct. 2, 15 (1942). See also 10 U.S.C. § 906 (Aug. 10, 1956, ch. 1041, 70A Stat. 71; Pub. L. 109-366, Sec. 4(a)(2), Oct. 17, 2006, 120 Stat. 2631.) HISTORY, ANCILLARY LAWS AND DIRECTIVES PROCLAMATION NO. 2561. ENEMIES DENIED ACCESS TO UNITED STATES COURTS, Proc. No. 2561, 7 F.R. 5101, 56 Stat. 1964, Jul. 2, 1942. It provided:

Whereas the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

Now, therefore, I, Franklin D. Roosevelt, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 430.

standards and repatriation rights for combatants held as prisoners of war.¹⁵⁸ In the context of internal armed conflicts, however, nation states generally have been reluctant to sign broad international treaties that might give rise to special status, or perceived special status, for rebel groups. Nevertheless, Common Article III, which appears in all four of the Geneva Conventions, applies certain minimum standards in armed conflicts not of an international character. It prohibits “violence to life and person,” torture, hostage taking, “humiliating and degrading treatment,” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”¹⁵⁹

Additional Protocol II supplements these standards for conflicts occurring within a state.¹⁶⁰ Importantly, the normative practice in internal conflicts has been to detain irregular forces and to release them simultaneously with the issuance of amnesty decrees or through bilateral prisoner exchanges.¹⁶¹ The United Nations has highlighted the importance of releasing irregular forces held in preventive detention, which correspondingly indicates they are held during hostilities or at least until they no longer pose a threat.¹⁶² Because rebel and other organized armed groups do not enjoy combatant immunity for their warlike acts, and because nations often wish to punish rebel soldiers under domestic law, any requirement to release enemy personnel held in preventive detention logically would not apply to those pending trial or those convicted of offenses under the law of the capturing state.¹⁶³

¹⁵⁸ G.C. III *supra* note 144.

¹⁵⁹ Hamdan at 629-30. See e.g., Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 3 is considered “common” because it appears in all four Geneva Conventions. It is often referred to as a convention in miniature and “at least ensures the application of the rules of humanity which are recognized as essential by civilized nations.” The text also has “the advantage of being applicable automatically, without any condition in regard to reciprocity.” Pictet, International Committee of the Red Cross, Commentary on the Geneva Conventions, 34-35 (1960).

¹⁶⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, 75 U.N.T.S. 31, entered into force Oct. 21, 1950 [hereinafter G.C. I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, art. 2, entered into force Oct. 21, 1950 [hereinafter G.C. II]; G.C. III, art. 2; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 2, 75 U.N.T.S. 287, entered into force Oct. 21, 1950 [hereinafter G.C. IV]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 1, 1125 U.N.T.S. 609, entered into force Dec. 7, 1978 [hereinafter AP II]. The U.S. is not a party to AP II. This minimum yardstick affords basic protections to individuals involved in a broad range of conflicts, including civil wars, rebellions, and other conflicts not of an international character. Pictet, International Committee of the Red Cross, Commentary on the Geneva Conventions, 34-37 (1960).

¹⁶¹ The International Committee of the Red Cross, Customary International Law Study, Rule 128, 454, available at, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp>.

¹⁶² *Id.*

¹⁶³ *Id.*

While it is useful and necessary to draw on traditional law of armed conflict precepts applicable in both international and internal armed conflicts,¹⁶⁴ neither model provides an entirely satisfying answer when dealing with detention in relation to a transnational terrorist group that poses a continuing and enduring threat to international peace and security. Even the matter of characterizing the conflict has caused huge debate.¹⁶⁵ In *Al-Aulaqi v. Obama*, Government lawyers described the existence of a “non-international armed conflict.”¹⁶⁶ Other statements have been less direct.¹⁶⁷ Beyond the difficulties in describing the type of conflict, the law simply does not define, and likely cannot define with precision, the point at which a hardened al-Qaeda fighter may be safely released.

Some have advocated an approach to detention based on Article 75 of Additional Protocol I (AP I) to the Geneva Conventions,¹⁶⁸ which provides that persons detained shall be released “as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”¹⁶⁹ While the Administration recently announced that it chooses to “treat the principles set forth in Article 75 as applicable to any individual it detains in an *international armed conflict*,”¹⁷⁰ it has not embraced AP I as a specific detention model for the current conflict. As a practical matter, many of the provisions in Article 75 reflect fundamental standards consistent with Common Article III and embraced by the United States. Moreover, the notion of assessing threats and releasing specific individuals who the Government determines no longer pose a threat, even in advance of the cessation of hostilities, has been embraced as a pragmatic solution to the dilemma posed by a conflict that is already into its second decade. Though the circumstances of the present conflict arguably make such calculations inevitable, great caution is required when making detention decisions based on continuing threat. The United States, to its great detriment, has already made serious errors and released al-Qaeda personnel who have returned to the fight.¹⁷¹

¹⁶⁴ Press Release, Department of Justice, Office of Public Affairs, Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees, Mar. 13, 2009, *available at*, <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>.

¹⁶⁵ Background Note for the ASIL Annual Meetings: *Targeting Operations with Drone Technology: Humanitarian Law Implications*, Human Right Inst., Columbia Law School, No. 10 Civ. 1469, Mar. 25, 2011.

¹⁶⁶ Opposition to Plaintiff’s motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 32-34, *Al-Aulaqi v. Obama*, 727 F.Supp. 2d 1 (D.D.C. 2010).

¹⁶⁷ ASIL Background Note *supra* note 163 at 7-8.

¹⁶⁸ *Id.* Jelena Pejic, *Procedural principles and safeguards for internment /administrative detention in armed conflict and other situations of violence*, Vol. 87, 858 Int’l. Rev. of the Red Cross 375, 377 (2005).

¹⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608 [hereinafter AP I], Article 75.

¹⁷⁰ The White House, *Fact Sheet: New Actions on Guantanamo and Detainee Policy* (Mar. 7, 2011). J. Bellinger, *Obama’s Announcement on International Law*, Lawfare (Mar. 8, 2011), *available at*, <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/> (pointing out the applicability of the “sense of legal obligation” principle to international armed conflicts only).

¹⁷¹ Department of Defense, *Fact Sheet—Former Guantanamo Detainee Terrorism Trends* (Apr. 7,

The NDAA detention provisions embrace the core concept in international law that enemy personnel may be detained for the duration of armed hostilities. Congress expressly granted the President broad authority to detain a narrow class of persons, effectively prescribing a domestic law detention standard, but one informed by international law and military custom. While Congress is generally ill-equipped to deal with individual cases, the benefit of the AUMF/NDAA legislative approach is that it broadly authorizes ongoing and future detention of al-Qaeda operatives around the world.¹⁷² At the same time, it affords the President considerable discretionary authority to review specific cases and to authorize releases where individuals no longer threaten the nation. As will be evident in the ensuing discussion, the Courts have also carved out a role in reviewing detention determinations and ensuring U.S. detention standards comport with domestic and international law requirements.

B. Those Subject to Military Detention

1. A Chat About Citizens and World War II

Cases decided under the AUMF have involved both citizens and non-citizens; the NDAA reaffirms the authority to detain both. Because of the intensive interest and focused debate on U.S. citizen detention, this section begins with a discussion of cases involving U.S. citizens detained as enemy personnel during World War II. Two cases from this era shed considerable light on the authority of the Government to detain citizen enemy personnel under law of war. Known as the German saboteurs case, *Ex parte Quirin* was argued before the Supreme Court on July 29 and 30, 1942, and decided July 31, 1942.¹⁷³ The petitioners before the Court were all German born, had all lived in the United States, and had all returned to Germany between 1933 and 1941. One of the petitioners, Haupt, became a naturalized citizen of the United States.¹⁷⁴ All received training at a sabotage school near Berlin. Four of the men were ferried to the United States aboard a German submarine and entered the country at Amagansett Beach on Long Island, New York on June 13, 1942. They carried with them a supply of explosives, fuses, incendiary and timing devices. Upon landing, they buried their uniforms and proceeded in civilian dress to New York City.¹⁷⁵ Four remaining men took a separate submarine and landed at Ponte Vedra Beach, Florida, landing on June 17, 1942. An officer of the German High Command had instructed the men to destroy war industries and war facilities in the United States.¹⁷⁶ All were taken into custody by the Federal Bureau of Investigation. At the direction of the Attorney General, all were later surrendered

2009), available at, <http://www.defense.gov/news/returntothefightfactsheet2.pdf>.

¹⁷² See D. Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, Oct. 2011, available at, http://works.bepress.com/diane_webber/8

¹⁷³ *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3.

¹⁷⁴ *Id.* at 20.

¹⁷⁵ *Id.* at 21.

¹⁷⁶ *Id.*

to military authorities and tried by military commission.¹⁷⁷ When reflecting on the 9/11 attacks or the hypothetical plot posited in this paper, it is easy to understand the historic parallel between recent terrorist threats and the *Quirin* saboteurs.

The saboteurs' main contention before the Supreme Court was that the President lacked statutory or constitutional authority to order the petitioners' trial by military commission for offenses with which they were charged. They argued they were entitled to be tried in the civil courts with the requisite Constitutional safeguards guaranteed by the Fifth and Sixth Amendments, including trial by jury.¹⁷⁸ Additionally, Haupt argued that as a citizen, the law of war can never be applied where the Courts are open and the process unobstructed—a position not without support in light of the oft-mentioned Civil War era case *Ex Parte Milligan*.¹⁷⁹ In a per curiam opinion, the Court in *Quirin* rejected the petitioners' claims, finding they were enemies whose particular acts constituted offenses against the law of war. Without precisely defining the Constitutional boundaries for trial by military commission, the Court found petitioners “were plainly within the boundaries,”¹⁸⁰ and that their actions constituted offenses against the law of war.¹⁸¹

While *Quirin* was decided after a military commission trial, it is significant to the broader debate about military detention. The Court explained that by “universal agreement and practice,” the law of war distinguishes between the armed forces and the peaceful population and between lawful and unlawful combatants.¹⁸² Lawful combatants are subject to detention and capture; likewise, unlawful combatants are subject to detention and capture, but they are also amenable to trial and punishment for their belligerent acts.¹⁸³ Further, the Court resoundingly rejected petitioners'

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 24.

¹⁷⁹ *Id.* at 42. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), was decided in the immediate aftermath of the Civil War. The Supreme Court found that Lambdin P. Milligan could not be tried by military tribunal because the civilian courts in Indiana were still operating. In *Quirin*, the Court noted that the Court in *Milligan*:

“was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We [the *Quirin* Court] construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as-in circumstances found not there to be present . . .”

Id. at 42, *citing*, *Milligan*, 4 Wall. at 118-122, 131.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 46.

¹⁸² *Id.* at 31.

¹⁸³ *Id.* at 31. The court provides examples of unlawful acts—a spy who without a uniform passes the military lines of a belligerent in time of war; an enemy combatant who without uniform comes

argument that they were somehow less than belligerents because they had “not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.”¹⁸⁴ In other words, the Court recognized an individual may be a member of the enemy force without being present in a theatre of operations.

While *Quirin* remains a controversial case, its pragmatic principles have served as a precedent in the current conflict against al-Qaeda. Like the German saboteurs, al-Qaeda operatives are not likely to appear in downtown New York City armed and dressed in military uniforms. Terrorists bent on attacking rail lines, civilian airliners, and public places doubtless will seek to blend in with the civilian population. Indeed, because of their ability to blend in, U.S. counterterrorism experts have long feared radicalized U.S. nationals recruited by al-Qaeda.¹⁸⁵ In *Quirin*, the Court recognizes that the threat posed by shadowy operatives may not arise in the zone of active military operations, yet military detention and military trial remain available and essential tools. Finally, *Quirin* makes clear that even in the absence of an actual or attempted belligerent action against the United States, it is sufficient for purposes of detention and trial that a person acted in circumstances which gave him that status of enemy belligerent and passed into the U.S. with hostile purpose.¹⁸⁶

In another fascinating case, *In Re Territo*, the 9th Circuit considered the military detention of Gaetano Territo.¹⁸⁷ Territo was born in West Virginia to Italian parents in 1915. He resided in the United States until 1920 when his family returned to Italy.¹⁸⁸ He was captured by U.S. forces on July 23, 1943, at Cotrano, Sicily while attempting to run from the American Army.¹⁸⁹ U.S. military authorities brought Territo to the United States as part of the Army’s program for the treatment of military

secretly through the lines for the purpose of waging war by destruction of life or property. *Id.*

¹⁸⁴ *Id.* at 38. As Justice O’Connor points out in *Hamdi v. Rumsfeld*, *infra* note 193, while Hamdi was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship precluded his “mere detention” for the duration of relevant hostilities.

¹⁸⁵ ‘Jihad Jane’: How does Al Qaeda recruit US-born women?, Peter Griff, March 10, 2010, *Christian Science Monitor*, available at, <http://www.csmonitor.com/USA/2010/0310/Jihad-Jane-How-does-Al-Qaeda-recruit-US-born-women>.

The case of Colleen R. LaRose – also known as “Jihad Jane” and “Fatima Rose” – raises troubling questions about the ability of Al Qaeda to attract US-born women to terrorism. Blond and green-eyed, Ms. LaRose looks more like a former cheerleader than the Western conception of an Islamist extremist. According to the FBI, she told co-conspirators in an e-mail that her appearance would allow her to blend in “with many people,” so that she could achieve “what is in my heart.” Her U.S. passport would also allow her to travel easily in and out of the country.” *Id.*

¹⁸⁶ *Quirin* at 38.

¹⁸⁷ *In Re Territo*, 156 F.2d 142 (9th Cir. 1946).

¹⁸⁸ *Id.* at 143.

¹⁸⁹ *Id.* The court indicated Territo was captured while serving in the Italian Army on the field of battle. He was wearing part of an Italian military uniform at the time of capture. The U.S. held him as a prisoner of war.

prisoners “because it was impracticable at the time to retain petitioner in custody as a prisoner of war within the physical confines of Italy.”¹⁹⁰ While in the United States, Territo enrolled in the Italian Service Unit, which enabled him to perform labor for eighty cents per day.¹⁹¹ The Ninth Circuit determined that the “object of capture is to prevent the captured individual from serving the enemy.”¹⁹² The Court rejected Territo’s contention that the fact of his citizenship legally prevented him from being a military prisoner of war. It also found unpersuasive Territo’s claim that his joining the Italian Service Unit changed his status.¹⁹³ Finally, the Ninth Circuit rejected Territo’s assertion that the cessation of hostilities between the United States and Italy changed his legal status, the Circuit noting there even though hostilities had essentially ceased there was still no peace treaty with Italy.¹⁹⁴ *Territo* and *Quirin* both underscore the authority and legality of detaining (and ultimately trying by military commission) citizens of the United States who join forces with the enemy. As discussed in the next section, the Supreme Court has often referred to *Quirin* in recent terrorist cases.

2. The Supreme Court Speaks

As with most great and serious issues of the day, it was only a matter of time before the issue of enemy detention came before the Supreme Court of the United States. In *Hamdi v. Rumsfeld*, a case discussed in depth during the legislative debate over the NDAA provisions, the Supreme Court considered the legality of the Government’s detention of a United States citizen as an “enemy combatant.”¹⁹⁵ Born in Louisiana in 1980, Yaser Esam Hamdi moved to Saudi Arabia as a child. In 2001, he was in Afghanistan where he was seized by Northern Alliance forces and eventually turned over to the United States military.¹⁹⁶ According to the Government, Hamdi affiliated with a Taliban military unit in Afghanistan, received weapons training, remained with his Taliban unit after September 11, and surrendered his Kalishnikov assault rifle upon capture.¹⁹⁷ Hamdi’s father claimed his son was in Afghanistan as a relief worker and became trapped there when the military campaign began.¹⁹⁸ The Government interrogated Hamdi in Afghanistan, eventually

¹⁹⁰ *Id.* at 144.

¹⁹¹ *Id.* at 143-4.

¹⁹² *Id.* at 145.

¹⁹³ *Id.* at 145.

¹⁹⁴ *Id.* at 148. “It is further argued that the cessation of hostilities between United States and Italy, an axis power, and the change of Italy from belligerency against the United States to that of active participation against another of the axis powers together with the service units in some manner changes the status of petitioner. However, no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war. We hold, as did the District Court, that petitioner’s restraint by the respondent is a legal one.” *Id.*

¹⁹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

¹⁹⁶ *Id.* at 510.

¹⁹⁷ *Id.* at 512-13. The Government set forth its factual basis for Hamdi’s detention in a declaration submitted by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy. The “Mobbs Declaration” was the “sole evidentiary support” presented to justify Hamdi’s detention. *Id.*

¹⁹⁸ *Id.* at 511-512.

transferring him to Guantanamo Bay. When authorities learned Hamdi was an American citizen, they ordered his transfer to a naval brig in Norfolk, Virginia.¹⁹⁹ The Court's decision in *Hamdi* is striking for a number of reasons.

First, it is worth remarking that both *Hamdi* and *Rasul v. Bush*, a related case decided the same day, began by restating the central point of what led to the AUMF in the first instance, namely that the al-Qaeda terrorist network hijacked four commercial airliners, "used them as missiles to attack American targets" and killed 3,000 people.²⁰⁰ Such statements go beyond mere symbolism. They suggest a sobering acknowledgement by the Court that this nation was attacked at home and that whatever actions the Court would subsequently take, it would do so mindful of the ongoing military conflict with al-Qaeda. Justice O'Connor's plurality opinion carved a carefully circumscribed and delimited path. The Court declined to address the Government's assertion that Article II of the Constitution affords the President plenary detention authority.²⁰¹ The Court also considered Hamdi's principal argument for the illegality of his detention, namely that the Non-Detention Act, 18 U.S.C. § 4001(a), forbid his detention and provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."²⁰² The Government had contended that the location of the Non-Detention Act in Title 18 meant it only applied to civilian prisoners and not to military detention.²⁰³ The Court again declined to address these broader arguments. Instead, Justice O'Connor built the plurality opinion upon the foundation that Congress authorized the military detention of Hamdi through the 2001 AUMF.²⁰⁴ Because the 2012 NDAA affirms and makes explicit Congress's determination that the authority of the President to use all necessary and appropriate force pursuant to the AUMF includes the authority to detain specified persons,²⁰⁵ the *Hamdi* precedent remains significant. Both the Court and the Congress have affirmed that the AUMF permits detention of enemy personnel by the Government, including detention of U.S. citizens under specific, and to some extent still contested, circumstances.

The Court in *Hamdi* concluded that detention of individuals falling in the limited category of persons defined in the AUMF for the duration of the particular conflict in which they are captured "is so fundamental and accepted an incident

¹⁹⁹ *Id.* at 510. Hamdi's transfer to Norfolk took place in April 2002. He was later transferred to the brig in Charleston, South Carolina.

²⁰⁰ *Rasul v. Bush*, 542 U.S. 466, 470 (2004); *Hamdi* at 510.

²⁰¹ *Hamdi* at 516-17. U.S. Const. art. II.

²⁰² *Hamdi* at 517. 18 U.S.C. § 4001(a). The Court notes: "Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 et seq., which provided procedures for executive detention, during times of emergency, of individual deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II. H. R. Rep. No. 92-116 (1971)."

²⁰³ *Hamdi* at 517.

²⁰⁴ *Id.* at 518.

²⁰⁵ NDAA of 2012, § 1021.

of war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”²⁰⁶ Citing *Quirin*, the plurality recognized that the capture and detention of “lawful combatants and the capture, detention and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incidents of war.’”²⁰⁷ Military detention is distinct from civilian criminal detention in that its purpose is neither punishment nor retribution, but solely custodial detention to prevent a combatant, lawful or otherwise, from returning to the fight.²⁰⁸ Regarding Yaser Esam Hamdi, the plurality affirmed the central principle that “there is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”²⁰⁹ Justice O’Connor reasoned that a citizen, no less than an alien, can be a part of forces hostile to the United States, and if released the citizen would pose the same threat of returning to the fight as would a non-citizen.²¹⁰

3. Around the Edges

Senator Feinstein and others have argued the *Hamdi* decision resolved the legal and Constitutional validity of holding a U.S. citizen captured on the battlefield in Afghanistan, but they question how far one can ride the *Hamdi* precedent.²¹¹ While *Quirin* provides precedent for the non-battlefield detention of a U.S. citizen, there is no post-9/11 Supreme Court case expressly affirming law of war detention authority over a U.S. citizen captured, as *Quirin* and his American cohort Haupt were, in the United States. The matter, however, was directly addressed in 2005 when the U.S. Court of Appeals for the Fourth Circuit decided *Padilla v. Hanft*.²¹² The U.S. District Court for the District of South Carolina held that the President lacked the authority to detain Padilla, a U.S. citizen; that his detention violated the Constitution; and that Padilla must either be criminally charged or released. On appeal, in reviewing the case on Padilla’s motion for

²⁰⁶ Hamdi at 518.

²⁰⁷ *Id.*, citing *Quirin supra* note 171, at 30.

²⁰⁸ Hamdi at 518. But see Alec Walen & Ingo Venzke, *Detention in the “War on Terror”: Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. Int’l. & Comp. L. 45 (Fall, 2007) (arguing Hamdi may permit indefinite and perhaps perpetual detention).

²⁰⁹ *Id.* at 519 (O’Connor, J. plurality opinion, joined by Breyer, J., Kennedy, J. and Rehnquist, C.J.) (emphasis added). Justice Thomas dissented, rejecting the plurality’s requirement for a hearing before a neutral decisionmaker, but he found Hamdi’s detention “falls squarely within the Federal Government’s war powers” and that the Court lacks the “expertise and capacity to second-guess” the President’s decision to hold Hamdi as an enemy combatant. *Id.* at 579-99.

²¹⁰ *Id.* at 519.

²¹¹ R. Wakeman, *Senate debate on the NDAA Conference Report*, Lawfare, available at, <http://www.lawfareblog.com/2011/12/senate-debate-on-the-ndaa-conference-report>. See also Robert Chesney, *The NDAA and US Citizen Detention*, Lawfare, available at, [the-ndaa-and-us-citizen-detention](http://www.lawfareblog.com/2011/12/senate-debate-on-the-ndaa-conference-report).

²¹² *Padilla v. Hanft*, 423 F. 3d 386 (2005). Procedural History: “On June 11, 2002, Padilla filed a petition for a writ of habeas corpus in the Southern District of New York, claiming that his detention violated the Constitution . . . The Supreme Court of the United States ultimately ordered Padilla’s petition dismissed without prejudice, holding that his petition was improperly filed in the Southern District of New York. *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S.Ct. 2711, 2727, 159 L.Ed.2d 513 (2004). Additionally, on July 2, 2004, Padilla filed the present petition for a writ of habeas corpus in the District of South Carolina.” *Id.* at 390.

summary judgment, the parties stipulated to these facts alleged by the Government.²¹³ Al-Qaeda operatives recruited Padilla. He subsequently met and trained with al-Qaeda terrorists in Afghanistan. He stood guard at a Taliban outpost and routinely changed safe houses to avoid bombing or capture. He eventually fled to Pakistan, met with Khalid Sheikh Mohammad, who told Padilla to travel to the United States for purposes of attacking apartment buildings in continued prosecution of al-Qaeda's war against the United States.²¹⁴ Sixty years after the FBI detained the group of German saboteurs in Chicago, the FBI arrested Padilla in the same city.

The Fourth Circuit's reasoning in *Padilla* closely tracked *Hamdi* and *Quirin*. Judge Luttig stated that Padilla "unquestionably qualifies" as an "enemy combatant" under *Hamdi*.²¹⁵ He found "no difference in principle" between the two.²¹⁶ Both associated with forces hostile to the United States and both took up arms against their country in Afghanistan. The Circuit Court had no difficulty finding that Padilla was an enemy combatant whose detention was necessary to prevent his return to the battlefield.²¹⁷ Comparing Padilla to Haupt, the American citizen saboteur in *Quirin*, Judge Luttig reasoned that both entered the United States bent on committing hostile acts and both associated with the military arm of the enemy.²¹⁸

Padilla principally maintained that his case was distinct because unlike Hamdi, who was taken on a foreign battlefield, he was seized on American soil.²¹⁹ The Fourth Circuit found that the reasoning in *Hamdi* "simply does not admit of a distinction between an enemy combatant captured abroad and detained in the United States, such as Hamdi, and an enemy combatant who escaped capture abroad but was ultimately captured domestically and detained in the United States."²²⁰ While Judge Luttig accurately noted the plurality in *Hamdi* carefully limited its opinion, he also made clear that the Supreme Court did not do so "in a way the leaves room for argument that the President's power to detain one who has associated with the enemy and taken up arms against the United States" varies depending on locus of eventual capture.²²¹

In a post-9/11 world, where prevention of an attack on the homeland is of paramount concern, the contrary position seems particularly troubling. It would allow military detention of a citizen who joins forces with al-Qaeda, and plans an attack against the U.S. from Afghanistan, so long as that person is captured overseas. Yet that same operative, committed to the same destructive acts against the country, would be rewarded for successfully entering the United States because

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 391.

²¹⁶ *Id.*

²¹⁷ *Id.* at 391-92.

²¹⁸ *Id.* at 392, citing *Quirin*, 317 U.S. at 37-38.

²¹⁹ *Id.* at 393.

²²⁰ *Id.*

²²¹ *Id.* at 394.

the option of military detention suddenly would no longer be available. Given the AUMF's overriding objective of preventing terrorist attacks within the country, this is a strange result.

The Fourth Circuit next addressed the argument that the availability of the criminal process rendered his military detention unnecessary. Relying on *Hamdi*, the court rejected this argument. The court noted that the power to detain is distinct in that its purpose is to prevent detainees from returning to the battlefield. Further the court pointed out that "in many instances criminal prosecution would impede the Executive in its efforts to gather intelligence from the detainee and to restrict the detainee's communication with confederates."²²² Judge Luttig found that the district court did not adequately defer to the President's determination that Padilla's detention was in the interest of national security and at a minimum failed to accord deference given that the President acted pursuant to a broad delegation of authority from Congress under the AUMF.²²³ He rejected Padilla's argument under *Ex parte Milligan* that because the civil courts were open and unobstructed Padilla must be tried in civil court.²²⁴ He reasoned that *Quirin* effectively narrowed the *Milligan* opinion and confirmed that its reasoning bore no applicability where a person is "a part of or associated with the armed forces of the enemy."²²⁵

Padilla argued that only a clear statement from Congress can authorize his detention. He relied on *Ex parte Endo*, a Japanese internment case that differed markedly from the present facts in that it dealt not with an alleged member of the enemy force, but a citizen the government conceded was loyal to the United States.²²⁶ Padilla further suggested that *Quirin* also contained a clear statement rule against law of war detention, which is not mentioned in the AUMF.²²⁷ The Fourth Circuit disagreed, finding that *Endo* itself observed that silence on detention did not mean the power to detain was lacking and that *Quirin*, to the extent it addressed the clear statement issue at all, reached the opposite conclusion.²²⁸ The Circuit Court also emphasized that *Hamdi* concluded "it [was] of no moment that the AUMF does not use specific language of detention."²²⁹

Considering the purpose of the AUMF was to prevent future acts of terrorism against the United States and protecting U.S. citizen at home and abroad, Judge Luttig reasoned that the AUMF applies even more clearly to Padilla than to Hamdi. Padilla not only took up arms against the Armed Forces of the United States on a foreign battlefield, he also traveled to back to the United States for the purpose

²²² *Id.* at 395.

²²³ *Id.*

²²⁴ *Id.* at 396-97, *citing*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).

²²⁵ *Id.* at 396-97, *citing*, *Quirin*, 317 U.S. at 45.

²²⁶ *Ex parte Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944).

²²⁷ *Padilla* at 395.

²²⁸ *Id.* at 395, *citing*, *Endo*, at 300 and *Quirin*, at 28.

²²⁹ *Id.* at 395, *citing*, *Hamdi*, at 124 S.Ct. 2641.

of committing “future acts of terrorism against American citizens and targets.”²³⁰ Understanding that the prime directive for Congress in the immediate aftermath of 9/11 was the prevention of a future attack on U.S. soil, it would defy common sense if the AUMF were interpreted to prevent military detention of terrorists in the United States. Through the 2012 NDAA provisions, Congress has now resolved any possible ambiguity by making detention authority explicit in the law.

The *Padilla* case remains controversial. While the Supreme Court considered whether to review the case, the government charged Padilla in federal court and requested to transfer Padilla to federal prison. Judge Luttig strongly criticized the Government’s decision, stating “its actions have left not only the impression that Padilla may have been held for these years, even if justifiably, by mistake--an impression we would have though the government could ill afford to leave extant. They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla . . . can, in the end, yield to expediency . . .”²³¹ Padilla ultimately was transferred, and the Supreme Court denied certiorari.²³² When the Supreme Court originally considered Padilla’s case in 2004 and declined to decide the case on the merits, four justices would have done so. Stevens’ dissent suggests these justices were supportive of the holding below that the Non-Detention Act prohibits the detention of U.S. citizens unless authorized by an act of Congress.²³³

The Fourth Circuit had occasion to re-examine *en banc* the military detention of a lawful U.S. resident in *Al-Marri v. Pucciarelli*, with the Circuit fracturing over two core issues in an unusual split of views.²³⁴ While the decision was ultimately vacated by the Supreme Court after Al-Marri was transferred back to civilian custody, the opinion is quite informative and often cited in more recent habeas cases. A citizen of Qatar, Al-Marri entered the United States on September 10, 2001, purportedly to pursue a master’s degree at Bradley University in Peoria, Illinois. In February 2002, he was charged in New York with possession of unauthorized credit cards, and in January 2003 with further counts of making false statements to the FBI and a banking institution. After the charges were dismissed for lack of venue, al-Marri was re-indicted in Illinois on the same seven counts.²³⁵ Before trial, the President determined he was an enemy combatant and ordered him placed in military detention, where he was detained for a period of five years at the Naval Consolidated Brig in South Carolina.²³⁶ On the first issue, by a 5 to 4 vote, Judge Traxler and four

²³⁰ *Id.* at 396.

²³¹ *Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir.)(2005)(order).

²³² *Padilla v. Hanft*, 546 U.S. 1084 (2006); 547 U.S. 1062 (2006).

²³³ *Id.* at 464-65, fn. 8. Justice Stevens acknowledged that the question of whether Padilla was entitled to immediate release is one about which reasonable jurists may differ, but he left little doubt this he was entitled to a hearing on the justification for his detention.

²³⁴ *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Pucciarelli was the Commander of the U.S.N. Consolidated Naval Brig where Ali Saleh Kahlah Al-Marri was detained.

²³⁵ *Id.* at 219.

²³⁶ *Id.*

other judges held that if the allegations by the government were true, Congress had empowered the President to detain al-Marri as an enemy combatant. On the second issue, Judge Traxler joined the four judges in the minority on the first issue, and the court concluded 5 to 4 that al-Marri had not been afforded sufficient due process to challenge the Government's assert that he was an enemy combatant.²³⁷

Thus, four judges found that neither the AUMF nor the President's inherent authority permits the indefinite military detention of al-Marri.²³⁸ They pointed out that "*Hamdi* and *Padilla* ground their holdings on the central teaching from *Quirin*, i.e., enemy combatant status rests on an individual's affiliation during wartime with the "military arm of the enemy government."²³⁹ And hearkening back to the Civil War era *Milligan* case, they contended that the Constitution does not permit the Government to subject civilians within the United States to military jurisdiction.²⁴⁰ The opinion cogently outlines the strongly held views of many who oppose military detention of citizens and residents in the United States, a view underpinned by the philosophical principle that "freedom from imprisonment . . . lies at the heart of liberty that [the Due Process] clause protects."²⁴¹ The four judges on the other side found that the AUMF granted the President the power to detain enemy combatants. They concluded enemy combatants include those persons who attempt to or engage in belligerent acts against the United States, either domestically, as in *Quirin*, or in a foreign combat zone, as in *Hamdi*.²⁴² They discussed al-Marri's alleged long affiliation with al-Qaeda going back to training camps in 1996 and 1998, as well as his pre-detention entry into the United States as a "sleeping agent" on September 10th.²⁴³ Further, they expressed skepticism, reasoning that if they applied al-Marri's argument to a 9/11 hijacker, it would have meant that had the hijacker been detained on the same date al-Marri entered the country, or the next day with box cutters in hand, he would "have had to be turned over to civilian court," and this "despite the fact that the hijacker would have been poised to commit an act of war—in fact an act of unlawful belligerency."²⁴⁴

Judge Traxler charted an interesting course, agreeing that the Constitution generally affords all persons the right to be tried in a criminal proceeding for criminal wrongdoing within the United States, yet recognizing the detention of enemy combatants during hostilities is an exception.²⁴⁵ He found it unnecessary to establish the combatant took up arms in a foreign combat zone and had "no doubt

²³⁷ *Id.* at 216.

²³⁸ *Id.* at 253.

²³⁹ *Id.* at 230, *citing*, *Quirin*, 317 U.S. at 37-38, 63 S.Ct. 2; *Hamdi*, 542 U.S. at 519, 124 S.Ct. 2633; *Padilla*, 423 F.3d at 391.

²⁴⁰ *Id.* at 230.

²⁴¹ *Id.* at 230 (siding with this view: Judges Michael, Motz, King, and Gregory).

²⁴² *Id.* at 284-86.

²⁴³ *Id.* at 284.

²⁴⁴ *Id.* at 287. Note, even under this argument a hijacker "could have been militarily detained in the immediacy of the situation." *Id.*

²⁴⁵ *Id.* at 257.

that individuals who are dispatched here by al-Qaeda” to act as sleeper agents and to commit additional attacks “are [also] individuals Congress sought to target when passing the AUMF.”²⁴⁶ Had al-Marri succeeded in the martyr mission to which he was allegedly assigned, he “would not be appreciably different from” the *Quirin* saboteurs or the al-Qaeda operatives who attacked the United States on September 11th.²⁴⁷ Thus, Judge Traxler found al-Marri, if the allegations him were true, fully subject to detention as an enemy combatant. Where he parted company from the four judges who regarded al-Marri as an enemy combatant was in relation to the second prong of the analysis, namely the level of due process accorded to al-Marri to challenge the basis for his detention. Judge Traxler concluded the district court erred in accepting a hearsay affidavit of a Government official without any inquiry into whether the “provision of non-hearsay evidence would unduly burden the government.”²⁴⁸ The matter of process requirements will be addressed in Section C.

C. Process Requirements

Hamdi is the core Supreme Court precedent confirming the legality of preventive detention of enemy personnel under the law of war, including detention of U.S. citizens. A number of cases before the Supreme Court and the courts below, have addressed the very challenging issue of determining the level of process the law affords these. *Hamdi* itself held that “due process demands that a citizen held in the United States as an enemy combatant must be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.”²⁴⁹ Decided contemporaneously with *Hamdi*, *Rasul v. Bush* addressed the applicability of the federal habeas corpus statute to two Australians and twelve Kuwaitis captured abroad during hostilities.²⁵⁰

Relying on the famous World War II case *Johnson v. Eisentrager*,²⁵¹ a District Court, in an opinion later affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, held that “aliens detained outside the sovereign territory of the United States” may not petition for a writ of habeas corpus.²⁵² The Supreme Court reversed. The majority indicated the writ is an integral part of the common-law, and in accordance with the Constitution may not be suspended except “when in cases of Rebellion or Invasion the public Safety may require it.”²⁵³ While the

²⁴⁶ *Id.* at 259-60 (rejecting al-Marri’s argument that would have us rule that when Congress authorized the President to deal militarily with those responsible for the 9/11 attacks upon our country, it did not intend to authorize the President to deal militarily with al-Qaeda operatives identically situated to the 9/11 hijackers.)

²⁴⁷ *Id.* at 261-62.

²⁴⁸ *Id.* at 268.

²⁴⁹ *Hamdi* at 1.

²⁵⁰ *Rasul v. Bush*, 542 U.S. 466 (2004); 28 U.S.C. § 2241.

²⁵¹ *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that courts lacked the authority to grant relief to German citizens captured in China and tried and convicted of war crimes by a U.S. military commission in Nanking and subsequently incarcerated in the Landsberg Prison in Germany).

²⁵² *Rasul* at 467, *citing* 215 F. Supp. 2d 55, 68 (D.C. 2002).

²⁵³ *Id.* at 473-74, *citing*, *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973), U.S. Const. art. I, Sec 9, cl. 2.

writ has expanded beyond its historic limits, the Court found that at “its historic core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention.”²⁵⁴

In *Rasul*, the Supreme Court considered six key factors in *Eisentrager*, noting the German prisoners were (a) enemy aliens; (b) had never been or resided in the United States; (c) were captured outside of our territory and there held in military custody as a prisoner of war; (d) were tried and convicted by a military commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and at all times were imprisoned outside the United States.²⁵⁵ The Court found the *Rasul* detainees, unlike those in *Eisentrager*, were not nationals of countries at war with the United States, denied they engaged in acts of aggression, had never been afforded access to any tribunal, and “for more than two years they were imprisoned in territory over which the United States has exclusive jurisdiction or control.”²⁵⁶ Relying on the 1973 case *Braden v. 30th Judicial Circuit Court of Kentucky*, the Court determined *Braden* filled an *Eisentrager* era “statutory gap” for “persons held outside the territorial jurisdiction of any federal district court” and enabled invocation of 28 U.S.C. § 2241 statutory habeas protections by Guantanamo detainees.²⁵⁷ The Court found no viable distinction between American citizens and aliens held in federal custody, and stated “there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship.”²⁵⁸ Under *Rasul*, therefore, Guantanamo detainees enjoyed a statutory entitlement to have the federal courts review the legality of their detention.

The *Rasul* decision extending 28 U.S.C. § 2241 to aliens detained at Guantanamo was criticized by the dissent as a “novel holding” that “contradicts a half-century-old precedent on which the military undoubtedly relied.”²⁵⁹ Justice Scalia found the reliance on *Braden*, a decision that did not mention *Eisentrager*, “implausible in the extreme” and an “irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.”²⁶⁰ This ruling precipitated a number of habeas challenges, and led the Department of Defense to establish Combatants Status Review Tribunals to determine the status of Guantanamo

²⁵⁴ *Id.* at 474, *citing*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

²⁵⁵ *Id.* at 475-76.

²⁵⁶ *Id.* at 476.

²⁵⁷ *Rasul* at 478, *citing*, *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973).

²⁵⁸ *Id.* at 481.

²⁵⁹ *Id.* at 488.

²⁶⁰ *Id.* at 489.

detainees.²⁶¹ In 2005, Congress passed the Detainee Treatment Act.²⁶² While significant portions of the DTA dealt with interrogation standards, it also contained jurisdiction-stripping provisions precluding habeas challenges under 28 U.S.C. § 2241.²⁶³ This set the stage for two crucial Supreme Court cases regarding the rights of law of war detainees.

The now famous case *Hamdan v. Rumsfeld* considered the cases of a Yemeni national captured in November 2001.²⁶⁴ The government alleged Hamdan acted as Osama bin Laden's bodyguard and driver between 1996 and 2001, that he transported weapons used by al-Qaeda, that he drove bin Laden to various training camps, and that he received training at al-Qaeda sponsored terrorist training camps.²⁶⁵ The Court concluded the DTA did not strip the Court of jurisdiction to hear pending

²⁶¹ Deputy Secretary of Defense Order Establishing Combatant Status Review Tribunal, Jul. 7, 2004, available at, <http://www.defense.gov/news/jul2004/d20040707review.pdf> (last accessed Feb. 21, 2012); U.S. Department of Defense, Combatant Status Review Tribunal Summary, available at, <http://www.defense.gov/news/csrtsummary.pdf> (last updated Oct. 17, 2007):

The Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) held 581 tribunals between July 30, 2004 and February 10, 2009. The tribunals determined that 539 detainees were properly classified as enemy combatants and 39 detainees were found to no longer be classified as enemy combatants. The Secretary of Defense's February 24, 2009 memo temporarily suspended Annual Administrative Reviews for Enemy Combatants detained at Guantanamo Bay, Cuba, to avoid duplicating the efforts of the review under the President's Jan. 22, 2009 Executive Order.

²⁶² The Detainee Treatment Act of 2005, Pub.L. 109-148, div. A, tit. X, §§ 1001-1006, 119 Stats. 2680, 2739-44 (2005) (hereafter DTA); see also National Defense Authorization Act for Fiscal Year 2006, Pub.L. 109-163, civ. A, tit. XIV, §§ 1401-1406, 119 Stats. 3136, 3474-80 (2006). The 2005 DTA at § 1005(e) provided:

- (e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—
- (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
 - (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
 - (A) is currently in military custody; or
 - (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

²⁶³ DTA § 1005.

²⁶⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²⁶⁵ *Id.* at 570.

claims,²⁶⁶ but scrupulously avoided Hamdan's invitation to determine Congress unconstitutionally suspended the writ of habeas corpus.²⁶⁷

In reaching the merits, the Court found that neither the AUMF nor the DTA provided express authorization to try Hamdan by military commission as devised by the President.²⁶⁸ The Court found that Article 21 of the Uniform Code of Military Justice, which is "substantially identical to" the World War II era Article 15, preserved a specific form of military commissions in current law. Article 21 provides:

The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.²⁶⁹

The Court found that nothing in the DTA hinted "that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."²⁷⁰ The Court then conducted an exhaustive examination of the Military Commission procedures applicable to Hamdan and determined that it lacked the power to proceed because "its structure and procedures violate both the UCMJ and the Geneva Conventions."²⁷¹ While the Supreme Court found this portion of the then-existing military commission process fatally defective, it made clear that if Congress "deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so."²⁷²

Justice Stevens conditioned the use of military commissions not only on compliance with the American common law of war but also with the "rules and precepts of the law of nations."²⁷³ The Government asserted the Geneva Conventions were inapplicable to Hamdan because he was captured and detained incident to the conflict with al-Qaeda, and al-Qaeda was not a "High Contracting Party." Justice Stevens determined that Common Article 3 applied in conflicts not of an international

²⁶⁶ *Id.* at 575-76.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 568. 592. See Military Commission Order No. 1, Aug. 31, 2005; *see also* Presidential Order regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 13, 2001).

²⁶⁹ *Id.* at 592; 10 U.S.C. § 821 (Art. 21, UCMJ).

²⁷⁰ *Id.* at 594.

²⁷¹ *Id.* at 567. While Justice Kennedy joined Justices Stevens' opinion, he did not find it necessary to decide whether Common Article 3's standard "necessarily requires that the accused have the right to be present at all stages of a criminal trial." Similarly, he did not join in the determination that "conspiracy" is not recognized as a violation of the law of war. *Id.* at 653-55.

²⁷² *Id.* at 637.

²⁷³ Hamdan at 613, *citing*, *In re Quirin*, 317 U.S. at 28.

character, binding the United States to apply certain minimum standards.²⁷⁴ For military commissions to be “regularly constituted courts” they must be constituted as an ordinary part of the military justice system in accordance with congressional statutes.²⁷⁵ Hamdan’s commission was not so constituted.²⁷⁶

Four justices went further, concluding that an accused must, absent disruptive conduct, be present for trial. In reaching this conclusion, they relied in part on Article 75 of API.²⁷⁷ While the United States is not a state party to the 1977 Protocol, the Court found that U.S. objections to AP I were not predicated on the safeguards articulated in Article 75. Justice Stevens concluded that the commission proceedings planned for Hamdan dispensed with principles “articulated in Article 75 and indisputably part of customary international law” that an accused ordinarily must be present at trial and be privy to the evidence against him.²⁷⁸

After *Hamdan*, Congress enacted the Military Commissions Act of 2006.²⁷⁹ It contained detailed procedural rules for military commissions, which have since been modified and expanded upon by the Military Commissions Act of 2009.²⁸⁰ The MCA of 2006 also clarified the jurisdiction-stripping provisions of the 2005 DTA.²⁸¹ This provision took effect upon enactment and left no ambiguity as to its applicability to both pending and future cases pending before the Federal Courts. This compelled the Supreme Court to address the fundamental issue it avoided in *Hamdan*—whether Congress had unconstitutionally suspended the writ of *habeas corpus*.²⁸²

²⁷⁴ Hamdan at 629-30.

²⁷⁵ Hamdan at 632-33.

²⁷⁶ *Id.* at 633-43, 646-53 (Justice Kennedy’s concurring opinion). While there may be justification for departing from specific processes upon showing of “evident practical need,” no such demonstration was provided by the Government in relation to the commissions designed to try Hamdan. *Id.*

²⁷⁷ AP I *supra* note 167.

²⁷⁸ *Id.* at 633-34, *citing*, Taft, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int’l L. 319, 322 (2003). William H. Taft, IV was Legal Adviser, U.S. Department of State. He stated, “[w]hile the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” See also Glabe, *Conflict Classification and Detainee Treatment in the War Against Al Qaida*, 2010 Jun Army Law 112, 115 (2010) (discussing Article 75).

²⁷⁹ Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2601 (2006).

²⁸⁰ See Jennifer K. Elsea, The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice, CRS Report RL33688 (2006).

²⁸¹ MCA of 2006, § 7. In addition to the § 7(e)(1) provision quoted in the main text, § 7(e)(2) provided: “Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

²⁸² U.S. Const. art. I, § 9, cl. 2 (Suspension Clause: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

Boumediene v. Bush squarely considered whether aliens detained at Guantanamo Bay have the constitutional privilege of habeas corpus, which cannot be withdrawn except in conformance with the Suspension Clause in Constitution.²⁸³ The D.C. Circuit concluded that the 2006 MCA eliminated statutory habeas jurisdiction in pending and future cases.²⁸⁴ It found no relevant distinction between the naval base at Guantanamo Bay and the prison in Landsberg, Germany, where the petitioners in *Eisentrager* were held. The Circuit Court’s majority concluded that aliens held in a foreign territory enjoy no constitutional right to *habeas*.²⁸⁵

In a 5-4 opinion authored by Justice Kennedy, the Supreme Court reversed. The Court’s majority quickly placed the decision in context:

If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases. It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history . . . The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.²⁸⁶

The Court reviewed the history of the writ, finding that it was one of the few safeguards of liberty in the Constitution predating the Bill of Rights. The Court held that the Suspension Clause is a key part of the “Constitution’s essential design” and one designed to ensure Judiciary, except during actual suspension, “will have a time-tested device” to maintain the “delicate balance of governance.”²⁸⁷ For the Court, the writ of habeas corpus is “itself an indispensable mechanism for monitoring the separation of powers.”²⁸⁸

In addressing the extraterritorial application of the writ to Guantanamo Bay, the Court relied on the so-called *Insular Cases*,²⁸⁹ and *Reid v. Covert*, which applied

²⁸³ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²⁸⁴ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 771.

²⁸⁷ *Id.* at 725, *citing*, *Hamdi* at 536.

²⁸⁸ *Id.* at 765.

²⁸⁹ *De Lima v. Bidwell*, 182 U.S. 1, 21 S.Ct. 743 (1901); *Dooley v. United States*, 182 U.S. 222, 21 S.Ct. 762 (1901); *Armstrong v. United States*, 182 U.S. 243, 21 S.Ct. 827, (1901); *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, (1901); *Hawaii v. Mankichi*, 190 U.S. 197, 23 S.Ct. 787, (1903);

the jury provisions of the Fifth and Sixth Amendments to U.S. civilians being tried by the military abroad.²⁹⁰ The Court paid particular attention to the “practical considerations” in these cases and found the Circuit Court’s “constricted reading” overlooked a “common thread”—that matters of “extraterritoriality turn on objective factors and practical considerations, not formalism.”²⁹¹ The Suspension Clause, they concluded, “has full effect Guantanamo Bay.”²⁹² Habeas entitles a detainee to a meaningful opportunity to demonstrate he is being held pursuant to “the erroneous application or interpretation” of relevant law.²⁹³ While release “need not be the exclusive remedy” and is not appropriate in every case in which the writ is granted, a habeas court at a minimum “must have power to order the conditional release of an individual unlawfully detained.”²⁹⁴

Justice Kennedy traced a number of pragmatic considerations and suggested “*habeas corpus proceedings need not resemble a criminal trial*, even when detention is by executive order.”²⁹⁵ He indicated “it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody[.]”²⁹⁶ and that it is entirely appropriate to grant “proper deference . . . to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.”²⁹⁷ He anticipated “domestic exigencies” that might impose “onerous burdens on the Government” such that the judiciary would be “required to devise sensible rules for staying habeas proceedings.”²⁹⁸ What the Court ultimately found compelling, however, was that the detainees involved here had been held over six years “without the judicial oversight that habeas corpus or an adequate substitute demands.”²⁹⁹ Thus, the Court held that “[a]ccess to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.”³⁰⁰

In vigorous dissents, Chief Justice Roberts and Justice Scalia accused the majority of striking down “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.”³⁰¹ Chief Justice Roberts found it remarkable that the majority cashiered the entire DTA process before ever giving the D.C. Circuit the opportunity to address issues reserved for

Dorr v. United States, 195 U.S. 138, 24 S.Ct. 808, (1904).

²⁹⁰ Reid v. Covert, 354 U.S. 1, 64, 77 S.Ct. 1222 (1957).

²⁹¹ Boumediene at 764.

²⁹² *Id.* at 771.

²⁹³ *Id.* at 779, *citing*, INS v. St. Cyr, 533 U.S. 289, 342, 121 S.Ct. 2271 (2001).

²⁹⁴ *Id.* See *Ex parte Bollman*, 4 Cranch 75, 136 (1807).

²⁹⁵ Boumediene at 783 (*italics added*).

²⁹⁶ *Id.* at 793.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 794.

²⁹⁹ *Id.* at 794.

³⁰⁰ Boumediene at 797.

³⁰¹ *Id.* at 801.

it within the statutory scheme. Further, this overreaching appeared “particularly egregious” given the weakness of its objections to the DTA process and the “utter failure” to provide substitute procedures.³⁰² Justice Scalia’s dissent touched on a more fundamental objection that “the writ of habeas corpus does not, and never has, run in favor of aliens abroad.” He suggested the majority’s “blatant abandonment” of “settle precedent” in *Eisentrager* “will make the war harder on us.”³⁰³ For the dissent, the opinion made “unnervingly clear” the process of “how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns the subject entails.”³⁰⁴ He also argued that the more accurate comparison from World War II to present-day detainees would be the more than 400,000 prisoners of war detained by the United States in that conflict.³⁰⁵ “Not a single one was accorded the right to have his detention validated by a habeas corpus action in federal court, despite the fact that many were transferred to U.S. soil.”³⁰⁶

Boumediene triggered multiple habeas challenges and a number of interesting decisions in the lower courts. The breadth of what was potentially on the table, from full-blown criminal trials to more circumscribed habeas reviews, has yielded a rather unique post-*Boumediene* jurisprudence. In the fall of 2008, U.S. District Court Judge Richard Leon conducted habeas reviews in *Boumediene*’s case, along with those of the five other petitioners.³⁰⁷ He fashioned “prudent” and “incremental” wartime habeas proceedings.³⁰⁸ He looked to the AUMF and considered whether there was sufficient evidence to show by a preponderance of the evidence that each petitioner was being properly detained as an “enemy combatant.”³⁰⁹ Like Judge Traxler in *al-Marri*, he found the Government’s exclusive reliance on evidence obtained from an unnamed source insufficient to justify the continued detention of five men, including *Boumediene* himself.³¹⁰

Through a growing series of habeas challenges, the D.C. Circuit has fleshed out habeas requirements in these wartime cases, addressing a number of procedural, definitional and evidentiary considerations. In *Al-Bihani v. Obama*, the Circuit Court considered the definition under which a person may be detained pursuant to the AUMF. The D.C. Circuit accepted the earlier definition offered: “an individual who was part of or supporting Taliban or al-Qaeda force, or associated forces . . . and

³⁰² *Id.* at 808.

³⁰³ *Id.* at 827-28.

³⁰⁴ *Id.* at 801.

³⁰⁵ *Id.* at 841.

³⁰⁶ *Id.*

³⁰⁷ *Boumediene, et al v. Bush, et al*, Civil Case No. 04-1166 (RJL), Memorandum Order (Dist. Ct. D.C., Nov. 20, 2008), *available at*, <http://www.scotusblog.com/wp-content/uploads/2008/11/leon-boumediene-order-11-20-2008.pdf>.

³⁰⁸ *Id.* at 5.

³⁰⁹ *Id.* at 8. Enemy combatant is defined as “an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” *Id.*

³¹⁰ *Id.* at 10-11. See *Bensayah v. Obama*, 610 F.3d 718 (2010).

the modified definition offered by the Obama administration requiring “substantial support.”³¹¹ Regarding the boundaries of who qualifies under the definition, the Circuit observed that “wherever the outer bounds may lie” they include individuals who engage in “traditional food operations essential to a fighting force and the carrying of arms.” They concluded that “Al-Bihani was part of and supported a group—prior to and after September 11— that was affiliated with al-Qaeda and Taliban forces and engaged in hostilities against a U.S. Coalition partner. Al-Bihani, therefore, falls squarely within the scope of the President’s statutory detention powers.”³¹²

Al-Bihani next argued that law of war detention authority exists only until the end of hostilities and in this instance, he asserted relevant hostilities had ended. The Circuit cogently rejected this argument. If the election of President Karzai or the installation of a post-Taliban regime required the release of detainees, then

. . . each successful campaign of a long war [would be] but a Pyrrhic prelude to defeat. The initial success of the United States and its Coalition partners in ousting the Taliban from the seat of government and establishing a young democracy would trigger an obligation to release Taliban fighters captured in earlier clashes. Thus, the victors would be commanded to constantly refresh the ranks of the fledgling democracy’s most likely saboteurs.³¹³

Further, the D.C. Circuit concluded that the determination of when hostilities have ceased is fundamentally a political decision, at least absent a congressional declaration terminating the war.³¹⁴ The recent Congressional affirmation of the AUMF’s detention authority confirms Congress’s view that hostilities against al-Qaeda remain ongoing and constitute a persistent, global military threat.

Regarding procedural safeguards, Al Bihani raised a host of issues ranging from the standard of proof to the requirement for a separate evidentiary hearing.³¹⁵

³¹¹ Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010). See also Hatim v. Gates, 632 F.3d 720 (D.C. Cir. 2011) (affirming those who purposefully and materially support al-Qaeda may be detained and finding there is no requirement to prove membership in the Al Qaida command structure).

³¹² Al Bihani at 873. Note, the court had “no occasion here to explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard. We merely recognize that both prongs are valid criteria that are independently sufficient to satisfy the standard.” *Id.* at 874. The Circuit also reviewed the 2009 Military Commissions Act definition of unprivileged enemy belligerents, i.e., those who “purposefully and materially supported hostilities against the United States or its coalition partners.” The Circuit concluded the category of persons covered by the government’s detention authority logically can be no narrower than that covered by its military commission authority. *Id.* at 872.

³¹³ *Id.* at 874.

³¹⁴ *Id.* at 874.

³¹⁵ Al-Bihani at 875-76. Al-Bihani asserted the district court erred by: (1) adopting a preponderance of the evidence standard of proof; (2) shifting the burden to him to prove the unlawfulness of his detention; (3) neglecting to hold a separate evidentiary hearing; (4) admitting hearsay evidence;

The D.C. Circuit found that habeas review for military detainees “need not match the procedures developed by Congress and the courts specifically for habeas challenges to criminal convictions.”³¹⁶ Relying on *Boumediene*, the court instead embraced innovative, pragmatic procedures that would not unduly burden the military.³¹⁷ Further, the D.C. Circuit rejected the contention that proof beyond a reasonable doubt or proof by clear and convincing evidence was necessary to hold a detainee. The court expressly declined to articulate the minimum proof standard required, but found the preponderance standard constitutionally permissible.³¹⁸

Other cases demonstrate the D.C. Circuit’s pragmatic approach. In *Bensayah v. Obama*, the court recognized the amorphous nature of the al-Qaeda threat and rejected formalistic criteria for determining whether a person is part of al-Qaeda.³¹⁹ In *Barhoumi v. Obama*, the court upheld Barhoumi’s detention as a member of an “associated force” based on diary records singling him out as a member of Zubaydah’s associated militia organization.³²⁰ In *Awad v. Obama*, the D.C. Circuit reviewed the district court’s factual finding for “clear error,” weighing each piece of evidence, not in isolation, but “taken as a whole.”³²¹ In reversing the lower court’s ruling in *Al-Adahi v. Obama*, the court found the district judge failed to take into account the “conditional probability” of the evidence,³²² leading the lower court to reject evidence erroneously because each particular fact did not by itself prove the ultimate fact that Al-Adahi was part of al-Qaeda. The mistake of requiring each

(5) presuming the accuracy of the government’s evidence; (6) requiring him to explain why his discovery request would not unduly burden the government; and (7) denying all but one of his discovery requests. *Id.*

³¹⁶ *Id.* at 876.

³¹⁷ *Id.* “Requiring highly protective procedures at the tail end of the detention process for detainees like Al-Bihani would have systemic effects on the military’s entire approach to war. From the moment a shot is fired, to battlefield capture, up to a detainee’s day in court, military operations would be compromised as the government strove to satisfy evidentiary standards in anticipation of habeas litigation.” *Id.*

³¹⁸ *Id.* at 878. Later in *Al-Adahi*, the Circuit expressed some frustration that the preponderance baseline had not been more rigorously tested, even suggesting some doubt “that the Suspension Clause requires use of the preponderance standard. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

³¹⁹ *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010). The Government argues it is authorized by the AUMF to detain Bensayah solely on the ground he was functionally a member or “part of al Qaeda. The evidence upon which the district court relied in concluding Bensayah “supported” al Qaeda is insufficient, however, to show he was part of that organization. Accordingly, we reverse the judgment of the district court and remand the case for the district court to hear such evidence as the parties may submit and to decide in the first instance whether Bensayah was functionally part of al Qaeda. The Circuit preferred a case-by-case “functional rather than formal approach” and remanded the case for further review after finding the evidence “insufficiently corroborative” to determine whether Bensayah was part of Al-Qaeda. *Id.* at 727.

³²⁰ *Barhoumi v. Obama*, 609 F.3d 416, 426 (D.C. Cir. 2010). See also *Hamly v. Obama*, 616 F.Supp.2d 63, 74-75 (D.C. Dist Ct. 2009).

³²¹ *Awad v. Obama*, 608 F.3d 1, 6-7 (D.C. Cir. 2010). See also *Barhoumi v. Obama*, 609 F.3d 416, 423 (D.C. Cir. 2010). Legal questions, including the ultimate determination of whether the facts found by the district court establish that a person was “part of” al-Qaida, are reviewed de novo. *Id.*

³²² *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

piece of evidence to bear independent weight constituted a “fundamental mistake that infected the lower court’s entire analysis.”³²³

The D.C. Circuit addressed discovery issues in *Al Odah v. U.S.*³²⁴ For habeas purposes, the touchstone for discovery it developed was enabling a “meaningful review”; thus, access to classified material by detainees’ counsel must be necessary to facilitate such a review.³²⁵ A naked declaration or mere certification by the government regarding sensitive information will not suffice.³²⁶ The D.C. Circuit supported a presumption favoring release of most classified information to detainees’ counsel and rejected the contention that submission of classified evidence to the court for *in camera*, *ex parte* review, in itself, resolved the discovery burden.³²⁷ The court suggested that its opinion in *Bismullah v. Gates* requiring the district court’s *ex parte* review of “highly sensitive information”³²⁸ did not end the inquiry regarding release to detainees’ counsel. In *Al Odah*, the court concluded that habeas court should proceed further by determining whether “classified information is material and counsel’s access to it is necessary to facilitate meaningful review.”³²⁹ If no alternatives would afford a detaining the meaningful review required by *Boumediene*, even sensitive classified information may need to be released to counsel.

Much has been written about hearsay in relation to war crimes trials and military commissions. Post-*Boumediene*, the D.C. Circuit determined hearsay evidence is not automatically invalid, nor is a traditional Confrontation Clause objection sustainable because *habeas reviews are not criminal prosecutions*.³³⁰ The court explained, “hearsay is always admissible.” The issue is what “probative weight to ascribe” to the evidence and whether there is “sufficient indicia of reliability.”³³¹ The D.C. Circuit applied similar logic in *Parhat v. Gates*, a case involving a Chinese citizen of Uighur heritage. There it required evaluation of the raw evidence, which must be sufficiently reliable and probative to demonstrate the truth of the asserted proposition.³³²

In summary, the D.C. Circuit has carved out a tailored, pragmatic approach in these detainee cases. Habeas proceedings for law of war detainees are not criminal

³²³ *Id.* at 1105-06. See also *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010).

³²⁴ *Al Odah v. U.S.*, 559 F.3d 539, 544 (D.C. Cir. 2009). The parties agreed the court should apply, by analogy, procedures used in criminal proceedings and in appellate reviews under the DTA. Compelling disclosure of classified material therefore required the district court to determine the information “is both relevant and material—in the sense that it is at least helpful to the petitioner’s habeas case.” *Id.*

³²⁵ *Id.*

³²⁶ *Id.*, citing *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008). *Bismullah v. Gates* 501 F.3d 178 (D.C. Cir. 2007).

³²⁷ *Al Odah* at 547.

³²⁸ *Id.*

³²⁹ *Id.* at 547-48.

³³⁰ *Al-Bihani* at 879 (emphasis added).

³³¹ *Id.* See also *Awad* at 7.

³³² *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

trials. Each habeas-eligible detainee enjoys the benefit of an independent judicial review, but the parameters differ categorically from a criminal trial. The definition of who may be detained is not dependent on formalistic criteria. Proof beyond a reasonable doubt is not required. There is no jury. Confrontation is different—hearsay, for example, is admissible when reliable. The process of weighing evidence must account for the exigencies of military operations. Through this evolving process, some detainees have been released. Others have been continued in law of war detention consistent with the AUMF. Ardent proponents of habeas may find this promised panacea somewhat unsatisfying. Those who feared judicial meddling in military affairs likely would agree habeas has not been the disaster some feared. Thus far, the D.C. Circuit has taken its duty seriously and made some tough calls designed to balance the inevitable tension between liberty and security. The next section briefly considers application of a purely civilian criminal law framework in law of war detainee cases.

D. Civilian Framework

This paper does not argue against the use of federal or state criminal trials in appropriate terrorist cases, but instead argues for an all-in approach that preserves the legal viability of military detention, military interrogation and commission trials in cases involving al-Qaeda and associated forces. In that spirit, it is appropriate to highlight key limitations with an entirely civilian-based approach. The first, and perhaps most obvious, point is that civilian criminals are arrested and typically read their *Miranda* rights.³³³ Subject to limited exceptions, statements adduced by law enforcement absent a *Miranda* warning are suppressed. By contrast, enemy forces are detained under the law of war, and the *Miranda* requirement simply doesn't apply. It may elicit discomfort in some, but when the military captures someone, part and parcel of capture is interrogating the individual for purposes of gathering intelligence about such things as enemy positions and planned future attacks. So long as the interrogation methods meet humane treatment standards, the act of questioning a suspected member of a belligerent force is both expected and appropriate.³³⁴ A civilian criminal suspect may invoke their *Miranda* rights and request an attorney.

Some have argued that *Miranda* need not hamper civilian law enforcement in counter-terrorism cases, and in recent statements the Justice Department has advocated a more expansive use of the so-called public safety exception in counter-terrorism cases.³³⁵ In *New York v. Quarles*, a divided Supreme Court allowed

³³³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). *Dickerson v. United States*, 530 U.S. 428, 435-437, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000)(stating a Constitutional basis for the *Miranda* warning).

³³⁴ See *supra* Part IV.A. See also Army Field Manual 2-22.3 (FM 34-52), Human Intelligence Collector Operations (Sep. 6, 2006) (providing detailed interrogation procedures).

³³⁵ Malvina Halberstam, *Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists*, 2 Univ. of Den. Crim. L.J. 1, 11 (2012), *citing*, FBI Memorandum, *Terrorists in the United States* (Oct. 21, 2010), *available at*, <http://www.nytimes.com/2011/03/25/us/25miranda-text>. This article contains a detailed discussion of *Miranda*, the public safety exception, and terrorist cases.

admission of a suspect's pre-*Mirandized* statement in response to a police officer's question about the whereabouts of a gun he had discarded following commission of a rape.³³⁶ The police were in the act of apprehending the suspect and "were confronted with the immediate necessity of ascertaining the whereabouts" of the discarded gun in order to prevent its use by any potential accomplice or its inadvertent discovery by a member of the public.³³⁷ In recognizing a narrow exception to *Miranda*, five justices concluded, "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."³³⁸ While it may be possible to shoehorn more expansive questioning of terrorist criminal suspects under the public interest exception, *Quarles* is quite narrowly conceived and arguably is tied to limited police questioning in the field. Further, even if it is possible to overcome the *Miranda* issue, there is the challenge of presentment.

At common law, an arresting officer was required to bring his prisoner before a magistrate as soon as he reasonably could.³³⁹ This 'presentment' requirement is designed to inform a suspect about the charges against him and to prevent prolonged detention and questioning without access to the court. As with *Miranda*, an arrested person's statement is "inadmissible if given after an unreasonable delay in bringing him before a judge."³⁴⁰ This rule is presently encompassed in Federal Rule of Criminal Procedure 5(a) stating: "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge . . ."³⁴¹ The Government challenged the presentment requirement in *Corley v. United States*, essentially arguing that 18 U.S.C. § 3501 (governing the admissibility of confessions) negated the prior rule that confessional statement must be suppressed where the statement is obtained in violation of established presentment requirements. However, the Supreme Court found § 3501 merely modified the prior rule without supplanting it. Thus,

[A] district court with a suppression claim must find whether the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]') . . . If the confession occurred before presentment and beyond six hours [of arrest], however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed.³⁴²

³³⁶ *New York v. Quarles*, 467 U.S. 649 (1984).

³³⁷ *Id.* at 657.

³³⁸ *Id.*

³³⁹ *Corley v. United States*, 556 U.S. 303, 129 S. Ct. 1558 (2009). See 18 U.S.C. § 3501(a)-(c).

³⁴⁰ *Id.* at 1562. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 61-62, 111 S.Ct. 1661, 114 L.Ed.2d. 49 (1991) (Scalia dissenting); *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 86 L.Ed. 819 (1943); *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957).

³⁴¹ Fed. R. Crim P. 5(a).

³⁴² *Corley*, *supra* note 337, at 1571.

As with *Miranda*, standard presentment requirements are ill suited to the detention of warriors of an enemy force. It simply makes no sense to capture a member of an enemy force on the one hand, and then negate all normal military modes of detention, interrogation and intelligence collection by *mirandizing* the detainee and presenting them to the nearest magistrate within a six hour period. One concerning aspect of the present debate is the tendency to conflate the military and civilian systems. They serve fundamentally distinct roles, and each has its proper place. The Supreme Court recognized this reality as far back as *Quirin* and reaffirmed it in *Hamdi*. Trying to force feed military operatives of an enemy force through a purely civilian criminal justice process arguably could weaken that system as it unnecessarily contorts itself to adjust to the exigencies of military conflict. The better approach, and the one thus far preferred by Congress, two Presidents, and the Supreme Court, is to preserve and utilize both military and civilian systems.

V. AN EMERGING CONSENSUS?

In popular government results worth having can be achieved only by [people] who combine worthy ideals with practical good sense.³⁴³

--Theodore Roosevelt

The uninitiated might perceive law of war detention in the context the current conflict as a muddled legal mess. Those who have been enmeshed in the debate for over a decade, quite frankly, might agree with such a characterization. After all, multiple close splits in the Supreme Court, two jurisdiction-stripping statutes, a threatened Presidential veto, civil liberties groups up in arms, and even the word ‘Guantanamo’ suggest discord and confusion have been the order of the day. This ongoing debate over military detention, however, is critical to the body politic. It strikes at the very heart of the balance between liberty and security in a free society, and the natural tension between those two honorable principles quite naturally precipitated a robust debate over the proper role of wartime detention in a conflict against an amorphous, non-state actor with worldwide reach and the demonstrated capacity to attack the U.S. at home. Yet for all the divergence of views, often loudly and eloquently expressed, there appears to be a growing consensus among the three co-equal branches of government. It may be the case that worthy ideals and practical good sense have finally led the nation toward a relatively cohesive wartime detention framework.

This framework centers on seven core principles. First, the United States is in an armed conflict against al-Qaeda and its associated forces and may defend itself consistent with the inherent right of self-defense. Second, the United States must follow established law of armed conflict principles, including applicable portions of

³⁴³ Theodore Roosevelt, Address at Harvard Union, Feb. 23, 1907 (appears in marble at the Theodore Roosevelt Island park).

the Geneva Conventions and customary international law. Third, the AUMF is the keystone of domestic legal authority for ongoing military operations, and resident within the authority to use all necessary and appropriate force, the Government may detain enemy personnel consistent with the law of war. The NDAA 2012 makes detention authority regarding specific, carefully defined covered persons explicit in the law. Fourth, the threat posed by al-Qaeda is not limited by geography, nor is the legal authority underpinning military operations, including targeting and detention. Fifth, a citizen or legal resident, no less than an alien, may be part of or supporting hostile forces, and hence may be subject to preventive detention. Sixth, long-term detention in an enduring conflict of unknown duration requires appropriate processes to review status determinations and to assess the risk of releasing detainees. In the face of increasingly lengthy periods of executive detention, the Supreme Court has assertively carved out a role for the courts in protecting individuals against arbitrary detention, but this approach is bounded by pragmatism and a recognition that the U.S. is in the midst of a military conflict. Seventh, both civilian and military counterterrorism professionals have a vital role to play in this fight. This means using all the tools of national power—the Federal Bureau of Investigation, Justice Department attorneys, Article III courts, the Central Intelligence Agency, Homeland Security, military intelligence officers, military judges, military commissions, as well as a vigilant citizenry.

Recent statements by Administration officials reflect these principles. This begins with a core recognition, shared by Congress, the President and the judiciary that the United States is in an armed conflict with al-Qaeda, the Taliban and associated forces. As the State Department’s Legal Advisor Harold Koh emphasized in his March 2010 speech to the Annual Meeting of the American Society of International Law, as a matter of international law, the United States has acted in accordance with the inherent right of self-defense within the United Nations Charter.³⁴⁴ This right, moreover, was explicitly recognized by the U.N. Security Council in its first post-9/11 U.N. Security Council Resolution.³⁴⁵ As Mr. Koh also pointed out, as a matter of domestic law, Congress, through the AUMF, expressly authorized the use of all necessary and appropriate force to counter al-Qaeda. This link to legislative authority is critically important because “when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”³⁴⁶ Further, the Supreme Court as early as *Hamdi* viewed the AUMF as invoking law of war authority, and as Mr. Koh noted, the habeas cases endorse the “overall proposition that individuals who are part of an organized armed group like al-Qaeda can be

³⁴⁴ Address by Harold Koh, Annual Meeting of the American Society of International Law (Mar. 25, 2010), *available at*, <http://www.state.gov/s/l/releases/remarks/139119.htm>.

³⁴⁵ UN Security Council, Security Council Resolution 1368 (2001) Threats to international peace and security caused by terrorist acts, Sep. 12 2001, S/RES/1368 (2001), *available at*, <http://www.unhcr.org/refworld/docid/3c4e94557.html> (last accessed Mar. 16, 2012).

³⁴⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).

subject to law of war detention for the duration of the current conflict.”³⁴⁷ This evidences a strong meeting of the minds that the grave threat posed by al-Qaeda and its associated forces wholly justified the Government’s recourse to the right of self-defense and law of war authorities, and a resounding rejection of a purely domestic law enforcement model.

In his February 2012 speech at Yale Law School, Department of Defense General Counsel Jeh Johnson offered cogent insight into counterterrorism principles about “which the top national security lawyers in [the] Administration broadly agree.”³⁴⁸ First, the AUMF is the “bedrock of the military’s domestic legal authority.” Second, the statutory authorization in the AUMF is “not open-ended” in that the definition of those against whom force may be authorized is specifically tailored to target al-Qaeda, Taliban or associated forces directly involved in the 9/11 attacks or persons who were part of, or substantially supported, those forces that are engaging in hostilities against the United States or its coalition partners. As Mr. Johnson then explained, Congress, the Executive and Judicial branches have all joined in embracing this interpretation.³⁴⁹ Additionally, he noted that the AUMF is without geographic limitation to Afghanistan, a legal fact that is crucial given that “over the last 10 years al-Qaeda has not only become more decentralized, [but has also] migrated away from Afghanistan to other parts of the world.”³⁵⁰ Finally, he stated that where a U.S. citizen becomes a belligerent fighting against the United States, under *Quirin* and *Hamdi* that individual, like their non-citizen counterpart, becomes a valid military objective.³⁵¹ Though Jeh Johnson was referring to the justification for targeted killing,³⁵² as a legal matter, the justification for targeting a U.S. citizen enemy belligerent equally justifies his or her preventive detention under the law of war.

Perhaps the most fractious lingering issue regards the capture and detention of an al-Qaeda operative within the United States who happens to be a United States citizen. The hypothetical rail attack scenario presented at the outset of the article was specifically chosen to highlight this issue. In the scenario, the danger of a military attack on chemical stores near an urban area presents a profound security threat to the country. In a post-9/11 world, it would be naïve in the extreme to believe al-Qaeda will not attempt to recruit Americans, and if any person, citizen or otherwise, joins forces with al-Qaeda, circumstances may arise that require a preventive detention of the al-Qaeda operative. Congress foresaw this possibility during debates of the NDAA and appropriately rejected efforts to limit the availability of detention authority under the law. Recent legislative initiatives continue to challenge this

³⁴⁷ Address by Harold Koh *supra* note 42.

³⁴⁸ Address by Jeh Johnson, Dean’s Lecture at Yale Law School (Feb. 22, 2012), *available at*, <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

point. Others potentially offer some promise of clarification, such as Congressman Gohmert's bill adding a Congressional notification requirement when an American citizen is detained under the AUMF and including an assurance of the ability to raise a habeas petition within 30 days of military detention.³⁵³ But the broader question is whether citizen detention is the proverbial boogeyman in the closet that will take away Americans' civil liberties? Hardly.

Consider the most obvious fact that no American citizen is currently in preventive detention under the AUMF. In the entire history of this conflict only a handful of Americans have been detained and only two citizens have been picked-up within the United States—al Marri and Padilla. Both were held during a period of acknowledged ongoing hostilities and both were eventually prosecuted in federal court. The 2012 NDAA makes detention authority explicit in the law, but as the drafters repeatedly made clear, the NDAA does not expand detention authority over U.S. citizens that did not already exist under the AUMF. Finally, and it would not be necessary to argue this point but for the rhetorical hyperbole from some quarters, detention under the AUMF is not the same as Japanese internment during World War II. At its core, that system was predicated on arbitrary ethnic distinctions and broad geographic restrictions that displaced thousands of concededly loyal citizens. Preventive detention under the NDAA and AUMF applies only to a narrow category of al-Qaeda, Taliban and associated forces, or persons who were part of or substantially supported those forces engaged in hostilities against the U.S. or its coalition partners. As in *Quirin* and *In re Territo*, and *Hamdi* for that matter, the focus here is on the enemy, and in very rare instances enemy personnel happen to carry a U.S. passport.

In his March 5, 2012 speech at Northwestern University School of Law School, Attorney General Holder discussed how al-Qaeda “has demonstrated the ability to attack with little or no notice.”³⁵⁴ Beyond detention of a U.S. citizen, he cogently argued it is consistent with domestic and international law to target a U.S. citizen al-Qaeda terrorist under specific, carefully delimited circumstances.³⁵⁵ The decision whether to capture or target is a “fact-specific, and potentially time sensitive, question,”³⁵⁶ but at the end of the day, as articulated by the Attorney General, a U.S. citizen may under extraordinary circumstances be targeted as a military objective consistent with the Constitution and Due Process under the law. As a matter of thematic consistency, if not simple logic, it would make no sense to accept the legal validity of targeting a U.S. citizen member of an organized armed group for a missile

³⁵³ House Armed S. Comm., 103rd Cong., Amendment to the Rules Committee Print on H.R. 4310, May 16, 2012, *available at*, <http://www.rules.house.gov/amendments/GOH830516122031323132.pdf>. But see Pete Kasperowicz and Jeremy Herb, *Lawmakers clash over rules for detaining terrorism suspects*, The Hill, May 18, 2012, *available at*, <http://thehill.com/blogs/floor-action/house/228255-members-with-dod-detainee-amendments-clash-in-midnight-debate>.

³⁵⁴ Address by Attorney General Holder, Northwest University School of Law (Mar. 5, 2012), *available at*, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-123051.html>.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

strike overseas, the legal validity of shooting that person in a ground engagement, and the legal validity of militarily detaining the same person if captured overseas, and yet reject the validity of their preventive detention when the same al-Qaeda operative steps foot on U.S. soil. This would create an oddly perverse incentive that would reward a terrorist operative by eliminating the possibility of preventive detention at the moment he potentially posed the greatest threat to the country. One cannot predict how a future terrorist attack will unfold, nor can one predict whether sufficient information will be available to support a criminal indictment. While the circumstances under which a U.S. citizen would be held in preventive detention arguably are incredibly rare, it would be a grievous mistake to foreclose this possibility entirely.

More generally, the use of a military preventive detention model or military commissions in no way rejects any of the range of traditional law enforcement tools available to the government. Counterterrorism officials throughout the government have masterfully orchestrated a number of important arrests and criminal prosecutions. While the NDAA nudges the Executive branch in the direction of military detention and military commissions for foreign al-Qaeda terrorists, the model preserves the ability of the President to adjust according to specific facts in each case. In sum, the NDAA provisions constitute an “all-in” approach that seeks to preserve both military and civilian counterterrorism efforts. As this conflict morphs and changes over time, it remains critical that the Government maintain the availability of military options and preventive detention where necessary, but it is equally important to “reject the false idea” that one must choose between civilian and military options. As Attorney General Holder emphasized, “[i]f we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the Nation and its people.”³⁵⁷

Once it is determined that a person is subject to detention under the AUMF/NDAA 2012, there is the matter of what happens next. In traditional military conflicts, military detainees and prisoners of war are held for the duration of relevant hostilities, and generally speaking there are no habeas proceedings, reviews by military judges, etc. The Guantanamo litigation, however, has resulted in a fundamentally different approach; one uniquely tailored to this conflict and one that is still evolving. In a certain sense, the “emerging consensus” regarding due process in preventive detention cases has very much been driven by fractured Supreme Court opinions and further shaped by the D.C. Circuit and District Courts habeas decisions. Whether one agrees or disagrees with *Boumediene* or would have preferred a more restrained approach, ala *Eisentrager*, the state of the law is all Guantanamo detainees may access a U.S. Federal Court via habeas proceeding before a federal judge. Procedurally, evidentiary issues, standards of proof, discovery, etc., have very much been shaped by pragmatic considerations designed to balance liberty and security considerations.

³⁵⁷ Address by Attorney General Holder *supra* note 352.

The largest group of U.S. detainees held under the AUMF, those in Afghanistan (and formerly in Iraq), do not have the ability to challenge their detention via habeas proceeding in federal court. *Boumediene* held the questions of extraterritoriality “turn on objective factors and practical concerns, not formalism.”³⁵⁸ In *Al Maqaleh v. Gates*, the D.C. Circuit reviewed cases brought by detainees held at Bagram, Afghanistan.³⁵⁹ It applied the “common thread” factors from *Boumediene*, i.e., citizenship and status of the detainee and the adequacy of the status determination process, the nature of where the apprehension and detention took place, and the practical obstacles inherent in resolving the detainees’ entitlement to the writ.³⁶⁰ The Circuit Court noted that the executive procedures used at Bagram afforded even less protection to the rights of detainees in the determination of status than was the case with the Combatant Status Review Tribunals in *Boumediene*.³⁶¹ It ultimately determined, however, that the United States lacked de facto sovereignty over Bagram, and significantly it has “all of the attributes of a facility exposed to the vagaries of war are present at Bagram.”³⁶² Under such circumstances, the Circuit declined to expand the reach of habeas.

In trying to balance the myriad of liberty and security considerations at play in long-term preventive detention, Congress weighed in with a requirement under Section 1024 that military judges review long-term detention cases. Based on recent developments and the anticipated transfer of detention operations to Afghan authorities, the need for these reviews may be limited in terms of numbers in Afghanistan. The existence of the 1024 judge review/access to counsel process, nevertheless, offers a mechanism to provide enhanced due process to detainees who are held under circumstances that render their cases ill-suited to habeas review. This is a valuable tool in the AUMF context, but one should caution that Congress is not creating new due process review standards that will necessarily be applicable or appropriate in future armed conflicts.

Justice Kennedy’s comments about “practical considerations and exigent circumstances” at the tail end of his *Boumediene* opinion offer some interesting general process benchmarks concerning detention and perhaps augur future consensus.³⁶³ Justice Kennedy indicates it would be an “impractical and unprecedented extension of judicial power” to extend habeas to foreign citizens the moment they are detained abroad.³⁶⁴ He counsels in favor of “proper deference” to procedures for screening and initial detention under lawful and proper conditions of confinement. He suggests

³⁵⁸ *Boumediene* at 34; see discussion *supra* Part IV.C.

³⁵⁹ *Al Maqaleh v. Gates*, 605 F.3d 84, 93 (D.C. Cir. 2010).

³⁶⁰ *Id.* at 94.

³⁶¹ *Id.* at 96.

³⁶² *Id.* at 97 (comparing the circumstances with post-war Germany and *Eisentrager*). The court also noted the third factor supported dismissal of the habeas petition because the U.S. holds detainees pursuant to a cooperative arrangement with Afghanistan on territory over which Afghanistan is sovereign. *Id.* at 99.

³⁶³ *Boumediene* at 793.

³⁶⁴ *Id.*

domestic exigencies might require the adoption of sensible rules for staying habeas proceedings.³⁶⁵ He cautions that habeas courts should not intervene the moment an enemy belligerent steps into a territory where the writ runs, offering the Executive “a reasonable period of time to determine a detainees status.”³⁶⁶ Justice Kennedy warns that habeas courts cannot “disregard the dangers the detention in these cases was intended to prevent.”³⁶⁷ Nevertheless, practical considerations cannot excuse interminable delay, and it appears quite clear that the Court has lost patience: “In some of these cases, six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands . . . the costs of delay can no longer be borne by those who are held in custody.”³⁶⁸

Reading the tea leaves of judicial dicta may be fraught with difficulty, but one certainly discerns from these pragmatic guidelines a view that the Executive should be accorded reasonable deference in matters of preventive detention. This deference is strongest during the early phases of detention, when facts are unclear, when the risks of release are acute, and the dangers of substituting a judicial judgment for that of the military or the Commander-in-Chief is greatest. If the Government learns that al-Qaeda operatives have invaded the U.S. bent on detonating explosives near chemical-laden rail cars, the overwhelming national effort must be directed toward destroying or detaining those forces intent on harming the country. This is not the time for *Miranda* and presentment but for concerted, decisive action bounded by the law of war. Every instrument of national power must be brought to bear, both military and civilian. If it makes the most sense for the FBI to detain someone, they should do so. If the military has the most information and can most quickly and effectively detain and interrogate, then consistent with military regulations, they should do so.

The process of understanding the depth and breadth of the danger, connecting the web of those involved, determining the possibility of future attacks takes time. It remains essential to afford the Commander-in-Chief adequate time and decision space to maximize the opportunity to defeat the threat and prevent future attacks. That is why the NDAA imposes no temporal limits, why it avoids geographic restrictions and why it grants no special protections to citizens who take up arms with the enemy. As *Hamdan* and *Boumediene* make clear, there are limits to the Court’s deference. The more time that passes, the greater the consequences of an erroneous deprivation of liberty and the greater the risk of not affording someone a reasonable opportunity to challenge the basis for their detention. If there is consensus on the matter of process in preventive detention, it appears to mean reasonable deference followed by increased scrutiny with the passage of time. It means judicial review bounded by pragmatism, and it means balancing very real security concerns against the need to protect individuals from arbitrary deprivation of liberty.

³⁶⁵ *Id.* at 793-94.

³⁶⁶ *Id.* at 795.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

VI. CONCLUSION

This paper began by offering a scenario in which terrorists will attack the United States using fertilizer-based explosives against rail lines. The NDAA of 2012 now makes explicit in the law that were the government to thwart such a plot, the terrorist attackers could be held in military detention pursuant to the AUMF. This article traced the contours of the new NDAA detention provisions. Section 1021 defines a narrow class of covered persons and reinforces the detention authority under the AUMF. Section 1022 requires specified foreign al-Qaeda detainees to be transferred to military custody, but allows the Executive wide latitude to fashion procedures and appropriate waivers. Section 1024 affords detainees held in long-term military detention under the AUMF the opportunity to have their status reviewed by a military judge. The paper then considered the legislative debate, specific proposed amendments, public views on the legislation, and the President's signing statement. It next focused on the major Supreme Court cases pertaining to preventive detention, and included a review of the recent habeas cases and a discussion about the limitations of a purely civilian approach. The paper concludes with a narrative that suggests that there is an emerging consensus among the three branches of government. This section draws on comments by current Administration officials and various court opinions to suggest basic shared principles underpin this consensus. The robust and healthy debate over detention reflects the best traditions of this country. It suggests that officials may disagree sharply based on deeply held convictions about how best to balance the competing demands of liberty and security, but at the end of the day, they will embrace pragmatic solutions designed to protect the nation.

WATERBOARDING:
ISSUES AND LESSONS FOR JUDGE ADVOCATES

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***The views expressed in this article are those of the authors and do not necessarily reflect the official policy or position of the Air Force, the Department of Defense, or the U.S. Government.

I. INTRODUCTION

On September 11, 2001, 19 terrorists hijacked four civilian airliners and used them in a coordinated attack against the United States. The Twin Towers were destroyed in New York, the Pentagon was severely damaged, and almost 3,000 people were killed. Soon after, on September 14th, Congress authorized the use of military force to combat the terrorists involved in planning and executing the attack and in October 2001, Operation ENDURING FREEDOM began in Afghanistan.¹ In the 11 years since 2001, the United States has aggressively fought against international terrorism, which has resulted in the capture, detention, and interrogation of tens of thousands of suspected terrorists and insurgents.²

In the aftermath of September 11th, there was a steady demand for intelligence to help prevent future attacks.³ Although the United States' various intelligence agencies had vast technological resources, capturing individual terrorists provided a unique opportunity to gain invaluable information not available through other sources. Over time, however, the standard interrogation techniques were found to be ineffective against some of the most hardened terrorists and more aggressive techniques were requested.⁴ In a complicated analysis of the laws that applied, authoritative guidance by the Department of Justice's Office of Legal Counsel (OLC) determined that a broad array of enhanced interrogation techniques were lawful. Among the list of techniques that were analyzed, waterboarding was one of the most controversial.

While waterboarding simulates drowning, the OLC legal reviews carefully parsed out situations where, in the opinion of the attorneys involved, the technique could be lawfully used against terrorist suspects in American custody.⁵ Although the OLC opinions found waterboarding to be lawful, Department of Defense (DoD) officials declined to approve its use by the military.⁶ However, it has been

¹ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The Authorization for the use of Military Force was a joint resolution that passed the House and Senate on September 14, 2001, and was signed into law by the President on September 18, 2001.

² See DEPARTMENT OF THE ARMY INSPECTOR GEN. REP., DETAINEE OPERATIONS INSPECTION 636-640, *in* THE TORTURE PAPERS 630 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (addressing Army detention operations in Iraq and Afghanistan).

³ See AMOS N. GUIORA, CONSTITUTIONAL LIMITS ON COERCIVE INTERROGATION 15 (2008) (pointing out the importance of good intelligence in counterterrorism operations).

⁴ See Letter from Department of Def. Gen. Couns. to Secretary of Def. (Dec 2, 2002), *in* THE TORTURE PAPERS, *supra* note 5, at 236 (recommending approval of a series of enhanced interrogation techniques for use by military interrogators at Guantanamo Bay, Cuba).

⁵ See *Id.*

⁶ See DONALD RUMSFELD, KNOWN AND UNKNOWN 576-586 (2011) (describing how the enhanced interrogation requests were routed, reviewed, and considered for approval). In his book, Secretary Rumsfeld states that, "[w]hen military interrogators at Guantanamo Bay sent up their chain of command a request to use waterboarding in late 2002, I rejected it. To my knowledge, no U.S. military personnel involved in interrogations waterboarded any detainees—not at Guantanamo Bay, or anywhere else in the world." *Id.* at 585.

acknowledged that the Central Intelligence Agency authorized waterboarding of three of the most high-profile detainees held in their custody.⁷

Over time, the OLC legal reviews were declassified and were so widely criticized that some argued the authors should be prosecuted as accomplices to the allegedly torturous acts they approved of.⁸ While no prosecutions resulted, the legal reviews have since been rescinded, governing authorities have been strengthened, and waterboarding is now explicitly prohibited by military regulations.⁹ Yet, the national debate on waterboarding continues, with former presidential candidates vowing to reauthorize the practice if elected and various people opining for, or against, the technique.¹⁰

As addressed in this article, the international and domestic law applicable to detainee treatment is surprisingly complex. Seemingly simple terms like “torture” are somewhat vaguely defined and left to subjective determinations to ascertain whether a given interrogation technique is lawful or not. Although the combination of publicly available Executive Orders and military regulations currently prohibits the United States military and civilian personnel from using the waterboarding technique, it is the position of this article that the practice is also unlawful under both domestic and international law.¹¹

This article explores waterboarding from the viewpoint of a uniformed military attorney, a judge advocate (JAG). It will address the procedure’s history, modern usage, relevant international and domestic law, and will provide advice on

⁷ See STAFF OF S. COMM. ON ARMED SERV., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY XV-XVII (Comm. Print 2008) (discussing the OLC legal advice on enhanced interrogation techniques, torture, and waterboarding). See also CENT. INTELLIGENCE AGENCY OFF. OF THE INSPECTOR GEN., REPORT ON COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES 3-4, 90-91 (Sept. 2001 – Oct. 2003) [hereinafter CIA IG REPORT], http://media.luxmedia.com/aclu/IG_Report.pdf. (noting that Abu Zubaydah was waterboarded at least 82 times, Al-Nashiri was waterboarded twice, and Khalid Shaykh Muhammad was waterboarded 183 times in one month).

⁸ See generally Marjorie Cohn, *Advising Clients to Commit War Crimes with Impunity: An Unethical Practice*, 10 SEATTLE J. FOR SOC. JUST. 249, 267-273 (2011); Daniel Kanstroom, *On “Waterboarding”: Legal Interpretation and the Continuing Struggle for Human Rights*, 32 B.C. INT’L & COMP. L. REV. 203, 207 (2009) (describing the OLC opinions as disgraceful).

⁹ See Cohn, *supra* note 11, at 266; Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2011); Exec. Order No. 13491, 3 C.F.R. 13491 (2009); Op. Off. Legal Counsel, Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (2009), 2009 WL 2810456 (O.L.C.); and Army Field Manual 2-22.3, Human Intelligence Collector Operations, Sept. 2006 (prohibiting waterboarding and other cruel, inhuman, and degrading practices during interrogation operations).

¹⁰ See Editorial, *The Torture Candidates*, N.Y. TIMES, Nov. 15, 2011, at A30 (reporting that three Republican presidential candidates supported waterboarding suspected terrorists, two denounced the practice, and another did not express a clear opinion).

¹¹ All of the resource materials used in this article, and the conclusions drawn by the authors, are derived from information that is publicly available and unclassified. Readers should be mindful that their own analysis of these matters may be impacted by classified military regulations, legal opinions, and executive orders that may, or may not, exist in relation to some future operation or fact scenario.

how to respond should a JAG be placed in a position to advise a commander on detainee treatment standards and interrogation techniques.¹²

*First Vignette*¹³

Captain B. Reynolds is a young JAG, relatively new to the Air Force, and is deployed to a joint command at a Forward Operating Base (FOB) overseas. The deployment has been tough on the entire unit, especially as casualty rates have increased and they've had more frequent memorial services. One of Capt Reynolds' duties is to advise each of the officers appointed to investigate the unit's combat deaths. Although he doesn't go on the patrols, it still troubles Capt Reynolds as he reads about Soldiers getting their arms and legs blown off by IEDs. Sometimes the other Soldiers on patrol even have to climb nearby trees to collect the different body parts blown off of their dead comrades.

Over time, Capt Reynolds begins to have concerns about his commander, Colonel F. Bowdin, who is becoming frantic whenever one of the unit's convoys is hit by an IED. COL Bowdin takes every casualty very hard and he is obsessed with how the significant activity (SIGACT) reports are going to be received at higher headquarters. During the morning battle update briefs, COL Bowdin often lays into the J-2 human intelligence (HUMINT) guys and tells them they need to do a better job with the tactical interrogations. He says that they need a game changer and must get actionable intelligence from the detainees in the temporary holding area before they are transferred to the Theater Internment Facility (TIF).

II. HISTORICAL PERSPECTIVE

Throughout history, different nations have used force during interrogations to induce cooperation, obtain information, and to secure confessions.¹⁴ Some ancient

¹² Even though Department of Defense Directive 2310.01E, *The Department of Defense Detainee Program*, established the Army as the Executive Agent for detention operations policy, throughout Operations ENDURING FREEDOM and IRAQI FREEDOM hundreds of Air Force, Navy and Marine Corps JAGs practiced detention operations with Task Force 134 in Iraq, Combined Joint Interagency Task Force 435 in Afghanistan, and in other commands throughout the United States Central Command area of responsibility and in other locations.

¹³ The vignettes throughout this article contain scenarios that deployed JAGs may be confronted with. The vignettes are intended to be illustrative only, the characters and details are fictitious, and the names are made up.

¹⁴ See BRIAN INNES, *THE HISTORY OF TORTURE* 8 (1998) (exploring the history of torture, which has been used as an interrogation technique, for punishment, and as a warning to others). See generally

and medieval societies used force quite openly and torture was not uncommon.¹⁵ The methods employed were often macabre and horrific, leading to prolonged suffering and permanent disfigurement, if not death.¹⁶ The creativity of these torturers knew almost no bounds, with thousands of techniques developed like pressing the body with heavy weights, roasting and boiling people alive, flaying the skin, and breaking uncooperative victims on the rack.¹⁷

However, sometimes situations required that no outward signs of mistreatment were visible, so over time interrogation techniques were developed that left little or no obvious signs of abuse.¹⁸ These included practices like beating a subject with objects that left no marks, asphyxiation, and different types of electrocution. Some of the techniques that were developed are still in use today.¹⁹

A. Water-Based Torture

The term waterboarding is of modern origin, but it harkens back to other water-based interrogation techniques of the past like the ducking stool and the “water cure.”²⁰ In many of the procedures, water was used to bring a person to the brink of drowning by holding them under water or by forcing water into their nose and mouth to prevent them from breathing.²¹ Plain water could be used in these procedures and sometimes the water was mixed with salt, hot spices or sewage.²² Of the many different types of water-based tortures, accounts of water torture from the Spanish Inquisition and in other historical situations sound similar to the modern waterboarding technique.²³ A 17th century writer described the process thusly:

The torturer thrown over his [the victim’s] mouth and nostrils a thin cloath, so that he is scarcely able to breathe thro’ them, and in the mean while a small stream of water like a thread, not drop by

DANIEL P. MANNIX, *THE HISTORY OF TORTURE* (2003) (detailing torture methods used throughout the ages).

¹⁵ See INNES, *supra* note 17, at 13 (noting that torture was a legal and recognized feature of many legal codes for over 3,000 years, both in Europe and in Asia).

¹⁶ *Id.*

¹⁷ *Id.* at 61, 85-92.

¹⁸ See DARIUS REJALI, *TORTURE AND DEMOCRACY* 406 (2007) (explaining that democracies too have a long, but largely forgotten, history of using what the author describes as “clean” or “stealth” interrogation techniques).

¹⁹ See INNES, *supra* note 17, at 11, 163 (chronicling torture in the 20th century); and REJALI, *supra* note 21, at 406.

²⁰ See REJALI, *supra* note 21, at 279 & 284 (grouping water torture methods into either a choking or pumping category and discussing the origins of the term “waterboarding”). See also Kanstroom, *supra* note 11, at 204.

²¹ See MICHAEL KERRIGAN, *THE INSTRUMENTS OF TORTURE* 83-87 (2001) (illustrating some of the ways water is used for torture, to include dunking a person in water, forcibly pumping water into a person’s body, and suffocating the person by dousing them with water).

²² REJALI, *supra* note 21, at 287-290.

²³ See KERRIGAN, *supra* note 24, at 83-86.

drop, falls from on high, upon the mouth of the person lying in this miserable condition, and so easily sinks down the thin cloth to the bottom of his throat, so that there is no possibility of breathing, his mouth being stopped with water and his nostrils with the cloth, so that the poor wretch is in the same agony as persons ready to die, and breathing out their last.²⁴

Similar stories of using water to suffocate or drown prisoners can be found in more recent times as well, although the exact techniques differ.²⁵

B. Use in the 20th Century

During World War II, German and Japanese troops infamously subjected prisoners to all manner of abuse, which in some cases also included water torture.²⁶ However, in the war crimes trials after the war some punishment was meted out for those abuses. In one case, in the International Military Tribunals for the Far East, the United States charged a Japanese officer with torturing an American with a method similar to waterboarding.²⁷ That defendant was found guilty of torture, among other crimes, and was sentenced to 15 years imprisonment.²⁸

The American military also has some history with techniques that are reminiscent of waterboarding, dating back at least to the Philippine-American War at the beginning of the 20th century.²⁹ That conflict was scarred by American and

²⁴ *Id.* at 85-86 (quoting an unnamed work by 17th century Dutchman Ernestus Eremundus Frisius).

²⁵ See REJALI, *supra* note 21, at 279. See also INNES, *supra* note 17, at 170-172 (reciting how French troops used water torture methods in Algeria during the 1950s and 60s).

²⁶ See INNES, *supra* note 17, at 163-167 (mentioning that, among other inhuman practices, the Gestapo in Europe, and Japanese troops in the Pacific, used water to torture prisoners).

²⁷ See Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17. See also Judgment of the International Military Tribunal for the Far East, 1 Nov. 1948. The title of Chapter VIII of the judgment was “Conventional War Crimes (Atrocities),” which listed the “water treatment” under the heading of “Torture and Other Inhumane Treatment.” *Id.* at 1058. The judgment said that the water treatment was used frequently by the Japanese, and that after the victim was secured in a prone position that “water was forced through his mouth and nostrils into his lungs and stomach until he lost consciousness. Pressure was then applied, sometimes by jumping upon his abdomen to force the water out. The usual practice was to revive the victim and successively repeat the process.” *Id.*

²⁸ See Pincus, *supra* note 30, at A17.

²⁹ See STUART CREIGHTON MILLER, *BENEVOLENT ASSIMILATION* 207-213 (1982) (describing how the massacre of Army soldiers at Ballangiga led to a virtual scorched earth policy by some American officers in the Philippines, who it was reported burned entire villages to the ground, ordered that no prisoners be taken, and oversaw the application of the water cure on hundreds of prisoners, some of whom died from the technique). Prohibitions on using force during interrogations also has a long history in the American military, with Article 16 of President Lincoln’s General Order 100 stating that, “[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.” See FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* 8 (Government Printing Office, 1898) (originally issued as General Orders No. 100, Adjutant General’s Office, 1863). Article 80 of General Order 100 also states that “[h]onorable

Filipino atrocities alike, with allegations of waterboarding and other mistreatment by American troops creating national news that sparked Congressional hearings and resulted in courts-martial for some of the officers in charge.³⁰ In fact, a 1902 cover of Life magazine showed American soldiers performing what was then known as the water cure on a captured Filipino insurgent.³¹ President Theodore Roosevelt even commented upon the procedure in a private letter when he described the water cure as “an old Filipino method of mild torture.”³²

More recently, in 1968, a picture of the water cure was on the front page of the Washington Post, which again prompted public interest and inquiries.³³ The United States Army conducted an investigation of the mistreatment and later court-martialed the soldier involved.³⁴ However, unlike in the Philippine-American war, World War II, and Vietnam, after the attacks on September 11, 2001, waterboarding was determined to be lawful and was used by the Central Intelligence Agency against a small number of suspected terrorists.³⁵ The waterboarding procedure was described in the OLC legal opinions, which summarized them as follows:

In this procedure, the individual is bound securely to an inclined bench, which is approximately four feet by seven feet. The individual’s feet are generally elevated. A cloth is placed over the forehead and eyes. Water is then applied to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted for 20 to 40 seconds due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual’s blood. This increase in the carbon dioxide level stimulates increased effort to breathe. The effort plus the cloth produces the perception of ‘suffocation and

men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.” *Id.* at 26-27.

³⁰ See MILLER, *supra* note 32, at 196-249. Although the court-martial sentences proved to be quite moderate, at least two Army officers were convicted of waterboarding Filipinos. See Paul Kramer, *The Water Cure*, THE NEW YORKER, Feb. 25, 2008, at 38 (recounting the trial of Captain Edwin Glenn, who was tried for ordering the water cure on prisoners). While Capt Glenn received only a one month suspension and a fifty-dollar fine as punishment, the then Judge Advocate General of the Army, General George B. Davis, expressed outrage at the lenient sentence in a forwarding memorandum to the President. *Id.*

³¹ LIFE MAG., May 22, 1902, illustration on front cover. See also Kramer, *supra* note 33, at 38-43 (providing a detailed account of the use of the water cure in the Philippines).

³² MILLER, *supra* note 32, at 235 (quoting from a letter President Roosevelt wrote to a friend about the water cure).

³³ See *Interrogation*, WASH. POST, Jan 21, 1986, at A1 (describing the picture as “[a] U.S. soldier and a South Vietnamese interpreter hold down a Vietcong suspect during questioning as another interpreter pours water on a towel covering his face. This induces a fleeting sense of suffocation and drowning meant to make him talk.”).

³⁴ See REJALI, *supra* note 21, at 172-173.

³⁵ See *supra* note 10 and accompanying text.

incipient panic,' i.e., the perception of drowning. The individual does not breathe any water into his lungs.³⁶

Now, years after the fact, it is hard to tell how closely the reality of waterboarding matched the carefully worded description in the OLC opinions.³⁷

Second Vignette

The holding area at the FOB is quite small and Capt Reynolds has only walked through it a couple of times. He is busy with hundreds of other taskers and detention ops weren't even brought up during his turnover with the previous JAG he replaced.

However, he does know that the terrorists captured by the unit are staged at the holding area for a few days before being sent to the hard-sided TIF in another part of the country. The unit MPs run the holding area, which is also supported by the medics who look over the detainees when they come in.

The HUMINT interrogators have a small building next to the holding area where they conduct their field interrogations. The building has a cypher lock on it and Capt Reynolds doesn't have the code, so he couldn't even drop in to their spaces if he wanted to. The HUMINT guys are different anyway. They stick to themselves, don't wear any military uniforms, and have never asked for any sort of legal support. Although he isn't an expert in detention ops or interrogations, Capt Reynolds does know that all interrogations have to comply with the Geneva Conventions and some Army manual on interrogations.

III. LAW & REGULATIONS ON THE USE OF FORCE DURING INTERROGATIONS

Radical and violent extremists around the world have targeted American interests for attack and destruction, which gives government authorities a legitimate and pressing need to identify, detain and interrogate those suspected terrorists.³⁸ Stopping this grave threat is a national priority given the possible catastrophic consequences of even one successful terrorist attack.³⁹ Further, in this type of

³⁶ Op. Off. Legal Counsel, Interrogation of al Qaeda Operative 3-4 (2002), 2002 WL 34501675 (O.L.C.).

³⁷ See CIA IG REPORT, *supra* note 10, at 37 (analyzing some of the charges where agents of the Central Intelligence Agency are alleged to have exceeded authorized boundaries in the use of waterboarding).

³⁸ While there is no commonly accepted definition of the term "terrorist" in international law, for the purposes of this article the term is defined as a non-state sponsored unprivileged enemy belligerent engaged in hostilities, or committing a hostile act, against the United States, American citizens, or allied and coalition partner nations.

³⁹ See Nat'l Security Strategy of the U.S., The White House (2010), at 19-25, <http://www.>

conflict, interrogations and the information they can elicit take on greater importance as terrorists can easily blend in with innocent civilians and escape detection until they are ready to strike.⁴⁰

It may be tempting to use any means necessary when fighting against such an enemy, but even in this situation there are standards in place that regulate the conduct of government agents, to include treatment standards applicable to armed conflicts and detention operations. This section addresses detainee treatment standards during interrogations, which can be found in the Geneva Conventions, domestic statutes, military regulations, and in other international law.

A. The Geneva Conventions

Within the four Geneva Conventions, the Third Geneva Convention (GC III) deals with the treatment of Prisoners of War (POWs), and the Fourth Geneva Convention (GC IV) relates to the treatment of civilians in the territory of the fighting who are not combatants and are not taking part in hostilities.⁴¹ Although most of the conventions regulate the uniformed forces of signatory nations engaged in international armed conflict (i.e. a state-on-state conflict), a portion of the conventions, called Common Article 3, applies during non-international armed conflicts too.⁴² As with most domestic and international law, a key factor in analyzing the Geneva Conventions is to understand when, and to whom, the different conventions and provisions apply.

Each of the Geneva Conventions contains the same language in Article 2, which recites when they apply. Essentially, they are applicable during an international armed conflict between nations who are a party to the conventions.⁴³ The scope of the conventions is limited to those parameters, with the exception of Common

whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

⁴⁰ See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 67 (2007) (describing the pressures that government authorities were under to obtain information from suspected terrorists who had been detained).

⁴¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 12, Aug. 12, 1949, 6 U.S.T. 3517, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

⁴² See *Hamdan v. Rumsfeld*, 548 U.S. 557, 562-63 (2006) (holding that Common Article 3 of the Geneva Conventions applies to suspected terrorists held at the United States military base at Guantanamo Bay, Cuba).

⁴³ See Third Geneva Convention, *supra* note 44, at art. 2. In addition to the language in Article 2 concerning which nations are bound by the Geneva Conventions, the POW protections in GC III are status based and are afforded only to individuals who meet the definition of a POW. *Id.* at art. 4. By the terms of GC III's Article 4, POW status is generally given to personnel who have fallen into enemy hands who are: 1) members of the armed forces of a party to the conflict; 2) civilians accompanying the armed forces; 3) local inhabitants who take up arms at the approach of enemy forces; and 4) members of a nation's militia or volunteer corps (as long as they are under responsible command, display a fixed distinctive sign recognizable at a distance, carry their arms openly, and comply with the law of armed conflict). *Id.*

Article 3, referenced above. That article, which also has the same language in all four conventions, includes minimum treatment standards that apply during non-international armed conflict occurring in the territory of one of the signatory states.⁴⁴

Before addressing the minimum standards, it is worth briefly addressing standards applicable in Common Article 2 international armed conflicts. GC III requires that POWs be treated humanely and that they be protected at all times against acts of violence or intimidation.⁴⁵ During interrogations, a prisoner is obliged to only provide his name, rank, date of birth, and serial number.⁴⁶ The convention further specifies that “[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”⁴⁷

GC IV includes similar treatment standards, which for that convention are intended to protect certain civilians called Protected Persons. These Protected Persons are civilians of a signatory state who find themselves in the hands of a party to a conflict or during occupation.⁴⁸ However, an important caveat in GC IV, included within Article 5, excludes civilians “definitely suspected of or engaged in activities hostile to the security of the State”⁴⁹ Those spies, saboteurs and terrorists are not entitled to the rights and privileges in GC IV to the extent that they would prejudice national security.⁵⁰

For those civilians covered by GC IV, the convention notes that they should be treated humanely and protected against violence, threats of violence, insults, and public curiosity.⁵¹ The convention states that civilians cannot be subject to physical or moral coercion when questioned and that they will be humanely treated during

⁴⁴ *Id.* at art. 3. *See also* Hamdan, 548 U.S. at 562-63.

⁴⁵ *See* Third Geneva Convention, *supra* note 44, at art. 13.

⁴⁶ *Id.* at art. 17.

⁴⁷ *Id.*

⁴⁸ Fourth Geneva Convention, *supra* note 44, at art. 4.

⁴⁹ *Id.* at art. 5 (noting that even those personnel that are not entitled to the full rights and privileges of other Protected Persons should nevertheless still be treated humanely). Additional Protocol I of the Geneva Conventions also contains fundamental guarantees of treatment for all personnel, to include terrorists, who do not have greater status protections afforded to them in the Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [hereinafter Additional Protocol I], June 8, 1977, 1125 U.N.T.S. 3, art. 47. These guarantees include a prohibition on any sort of mental or physical torture, as well as outrages on personal dignity like humiliating and degrading treatment. Although many American allies have ratified Additional Protocol I, the United States has not and only recognizes portions of the protocol to the extent they are reflective of customary international law. *See* further discussion at Footnote 57.

⁵⁰ *Id.* *But see* Knut Dormann, *The Legal Situation of “unlawful/unprivileged combatants,”* 849 INT’L REV. RED CROSS 45 (arguing that unlawful combatants are entitled to GC IV protections if they are captured).

⁵¹ *See* Fourth Geneva Convention, *supra* note 44, at art. 27.

confinement pending trial.⁵² GC IV also includes a prohibition on murder, torture, corporal punishment and mutilation.⁵³ Like the other Geneva Conventions, GC IV also includes Common Article 3.

The extent to which the different provisions of GC III and GC IV apply to a particular detainee depends on the type of conflict involved and the classification of the individual detainee. However, during a non-international armed conflict where a detainee is neither a POW nor a Protected Person, then the minimum treatment standards in Common Article 3 apply. Looking at terrorists in particular, while they do not meet the definition of a POW, and do not enjoy the full privileges of a Protected Person, their treatment during detention is still regulated by Common Article 3 during non-international armed conflicts.⁵⁴

⁵² *Id.* at arts. 31 & 37.

⁵³ *Id.* at art. 32.

⁵⁴ *See* Third Geneva Convention, *supra* note 44, at art. 3. *See* GOLDSMITH, *supra* note 43, at 113 (mentioning the long standing American position that terrorists are not considered POWs since they do not wear uniforms or openly carry their weapons). *See also* Hamdan, 548 U.S. at 562-63.

For suspected terrorists detained in an international armed conflict, Common Article 3 would not seem to apply since the article states that it is applicable “[i]n the case of armed conflict not of an international character . . .” *See* Third Geneva Convention, *supra* note 44, at art. 3. However, the application of the fundamental principles in Common Article 3 appear to have exceeded the strict wording of the article and now are viewed by some as the minimum standards applicable in any armed conflict. The International Committee of the Red Cross recognizes Common Article 3 as customary international law and that the prohibitions on torture and cruel or inhuman treatment apply in both international and non-international armed conflicts. *See* Jean-Marie Henckaerts, 857 INT’L REV. RED CROSS 175, 187, 206. Further, while citing to the official commentary to GC III, the Supreme Court in the Hamdan decision noted that Common Article 3 applies irrespective of the nature of the conflict. *See* Hamdan, 548 U.S. at 631 and Footnote 63. Lastly, while not acknowledging Common Article 3’s legal application in international armed conflicts directly, DoD’s stated policy is that Common Article 3 establishes the minimum standards applicable to all detainee treatment. *See* Department of Defense Directive 2310.01E, The Department of Defense Detainee Program (2006), para 4.2.

Beyond Common Article 3, Additional Protocol I of the Geneva Conventions also includes provisions regarding fundamental guarantees during armed conflicts, to include international armed conflicts and non-international armed conflicts. *See* Additional Protocol I, *supra* note 52, at arts. 1, 75. While the United States has not ratified Additional Protocol I, it does recognize much of the protocol as reflective of customary international law. *See* Joint Memorandum from the Army, Air Force, Navy, and Marine Corps international law sections to the Department of Defense General Counsel’s Office, May 9, 1986, in LAW OF WAR DOCUMENTARY SUPPLEMENT, International and Operational Law Department of the Army Judge Advocate General’s Legal Center and School 223 (2009). Importantly, the United States has acknowledged that it follows Article 75 of Additional Protocol I out of a sense of legal obligation in relation to anyone detained in an international armed

In the past, there was disagreement on whether Common Article 3 applied to foreign terrorists detained outside of the country, with many lawyers arguing that it did not.⁵⁵ In fact, an important conclusion in one of the OLC legal opinions was that Common Article 3 did not apply to foreign terrorists held outside of the United States.⁵⁶ However, in 2005, this issue was addressed by the Supreme Court in *Hamdan v. Rumsfeld*, where it was held that our current conflict with al-Qaeda was a non-international armed conflict and that Common Article 3 applied to the detention of terrorists at Guantanamo Bay.⁵⁷ Although this holding came as a shock to many government lawyers and was contrary to their previous understanding of the law, with the *Hamdan* decision the Supreme Court decided that even though they may be considered unprivileged enemy belligerents, Common Article 3 still applies to the detention and interrogation of suspected terrorists.

Common Article 3 states that persons “shall in all circumstances be treated humanely” and specifically prohibits murder, mutilation, cruel treatment, torture, outrages on personal dignity, and humiliating and degrading treatment.⁵⁸

B. The Torture Convention

Beyond the Geneva Conventions, another international agreement applicable to the treatment of detainees is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Torture Convention).⁵⁹ The Torture Convention came into force in 1987, with the United States and almost 150 other nations agreeing to be bound by its terms.⁶⁰ Unlike the Geneva Conventions, which are applicable during times of armed conflict, the Torture Convention applies to the conduct of government agents during armed conflict and peacetime as well.⁶¹

conflict. See White House Press Release, Fact Sheet: New Actions on Guantanamo and Detainee Policy, March 7, 2011, http://www.whitehouse.gov/sites/default/files/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf. Further, in regard to detainee treatment standards, Article 75 and Common Article 3 contain similar standards that require persons no longer taking part in hostilities to be treated humanely and that they not be subjected to torture. See Additional Protocol I, *supra* note 52, at art. 75; and Third Geneva Convention, *supra* note 44, at art. 3. So, in both international and non-international armed conflicts, all detained personnel must be treated humanely and not tortured.

⁵⁵ See *Hamdan*, 548 U.S. at 562-63.

⁵⁶ See Op. Off. Legal Counsel, Application of Treaties and Laws to al Qaeda and Taliban Detainees (2002), in THE TORTURE PAPERS, *supra* note 5, at 81, 86-87 & 117.

⁵⁷ See *id.* Despite a scathing dissent noting errors in the majority decision, the court held that Common Article 3 applies to foreign terrorists captured overseas that are detained by United States government officials. *Id.*

⁵⁸ Third Geneva Convention, *supra* note 44, at art. 3.

⁵⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Jun. 26, 1987, S. Treaty Doc No. 100-20, 1465 U.N.T.S. 113 [hereinafter the Torture Convention].

⁶⁰ See DEPARTMENT OF STATE, TREATIES IN FORCE 472 (2011).

⁶¹ See Torture Convention, *supra* note 62, at 2.

The Torture Convention requires each signatory nation to enact legislation to prevent torture and to make torturous acts by government agents a crime under domestic legislation.⁶² It states that “[n]o exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁶³ The convention states that orders from a superior authority cannot justify torture, and defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession. . . .”⁶⁴ The convention also prohibits “other acts of cruel, inhuman or degrading treatment or punishment” that does not rise to the level of torture.⁶⁵

Upon ratification of the Torture Convention in 1994, the United States established reservations and understandings to the convention noting that for an act to constitute torture it must be “specifically intended to inflict severe physical or mental pain or suffering.”⁶⁶ The United States made an additional declaration that it is bound to prevent cruel, inhuman or degrading treatment or punishment only to the extent that such conduct is prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution.⁶⁷ The reservations and understandings established additional caveats by defining mental pain or suffering as “prolonged mental harm” caused by the threat of imminent death or infliction of severe physical pain or suffering (or threatening severe physical pain or suffering).⁶⁸

So, as it relates to the United States, the treatment standards within the Torture Convention are contingent upon the stated reservations and understandings, domestic legislation executing the treaty, and case law regarding constitutionally prohibited conduct.⁶⁹

⁶² *See id.* at arts. 2.1 & 4.

⁶³ *Id.* at art. 2.2.

⁶⁴ *Id.* at arts. 1 & 2.3. The definition of torture in Article 1 applies to acts performed by government agents, at their instigation or with their acquiescence, and also prohibits torture as a form of punishment. *Id.* at art. 1.

⁶⁵ *Id.* at art. 16.1.

⁶⁶ *See* S. EXEC. DOC. No. 101-30, at para II(1)(a).

⁶⁷ *See Id.* at para. I(2).

⁶⁸ *Id.*

⁶⁹ The United States has also ratified the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which contain virtually identical language prohibiting torture as well as cruel, inhuman or degrading treatment or punishment. *See* Universal Declaration of Human Rights, art. 5, and International Covenant on Civil and Political Rights, art. 7. Interestingly, when the United States ratified the International Covenant on Civil and Political Rights it also submitted the now familiar reservation and understanding that the “cruel, inhuman or degrading treatment or punishment” prohibited in Article 7 means that cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution.

C. Detainee Treatment Act and the Military Commissions Act

In the aftermath of the Abu Ghraib prison scandal, the Detainee Treatment Act of 2005 was passed, which also included treatment standards for detainees in American custody. The act requires that detainee interrogations under DoD control, or in a DoD facility, use only those techniques listed in the Army Field Manual on interrogations (discussed in sub-paragraph D below).⁷⁰ Further, while it does not address torture by name, the act states that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁷¹ Accordingly, while the statutory limitation on using interrogation techniques listed in the Army Field Manual applies to DoD only, the prohibition on cruel, inhuman or degrading treatment or punishment applies to all government agencies.

Like the reservations and understandings lodged when the Torture Convention was ratified, the Detainee Treatment Act defines cruel, inhuman, or degrading treatment or punishment as conduct or punishment that is prohibited by the Fifth, Eighth, and Fourteenth Amendments of the Constitution.⁷² Since the Eighth Amendment applies largely to the punishment phase of a court proceeding and the Fourteenth Amendment is applicable to state governments, that leaves the due process protections of the Fifth Amendment as a critical area of analysis regarding detainee treatment standards prohibiting cruel, inhuman, or degrading treatment that falls short of outright torture.⁷³

Courts have interpreted the due process clause to prohibit conduct by federal authorities that “shocks the conscience.”⁷⁴ This standard was created by the Supreme Court in *Rochin v. California*, where the court held that it was a violation of a suspect’s due process rights when police officers forcibly pumped his stomach for drugs.⁷⁵ However, the “shocks the conscience” standard is somewhat subjective since it requires an analysis of the government action in question in relation to

⁷⁰ Detainee Treatment Act of 2005 § 1002.

⁷¹ *Id.* at § 1003(a). This language was important because it closed a loophole some had argued was created by the United States’ reservations and understandings to the Torture Convention, which would have vitiated much of the treaty since in most cases the Constitution of the United States does not apply overseas.

⁷² *Id.* at §1003(d).

⁷³ See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (reaffirming that the Eighth Amendment’s prohibition on cruel and unusual punishment was meant to protect individuals convicted of crimes).

⁷⁴ See *Rochin v. California*, 342 U.S. 165 (1952).

⁷⁵ See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) (holding that due process rights are not “subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.”). The Supreme Court also stated that “only the most egregious official conduct can said to be ‘arbitrary in the constitutional sense.’” *Id.* at 846, quoting *Collins v. Harker Heights*, 503 U.S. 129.

the government interest at stake.⁷⁶ Importantly, this legal standard has never been tested in a situation where an aggressive interrogation technique was used to elicit information from a foreign terrorist believed to have information that could stop an impending attack.

The Military Commissions Act of 2006 (MCA) similarly included language regarding humane treatment of detainees. The act authorized military commissions, established procedures for the commissions, and modified the War Crimes Act to allow prosecution for only grave breaches of Common Article 3 of the Geneva Conventions rather than any simple breach.⁷⁷ The MCA also contains a standalone provision prohibiting government agents from subjecting persons in their custody to cruel, inhuman or degrading treatment or punishment.⁷⁸ These terms are all defined within the MCA, which also adopts the practice of defining cruel, inhuman or degrading treatment as conduct that is prohibited by the Fifth, Eighth, and Fourteenth Amendments.⁷⁹

D. Military Regulations

In addition to international and domestic law, military regulations also provide detailed guidance on detainee treatment and interrogations. The seminal regulation in this area is Army Field Manual 2-22.3, *Human Intelligence Collector Operations*, which is the primary source of guidance on interrogation operations for the United States military and applies to the Army, Air Force, and the other services alike.⁸⁰ Unlike most service regulations, the field manual has taken on greater weight and authority due to the Detainee Treatment Act, which requires the Department of

⁷⁶ See Michael J. Garcia, Congressional Research Service Report on Interrogation of Detainees (2009).

⁷⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, 28 & 42 U.S.C.). The MCA also included a number of other important provisions, to include rules on the admissibility of statements obtained by force and an affirmation of the President's authority to interpret the meaning and application of the Geneva Conventions. *Id.* at § 3, 948r, & § 6(a)(3).

⁷⁸ *Id.* at § 6(c) (noting that the prohibition on cruel, inhuman, or degrading treatment or punishment is not restricted due to a person's nationality or physical location).

⁷⁹ *Id.* Another important provision of the MCA stated that no court or judge had the authority to consider an application for a writ of habeas corpus filed by, or on behalf of, a suspected terrorist determined to be an enemy combatant. *Id.* at § 7. This section, as it applied to suspected terrorists held at Guantanamo Bay, was later struck down by the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸⁰ See Army Field Manual 2-22.3, *supra* note 12. This is the successor publication to Field Manual 34-52 on intelligence interrogation that is reference in the Detainee Treatment Act. Other guidance includes Department of Defense Directive 2310.01E, The Department of Defense Detainee Program (2006); Department of Defense Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (2008); Directive-Type Memorandum (DTM) 09-031, Videotaping or Otherwise Electronically Recording Strategic Intelligence Interrogations of Persons in the Custody of the Department of Defense; and Chairman of the Joint Chiefs of Staff Instruction 3290.01C, Program for Detainee Operations (2008).

Defense to use only those interrogation techniques listed in the manual.⁸¹ The field manual's application was further extended by President Barack Obama through Executive Order 13491, which now applies the manual to all interrogations by United States government officers, employees, or agents.⁸²

Field Manual 2-22.3 prohibits cruel, inhuman and degrading treatment of all detainees, regardless of their legal status.⁸³ It also prohibits torture and the use of the following practices in conjunction with interrogation: waterboarding, use of military working dogs, conducting mock executions, beating, and forced nudity.⁸⁴ The manual contains exhaustive instructions on detainee treatment and the conduct of military interrogations, is replete with references to the applicable law, and contains the entire text of the Third and Fourth Geneva Conventions.

The field manual also contains lists of approved interrogation techniques, to include 18 "approach techniques" that can be used against any detainee regardless of their status under the Laws of Armed Conflict (LOAC).⁸⁵ The techniques include the direct approach, incentive approach, various emotional approaches, and others. However, the manual does not provide detailed instructions on how each technique is to be performed.⁸⁶ The last approved technique, the separation technique, cannot be used on detainees who are POWs, but is available for use on other detainees that do not meet that definition.⁸⁷

IV. ENFORCEMENT OF DETAINEE TREATMENT STANDARDS

Depending on the status of the government agent involved, whether military or civilian, there are a number of enforcement mechanisms available to ensure compliance with the United States' international obligations as well as domestic legislation establishing detainee treatment standards. This section outlines some of the authorities to punish noncompliance by military members, as well as suggests other possible avenues to enforce treatment standards against civilian interrogators working for the United States government.

⁸¹ See Detainee Treatment Act of 2005, *supra* note 12, at § 1002(a). The Detainee Treatment Act also prohibits cruel, inhuman, or degrading treatment or punishment of any detainee in United States government control. *Id.* at § 1003. Cruel, inhuman, or degrading treatment or punishment is defined in the act as any treatment that would be prohibited by the Fifth, Eighth, or Fourteenth Amendments to the Constitution, as defined in the United States reservations, declarations and understandings to the Torture Convention. *Id.* at § 1003(d).

⁸² Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

⁸³ See Army Field Manual 2-22.3, *supra* note 12, at 5-21.

⁸⁴ *Id.* at 5-21 & 5-26.

⁸⁵ *Id.* at 8-1 to 8-20.

⁸⁶ For instance, in the incentive approach the interrogator offers to trade something for information from the detainee. The thing given up can be a reward or even "the removal of a real or perceived negative stimulus," but no further information is provided. *Id.* at 8-7 to 8-8.

⁸⁷ *Id.* at M-1.

A. Uniform Code of Military Justice (UCMJ)

The UCMJ is a criminal code that applies almost exclusively against American military members and is enforceable within the United States and overseas, when a member is on or off of duty, and during armed conflict as well as in peacetime.⁸⁸ It is a comprehensive code that covers common law crimes such as theft, assault, and murder in addition to military-specific crimes like failure to obey an order, being absent without leave, and misbehavior of a sentinel. While the vast majority of service members obey orders, follow the law, and act with integrity, the UCMJ provides the legal framework to prosecute those members who fail to maintain the high standards required.

Any American military member who does not follow a General Order on detainee treatment, the Army field manual on interrogations, or the lawful orders of their superiors can be prosecuted for violating Article 92 of the UCMJ for not obeying a lawful order or regulation. Any underlying misconduct, like threatening or hitting a detainee, can be prosecuted under Articles 134 (communicating a threat) or 128 (assault). Depending on the alleged mistreatment, members could also be prosecuted for a violation of Article 93 (cruelty and maltreatment), Article 118 (murder), Article 124 (maiming), or other articles.⁸⁹

In the context of waterboarding, a military member who subjected a detainee to such abuse could, depending on the circumstances, be prosecuted for failure to obey a regulation, cruelty and maltreatment, assault, and possibly even attempted murder. An accused may offer a defense that he was following orders or that he did not have the requisite intent to commit these acts. These defenses would have to be evaluated by the trier of fact, but it is unlikely they would succeed given the now clear prohibition on waterboarding in the Army field manual.⁹⁰ Depending on the circumstances of a particular case, the penalties for performing waterboarding could be severe and result in long term confinement.

⁸⁸ See 10 U.S.C. § 802 & § 805 (2011). Among the list of other personnel who could be subject to the UCMJ are prisoners of war in United States custody and civilians accompanying the armed forces in time of war. *Id.* at § 802.

⁸⁹ See 10 U.S.C. §§ 892, 893, 918, 924, 928 & 934 (2011). A military member could also be prosecuted for various inchoate crimes, for conduct unbecoming an officer under Article 133, or under Article 134 for other conduct that is prejudicial to good order and discipline in the armed forces or of a nature to bring discredit upon the armed forces. *Id.* at §§ 933 & 934.

⁹⁰ Criminal liability for detainee mistreatment may extend beyond one individual and could implicate other personnel in the command involved, to include the responsible commander. Commanders could be prosecuted for their part in violating the prohibition on waterboarding, for failing to properly supervise their subordinates as they violate orders and regulations, or for violating the order themselves. In this context, superiors might be prosecuted as co-conspirators, for failing to obey orders, or for dereliction of duty for not supervising their subordinates appropriately.

B. The Torture Statute

While the UCMJ normally only applies to military members, there are other federal laws prohibiting torture and cruelty to individuals detained by government authorities that apply to military and civilian personnel equally. Specifically, the Torture Statute, which was enacted in 1994, authorizes death, or life in prison, as the maximum punishment for anyone who tortures detainees in their care.⁹¹ The statute applies irrespective of the nationality of the victim and specifically provides for jurisdiction to prosecute American nationals for crimes committed outside of the United States.⁹²

The Torture Statute defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁹³ The statute continues by defining severe mental pain or suffering as prolonged mental harm caused by: 1) intentionally causing, or threatening to cause, severe physical pain or suffering; 2) the use of drugs or other procedures intended to profoundly disrupt a person’s “sense of personality;” 3) the threat of imminent death; or 4) the threat that another person will be killed, caused severe physical pain or suffering, or subjected to drugs or other procedures calculated to disrupt their sense of personality.⁹⁴

C. The War Crimes Act

Beyond laws relating specifically to torture, the War Crimes Act authorizes the death penalty as the maximum punishment for someone who commits a war crime.⁹⁵ It prohibits war crimes in the United States and overseas, and defines war crimes as any grave breach of the Geneva Conventions generally, or of Common Article 3.⁹⁶ In looking at Article 130 of GC III, grave breaches include: torture, inhuman treatment, and willfully causing great suffering or serious injury.⁹⁷ Article 147 of GC IV similarly lists torture, inhuman treatment, and causing great suffering or serious injury among the list of acts that constitute a grave breach of the convention.⁹⁸

The Military Commissions Act (MCA) modified an earlier version of the War Crimes Act to allow prosecution for only grave breaches of Common Article 3, as opposed to any violation of the article, and it also included a list of those actions

⁹¹ See 18 U.S.C. § 2340A(a) (2011).

⁹² *Id.* at § 2340A(b).

⁹³ *Id.* at § 2340(1).

⁹⁴ *Id.* at § 2340(2).

⁹⁵ 18 U.S.C. § 2441(a) (2012) (authorizing the death penalty as the maximum punishment for a war crime where the victim died and life in prison as the maximum sentence in other cases).

⁹⁶ *Id.* at § 2441(a) & (c).

⁹⁷ See Third Geneva Convention, *supra* note 44, at art. 130.

⁹⁸ See Fourth Geneva Convention, *supra* note 44, at art. 147.

that constitute grave breaches.⁹⁹ The MCA's modification of the War Crimes Act added needed clarity by specifying the exact portions of Common Article 3 that were enforceable under domestic criminal law. Without such clarification, any prosecution for a violation of Common Article 3 under the earlier version of the War Crimes Act would be susceptible to challenge for being unconstitutionally vague.

Pursuant to the MCA's amendment, torture and cruel or inhuman treatment were included within the list of grave breaches under Common Article 3.¹⁰⁰ In defining the grave breaches of Common Article 3, the act further states that torture must be "specifically intended to inflict severe physical or mental pain or suffering," and that cruel or inhuman treatment is "an act intended to inflict severe or serious physical or mental pain or suffering...including serious physical abuse."¹⁰¹ The act then references the Torture Statute for the definition of "severe mental pain or suffering."¹⁰²

Since the passage of the MCA and promulgation of Executive Order 13491, no court has expressly addressed whether waterboarding constitutes a grave breach of any portion of the Geneva Conventions, the Torture Convention or the War Crimes Act.

D. Other Methods of Enforcement

The UCMJ and the federal statutes criminalizing torture and mistreatment of detainees are US-centric, focusing on how the United States interprets international law. However, in an era of multi-national coalitions and international travel, it should be recognized that other nations may attempt to prosecute American citizens who mistreat detainees as well.¹⁰³ This could take the form of an international tribunal or domestic criminal prosecution in a foreign court.¹⁰⁴ Further, while the United States

⁹⁹ *Id.* at sec. 6(b) (listing torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages as grave breaches of Common Article 3).

¹⁰⁰ *Id.*

¹⁰¹ The Military Commissions Act also defined "serious physical pain or suffering" as bodily injury that involves substantial risk of death, extreme physical pain, a serious burn or physical disfigurement, or a significant loss or impairment of a bodily organ, member, or mental faculty. *See* Military Commissions Act, *supra* note 80, at § 6(b)(2)(D).

¹⁰² *Id.* at § 2441(d)(2)(A). For the definition of "serious bodily injury," the act refers to 18 U.S.C. § 113, Assaults Within the Maritime and Territorial Jurisdiction, which then refers to the ultimate definition of the term at 18 U.S.C. § 1365, Tampering with Consumer Products. 18 U.S.C. § 113 (2012). 18 U.S.C. § 1365 states that "serious bodily injury" is bodily injury involving a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily member, organ or mental faculty. *See* 18 U.S.C. § 1365 (2012). The Military Commissions Act also modified the language in the Detainee Treatment Act relating to serious mental pain or suffering by replacing "severe" with "serious," and replacing "prolonged mental harm" with "serious and non-transitory mental harm").

¹⁰³ *See* RUMSFELD, *supra* note 9, at 595-600 (relaying the frustration for senior American policymakers that are pestered with nuisance suits in foreign countries).

¹⁰⁴ *See* Cohn, *supra* note 11, at 267-269 (discussing Spain's criminal investigation of American

has not ratified the Rome Statute and would undoubtedly object to any prosecution of an American citizen by the International Criminal Court (ICC), the possibility that an independent prosecutor at the ICC may investigate or indict an American citizen for detainee mistreatment cannot be ignored.¹⁰⁵

E. Analyzing the Legal Mosaic

From the status-based protections in the Geneva Conventions to the detailed standards laid down in military regulations, it is clear that the United States has joined with the majority of other nations in rejecting state-sponsored torture. As the Torture Convention states, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹⁰⁶ These international norms are mirrored in domestic legislation and policy, with the War Crimes Act, the Torture Statute and the UCMJ providing the mechanisms to prosecute military members or civilians for torturing or mistreating detainees.

However, looking beyond the broad pronouncements forbidding torturous conduct, both international law and domestic legislation contain subjective language that makes it more difficult to determine if a particular interrogation technique is, in fact, prohibited. For instance, neither the Geneva Conventions nor Common Article 3 defines the term “torture.”¹⁰⁷ The Torture Convention does define the term with some degree of specificity, noting that it is any act that causes severe mental or physical pain or suffering.¹⁰⁸ However, even that definition is subject to interpretation on whether certain interrogation techniques create “severe” mental or physical pain or suffering, or only some lesser degree of discomfort.

To muddle things even further, the reservations and understandings lodged by the United States upon ratification of the Torture Convention contain additional caveats to the definition of the term “torture.”¹⁰⁹ The reservations also state that the

lawyers involved in the legal reviews concerning enhanced interrogation techniques).

¹⁰⁵ See GOLDSMITH, *supra* note 43, at 61-63. Beyond criminal sanctions, the Alien Tort Claims Act and Torture Victims Compensation Act provide federal courts jurisdiction to hear claims from alleged victims of torture. See The Alien Tort Claims Act, 28 U.S.C. § 1350 (2011); The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). However, the United States would still have sovereign immunity regarding claims under the Alien Tort Crimes Act, and the Torture Victims Compensation Act is only available to victims of torture at the hands of someone acting under actual or apparent authority of a foreign nation. See *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992).

¹⁰⁶ The Torture Convention, *supra* note 62, at art. 2.1.

¹⁰⁷ See COMMENTARY ON THE III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 38-40 (Jean S. Pictet, ed., 1960) (analyzing why no definition for torture was included in the Geneva Conventions, which allowed it to be flexible and not tied to a particular list of tortures that could not possibly envision all of the creative techniques future torturers could devise).

¹⁰⁸ See The Torture Convention, *supra* note 62, at art. 1.1.

¹⁰⁹ See S. EXEC. DOC. No. 101-30 at para. II(1)(a) (stating that for an act to constitute torture it must be specifically intended to cause severe physical or mental pain or suffering). The section also

“cruel, inhuman or degrading treatment or punishment” prohibited by the convention is interpreted to prohibit only the cruel, inhuman or degrading treatment prohibited by the Fifth, Eighth and Fourteenth Amendments.¹¹⁰ As noted in previous sections, it is unsettled exactly what conduct would be prohibited under these amendments in the context of interrogating suspected terrorists.

Despite these definitional complications and the challenge prosecutors may have in proving specific intent to torture under the Torture Statute, ample authority exists to guide military commanders as they consider what conduct is, and is not, permissible as they detain and interrogate suspected terrorists. For military personnel and civilians working for the United States government these issues have been made much clearer with unclassified executive orders and military regulations removing any doubt that torture is prohibited, as is cruelty and inhuman treatment.

The permissibility of specific interrogation techniques or approaches has to be analyzed on a case-by-case basis within the broad area of law pertaining to detainee treatment. Suspected terrorists certainly should be interrogated to gain intelligence that may help to protect American troops and the nation, and while we do not have to mollicoddle them, they must be humanely treated and not subjected to torture, mistreatment, or abuse. There may continue to be some debate about other interrogation techniques that are aggressive, but not unlawful, but there should be no disagreement on the legality of waterboarding. Restraining someone on their back and forcing water into their mouth and nose to suffocate them until they feel like they are about to die is unlawful and violates military regulations and both domestic and international law.

We conclude that waterboarding, particularly when used repeatedly, rises to the level of inflicting severe physical or mental pain and suffering, and therefore violates Common Article 3 and the Torture Convention.

Third Vignette

Over time, Capt Reynolds’ concerns about the battlefield interrogations grow. COL Bowdin keeps encouraging the interrogators to increase the pressure on the detainees. He snaps at the interrogators that he doesn’t want to hear about what they can’t do, that he wants results and he wants them now. Some of the civilian advisors that live in the internal compound where the intel guys work are also advising COL Bowdin about what they can do and how they could help the interrogations. Capt Reynolds suspects that inappropriate things are going on or are

addresses what is meant by mental pain or suffering, which is defined as prolonged mental harm resulting from certain listed actions. *Id.*

¹¹⁰ *Id.* at para. I(2).

being planned, and when he tries to talk to COL Bowdin about treatment standards the commander blows him off. How should Capt Reynolds respond?

V. PRACTICAL ADVICE FOR JUDGE ADVOCATES

In the abstract, most reasonable people agree that aggressive interrogation is an unsavory thing and under ordinary circumstances anything that tracks close to legal limits should be avoided. For intelligence officials, military commanders, interrogators, and legal personnel there is a competing recognition that battlefield intelligence is central to the current fight. Information gathered through interrogation may prevent the next IED attack, and the intelligence mosaic developed over weeks or months may prove decisive in capturing a key leader or in preventing a future attack within the United States. The dilemma Capt Reynolds faces is how to guide a commander who appears determined to use any and all techniques, legal or otherwise, to obtain information. If the commander fails to heed appropriate advice, what actions must Capt Reynolds take? In a larger sense, the very real issues Capt Reynolds faces raise fundamental questions about our national values. Why should we care how a terrorist is treated?

To begin, Capt Reynolds must educate himself on the laws and regulations pertaining to detainee treatment and interrogations. The Army field manual is a good place to start, which should be supplemented with the other law and policy noted in this paper. Although the sources of law, and this paper, focus on the status of detainees, that official classification usually takes some time and may not be accomplished immediately.¹¹¹ In the interim, DoD considers Common Article 3 as the minimum standards applicable to detainees in United States military custody during armed conflicts.¹¹² Further, DoD policy mandates that all detainees, regardless of their status, will be treated humanely and not subjected to cruelty, torture, or inhuman or degrading treatment.¹¹³

Terrorist suspects in detention do not have to be pampered and pointed interrogation is appropriate within the bounds of the field manual and other applicable law. However, as the approach techniques in the field manual are refined and put into practice, questions may arise about how they are being applied in a given situation or whether a certain practice is lawful and appropriate. JAGs should carefully

¹¹¹ See Army Field Manual, *supra* note 12, at 6-7 to 6-9 (describing how screening occurs at a detention facility in relation to the different categories of persons that may be encountered). See also Third Geneva Convention, *supra* note 44, at art. 5 (addressing “Article 5 tribunals” that take place to determine the status of captured personnel if there is doubt as to their status under the laws of armed conflict).

¹¹² See Department of Defense Directive 2310.01E, The Department of Defense Detainee Program, para. 4.2 (stating DoD policy that Common Article 3 establishes the minimum standards applicable to detainees in DoD control without regard to their actual legal status).

¹¹³ Army Field Manual, *supra* note 12, at vii-viii. See also Department of Defense Directive 2310.01E, para. 4.1.

consider all of the controlling guidance and authorities in providing this advice, and JAGs like Capt Reynolds should be enmeshed in day-to-day operations so they are aware of these issues as they arise. There is no excuse for not knowing what is going on and it remains essential to confer with attorneys at higher levels of the chain of command if any practice seems out of the ordinary or there is uncertainty if a given technique strictly complies with Field Manual 2-22.3.¹¹⁴

In our example in the vignette, Capt Reynolds needs to get more involved with detention operations at the FOB and speak directly to COL Bowdin about the commander's comments that could be interpreted as encouraging detainee mistreatment.¹¹⁵ COL Bowdin should be informed of the controlling laws and regulations and be advised about the ramifications of non-compliance.¹¹⁶ The commander must be told what the rules are and informed that anyone, whether military or civilian, who mistreats detainees is violating the law and can be prosecuted for their actions.

JAGs in a combat zone are at the confluence of law and military operations, which can be an incredibly stressful situation and place them under immense pressure.¹¹⁷ Commanders are responsible for the lives of their troops, have a mission to accomplish, and sometimes are not receptive to a judge advocate advising against something they are determined to do. Human life is often at stake and commanders, not their JAGs, traditionally perform the solemn duty of writing condolence letters to families of their fallen troops.¹¹⁸ JAGs do, however, provide invaluable advice and

¹¹⁴ If a command has a policy that all communications with a higher headquarters office needs to be routed through the commander, the policy would not necessarily apply to JAGs due to the application of 10 U.S.C. § 806(b). That paragraph states that, "the staff judge advocate or legal officer of any command is entitled to communicate directly with the staff judge advocate or legal officer of a superior or subordinate command, or with the Judge Advocate General." 10 U.S.C. § 806(b) (2011). Further, such an order requiring communications to flow through command channels also would not preclude military members from reporting a crime, talking to an Inspector General, or communicating with a member of Congress.

¹¹⁵ Any attempts to interfere with a JAG providing direct advice to his commander would be unlawful pursuant to 10 U.S.C. § 8037, which states that, "[n]o officer or employee of the Department of Defense may interfere with . . . the ability of officers of the Air Force who are designated as judge advocates who are assigned or attached to, or performing with, military units to give independent legal advice to commanders." 10 U.S.C. § 8037(f) (2011).

¹¹⁶ JAGs must be careful not to provide legal advice to the commander that could be viewed as taking part in any sort of misconduct or illegal activity. Further, if it appears that the commander is complicit in the misconduct or fails to stop it, JAGs should carefully review their rules of professional conduct relating to the organization as a client, confidentiality of communications, and conversing with higher headquarters legal offices. See Air Force Rules of Professional Conduct, Rule 1.13 (2005).

¹¹⁷ See STAFF OF S. COMM. ON ARMED SERV., 110TH CONG. INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, *supra* note 10, at 193-94 (relaying that one of the JAGs advising a unit in Iraq felt that he was risking his life talking to a senior attorney about detainee abuse within his unit). See also GOLDSMITH, *supra* note 43, at 11 (stressing the "enormous pressure to stretch the law to its limits" that government attorneys were under at the OLC when advising on national security matters).

¹¹⁸ The immense pressures attorneys can be placed under cannot be understated. In one striking

counsel to commanders and their units to assist them with mission accomplishment while remaining within the bounds of the law, regulations, and other applicable guidance. Great fortitude and integrity is often required when advising commanders against a course of action they were previously intent on pursuing.

While JAGs are trained to help find lawful ways to meet their commander's intent, that does not include finding loopholes or practicing creative lawyering to circumvent the law or regulations. In the case of waterboarding, or any other derivative technique, a JAG should advise commanders that the technique is unlawful. In the unlikely event that the advice is ignored, JAGs should confirm their understanding of the facts and law, and consult with their higher headquarters legal office. Afterward, the commander should again be advised that a given technique is illegal and that authorizing the practice, or failing to stop it, can be grounds for criminal prosecution. In the end, JAGs owe a duty of loyalty to their organization, not any single individual, and any unauthorized interrogation techniques must be reported up the chain of command as do any violations, or suspected violations, of the laws of armed conflict.¹¹⁹ If the immediate commander will not intervene, or is complicit with the violations, then that should be reported as well.

VI. CONCLUSION

It has been reported that DoD contemplated using waterboarding after the September 11 attacks and that another non-DoD agency did use the technique in a limited manner to gather intelligence regarding a feared second wave of attacks. The legality of the technique has been debated in the past, but based on publicly acknowledged law, regulations, and executive orders there should be no further doubt as to the legality and permissibility of waterboarding. Waterboarding can inflict severe physical and emotional pain and suffering, and any military or civilian agent of the government who waterboards a detainee would place themselves at risk for prosecution under the various mechanisms identified in this article.

Senior military attorneys have consistently argued against the use of waterboarding as its use has been debated within DoD. However, the humane treatment of enemy personnel in military custody is important for non-legal reasons

example, Mr. Jack Goldsmith, former Assistant Attorney General and head of the Office of Legal Counsel, relays an exchange between him and Mr. David Addington, former legal counsel to Vice President Dick Cheney. In reacting to Mr. Goldsmith's opinion that he did not find that a certain counterterrorism program was legally supportable, Mr. Addington told Mr. Goldsmith that, "[i]f you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands." GOLDSMITH, *supra* note 43, at 71.

¹¹⁹ See Department of Defense Directive 2310.01E, The Department of Defense Detainee Program, para. 4.10 (2006) (requiring all personnel to report possible, suspected, or alleged violations of the laws of armed conflict or detentions operations laws, regulations or policy). The requirement to report law of armed conflict violations is also included within Department of Defense Directive 2311.01E, the Department of Defense Law of War Program, paragraph 6.3. See also Air Force Rules of Professional Conduct, Rule 1.13 (2005).

too.¹²⁰ Since service members are most at risk of being captured during armed conflicts, there is a concern that any maltreatment perpetrated by the United States will create an environment where captured service members may be abused and brutalized as well. Dilution of standards may degrade treatment accorded to Americans in current conflicts in addition to future situations where the United States has an interest in ensuring that detained American forces, or civilians accompanying the armed forces, are treated humanely and with restraint by their captors. In addition, for those who talk about authorizing waterboarding only in a “ticking time bomb” scenario, such an argument should be recognized as an attempt to erode the Geneva Conventions and an abandonment of America’s longstanding embracement of fundamental law of war principles.

Ordering military personnel to mistreat detainees weakens the military itself due to the negative impact it would have on good order and discipline. The American armed forces prides itself on being a professional force where service members obey the rule of law, have high ethical standards, and unleash the destructive power at their disposal only where and when they are ordered to do so. Those core foundations are eroded if the government orders service members to mistreat detainees in their care, which could multiply into additional mistreatment, barbarity, and a breakdown in discipline as military professionals are ordered to conduct activities they know to be immoral, unethical and illegal.¹²¹

In a larger sense, the manner in which the United States treats detainees reflects the values of the nation. The government, law enforcement agencies, and the military have an immense responsibility to defend the nation against terrorist attacks. Like all governmental action, though, their actions must comply with the Constitution, applicable domestic law, as well as international treaties and conventions to which the United States has voluntarily acceded to. Rather than constrain the defense of the nation, compliance with these legal norms shows America’s true mettle and the strength of its convictions. Torture and barbarity must be rejected even in the face of great adversity.¹²²

An unequivocal repudiation of torture and cruel and inhuman treatment is an affirmation of America’s values and ideals. Terrorists may behead prisoners and kill innocent people, but that does not mean the United States should debase itself by following their example. When terrorists or other enemy detainees are in American

¹²⁰ See STAFF OF S. COMM. ON ARMED SERV., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, *supra* note 10, at 126-27 (listing a number of concerns the senior military attorneys of the Department of Defense raised in relation to the enhanced interrogation techniques that were being considered by the Secretary of Defense).

¹²¹ See RUMSFELD, *supra* note 9, at 583 (stating that the reports of the interrogation techniques used on a detainee in military custody appear to have exceeded the boundaries of the techniques that he previously approved as Secretary of Defense). In his book, Secretary Rumsfeld noted that he was troubled by the combination and frequency of the interrogation techniques that were used as well as the types of techniques that were employed. *Id.*

¹²² See Kanstroom, *supra* note 11, at 211 (discussing a historic abhorrence to torture).

custody, treatment standards should not drastically ebb and flow depending on their pre-capture conduct or legal status. Whether holding POWs covered by the entirety of the Third Geneva Convention or terrorist belligerents covered just by Common Article 3, American behavior should affirm that the United States respects the rule of law and refuses to establish a precedent that in some situations the government is authorized to commit torture.

The war against international terrorists involves fighting an enemy who operates without conscience; one that does not have a capital to conquer, an air force to shoot down, or a navy to sink. We are at war with radical extremists that glorify suicide and the killing of innocent civilians. While our enemies engage in the most barbaric practices, in combating terrorism and winning this war America does not have to abandon her values or mirror an enemy's savagery to be successful. Treating detainees humanely is not inconsistent with good intelligence gathering and can actually send a powerful message juxtaposing ourselves against a vicious enemy. Gathering intelligence while maintaining the moral high ground, over time, will deliver a decisive blow against the enemies of peace as our ideological struggle continues.

The battle against international terrorism shows no sign of abating, which makes it likely that the United States will continue to detain and interrogate suspected terrorists. Waterboarding is now expressly prohibited by the United States government and that prohibition, which is now expressly stated in governing regulations, is consistent with domestic and international law. Although policy and even the law can change, any backsliding in this area would be detrimental to American interests, could alienate our closest allies, would weaken the military, and be a catastrophic setback for the country and our efforts to combat terrorism itself.

POLITICAL SPEECH, THE MILITARY, AND THE AGE
OF VIRAL COMMUNICATION

LIEUTENANT COLONEL JEREMY S. WEBER*

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“Thirty-two years in the peacetime army had taught me to do my job, hold my tongue, and keep my name out of the papers.”

—General Omar Bradley¹

I. INTRODUCTION

At the kickoff of the 2012 Presidential campaign, the perceived comfortable gap between the military and politics was shattered on national television in prime time. On the night of the Iowa Republican caucus, Corporal Jesse Thorsen, an Army reservist, appeared live on the Cable News Network (CNN) in uniform at a rally for Congressman Ron Paul, a Republican presidential candidate. Interviewed by a CNN reporter, Corporal Thorsen voiced his support for Congressman Paul and began to express his disagreement with the nation’s foreign policy before a reported technical glitch cut off the feed to the network.² Not satisfied with his brief appearance on camera, the soldier took to the stage at the rally. Invited by Congressman Paul to speak to the gathering of supporters, Corporal Thorsen (still in uniform) stirred up the crowd by touting the candidate’s foreign policy, which he called “by far, hands down, better than any candidate’s out there.”³ Raising his hands in the air to the cheering crowd, Corporal Thorsen gushed that meeting Congressman Paul was “like meeting a rock star” and vowed that “we are going to make sure this man is the next president of the United States.”⁴

Corporal Thorsen’s appearance and words overtly violated numerous military policies by appearing in uniform at a political rally and speaking on stage in an apparent attempt to use his military status to advocate for a candidate.⁵ His actions brazenly violated a fundamental constitutional principle of maintaining a politically neutral military under the control of civilian leadership.⁶ Yet, the official condemnation of Corporal Thorsen’s actions was fairly muted. It took the Army more than two months to announce that Corporal Thorsen’s actions violated DoD regulations and that he received a reprimand placed in his official military personnel

¹ GENERAL OMAR N. BRADLEY, A SOLDIER’S STORY 147 (1951).

² Philip Grey, *Post Officials: Politicking in Uniform is a No-Go*, LEAF-CHRON. (Clarksville, Tenn.), Jan. 7, 2012, at A1.

³ *MSNBC Iowa Caucus Coverage 2300 Hour* (MSNBC television broadcast), Jan. 4, 2012, transcript available at 2012 WLNR 148927.

⁴ *Id.*

⁵ See, e.g., U.S. DEP’T OF DEF. DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES, (19 Feb 2008) [hereinafter DoDD 1344.10] (members on active duty should not engage in partisan political activity); see also Jill Laster & Joe Gould, *The Military and Political Campaigning*, ARMY TIMES, Jan. 16, 2012, at 3 (“It’s been widely reported that a 28-year-old Army reservist may have breached protocol when he voiced his support for Ron Paul at a rally in Iowa while in uniform, both at the podium and in a CNN interview.”).

⁶ See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976) (holding that a military policy of keeping official military activities free of entanglement with partisan political campaigns survived First Amendment scrutiny and finding that the policy “is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control.”).

file.⁷ Corporal Thorsen immediately took to the airwaves on a radio program, stating he was “more than pleased” with the result, which he characterized as follows: “Let’s be frank—It basically says, ‘You’ve been a real bad soldier, don’t do that again.’”⁸ Meanwhile, mainstream media coverage of the entire incident was scant, with only a small number of commentators speaking out against Corporal Thorsen’s actions.⁹

In the underworld of cyberspace, however, the incident ignited a viral wave of commentary, debate, and action. Corporal Thorsen’s Facebook page—featuring him on stage at the Congressman Paul rally in uniform—drew more than 1,400 “likes,” many of them purporting to be military members. The Facebook page, which is still active as of this writing and expressly mixes politics and Corporal Thorsen’s military affiliation, has drawn a throng of supporters praising his actions at the rally, and encouraging him to “keep spreading the truth.”¹⁰ Meanwhile, the video of the corporal’s activities that night has drawn tens of thousands of hits on YouTube, along with blunt comments that support his actions and condemn both CNN and the military for allegedly attempting to censor Corporal Thorsen.¹¹ Undeterred by any disciplinary action taken against him, Corporal Thorsen released a lengthy YouTube video defending his actions, criticizing the nation’s foreign policy, and calling Congressman Paul “the choice of the troops.”¹²

It may be easy to dismiss Corporal Thorsen as a rogue case not emblematic of the vast majority who mind their words and actions more carefully. However, it would be unwise to ignore the larger issue that this incident raises. The military has traditionally been able to strike a delicate balance between military members’ political free speech rights and the need to maintain a disciplined, politically-neutral military organization under civilian control. It has achieved this balance largely by exercising great restraint in how it enforces political speech restrictions,

⁷ Leo Shane III, *Army Reservist Who Endorsed Ron Paul Receives Reprimand*, STARS & STRIPES (Mar. 30, 2012), available at <http://www.stripes.com/army-reservist-who-endorsed-ron-paul-receives-reprimand-1.173096>. The announcement does not appear on any Army web site, but refers to Mr. Thorsen as a Specialist rather than a Corporal, even though the Army had referred to the member as a Corporal at the time of the incident. *Id.* One report indicated that Army investigators could not find documentation that Thorsen had been promoted to Corporal. Ryan J. Foley, *Ron Paul Backer Jesse Thorsen Reprimanded by Army Reserve for Participating in Political Rally*, HUFFINGTON POST, Mar. 30, 2012, http://www.huffingtonpost.com/2012/03/30/ron-paul-jesse-thorsen-soldier-army-reserve_n_1391647.html. For ease of reference, this article refers to Mr. Thorsen as a Corporal.

⁸ Shane, *supra* note 7.

⁹ See, e.g., Paul Rieckhoff, *A Message to All Candidates: Our Troops Aren’t Props*, HUFFINGTON POST, Jan. 10, 2012, http://www.huffingtonpost.com/paul-rieckhoff/a-message-to-all-candidat_b_1195752.html.

¹⁰ Corporal Thorsen’s Facebook page, <https://www.facebook.com/pages/Corporal-Jesse-Thorsen/270842646306011> (last visited Apr. 23, 2012).

¹¹ The video is posted on a number of times on YouTube, but for one example, see CNN Cuts Off Cpl. Jesse Thorsen, Ron Paul Lets Him Finish, <http://www.youtube.com/watch?v=5Hfpt4sxpPo> (last visited Mar. 16, 2012).

¹² Cpl Jesse Thorsen Speaks Out for Ron Paul Despite US Army Censorship!, <http://www.youtube.com/watch?v=bs6-sQ3kuD8> (last visited Mar. 16, 2012). Corporal Thorsen appears in civilian clothes in the video, speaking from what appears to be a private residence.

thereby avoiding excessive controversy and scrutiny. A new development in society, however, is about to fracture this fragile equilibrium. As illustrated by Corporal Thorsen's Facebook page and YouTube sites, military members—like members of society at large—are using social media and user-generated forums to “virally”¹³ spread messages to a large audience. Through electronic means, military members across the spectrum of ranks are able to spread their political views to a wide audience as never before, either through posts they personally create or by commenting upon and linking to material created by others. Commentators are just beginning to notice that military members' use of social media and viral messaging poses a significant challenge to the delicate balance between military members' free speech rights and military necessity.¹⁴

While the explosion in viral communication has the potential to affect the military's enforcement of a wide variety of speech-related restraints,¹⁵ this article focuses on perhaps the most notable issue presented by this situation—how the restrictions the military imposes on political speech apply and should be enforced in viral media. This article first explores traditional political speech restrictions upon military members, surveying the competing interests policy and lawmakers face in this area, the statutes and regulations limiting military members' political speech, how these restrictions have been enforced in recent decades, and how the courts review challenges to political speech restrictions. Next, the article explores the exponential growth in social media and other user-generated forums to rapidly spread messages to a large audience, how military members have taken advantage of these means to express all views on all manner of topics, and how the military has responded to this new reality. Part IV of this article then explores how existing political speech restrictions translate to viral communication, concluding ultimately that military members' political speech through viral communication presents a greater threat to the imperative for a disciplined, apolitical, civilian-controlled military than normally perceived. Therefore, stricter enforcement of political speech restrictions may be justified in this new media.

¹³ Content is considered “viral” when it is distributed, linked to, or viewed by a large number of users in a short period. *See generally* Jan Trzaskowski, *User-Generated Marketing—Legal Implications When Word-of-Mouth Goes Viral*, 19 INT'L J.L. & INFO. TECH. 348 (2011). This article uses the terms “viral communication” and “viral media” to refer not only to social media sites *per se*, but a range of interactive, shareable sites that allow for interaction between poster and reader, and quick, widespread dissemination of material.

¹⁴ *See, e.g.*, David Johnsen, *Free Speech on the Battlefield: Protecting the Use of Social Media by America's Soldiers*, 44 J. MARSHALL L. REV. 1085 (2011) (noting the rise in use of social media by military members and proposing a flexible test to resolve the tension between free speech rights and the need for discipline in the ranks).

¹⁵ *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, arts. 89 (prohibiting disrespect toward a superior commissioned officer); 91 (contempt or disrespect toward a warrant, noncommissioned, or petty officer while that officer is in the execution of his or her office); 117 (provoking speech or gestures); 133 (conduct unbecoming an officer and gentleman); and 134 (all disorders and neglects to the prejudice of good order and discipline in the armed forces and all conduct of a nature to bring discredit upon the armed forces) (2012) [hereinafter MCM].

II. EXISTING POLITICAL SPEECH RESTRICTIONS—THE TRADITIONAL APPROACH

A. Competing Interests Shaping Military Political Speech Restrictions

I think I should make it clear that, in my opinion, every individual in the military service is entitled to the same constitutional rights, privileges, and guarantees as every other American citizen, except where specifically denied or limited by the Constitution itself.¹⁶

I believe it ill-advised and unwise to apply the civilian concepts of freedom of speech and press to the military service unless they are compressed within limits so narrow they become almost unrecognizable.¹⁷

As with the above-quoted statements of two judges from the military's highest appellate court in 1954, legal scholars have debated for much of the nation's history whether the protections of the Bill of Rights—particularly the First Amendment—apply to military members.¹⁸ In the mid-twentieth century, however, in the wake of the full-scale mobilization of World War II and the resulting scrutiny of the military justice system, a consensus began to emerge that the Bill of Rights generally applied to the military, at least to some degree. The Uniform Code of Military Justice (UCMJ), enacted in 1950, guaranteed military members many rights analogous to those in the Bill of Rights, such as the Sixth Amendment's protection from compulsory self-incrimination¹⁹ and the Fifth Amendment right to be protected from double jeopardy.²⁰ By 1960, the Court of Military Appeals (itself a creation of the UCMJ designed to ensure the protection of service members' basic constitutional rights) concluded that "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."²¹ Two years later, Supreme Court Chief Justice Earl Warren declared in a law school lecture "my conviction that the guarantees of our Bill of Rights need not be considered antithetical to the maintenance of our defenses."²²

¹⁶ *United States v. Vorhees*, 16 C.M.R. 83, 105 (C.M.A. 1954).

¹⁷ *Id.* at 105 (Latimer, J., concurring in part and dissenting in part).

¹⁸ See, e.g., Fredrick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 267-70 (1958) (exploring legislation early in the history of the United States to prohibit military members from using contemptuous or disrespectful words against the President or other prominent government officials, and concluding that "the Founders did not intend [the First Amendment's Free Speech Clause] to apply to persons in the land and naval forces.").

¹⁹ UCMJ art. 31(a) (2012) ("No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.").

²⁰ UCMJ art. 44 (2012) (generally protecting service members from being tried a second time for the same offense).

²¹ *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

²² Earl Warren, *The Bill of Rights and the Military*, 4 A.F. L. REV. 6, 12 (1962).

However, when it comes to matters of free speech (particularly political speech), the recognition that the Bill of Rights generally applies to military members hardly ends the question of what speech may be restricted. Congress and the American military have restricted service members' political speech throughout the nation's history, and continue to do so today. The matter is governed by two competing forces that frame military political speech restrictions and the courts' interpretation of those restrictions. On the one hand, free speech considerations indicate that restrictions should be narrow—or nonexistent—and that political speech by military members serves a valuable function in our democratic society. This consideration is counterbalanced, however, by the long-recognized need to maintain a disciplined, politically-neutral military, subservient to civilian leadership regardless of the political affiliation of those civilian leaders. Courts and commanders have both struggled to define how to balance these interests, and when one interest should outweigh the other.

1. Free Speech Considerations

Freedom of speech is, of course, one of the most cherished rights in liberal democratic societies, and it is manifest that the First Amendment generally protects political speech. In fact, it has been said that political speech protection forms the heart of the First Amendment.²³ In the words of the Supreme Court, issues of social and political concern are “the core of what the First Amendment is designed to protect.”²⁴ In particular, the Founding Fathers particularly cherished the ability to criticize the government as a check on government power.²⁵ As a result, the government is generally prohibited—outside the military context—from imposing content-based restrictions on political speech absent a showing that the words “create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”²⁶

²³ See *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes”); see also Captain Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1193 (1986) (“it is widely accepted that the protection of political speech lies at the core of the first amendment.”).

²⁴ *Virginia v. Black*, 538 U.S. 343, 365 (2003). See also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (recognizing that political speech “occupies the core of the protection afforded by the First Amendment.”).

²⁵ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (“[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

²⁶ *Schenk v. United States*, 249 U.S. 47, 52 (1919).

Despite early doubt as to the matter, the Supreme Court has settled for decades that military members retain at least some free speech protection under the First Amendment.²⁷ Therefore, the military is compelled—at least to some degree—to ensure its members are guaranteed the right to speak on all manner of subjects, including political ones. The notion that service members should have meaningful First Amendment rights has solidified with the growth and institutionalization of a large standing military. Noting the growth of the military’s size and reach since the nation’s birth, Chief Justice Warren aptly argued that “[w]hen the authority of the military has such a sweeping capacity for affecting the lives of our citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question.”²⁸ The fact that the nation has not faced a total war or existential threat scenario in its recent history also has strengthened the argument for military members to enjoy a greater degree of speech, as free speech protections and security are often tied together.²⁹ In this environment, the natural tendency of society in general is to move the military as close as possible to the standards of the rest of society.³⁰

The First Amendment therefore places legal limits on the military’s ability to restrict political speech. Apart from pure legal considerations, however, policy concerns also give some weight to an expanded view of allowing military members to engage in political speech. Commentators often note the apparent disconnect in a situation where the Americans who most visibly defend our democratic form of government are themselves deprived of the full benefit of the rights that system affords.³¹ The military may wish to ease speech restrictions out of a desire to be seen as more open and accommodating, especially since the military depends on volunteers to fill its ranks. One author has argued that the military would benefit from heightened free speech protections among its ranks, since it is seen as a leader in society and offering greater free speech rights would cement the idea of the dual citizen-soldier.³² Allowing more free speech rights would also support the military’s

²⁷ See *Parker v. Levy*, 417 U.S. 733, 758 (1974) (holding that “While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”).

²⁸ Warren, *supra* note 22, at 10.

²⁹ See, e.g., *Schenk* 249 U.S. at 52 (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

³⁰ Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America’s Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 343 (2007) (“In contrast to its ‘society apart’ label, the military is growing increasingly similar to civilian society.”).

³¹ See, e.g., *Goldman v. Secretary of Defense*, 739 F.2d 657, 658 (D.C. Cir. 1984) (“[N]otwithstanding the broad latitude rightly vested in those charged with defending the Nation’s security, I am unable to agree that the needs of the military warrant vitiating the very liberties which the armed services have valiantly defended in the two centuries of the Nation’s history.”) (Starr, J., dissenting from denial of en banc rehearing petition); Aldrich, *supra* note 23, at 1189 (“It is ironic that the men and women who defend the constitutional rights enjoyed by Americans are themselves deprived of some of those rights.”).

³² Reuter, *supra* note 30, at 341-42.

increasing expectation that military members will be educated and actively engaged in learning and challenging their minds outside of their military duties.³³ Other benefits to allowing military members to more freely share their political views might be improved morale, decreased disillusionment and frustration, and a sense of participation in the political process.³⁴

Commentators cite two other reasons why freedom of speech for military members is particularly important. First, as the most visible executors of our nation's foreign policy, it is commonly understood that military members have something to add to the public discourse on political issues, and even speech that is contemptuous, disloyal, or otherwise in violation of military political speech restrictions, contributes to the marketplace of ideas.³⁵ Society could benefit from increased exposure to military members' perspective on political issues. As a noted 1957 Columbia Law Review article by Professor Detlev Vagts stated, "In preventing unofficial opinions from competing in the military marketplace of ideas we grant a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times."³⁶ Overly prohibiting critical views of political speech, particularly on matters of defense policy, "encourage[s] mental laziness; deprive[s] the Defense Department, Congress, and the voters of valuable sources of data; and threaten[s] to reduce even further the small roster of American officers who make lasting contributions to military thought."³⁷ Allowing the military's voice to be heard is particularly important to Congress, which has a "vested interest in promoting a culture more accepting of alternative, and even dissenting, ideas within the rank structure" in order to carry out its Constitutional responsibility of overseeing the armed forces.³⁸ The idea that dissenting voices on policy issues contributes to the greater debate should fall on particularly sympathetic ears in the Air Force, with its history of its founders criticizing the Army's employment of airpower, even to

³³ *Id.* at 343; see also Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 350 (1998):

Perhaps the most basic argument in favor of providing substantial free speech protections to military personnel involves respect for the member's personal autonomy and intellectual self-awareness. By permitting the individual to speak freely and debate the validity of a wide range of topics, the military encourages the development of both the communication and intellectual skills necessary for effective leadership.

³⁴ Reuter, *supra* note 30, at 341-44.

³⁵ The "marketplace of ideas" concept influences First Amendment jurisprudence and free speech sentiment. The concept holds that freedom of speech advances the pursuit of truth by creating an open marketplace of ideas in which "truth supposedly emerges from the competition of true and false ideas for the adherence of an audience." Christopher T. Wonnell, *Truth and The Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 670 (1986). In a famous exposition of the doctrine, Judge Learned Hand wrote that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

³⁶ Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 191 (1957).

³⁷ *Id.*

³⁸ Reuter, *supra* note 30, at 340-41.

the point of General Billy Mitchell being court-martialed for making remarks that were allegedly contemptuous, disrespectful, and to the prejudice of good order and discipline.³⁹

A second reason for allowing military members a greater measure of free speech is to provide an outlet for voicing discontent that is generally healthier than other alternatives. Allowing some degree of dissenting speech is certainly more preferable than a situation where military members act on their disagreement through violation of orders, or worse. There is value in the proposition that allowing military members some latitude to engage in political speech provides military members with a needed release valve otherwise denied them. One court has said that there is “no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form.”⁴⁰ This would seem to hold especially true for military members, whose rights are otherwise greatly constrained. Given their unique role, military members may deserve particular protection from the evils the safety valve is designed to prevent. This notion of a release valve is not new to military culture, where grumbling is time-honored tradition. As the precursor to today’s Army Court of Criminal Appeals has noted:

That military personnel complain is not a classified matter. Complaining is indulged in by enlisted men and officers of all grades and rank. Complaints can be registered on any topic and frequently are. “Bitching,” to use the vernacular, may be expressed in gutter talk or in well articulated phrases and has been developed into a fine art. Nevertheless it sometimes serves a useful purpose. It provides an outlet for pent-up emotions, therapy for frustrations and a palliative for rebuffs and rejections. A noticeable failure to complain in a military organization is considered by some commanders as an indication of approaching morale problems.⁴¹

2. Civilian Control of the Military and the Need for an Apolitical Military

Free speech is a core principle of the American liberal democracy. However, civilian control of the military is equally vital, if not more so, for without the ability to control the military’s power, the democratic form of government that best ensures freedom of speech is placed in peril. The Founding Fathers recognized this. At the birth of an independent American nation, the patriots criticized the King for having had “affected to render the Military independent of and superior to the Civil power.”⁴² As a result, the authors of the Constitution created a system that grants

³⁹ For an account of Mitchell’s court-martial, see Rebecca Maskel, *The Billy Mitchell Court-Martial*, AIR & SPACE, July 2009, <http://www.airspacemag.com/history-of-flight/The-Billy-Mitchell-Court-Martial.html>.

⁴⁰ U.S. v. New York Times Co., 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

⁴¹ U.S. v. Wolfson, 36 C.M.R. 722, 728 (A.B.R. 1966).

⁴² THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

the President the role of commander-in-chief of the armed forces, and the Congress the power to declare war and to control the military's budget—powers that greatly limit the military's ability to act independently of its civilian leadership.⁴³ Since then, a bedrock principle of liberal democratic governance has been that the military remains subservient to its civilian leadership, no matter its political affiliation.

Defining exactly what civilian control of the military means has proved somewhat elusive and has given rise to many definitions, but, according to one approach, it has come to mean that three elements are present: 1) Civilians establish the ends of government policy, limiting the military to decisions about the means to achieve those ends; 2) Civilian leadership decides where the line between ends and means is drawn; and 3) In no event should the military be allowed to acquire unwarranted influence in civilian affairs, endangering liberties or the democratic process.⁴⁴ It has proven still more difficult to form a model of exactly how civil-military relations are formed in practice. Samuel Huntington proposed the classic definition of this balance in 1957 when he claimed that civil-military relations are shaped by three variables: The external threat (the “functional imperative”), the U.S. constitutional structure, and the liberal antimilitary ideology that dominates U.S. thinking.⁴⁵ In Huntington's view, “objective civilian control” of the military is necessary to preserve both liberty and the security of the state, granting the military a certain sphere of autonomy within which it may operate without interference but without which it may not venture.⁴⁶ Since then, others have attempted to provide alternate frameworks for analyzing the civil-military balance.⁴⁷ The most prominent alternative to Huntington's approach is Morris Janowitz's convergence theory, which did not accept the gap between military and civilian attitudes as unchallengeable, and argued for a narrowing of the gap—a convergence—between the two to bring the military closer to civilian society's outlook.⁴⁸

Regardless of how it is formulated or what forces shape its exact dimension, the need for civilian control of the military is more or less universally agreed upon. As one commentator has noted, “Few assumptions about American politics seem more settled than that of civilian control of the military.”⁴⁹ Justice Lewis Powell wrote in 1976 that “Command of the armed forces placed in the political head of

⁴³ U.S. CONST. art 1, § 8 (granting Congress the power “to raise and support Armies . . .” “to provide and maintain a Navy” and to “declare War”), art. 2, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”)

⁴⁴ Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 343-44 (1994).

⁴⁵ See Samuel P. Huntington, *THE SOLDIER AND THE STATE* 232 (12th ed. 1995).

⁴⁶ *Id.* at 189-92.

⁴⁷ See generally Peter D. Feaver and Erika Seeler, *Before and After Huntington*, in *AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA* 72-90 (Suzanne C. Nielsen and Don M. Snider eds. 2009) (exploring efforts both before and after Huntington's work to address the subject).

⁴⁸ See generally Morris Janowitz, *THE PROFESSIONAL SOLDIER: A SOCIAL AND POLITICAL PORTRAIT* (1960).

⁴⁹ Dunlap, *supra* note 44, at 341.

state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one.”⁵⁰ In fact, civilian control of the military “is so ingrained in America that we hardly give it a second thought.”⁵¹ The 2011 National Military Strategy reaffirms this principle: “The military’s adherence to the ideals comprised in our Constitution is a profound example for other nations. We will continue to affirm the foundational values in our oath: civilian control of the military remains a core principle of our Republic and we will preserve it.”⁵² Americans seem to have internalized this principle and thereby avoided the experiences of unstable democracies around the world that have been toppled by military regimes: civilian political leadership must remain in charge of the military, lest democracy itself be threatened.

The corollary to the principle of military subordination to political leadership is that the armed forces remain neutral in matters of politics, voicing views on matters of politics only when necessary to fulfill the military’s role of providing advice on matters affecting national security.⁵³ Over the course of its history, the military has struggled with this concept from time to time. Up until the mid-1800s, the nation had difficulty keeping its military separate from its politics, as several officers parlayed successful military careers into the Presidency.⁵⁴ However, in the wake of the Civil War, General William T. Sherman, as Commanding General of the Army, sought to professionalize the American military. He stressed the need for civilian control of the military and a military separated from politics. Of the Presidency, he wrote, “Let those who are trained to it keep the office, and keep the Army and Navy as free from politics as possible, for emergencies that may arise at any time.”⁵⁵ On party politics, he wrote, “no Army officer should form or express an opinion.”⁵⁶ The emerging vision of a politically neutral military took root in the latter half of the 1800s as the militia yielded to a standing army, and the creation of service academies gave the military a core identification distinct from the civilian world.⁵⁷

⁵⁰ Greer v. Spock, 424 U.S. 828, 845-46 (1976) (Powell, J., concurring).

⁵¹ Jim Garamone, *Why Civilian Control of the Military?*, ARMED FORCES PRESS SERVICE, May 2, 2001, <http://www.defense.gov/news/newsarticle.aspx?id=45870>.

⁵² JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA: REDEFINING AMERICA’S MILITARY LEADERSHIP 16 (2011), available at http://www.jcs.mil//content/files/2011-02/020811084800_2011_NMS_-_08_FEB_2011.pdf.

⁵³ See Greer, 424 U.S. at 841 (Burger, C.J., concurring) (asserting that the military’s political neutrality is “a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. 2, § 2 of the Constitution.”). See also Huntington, *supra* note 45, at 83 (“The antithesis of civilian control is military participation in politics.”).

⁵⁴ Steve Corbett & Michael J. Davidson, *The Role of the Military in Presidential Politics*, PARAMETERS, Winter 2009-10, at 59. See also Jason K. Dempsey, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-MILITARY RELATIONS Kindle edition, location 231 (2009) (“[O]vert political expressions of partisan affiliation by members of the military was most common in the period between the Revolution and the Civil War. During this period there was no such thing as a distinct army profession, and politics and military service often went hand in hand.”).

⁵⁵ Huntington, *supra* note 45, at 232.

⁵⁶ *Id.*

⁵⁷ See Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 31 (2002) (discussing the

By the 1970s, the Supreme Court in the *Greer* case held that the military had a special responsibility to avoid “both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates,” and policies that restrict political speech toward that end are “wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control.”⁵⁸ Today, the concept of an apolitical military is firmly ingrained in our national consciousness. In fact, the military’s separation from partisan politics is “a core value of its professional ethic.”⁵⁹ This obligation of political neutrality has been called “the military’s half of the constitutional bargain underlying civilian control,” the price the military pays for receiving deference and a degree of autonomy from its civilian leadership.⁶⁰ This characteristic is so marked that one commentator noted that the “principle of political subordination is one of the most remarkable characteristics of the U.S. military.”⁶¹

Still, the military has struggled with how to remain politically neutral in a political context where both parties seek to ride the coattails of its prestige. Throughout the 1990s and early 2000s, the military experienced difficulties in this area. For example, a group of military veterans including recently-retired general officers endorsed George W. Bush’s candidacy in 2000, raising concerns of politicization of the ranks and eroding support for the military.⁶² By 2008, the mix of politics and the military had become so problematic that the Chairman of the Joint Chiefs of Staff wrote an open letter to all service members stressing the need for the military to remain apolitical. It eloquently lays out the case for an apolitical military, stating in part:

[T]he U.S. military must remain apolitical at all times and in all ways. It is and must always be a neutral instrument of the state, no matter which party holds sway.

A professional armed force that stays out of the politics that drive the policies it is sworn to enforce is vital to the preservation of the union and to our way of life.

...

We are first and foremost citizens of this great country, and as such have a right to participate in the democratic process. As George

two reforms and asserting that “[w]ithin a decade of the Jeffersonian reforms, the apolitical culture of the modern military was apparent, as was its growing sense of cultural uniqueness.”).

⁵⁸ *Greer*, 424 U.S. at 839.

⁵⁹ Corbett & Davidson, *supra* note 54, at 63.

⁶⁰ Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553, 577 (2003).

⁶¹ Turley, *supra* note 57, at 102.

⁶² Steven Lee Myers, *The Nation; When the Military (Ret.) Marches to Its Own Drummer*, N.Y. TIMES, Oct. 1, 2000, at 44.

Washington himself made clear, we did not stop being citizens when we started being Soldiers.

What I am suggesting—indeed, what the Nation expects—is that military personnel will, in the execution of the mission assigned to them, put aside their partisan leanings. Political opinions have no place in cockpit or camp or conference room. We do not wear our politics on our sleeves. Part of the deal we made when we joined up was to willingly subordinate our individual interests to the greater good of protecting vital national interests.

. . .

As the Nation prepares to elect a new President, we would all do well to remember the promises we made: to obey civilian authority, to support and defend the Constitution, and to do our duty at all times.

Keeping our politics private is a good first step.

The only things we should be wearing on our sleeves are our military insignia.⁶³

Besides the imperatives of a civilian-controlled, apolitical military, political speech restrictions are sometimes justified on the related need for a disciplined fighting force answerable to a chain of command. The Supreme Court has noted that restrictions on the rights of military members are justified in part because “Loyalty, morale, and discipline are essential attributes of all military service.”⁶⁴ Professor Vagts noted that restraints on speech “are ultimately rooted in the need for a rigid and thoroughgoing attitude of subordination towards superior authorities.”⁶⁵ The Supreme Court in *Parker v. Levy* famously noted that it was the “fundamental necessity for obedience” and the “necessity for imposition of discipline” that “may render permissible within the military that would be constitutionally impermissible outside it.”⁶⁶ The Supreme Court has also held that limitations on military members’ First Amendment rights are tolerated because “to accomplish its mission, the military must foster instinctive obedience, unity, commitment, and esprit de corps”⁶⁷ The importance of discipline and obedience often justifies limitations on military members’ free speech rights when that speech clashes with the authority of the chain of command. For example, Congress has criminalized speech toward superiors

⁶³ Admiral Michael G. Mullen, “From the Chairman: Military Must Stay Apolitical,” 50 *JOINT FORCE Q.* 2, 2-3 (2008).

⁶⁴ *Brown v. Gilnes*, 444 U.S. 348, 356-57 n.14 (1980).

⁶⁵ Vagts, *supra* note 36, at 188.

⁶⁶ *Parker v. Levy*, 417 U.S. 733, 758 (1974).

⁶⁷ *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

such as disrespecting a superior commissioned officer.⁶⁸ The principle of restricting speech to further obedience to authority certainly carries weight in the context of political speech, given that the chain of command ultimately leads to an elected political official, the President.

It should also be noted that today's military is an all-volunteer force that is, by design, somewhat separate from the society it serves. A citizen who is drafted against his or her will into the military presents a more sympathetic case from a First Amendment standpoint from one who consciously chooses to serve with the knowledge that he or she is giving up some degree of constitutional rights.⁶⁹ Therefore, the nation may be justified in limiting political speech today to a greater degree than it could, for example, during the mass mobilization of World War II. There are counterarguments to this position,⁷⁰ but it remains, nonetheless, an important consideration in striking such a delicate balance.

B. Existing Restrictions on Political Speech

Congress and the military have sought to achieve this balance through a collection of restrictions that may impact military members' ability to engage in political speech. Some involve unique military restrictions on speech, but they focus on speech generally and only indirectly affect political speech.⁷¹ Others involve

⁶⁸ UCMJ art. 89 (2012).

⁶⁹ As an example of this argument, during the height of the Monica Lewinsky incident in President Clinton's second term, when a reporter raised a question about UCMJ Article 88, which prohibits contemptuous words toward certain public officials, Pentagon spokesperson Kenneth Bacon stated:

We have an all volunteer military. People know what the rules are when they join the military. The military has specific rules that are set up to protect good order and discipline, and this is not the first time we've seen that military rules may be slightly different from those in the rest of society. No one [who has not volunteered to serve] is forced to abide by these rules.

Kenneth H. Bacon, Assistant Sec'y of Def. (Pub. Affairs), Department of Defense News Briefing (Oct. 20, 1998) (transcript available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1756>).

⁷⁰ For example, it has been argued that the all-volunteer force construct requires the military to attract talented young people to military service, and as it has sought to do so, "exclusive reliance on 'duty, honor, country' has waned." C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CIN. L. REV. 779, 825 (1988). In addition, with a large, standing, all-volunteer military that generally serves for a longer time than draftees, it can be argued that it is less desirable to have the large number of volunteer military members give up significant free speech rights for their longer periods of service. See Warren, *supra* note 22, at 11-12 (asserting that the size and reach of the standing military, and the length of service required by even draftees, indicates that the military should not reside beyond the scope of the First Amendment).

⁷¹ See, e.g., UCMJ arts. 89 (prohibiting disrespect toward a superior commissioned officer), 91 (prohibiting insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer), 92 (prohibiting failure to obey an order or regulation), and 117 (prohibiting provoking speech and gestures) (2012).

restrictions on political speech that apply to members of society in general and are not unique to military members.⁷² Still other restrictions apply to behavior more akin to conduct rather than speech, but could nonetheless impact military members' free speech rights as well.⁷³ This article, however, focuses on four specific types of restrictions on military members' political speech: the UCMJ's prohibition against contemptuous words, the UCMJ's general articles, a statute that prohibits military members from using their authority to influence others, and DoD regulations that proscribe certain political activities.

1. Article 88

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.⁷⁴

Article 88 stands apart in the controversy it generates for its viewpoint-directed restrictions on military members' free speech rights. One scholarly commentator notes that the article "is the most restrictive of the UCMJ's prohibitions on speech" and "leaves soldiers unable to voice their criticism of a war in which they are forced to participate."⁷⁵ Another argues that "[w]hile there may be justification for curtailing the rights of military members in some areas, the extent to which free speech rights are impinged upon by Article 88 is unwarranted."⁷⁶ Media observers have occasionally pointed out the apparent conflict between Article 88 and the need for open discourse in our society, as well as difficulties in applying the law.⁷⁷

Military criminal prohibitions against contemptuous words have existed since the nation's founding, predating even the Bill of Rights.⁷⁸ Due to the negative experience with the military justice system of many who served during World War II

⁷² For example, 18 U.S.C. § 2385 (2012) makes it unlawful to advocate the overthrow of the federal government or the government of any state, territory, district, or possession of the United States.

⁷³ See, e.g., UCMJ art. 94 (prohibiting mutiny and sedition) (2012).

⁷⁴ UCMJ art. 88 (2012).

⁷⁵ Sarah N. Rosen, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Regulations*, 12 U. PA. J. CONST. L. 875, 880-881 (2010).

⁷⁶ Aldrich, *supra* note 23, at 1219.

⁷⁷ See, e.g., Nathaniel Fick, *General Dissent: When Less Isn't More*, USA TODAY, Apr. 25, 2006, at 13A (noting the purposes behind Article 88 but also the need for active citizenship by current and former military members); David Evans, *Military Law Damns Bad-Mouthing General*, BUFF. NEWS, Jun. 20, 1993, at E9 (noting the legitimate motivation behind Article 88 but asserting that a generalized critique of Congress is punishable under Article 88 and serves as "proof that we colonials ironically have created a whole new royalty.>").

⁷⁸ John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1708-18 (1968) (detailing pre-UCMJ statutes used to prosecute military members for using contemptuous words against certain government officials).

in general (likely not helped by indiscriminate application Article 88's predecessors), the Congress took up the cause of generating a new, fairer, uniform code in the aftermath of the war.⁷⁹ The enactment of the UCMJ's Article 88 made two principal changes to previous prohibitions against contemptuous words, expanding the list of officials protected by including the secretaries of all three military departments and the Secretary of the Treasury, and limiting its application to commissioned officers.⁸⁰ While the article did not generate any discussion in the House subcommittee that debated the new UCMJ,⁸¹ the Senate showed some concern about the proposed Article 88, with one senator asserting that "criticism from people in uniform is a good thing"⁸² and another stating he did "not know why Congress should be immune from criticism."⁸³ Another agreed that the article was "pretty restrictive," but added that "I hate to see a fellow called out on Saturday night and say everything against his Government, and then on Monday morning he appears in uniform with a great smile on his face and squared-up shoulders."⁸⁴ After being assured by Professor Edmund Morgan (chairman of the UCMJ's drafting committee) that the article "would not be used often," the subcommittee moved on to other matters, expressing the hope that the language of the article could be improved.⁸⁵

The reach of Article 88 is not entirely clear, due in part to the fact it has only been used to prosecute a military member once and therefore suffers from lack of judicial clarification. Article 88 sets out a broad prohibition against the use of contemptuous words; clarifying exactly the scope of this article is left to the courts and the Manual for Courts-Martial (MCM). The MCM helps illuminate the reach of Article 88:

It is immaterial whether the words are used against the official in an official or private capacity. If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad

⁷⁹ See generally Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

⁸⁰ Kester, *supra* note 78, at 1718.

⁸¹ *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles of the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing on H.R. 2498 Before the Subcomm. of the H. Armed Services Comm. on the Uniform Code of Military Justice*, 81st Cong., 1st Sess. 1226 (1949).

⁸² *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S.857 and H.R. 4080 Before the Subcomm. of the S. Comm. On Armed Services*, 81st Cong., 1st Sess. 99 (1949).

⁸³ *Id.* at 331.

⁸⁴ *Id.* at 332.

⁸⁵ *Id.* at 333.

circulation to a written publication containing contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.⁸⁶

As the MCM discussion makes clear, there is a distinction between “expressions of opinion made in a purely private conversation” on the one extreme and “giving broad circulation to a written publication containing contemptuous words . . . in the presence of military subordinates” on the other end of the spectrum. The MCM discussion also notes a potential defense for speech that merely criticizes an official instead of using “personally contemptuous words.” However, the earlier statement that it is immaterial whether the words are directed toward the official in an official or private capacity seems to limit or even abrogate this potential defense.⁸⁷ One commentator, after reviewing the history of the prohibition against contemptuous words, asserted that “the political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous. Further, unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous.”⁸⁸ Because of the latitude allowed commanders in deciding what language is “contemptuous” and what comments fall within the realm of fair political comment, “Article 88 requires line-drawing,” and “[s]ubtle differences of language, tone, setting, and audience may put a case over the line.”⁸⁹

Like all the political speech restrictions outlined in this article, the prohibition against contempt toward officials is aimed toward the concerns of a civilian-controlled, disciplined, apolitical military. It is written with “the purpose of keeping military power in check, subordinate to civilian superiors and to the constitutional scheme.”⁹⁰ The article serves as “a means of ensuring civilian control of the military and of assuring among military personnel a demeanor befitting the subordinate role which the military traditionally has occupied in our society.”⁹¹ Similarly, another commentator sees the rationale for the article as a combination of the civilian control and the discipline principles: “Violations of Article 88 strike at the heart of our system of government They not only erode civilian control of the military but also threaten the hierarchical system *within* the military. Compliance with Article 88 is a baseline measure of obedience and loyalty; officers who violate it set a poor example.”⁹²

⁸⁶ MCM, pt. IV, ¶ 12.

⁸⁷ See Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999, at 6 (exploring the apparent disconnect between the two MCM provisions).

⁸⁸ *Id.* at 7.

⁸⁹ Eugene R. Fidell, *Free Speech v. Article 88*, U.S. NAVAL INST. PROCEEDINGS, Dec. 1988, at 124, 125.

⁹⁰ Kester, *supra* note 78, at 1752. Kester also asserts, however, that Article 88 is interpreted and enforced by the military, causing the military to essentially make political decisions in prosecuting Article 88 offenses, causing “a departure from the principle of political neutrality which it seeks to promote.” *Id.* at 1753.

⁹¹ *Id.* at 1765.

⁹² Fidell, *supra* note 89, at 126.

2. The UCMJ's General Articles

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.⁹³

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.⁹⁴

Article 133 and 134 encompass dozens of variations of misconduct. While Articles 133 and 134—the “general articles”⁹⁵—do not specifically set limits on military members’ political speech, they certainly can have that effect, as particularly harsh, public political speech can either be of a nature to discredit the armed forces or prejudicial to good order and discipline. Article 134 also provides a possible way to prosecute enlisted members for speech that attacks the President and other prominent government officials, since Article 88’s reach is limited to commissioned officers.⁹⁶ Though the general articles have been criticized for their vagueness and potential of abuse, they remain enforceable, good law.⁹⁷ They also provide commanders and prosecutors with an effective tool to prosecute conduct not specifically proscribed elsewhere, but that nonetheless impacts good order and discipline or discredits the military. Under the general articles, speech may be punished regardless of whether it occurs on or off a military installation or whether the military member is on or off duty, though the location where the speech occurred is a factor to be considered in determining whether the speech actually prejudiced good order and discipline.⁹⁸

⁹³ UCMJ art. 133 (2012).

⁹⁴ UCMJ art. 134 (2012).

⁹⁵ See Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 43 (1975) (“Articles 133 and 134 are the ‘general articles.’”).

⁹⁶ While it seems apparent that contemptuous words against high government officials would either be of a tendency to discredit the armed forces or would prejudice good order and discipline, some have questioned whether Article 134 should be used to charge enlisted members with uttering contemptuous words. See, e.g., Kester, *supra* note 78, at 1735 (“Of very questionable legality has been the Army’s occasional resort to the general article to punish enlisted men, whom Congress in 1950 exempted from article 88, for statements disrespectful of the President.”).

⁹⁷ See Robinson O. Everett, *Military Justice is to Justice As . . .*, 12 A.F. L. REV. 202, 210 (1970) (“Critics of military justice . . . have made much of alleged unconstitutional vagueness in Articles 133 and 134 of the Uniform Code . . . Over the years, these articles and their predecessors have been upheld by the Supreme Court and other tribunals; and a persuasive argument can be made that they are not unconstitutionally vague—especially as construed by the Court of Military Appeals.”).

⁹⁸ See, e.g., *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993), *aff’d*, 40 M.J. 420 (C.M.A. 1994) (upholding Article 134 conviction for soldier who appeared in uniform off base while on leave at a

Along with generally prohibiting service-discrediting conduct and conduct prejudicial to good order and discipline, The Manual for Courts Martial provides a list of specifications that can be charged under Article 134.⁹⁹ One of these enumerated offenses prohibits statements “disloyal to the United States” that are “made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces.”¹⁰⁰ Along with all Article 134 offenses, disloyal statements must be prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces in order to be punishable.¹⁰¹ The Manual for Courts-Martial lists certain examples of prohibited statements such as “praising the enemy, attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed forces.”¹⁰² The Manual further notes:

A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is a part of its administration.¹⁰³

The UCMJ general articles, particularly the prohibition against disloyal statements, tie directly into the concerns for a civilian-controlled, apolitical, and disciplined military. The UCMJ general articles are constitutional in part because of the concern that disloyal statements would undermine respect for authority, authority which ultimately resides with the President as commander-in-chief.¹⁰⁴

high school assembly and made false statements about war service, where government demonstrated that the false presentation diminished listeners’ confidence in the integrity of military personnel).

⁹⁹ MCM, pt. IV, at ¶¶ 61-113.

¹⁰⁰ *Id.* at ¶ 72.

¹⁰¹ *Id.*; see also *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (holding that to establish a violation of Article 134, the government must allege in the specification and prove beyond a reasonable doubt both that the accused engaged in certain conduct and that the conduct satisfied at least one of three listed “terminal elements” of Article 134: that the accused’s conduct was (1) to the prejudice of good order and discipline, (2) of a nature to bring discredit upon the armed forces, or (3) a crime or offense not capital. If the government fails to allege at least one of the three clauses either expressly or by necessary implication, the charge and specification fail to state an offense under Article 134).

¹⁰² MCM, pt. IV, at ¶ 72

¹⁰³ *Id.*

¹⁰⁴ See *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972):

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.

The highest military appeals court recognized the competing forces of free speech and a controlled, disciplined military in the Article 134 context. In affirming a Soldier’s conviction for conspiring to organize a strike, unlawfully organizing and attempting to organize a strike, and soliciting soldiers to strike as his unit prepared for deployment to Iraq, the court stated that in order to “ensure an adequate discussion of the competing interests, servicemembers as well as the public in general have a right to voice their views so long as it does not impact on discipline, morale, esprit de corps, and civilian supremacy.”¹⁰⁵

3. 18 U.S.C. 609

Whoever, being a commissioned, noncommissioned, warrant, or petty officer of an Armed Force, uses military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place, or attempts to do so, shall be fined in accordance with this title or imprisoned not more than five years, or both. Nothing in this section shall prohibit free discussion of political issues or candidates for public office.¹⁰⁶

In 1986, Congress added this prohibition against using one’s military authority to influence another service member’s vote or to require a service member to march to a polling place.¹⁰⁷ Little legislative history is available concerning its enactment, and the statute has rarely—if ever—been used to form the basis of a prosecution.¹⁰⁸ What little legislative history is available indicates the statute was passed as part of an effort to facilitate the ability of military members to freely exercise their right to vote.¹⁰⁹ 18 U.S.C. 609 is one of a series of statutes that prohibit military members from engaging in certain election-related conduct¹¹⁰ and is the law in this series most likely to affect military members’ political speech. While there is virtually no commentary or judicial review explaining the motivation for

Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

(citations omitted).

¹⁰⁵ United States v. Brown, 45 M.J. 389, 396 (C.A.A.F. 1996).

¹⁰⁶ 18 U.S.C. §609 (2012).

¹⁰⁷ Pub. L. No. 99–410, § 202(a), 100 Stat. 929 (1986).

¹⁰⁸ The statute appears to have only been cited tangentially in a handful of federal cases. *See, e.g.,* Rigdon v. Perry, 962 F.Supp. 150, 157 (D.D.C. 1997) (holding that a restriction on chaplains from urging their congregants to communicate with Congress about pending antiabortion legislation unlawfully violated the chaplains’ free exercise and free speech rights and citing 18 U.S.C. § 609 as partial support for the distinction between military members expressing personal opinions on political issues and using their military authority to influence the outcome of a political issue).

¹⁰⁹ H.R. Rep. No. 99-765 (1986) (setting forth the purpose of the Uniformed and Overseas Citizens Absentee Voting Act, including the addition of 18 U.S.C. § 609).

¹¹⁰ *See, e.g.,* 18 U.S.C. §592 (2012) (prohibiting the ordering, bringing, keeping, or having of any troops or armed persons at any place where an election is held unless force is necessary); 18 U.S.C. § 593 (prohibiting military members from certain election-related activity).

this prohibition, it seems fair to presume that it is aimed at one of the same goals as the other political speech restrictions outlined in this article—the need to keep the military above the fray of politics.

4. Regulatory Limits on Political Activities

It is DoD policy to encourage members of the Armed Forces (hereafter referred to as “members”) (including members on active duty, members of the Reserve Components not on active duty, members of the National Guard even when in a non-Federal status, and retired members) to carry out the obligations of citizenship. In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply:¹¹¹

DoDD 1344.10 seeks to strike a balance between military members’ free speech rights and other rights to engage in political activities, and the military’s need to remain apolitical. Paragraph 4.6.4 states that much of the regulation is punitive, meaning that violations of DoDD 1344.10 may be charged under the UCMJ as failure to obey an order or regulation.¹¹² After noting the need for balance between allowing military members to exercise their political rights and the necessity of maintaining a politically-neutral military, the DoD directive then sets out specific guidance as to what political activities are permissible and impermissible.

A full listing of permissible and impermissible activities under DoDD 1344.10 is not possible in this forum.¹¹³ Generally, the directive sets forth ten activities active duty members may engage in and 16 activities that they may not. Most relevant to this discussion, the DoDD states that active duty military members may: express a personal opinion on political candidates and issues, but not as a representative of the armed forces;¹¹⁴ promote and encourage others to exercise their voting franchise, if such promotion does not constitute use of one’s official authority or influence to interfere with the outcome of any election;¹¹⁵ write a letter to the editor of a newspaper expressing the member’s personal views

¹¹¹ DoDD 1344.10, *supra* note 5, ¶ 4, at 2.

¹¹² *Id.* ¶ 4.6.4, at 10. In order to obtain a conviction for failure to obey a lawful general regulation, the government must demonstrate that: (1) A certain lawful general order or regulation was in effect; (2) The accused had a duty to obey that order or regulation; and (3) The accused violated or failed to obey the order or regulation. See MCM. pt. IV, art 92(b)(1). See also *United States v. Pope*, 63 M.J. 68, 71-72 (C.A.A.F. 2006).

¹¹³ For a more detailed look at the regulation, see Andrew Alan Pinson, *A Bridge Too Far? Directive 1344.10 and the Military’s Inroads on Core Political Speech in Campaign Media*, 44 GA. L. REV. 837 (2010).

¹¹⁴ DoDD 1344.10, *supra* note 5, ¶ 4.1.1.1, at 2.

¹¹⁵ *Id.* ¶ 4.1.1.2, at 2.

on public issues or political candidates, if such action is not part of an organized letter-writing campaign or solicitation of votes for or against a political party or partisan political cause or candidate;¹¹⁶ and display a political bumper sticker on the member's personal vehicle.¹¹⁷ The regulation states that active duty members may not: use official authority or influence to influence or interfere with an election, affect the course or outcome of an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others;¹¹⁸ allow or cause to be published partisan political articles, letters, or endorsements signed or written by the member that solicit votes for or against a partisan political party, candidate or cause;¹¹⁹ participate in any radio, television, or other program or group discussion as an advocate for or against a partisan political party, candidate, or cause;¹²⁰ distribute partisan political literature;¹²¹ display a large political sign, banner or poster (as distinguished from a bumper sticker) on a private vehicle;¹²² or display a partisan political sign, banner, poster, or similar device visible to the public at one's residence on a military installation, even if that residence is part of a privatized housing development.¹²³ Military members who are not on active duty may engage in any of the actions outlined above, provided the member is not in uniform and does not otherwise act in a manner that could reasonably give rise to the interference or appearance of official sponsorship, approval, or endorsement.¹²⁴ For activities not expressly prohibited, the DoDD states that any activity that may be reasonably viewed as directly or indirectly associating the Department of Defense or military service with a partisan political activity or that is otherwise contrary to the spirit and intention of the DoDD shall be avoided.¹²⁵

DoDD 1344.10 is not the only regulation that covers military members' political activities. Department of Defense Instruction 1325.06 covers dissident and protest activities among members of the armed forces.¹²⁶ Like DoDD 1344.10, the instruction states that service members' rights of expression should be preserved to the maximum extent possible in accordance with constitutional and statutory provisions.¹²⁷ Enclosure 3 of the instruction includes some guidance on possessing and distributing printed and electronic materials on post, placing off-installation gathering places off limits, off-installation demonstrations and similar activities,

¹¹⁶ *Id.* ¶ 4.1.1.6, at 2.

¹¹⁷ *Id.* ¶ 4.1.1.8, at 3.

¹¹⁸ *Id.* ¶ 4.1.2.2, at 3.

¹¹⁹ *Id.* ¶ 4.1.2.3, at 3.

¹²⁰ *Id.* ¶ 4.1.2.6, at 3.

¹²¹ *Id.* ¶ 4.1.2.7, at 3.

¹²² *Id.* ¶ 4.1.2.11, at 4.

¹²³ *Id.* ¶ 4.1.2.12, at 4.

¹²⁴ *Id.* ¶ 4.1.4, at 4.

¹²⁵ *Id.* ¶ 4.1.5, at 5.

¹²⁶ U.S. DEP'T OF DEF. INSTR. 1325.06, HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (27 Nov. 2009) (C1 22 Feb 2012) [hereinafter DoDI 1325.06].

¹²⁷ *Id.* ¶ 3(b), at 1.

and grievances.¹²⁸ It also prohibits military personnel from actively advocating supremacist, extremist, or criminal gang doctrine, or advancing efforts to deprive individuals of their civil rights.¹²⁹ Most relevant to this discussion, the instruction also contains a section entitled “publication of personal writing matters (to include web sites, web logs (blogs), and other electronic communications).” It states:

Service members may not pursue personal writing for publication whether by traditional written or by electronic means (Web sites, BLOGS, and other electronic communications) during duty hours, nor may they use Government or non-appropriated fund property for this purpose, on or off duty, unless it is for official use or authorized purposes only pursuant to section 2-301 of DoD 5500.7-R Publication of such matters by military personnel off-post, on their own time, and with their own money and equipment is not prohibited; however, if such a publication contains language the utterance of which is punishable under Federal law or otherwise violates this Instruction or other DoD issuances, those involved in printing, publishing, or distributing it may be disciplined or face appropriate administrative action for such infractions.¹³⁰

In addition, each service has its own regulations that govern members’ political activities.¹³¹ Together, these regulations attempt to strike a balance between respecting military members’ free speech rights while preserving “in part the long-standing tradition that the military remain an apolitical body whose duty is to obey the orders of its civilian leaders.”¹³² Regulatory limits on political activities by uniformed members generally seek to comply “with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement”¹³³ One commentator has noted that certain restrictions contained within DoDD 1344.10 are “meant to prevent the appearance of military endorsement of candidates, a purpose grounded in America’s long-standing desire for a politically neutral military.”¹³⁴ The regulations clearly focus on drawing a distinction between acts and speech done in a private capacity and acts and speech that could be imputed to the armed forces. However, the regulations err on the side of a “[v]ery limited ‘private citizen’

¹²⁸ *Id.* enc. 3, ¶ 1-7, at 7-9.

¹²⁹ *Id.* enc. 3, ¶ 8, at 9.

¹³⁰ *Id.* enc. 3, ¶ 4, at 7-8.

¹³¹ U.S. DEP’T OF AIR FORCE, INSTR. 51-902, POLITICAL ACTIVITIES BY MEMBERS OF THE US AIR FORCE (12 Nov. 2010); U.S. DEP’T OF ARMY, INSTR. 600-20, ARMY COMMAND POLICY ¶ 5-3, App. B (4 Aug. 2011); U.S. DEP’T OF NAVY, SEC’Y OF NAVY INSTR. 5720.44C, DEPARTMENT OF THE NAVY PUBLIC AFFAIRS POLICY AND NAVY REGULATIONS (21 Feb. 2012).

¹³² John L. Kiel, Jr., *When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military*, PARAMETERS, Autumn 2007, at 69, 72.

¹³³ DoDD 1344.10, *supra* note 5, ¶ 4, at 2.

¹³⁴ Pinson, *supra* note 113, at 841.

standard,” given the risk that a military member’s political activities will be attributed to the institution.¹³⁵

C. Enforcement of Political Speech Restrictions

Despite all the attention they engender from commentators and critics of the military justice system, the restrictions described above have very rarely been used to prosecute military members for political speech. Commanders have generally exercised great restraint in employing the powerful tools at their disposal. Non-judicial punishment proceedings for violations of political speech restrictions are rare, and courts-martial are even rarer. Generally, even blatant violations of these restrictions are not prosecuted, and typically draw an administrative reprimand or lower-level responses. After a flurry of activity in this area during the Vietnam War, there have been very few examples where military members have been court-martialed for violating political speech restrictions. Thus, this “dilemma of dissension in the ranks” has remained “dormant for more than 40 years.”¹³⁶ Commanders’ restraint in criminally enforcing political speech restrictions has kept the peace for decades between supporters and detractors of the restrictions, with the restrictions serving as a deterrent and occasionally forming the basis for lower-level corrective action while commanders have avoided the scrutiny and possible martyrdom that might result from court-martialing a member who engages in impermissible political speech.¹³⁷

¹³⁵ DoD Standards of Conduct Office, *Political Activities*, at 4, available at http://www.DoD.mil/DoDgc/defense_ethics/resource_library/deskbook/10ecc_political_activities.pdf

¹³⁶ Kiel, *supra* note 132, at 71.

¹³⁷ *See id.* at 80-81:

Senior leaders rarely courts-martial [sic] service members for voicing their political views in public for any number of reasons. Perhaps the most important reason is that commanders understand that their soldiers enjoy, for the most part, the same free speech rights that civilians are afforded under the Constitution.

...

Much like any other criminal matter, commanders have a host of options when it comes to disposing of these types of cases. Options range from doing nothing to recommending a general courts-martial [sic]. The proper response likely lies somewhere in between. Commanders can always resort to letters of reprimand and poor evaluation reports to get the desired time without the crippling stigma of jail time or a federal conviction. . . .

Harsher measures like a courts-martial [sic] should be reserved for egregious offenders who take their criminal conduct to greater heights.

1. Article 88

Several commentators have done a commendable job detailing the employment of Article 88's predecessors going back as far as sixteenth century England.¹³⁸ From 1862 to 1968, prohibitions against contemptuous words were employed about 115 times to prosecute military members, with the majority of these prosecutions taking place during the Civil War and the two World Wars.¹³⁹ A breakdown of these courts-martial reveals that most of the offenders fell into four categories: "noisy drunks";¹⁴⁰ "habitual gripers and blowhards";¹⁴¹ prosecutions covering frank statements made in private letters or conversations with friends;¹⁴² and offhand remarks made with "[n]o real idea of persuading others and little if any hostile motive."¹⁴³ Only a small number of prosecutions involved more blatant offenders, such as enemy sympathizers or public proclamations of contempt.¹⁴⁴

Since the enactment of the UCMJ, only one court-martial has resulted from contemptuous speech. Second Lieutenant Henry H. Howe, Jr., was an unlikely figure to make military justice history. An assistant motor officer of an engineer battalion at Fort Bliss, Texas, Lieutenant Howe marched in an off-base protest in 1965, organized by professors and students from a state college who intended to demonstrate against American foreign policy. Lieutenant Howe was not a member of this group, but did take part in the demonstration in civilian clothes, carrying a sign that read "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS [sic] IN VIET NAM" on one side and "END JOHNSON'S FACIST [sic] AGRESSION [sic] IN VIET NAM" on the other.¹⁴⁵ Lieutenant Howe's military affiliation was not widely known at the time, but came to the attention of Army authorities when a gas station attendant noticed Lieutenant Howe's protest sign and an Army sticker on his vehicle and notified the military police.¹⁴⁶ Lieutenant Howe was tried at a general court-martial of violating Article 88 as well as Article 133. Another charge of violating Article 134 was dismissed.¹⁴⁷ He was convicted of the remaining two charges and sentenced to a dismissal, total forfeitures, and confinement at hard labor for two years. A board of review upheld the findings and sentence on appeal.¹⁴⁸

¹³⁸ See, e.g., Kester, *supra* note 78, at 1701-17.

¹³⁹ *Id.* at 1720-21 (stating that of these 115 courts-martial, "all but a handful occurred during the Civil War, World War I, or World War II, or the year or two following each of these conflicts."). See also Davidson, *supra* note 87, at 2.

¹⁴⁰ Kester, *supra* note 78, at 1736.

¹⁴¹ *Id.* at 1736-37.

¹⁴² *Id.* at 1737-38.

¹⁴³ *Id.* at 1738-39.

¹⁴⁴ *Id.* at 1739-40.

¹⁴⁵ *United States v. Howe*, 37 C.M.R. 429, 432-33 (C.M.A. 1967).

¹⁴⁶ Davidson, *supra* note 87, at 3.

¹⁴⁷ *Howe*, 37 C.M.R. at 431.

¹⁴⁸ *Id.*

Though Lieutenant Howe occupies the unfortunate distinction as the sole military member convicted of an Article 88 offense, by no means is he the only officer to run afoul of the prohibition against contemptuous words. Several incidents have made their way into the mainstream media and it is likely that many other instances have been handled at lower levels without public knowledge. In 1993, President Bill Clinton had just assumed office, and his standing with the military was uncertain. Many military officers already viewed President Clinton skeptically because of his lack of military service and allegations that he had “dodged” the military draft during Vietnam. This, along with a lack of civilian leaders’ familiarity with military culture, damaged the relationship between the military and its civilian leaders.¹⁴⁹ The new President was “the object of ill-concealed disrespect among more than a few senior officers in his own Pentagon.”¹⁵⁰ In the midst of this volatile situation, Air Force Major General Harold N. Campbell, in an awards banquet speech, described the President as a “gay-loving, pot-smoking, draft-dodging womanizer” to an audience of military members.¹⁵¹ After an investigation and initial proposals that General Campbell could face a court-martial,¹⁵² the General was nonjudicially punished under Article 15 of the UCMJ, receiving a forfeiture of about \$7,000 in pay and a reprimand, after which he promptly retired.¹⁵³

Five years later, news of President Clinton’s affair with a White House intern caused some military members to believe the President’s conduct disqualified him from serving as their commander-in-chief. Marine Corps Major Shane Sellers was among them. Major Sellers, an intelligence analyst assigned to the Defense Intelligence Agency, wrote a newspaper column in the *Navy Times* that stated: “It’s not about sex. It’s tawdry and titillating, to be sure. But for all its soap-opera quality, what Clinton and Monica [Lewinsky] did as consenting adults boils down to adultery. And one should call an adulterous liar exactly what he is—a criminal.”¹⁵⁴ Sellers’ article, which also criticized members of Congress for backing punishment of the President short of impeachment, was the most notorious of several officers’ columns and letters to the editor that harshly criticized the President’s conduct,¹⁵⁵ leading some Pentagon officials to take the unusual step of reminding military members of Article 88’s restrictions.¹⁵⁶ However, Major Sellers was not disciplined for the incident. Instead, he received verbal counseling and a nonpunitive letter

¹⁴⁹ See generally, Tim Weiner, *Clinton as a Military Leader: Tough On-the-Job Training*, N.Y. TIMES, Oct. 28, 1996, at 1 (exploring early mistakes by the Clinton administration in leading the military and the general lack of confidence military leaders placed in President Clinton early in his presidency).

¹⁵⁰ Doyle McManus, *Clinton Seen Mending Rift with Military*, L.A. TIMES, Sept. 4, 1995, at 1.

¹⁵¹ Paul Quinn-Judge, *Air Force Reprimands, Retires General Accused of Ridiculing Clinton*, BOSTON GLOBE, June 19, 1993, at 3.

¹⁵² Kirk Spitzer, *General’s Remarks Under Investigation*, USA TODAY, June 9, 1993, at 2A.

¹⁵³ Quinn-Judge, *supra* note 151.

¹⁵⁴ Steven Lee Myers, *Testing of a President: Critics; Marines Scold Officer Who Called Clinton an ‘Adulterous Liar’ in a Column*, N.Y. TIMES, Nov. 14, 1998, at A10.

¹⁵⁵ *Marine Gets Warning Over His Criticism of Clinton*, BOSTON GLOBE, Nov. 14, 1998, at A13.

¹⁵⁶ Steven Lee Myers, *Military Warns Soldiers of Failure to Hail Chief*, N.Y. TIMES, Oct. 21, 1998, at A22.

of caution.¹⁵⁷ Around this same time, another Marine Corps major, Daniel Rabil, wrote an op-ed piece in *The Washington Times* that characterized the President as a “lying draft dodger” and a “moral coward” who “always had contempt for the American military.”¹⁵⁸ The Marine Corps responded by transferring Major Rabil, a reservist, to non-drill reserve status and issuing him a letter of caution, effectively precluding him from further promotion.¹⁵⁹

Examples of Article 88 violations are not confined to the Clinton administration. Early in President George W. Bush’s first term, Air Force Lieutenant Colonel Stephen Butler wrote a letter to the editor of the *Monterey County Herald* that contained a number of criticisms of the President and his handling of the 9/11 terrorist attacks. Lieutenant Colonel Butler’s letter argued that President Bush “did nothing to warn the American people because he needed this war on terrorism” to save his presidency, and that “The economy was sliding into the usual Republican pit, and he needed something to hang his presidency on.”¹⁶⁰ Lieutenant Colonel Butler’s punishment was not disclosed, though it was reported that he was reassigned and may have received nonjudicial punishment.¹⁶¹ A few years later, Army Lieutenant Ehren Watada held a news conference to discuss his refusal to deploy to Iraq; during the session, he repeatedly accused President Bush of lying and betraying the trust of the American people in leading the country to war in Iraq.¹⁶² The Army initially charged Lieutenant Watada with violations of Article 88;¹⁶³ those charges were later dropped as his court-martial proceeded to trial.¹⁶⁴

2. General Articles

Court-martial convictions for political statements under the general articles, including disloyal statements, are rare.¹⁶⁵ The best-known court-martial for political

¹⁵⁷ *Marine Gets Warning Over His Criticism of Clinton*, *supra* note 155.

¹⁵⁸ Rowan Scarborough, *Major Gets Punished for Criticizing President*, WASH. TIMES, Dec. 7, 1998, at A1.

¹⁵⁹ *Id.* In a later opinion piece for the same publication, Major Rabil defended his actions and criticized other military leaders for hiding behind Article 88 to justify their “moral laziness.” Daniel Rabil, *Code of Dishonor*, WASH. TIMES, Mar. 16, 1999, at A19.

¹⁶⁰ Drew Brown, *Anti-Bush Letter Touches Raw Nerve in Military*, AKRON BEACON J., June 9, 2002, at A13.

¹⁶¹ Dale Eisman, *Remarks Providing a Lesson in Military Law for Senior Officials, Freedoms Balanced with Duty to Country*, VIRGINIA PILOT & LEDGER STAR (Norfolk, Va.), Oct. 25, 2003, at A1.

¹⁶² Michael Gilbert, *Army Charges Could Bring Prison Time for Iraq War Resister*, NEWS TRIB. (Tacoma, Wash.), July 6, 2006, at A1.

¹⁶³ Hal Bernton, *Army Charges Lieutenant Who Wouldn't Go to Iraq*, SEATTLE TIMES, July 6, 2006, at A1.

¹⁶⁴ A mistrial eventually resulted in Lieutenant Watada’s court-martial on charges of missing movement and conduct unbecoming an officer and a gentleman. *Watada v. Head*, 2008 WL 4681577 (W.D. Wash. 2008). Charges were later re-preferred against Lieutenant Watada, and he responded by petitioning the U.S. District Court for a writ of habeas corpus. *Id.* The court granted the petition in part and ordered that the military may not convene a court-martial against Lieutenant Watada based on double jeopardy principles. *Id.*

¹⁶⁵ See Kiel, *supra* note 132, at 76 (“Much like Article 88, prosecutions for political speech under

speech under the general articles took place during the Vietnam War, when Army doctor Captain Howard Levy disobeyed an order to train Special Forces aides in dermatology procedures to ready them for combat.¹⁶⁶ Around this same time, he made several public statements to enlisted personnel at his duty station, including statements that “The United States is wrong in being involved in the Vietnam War,” “I would refuse to go to Vietnam if ordered to do so,” “If I were a colored soldier and were sent I would refuse to fight,” and “Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.”¹⁶⁷ Captain Levy was court-martialed for willfully disobeying a superior officer’s order and for violating Articles 133 and 134 by his statements to enlisted personnel.¹⁶⁸ He was convicted, and after direct appeals proved unsuccessful, he collaterally challenged his conviction all the way to the Supreme Court.¹⁶⁹ In what is likely the most important opinion dealing with the First Amendment rights of military members and the power of the military to regulate military speech, the Supreme Court upheld the conviction.¹⁷⁰ In so doing, the Court famously noted that it “has long recognized that the military is, by necessity, a specialized society separate from civilian society,” and that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”¹⁷¹

In other examples of violations of the general articles for political speech, the Lieutenant Watada case described above resulted in a charge of conduct unbecoming an officer and a gentleman for the same statements publicly criticizing President Bush that formed the basis of the Article 88 charge.¹⁷² Despite the directly disloyal nature of his statements, however, it is likely that charges would never have been preferred had he not opted to intentionally miss movement with the rest of his brigade.¹⁷³ In an older example, Private First Class Allen McQuaid made a series of critical statements about the United States and its foreign policy objectives toward the Soviet Union in 1951, encouraged members disaffected with the service to “follow the dictates of their own consciences,” and posted his views in writing on the front door of the officers’ club and on the bulletin board at the Air Base Group headquarters.¹⁷⁴ The accused was charged with and convicted of three specifications of violating Article 134.¹⁷⁵

Article 133 are extremely rare.”).

¹⁶⁶ Parker v. Levy, 417 U.S. 733, 736 (1974).

¹⁶⁷ *Id.* at 736-37.

¹⁶⁸ *Id.* at 737.

¹⁶⁹ *Id.* at 740-42.

¹⁷⁰ *Id.* at 762.

¹⁷¹ *Id.* at 743-44.

¹⁷² Kiel, *supra* note 132, at 78.

¹⁷³ *Id.* at 81.

¹⁷⁴ United States v. McQuaid, 5 C.M.R. 525, 528 (A.F.B.R. 1952).

¹⁷⁵ *Id.*

3. 18 U.S.C. 609

A series of database searches revealed no appellate cases, civilian or military, in which the statutory prohibition against using one's military authority to influence an election was used as a basis for prosecution. In fact, only a small number of cases even cited the statute, and then only tangentially.¹⁷⁶

4. Regulatory Limits on Political Activities

As with the other political speech restrictions outlined above, commanders have generally applied the restrictions lightly. In fact, the instructions “presuppose that commanders will exercise calm and prudent judgment when trying to properly reconcile these two interests when they clash.”¹⁷⁷ As a result, violators of this regulation appear to almost never be subject to court-martial. A search of military appellate cases revealed no cases involving a member charged with disobeying this directive, and even a law review article critical of DoDD 1344.10 cited no instances in which a service member was actually court-martialed for violating the directive.¹⁷⁸ One case involving the violation of a service-specific version of the DoD directive involved a civil challenge to the regulation rather than an appeal of a court-martial action. In *Brown v. Glines*,¹⁷⁹ a reserve Captain on active duty at Travis Air Force Base drafted a petition to several members of Congress and the Secretary of Defense complaining about Air Force grooming standards.¹⁸⁰ Captain Glines circulated the petition without obtaining prior approval of the base commander, and as a result, was assigned to the standby reserves for violating Air Force regulations requiring prior approval for the circulation of petitions.¹⁸¹ The Supreme Court ultimately denied Captain Glines' challenge to the regulations (a challenge based in part on the First Amendment), holding that the regulations protected a substantial government interest in military effectiveness.¹⁸²

¹⁷⁶ See, e.g., *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1310 (N.D. Fla. 2000) (citing several provisions of Uniformed and Overseas Citizens Absentee Voting Act, including 18 U.S.C. § 609, as evidence of Congress's intent to facilitate absentee voting and provide for a write-in absentee voting procedure for overseas voters who through no fault of their own, fail to receive a regular absentee ballot in sufficient time to vote); *Rigdon v. Perry*, 962 F. Supp. 150, 157 (D.D.C. 1997) (citing 18 U.S.C. § 609 and DoDD 1344.10 in civil suit by military chaplains and congregants against the Department of Defense for prohibitions against chaplains encouraging congregants to contact Congress on pending antiabortion legislation).

¹⁷⁷ Kiel, *supra* note 132, at 71.

¹⁷⁸ See generally Pinson, *supra* note 113.

¹⁷⁹ *Brown v. Glines*, 444 U.S. 348 (1980).

¹⁸⁰ *Id.* at 351.

¹⁸¹ *Id.*

¹⁸² *Id.* at 354.

D. Judicial Scrutiny of Political Speech Restrictions

Perhaps due in part to the restraint demonstrated in enforcing these restrictions, courts have granted the military great deference in matters of political speech restrictions. While the “clear and present danger” standard the Supreme Court has imposed on the government to justify political speech restrictions remains in the military context, the military has been granted “a near *carte blanche*” to define what constitutes a clear and present danger,¹⁸³ and therefore “may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy.”¹⁸⁴ A number of reasons have been advanced for the courts’ deference toward military regulations,¹⁸⁵ but regardless of the reasons for this deference, the end result is that the political speech restrictions outlined above have survived virtually every challenge in the courts.

The most prominent judicial treatment of Article 88 is naturally the *Howe* case, given that it is the only court-martial that has resulted from an Article 88 violation in the UCMJ’s history. After Lieutenant Howe’s conviction and the initial appellate review, he raised seven alleged errors to the Court of Military Review, predecessor to the current Court of Appeals for the Armed Forces.¹⁸⁶ Most notably, he alleged that: 1) The charges violated his First Amendment rights; 2) Articles 88 and 133 are so vague and uncertain that they violate the Fifth Amendment’s Due Process Clause; 3) The court failed to instruct the members that if the words at issue occurred in the context of a political discussion, they would have to find that Lieutenant Howe intended them to be personally disrespectful; and 4) The court erred in instructing the members that in determining whether the words were contemptuous, the court “should apply the test of how the words were understood and what they were taken to mean by the persons who saw them, or some of them.”¹⁸⁷ The court rejected all of Lieutenant Howe’s arguments. As to the first issue, after a lengthy review of the history of both Article 88’s predecessors and limits on First Amendment speech rights, the court found that with forces engaged in combat in Vietnam, “in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services,” a position the court found “seems

¹⁸³ Carr, *supra* note 33, at 304 (internal citations omitted).

¹⁸⁴ *Id.* at 306.

¹⁸⁵ See, e.g., Shannon Gilreath, *Sexually Speaking: “Don’t Ask, Don’t Tell” and the First Amendment After Lawrence v. Texas*, 14 DUKE J. GENDER L. & POL’Y 953, 963 (2007) (setting forth the “Defense is Different” explanation centered on the theory that the military possesses specialized expertise and requires a surrender of personal liberty); Ross G. Shank, *Speech, Service, and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 VAND. L. REV. 1093, 1140 (1998) (attributing the unwillingness of courts to interfere in military matters in part to the consequences that could result from an ineffective military); Reuter, *supra* note 30, at 329-33 (outlining the evolution of judicial deference to the military in free speech matters).

¹⁸⁶ The Court of Appeals for the Armed Forces serves as the highest appellate court in the military justice system and hears appeals in selected cases. UCMJ art. 67 (2012). Its decisions are only reviewable by the Supreme Court upon writ of certiorari. UCMJ art. 67a (2012).

¹⁸⁷ *Howe*, 37 C.M.R. at 433.

to require no argument.”¹⁸⁸ The court relied on the fact that the restrictions in Article 88’s predecessors predated the First Amendment and that the military stands apart from the rest of society.¹⁸⁹ Most notably, however, the court relied upon the need to maintain respect for civilian authority as a justification for Article 88 that overrode any First Amendment concerns presented by this case. Quoting from an eloquent lecture by Chief Justice Warren in 1962, the court stated:

It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. . . .

Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart. After the War, he resigned his commission and returned to civilian life. In an emotion-filled appearance before the Congress, his resignation was accepted by its President, Thomas Mifflin, who, in a brief speech, emphasized Washington’s qualities of leadership and, above all, his abiding respect for civil authority. . . .

Such thoughts were uppermost in the minds of the Founding Fathers when they drafted the Constitution.¹⁹⁰

The court therefore accepted the “clear and present danger” test as the proper one, but had no issue in finding this test was met in this case. The court did not further address to what extent service members’ speech can be restricted, and

¹⁸⁸ *Id.* at 438.

¹⁸⁹ See Carr, *supra* note 33, at 336:

Apart from the actual finding that Article 88 is facially valid, the court’s holding is significant in at least three respects. First, the court relied heavily upon the fact that the restrictions proscribed in the article pre-dated the First Amendment. The consequent reenactment of the Article by Congress led the court to conclude that this prohibition was acceptable. It has been argued, however, that this reasoning is inapplicable to the current military community because the Founding Fathers had never envisioned a large peacetime standing army. Second, the court placed great emphasis on the “separate community” theory and the importance of civilian control of the military to survival of our democratic government. Third, the ease by which the court found that Howe’s expressive conduct represented a clear and present danger to military discipline is notable. (citations omitted).

¹⁹⁰ *Howe*, 37 C.M.R. at 438-39 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y. U. L. REV. 181, 183 (1962)).

what test courts will use to review such restrictions.¹⁹¹ Finally, the court moved on to dispose of Lieutenant Howe's remaining claims, concluding that Article 88 presents no Due Process issue because it places members on "fair notice" of the conduct it prohibits, that intent is not an element of the offense, and that the trial court's instructions may have been improper, but no prejudice occurred because the "language used on the appellant's placard is hardly susceptible to more than one interpretation," holding that the term "fascist" "imputes both malfeasance of offense and the more horrendous crime of disloyalty."¹⁹²

During the Vietnam War, it appeared for a time that convictions under the general articles for disloyal statements would be severely curtailed. In *Stolte v. Laird*,¹⁹³ two soldiers distributed about 150 leaflets expressing their disapproval of the war in Vietnam.¹⁹⁴ The leaflets listed the soldiers' names, units, and ranks, and asserted, among other ideas, that "We are tired of all the lies about the war, the false ideas, the empty reasoning," and urged others to oppose the war.¹⁹⁵ Both were convicted of violating Article 134 by uttering disloyal statements and sentenced to a dishonorable discharge, forfeiture of all pay and allowances, and confinement at hard labor for three years.¹⁹⁶ The soldiers then filed a petition for a writ of habeas corpus with the U.S. District Court for the District of Columbia. The court granted the petition, holding that the specification under which the soldiers were convicted was unconstitutionally vague and overbroad, both on its face and as applied.¹⁹⁷ The court recognized that the requirement under Article 134 to demonstrate direct prejudice to good order and discipline "might go far toward redeeming the overbreadth of the proscription if it were strictly interpreted and applied, as e.g. by a 'clear and present danger' standard."¹⁹⁸ However, the court found that the military had applied the "prejudicial to good order and discipline" requirement too loosely, resulting in a situation where "[u]ndifferentiated fear and apprehension" could result in a conviction, thereby violating the First Amendment.¹⁹⁹ The court focused on the fact that the leaflets were distributed while the soldiers were off duty, that the government provided no evidence that the leaflets interfered with anyone's duties, and that there was no evidence that order broke down at all as a result of the statements.²⁰⁰ In summary, the court held, "To proscribe speech by servicemen there must be truly

¹⁹¹ See Kester, *supra* note 90, at 1748 ("On the underlying issues in the case—to what extent the speech of servicemen can be restricted when civilians are free to talk, and by what standards such restrictions will be judicially examined—the Court of Military Appeals offered little guidance.")

¹⁹² *Howe*, 37 C.M.R. at 445.

¹⁹³ *Stolte v. Laird*, 353 F. Supp. 1392 (D.D.C. 1972).

¹⁹⁴ *Id.* at 1393.

¹⁹⁵ *United States v. Amick*, 40 C.M.R. 720, 22 (A.B.R. 1969).

¹⁹⁶ *Id.* at 721.

¹⁹⁷ *Stolte*, 353 F.Supp. at 1407.

¹⁹⁸ *Id.* at 1405.

¹⁹⁹ *Id.* (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

²⁰⁰ *Stolte*, 353 F. Supp. at 1405-06.

direct and palpable prejudice to good military order and discipline. None was shown here.”²⁰¹

While the District Court decision in *Stolte* indicated a more zealous scrutinizing of military speech restrictions, the Supreme Court quickly squelched this approach in *Parker v. Levy*. Following Captain Levy’s conviction for his anti-Vietnam War statements, the Court of Appeals reversed, holding that the general articles are void for vagueness.²⁰² The Court of Appeals held that the general articles may punish actions within the protection of the First Amendment, and saw “no countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values.”²⁰³ The Supreme Court found otherwise, holding that the military is “‘a specialized community governed by a separate discipline from that of the civilian,’ and that ‘the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.’”²⁰⁴ The Court concluded that military officers are “more competent judges than the courts of common law,”²⁰⁵ and without the experience necessary to determine what crossed the line for general article violations, it was unable to find the general articles impermissibly vague or overbroad.²⁰⁶ Turning more specifically to the First Amendment issue, after finding that the protections of the First Amendment generally apply to military members, and the distinct nature of military service requires a different application of First Amendment protections, the Court found that there is a “wide range” of conduct to which the general articles might apply without infringing on the First Amendment, and the fact that “there may lurk at the fringes of the articles . . . some possibility that conduct which would be ultimately held to be protected by the First Amendment could be included within their prohibition” was insufficient to invalidate the general articles.²⁰⁷ Moving from a more general analysis of the general articles to applying them to Captain Levy’s conduct, the Court found his speech “was unprotected under the most expansive notions of the First Amendment.”²⁰⁸ Captain Levy’s conviction was reinstated.

The Court in *Parker*, like that in *Howe*, held that “the clear and present danger test applies in the military context and displayed a substantial amount of deference to the military’s professional judgment as to whether the test was met.”²⁰⁹ That exemplifies the deferential approach demonstrated in a variety of decisions over the past decades from a range of courts. In *United States v. Priest*, the leading

²⁰¹ *Id.* at 1406.

²⁰² *Levy v. Parker*, 478 F.2d 772 (3rd Cir. 1973).

²⁰³ *Id.* at 796.

²⁰⁴ *Parker*, 417 U.S. at 744 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

²⁰⁵ *Parker*, 417 U.S. at 748 (quoting *Swain v. U.S.*, 165 U.S. 553 (1897) (quoting *Smith v. Whitney*, 116 U.S. 178 (1886))).

²⁰⁶ *Parker*, 417 U.S. at 755-58.

²⁰⁷ *Id.* at 760-61.

²⁰⁸ *Id.* at 761.

²⁰⁹ Carr, *supra* note 33, at 320.

case from the military courts, the court upheld the conviction of a sailor for disloyal statements when he published 800 to 1,000 pamphlets calling for the overthrow of the government.²¹⁰ Applying the clear and present danger test, the Court held that it is not necessary to demonstrate actual impairment to discipline before sustaining a conviction; instead the relevant consideration is “whether the gravity of the effect of accused’s publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction.”²¹¹ The court easily concluded that this standard was met, since the statements “expressly sought a breakdown in military discipline” and explicitly encouraged behavior that the court described as “a calculated call for revolution.”²¹²

While there have been few political speech courts-martial since Vietnam, the courts have consistently displayed similar deference in First Amendment challenges to other speech cases.²¹³ This deference has drawn both praise and criticism. Former Senator Sam Nunn offered the former when he wrote that the “Supreme Court’s jurisprudence in the field of military law has been characterized by the highest degree of deference to the role of Congress and respect for the judgment of the armed forces in the delicate task of balancing the interests of national security and the rights of military personnel.”²¹⁴ Others disagree, stating that the courts have offered “generic reasoning of complete deference to the military”²¹⁵ and calling the judiciary’s actions in free speech challenges to military restrictions the “most extreme judicial abdication.”²¹⁶ Regardless of the merits of this judicial deference to military judgment on questions of political speech, it is undisputed that in when faced with traditional communication, courts have had few reservations about

²¹⁰ *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972).

²¹¹ *Id.* at 344-45.

²¹² *Id.* at 345.

²¹³ *See Carr, supra* note 33, at 323-328 (outlining unsuccessful First Amendment challenges to convictions in cases such as private communication between adults of hostile and degrading language, spitting on the American flag, and giving a false account of one’s own military service in wartime). *See also Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) (“[M]ilitary discipline, and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts”); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society”); *Carlson v. Schlesinger*, 511 F.2d 1327, 1331-32 (D.C. Cir. 1975) (holding that a requirement for a military member to obtain his commander’s approval before circulating a petition in a combat zone is “eminently reasonable” and that “in a combat zone situation, a commanding officer must be afforded substantial latitude in balancing competing military needs and first amendment rights”); and *United States v. Wilson*, 33 M.J. 797, 800 (A.C.M.R. 1991) (upholding a soldier’s conviction for blowing his nose on the American flag while a member of the flag-raising detail and rejecting soldier’s First Amendment claim because “military necessity, including the fundamental necessity for discipline, can be a compelling government interest warranting the limitation of the right of freedom of speech.”).

²¹⁴ Hon. Sam Nunn, *The Fundamental Principles of the Supreme Court’s Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 557 (1994).

²¹⁵ Reuter, *supra* note 30, at 332.

²¹⁶ Dienes, *supra* note 70, at 799.

deferring to congressional or military determinations that particular restrictions are necessary in order to achieve civilian control of the military, an apolitical military, good order and discipline, or related legitimate ends.

III. THE VIRAL GROWTH OF VIRAL COMMUNICATION

A. World Gone Viral

The world has been transformed by viral communication. By one study, Americans spend more than 20 percent of their online time on social media websites, more than any other single website type.²¹⁷ Collectively, social media, user-generated content services, and online collaboration and sharing tools have created the capacity for videos, images, or articles to “go viral”—to spike in popularity and reach a large number of users in a short period of time.²¹⁸ This article calls this entire spectrum of exponential sharing and linking media “viral communication”; others have dubbed it “Web 2.0.”²¹⁹ The phenomenon has been dubbed a “revolution,” a “story about community and collaboration on a scale never seen before.”²²⁰ Social media use doubled between 2008 and 2011, revealing a change in how people interact with information: With the advent of viral media, people “not only want to receive information, but they want to discuss it with as many people as possible.”²²¹

The most popular of these sites, Facebook,²²² allows individuals and organizations to connect virtually with others (normally “friends” who agree to form a connection), share photographs and digital video, make announcements, and share links to other websites.²²³ Facebook boasted 845 million users at the end of 2011 (12 percent of the planet’s population) and was expected to exceed one billion users in 2012.²²⁴ Close to half a billion Facebook users check the site at least once a day, and on average, 2.7 billion “likes”²²⁵ and comments are posted every

²¹⁷ Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 149 (2012).

²¹⁸ *Viral*, <http://www.techterms.com/definition/viral> (last visited Mar. 28, 2012).

²¹⁹ O’Reilly Media developed the term in 2004 to refer to “a second generation of Web-based use and services—such as social networking sites and wikis—that emphasize online collaboration and sharing among users.” Thomas O’Guinn, Chris Allen &, Richard J. Semenik, *ADVERTISING & INTEGRATED BRAND PROMOTION* 49 (5th ed. 2008).

²²⁰ Lev Grossman, *You—Yes, You—Are TIME’s Person of the Year*, *TIME*, Dec. 25, 2006, <http://www.time.com/time/magazine/article/0,9171,1569514,00.html>.

²²¹ Chloe Stepney, *What to Do for Social Media Day? Get Connected!*, *CHRISTIAN SCI. MONITOR*, Jun. 30, 2011, available at 2011 WLNR 13038159.

²²² Facebook Home Page, <http://www.facebook.com> (last visited Sept. 10, 2012).

²²³ WiseGeek, *What Is Facebook?*, <http://www.wisegeek.com/what-is-facebook.htm> (last visited Sept. 10, 2012).

²²⁴ Facebook, Inc., Registration Statement (Form S-1) (Feb. 1, 2012), available at <http://sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm> [hereinafter SEC Filing].

²²⁵ Facebook users click a “like” button to provide positive feedback on a posting or to connect to organizations they care about. Facebook, *What is the Like Feature?*, <https://www.facebook.com/help/like> (last visited Sept. 10, 2012).

day.²²⁶ One hundred billion friendships have been formed through the site.²²⁷ The site's global popularity continues to increase; in country after country, users have chosen Facebook over formerly popular local networking sites in "what seems like an unstoppable march to global dominance."²²⁸

If there is challenger to Facebook's dominant status among social media sites, it is Twitter.²²⁹ Launched in 2006, Twitter serves as a platform to allow people to communicate information about their activities or their perspectives on issues at a micro level, an activity sometimes termed "micro-blogging."²³⁰ Twitter allows users to update anyone interested on their actions and location in postings of 140 characters or less, forcing the user to "make pithy statements on the fly."²³¹ Users (called "tweeters" or "twitterers") can also link to other sites or to a photograph or video, or can repost other users' messages on their own pages.²³² The site boasts 100 million users, and users "tweet" an average of 230 million times a day.²³³ The site is considered addictive, with tweeters tending to post constant updates about their status many times a day.²³⁴ Whereas Facebook is mostly used to communicate with a circle of acquaintances, Twitter users' pages and messages are open to the public.²³⁵

While Facebook allows communication through a variety of means (text, pictures, or video) among friends, YouTube—and other sites like it—focus on the specific purpose of allowing users to share videos with a wide audience. Born in 2005, YouTube quickly grew to the point that by 2009, the site registered one billion views per day.²³⁶ After being acquired by Internet giant Google, YouTube continued to grow exponentially, and by early 2012 the site streamed four billion videos a day.²³⁷ Primarily focused on facilitating the sharing of user-generated videos, much of the content on the site involves entertainment, hijinks, spoof videos, and outright bizarre activities, leading to its reputation as "a storehouse of whimsical, time-wasting, and occasionally distasteful videos."²³⁸ However, the site serves more

²²⁶ SEC Filing, *supra* note 224.

²²⁷ *Id.*

²²⁸ Mike Swift, *Rise of a Single Social Network*, SAN JOSE MERCURY NEWS, Jan. 12, 2012, at 1A.

²²⁹ Twitter Home Page, <http://www.twitter.com> (last visited Sept. 10, 2012).

²³⁰ Mark Glaser, *MediaShift: Your Guide to Micro-Blogging and Twitter*, PBS, May 15, 2007, available at <http://www.pbs.org/mediashift/2007/05/your-guide-to-micro-blogging-and-twitter135.html> (last visited Sept. 10, 2012).

²³¹ *Id.*

²³² Paul Boutin, *Nine Things You Didn't Know About Twitter*, N.Y. TIMES, Jan. 19, 2012, at B8.

²³³ John Timpane, *In 2011, Twitter Leaped into Action*, PHILA. INQUIRER, Dec. 25, 2011, at A01.

²³⁴ One study from the University of Chicago's Booth School of Business reported that social media in general, and Twitter in particular, is more addictive than cigarettes and alcohol. Chris Ciaccia, *Twitter is More Addictive Than Cigarettes*, DALLAS MORNING NEWS, Feb. 6, 2012, available at <http://business-news.thestreet.com/dallas-morning-news/story/twitter-is-more-addictive-than-cigarettes/11404024>.

²³⁵ *Twitter, Facebook in Ultimate Social War*, DETROIT FREE PRESS, Oct. 27, 2011, at X2.

²³⁶ Steve Johnson, *YouTube Turns 5*, ORLANDO SENTINEL, Apr. 23, 2010, at A8.

²³⁷ *YouTube Now Streaming 4 Billion Videos Per Day*, CHI. TRIB., Jan. 25, 2012, at 3.

²³⁸ Stephanie Strom, *YouTube Subtracts Racy and Raucous to Add a Teaching Tool*, N.Y. TIMES, Mar. 10, 2012, at A14.

useful purposes as well. YouTube contains educational videos that tutor students on difficult subjects, how-to demonstrations, recording of performing arts events, and political discourse.

The sites described above are the dominant players in their respective fields. Blogging, however, is a medium not dominated by any particular website. A blog (short for web log) is a website on which people post entries viewable by anyone, allowing readers to leave comments. While the medium is not strictly defined, it is often characterized by a “personal and opinionated writing style.”²³⁹ Many blogs are topic-centered, and popular blogs on topics such as news, entertainment, technology, and politics can draw millions of readers.²⁴⁰ About 57 million American adults—or 39 percent of Internet users—read blogs of some type.²⁴¹ While the popularity of blogs has waned somewhat with the rise of social media sites such as Facebook and Twitter, they nonetheless remain a powerful presence on the web.²⁴² Some blogs are small and personal, while others appeal to a wide audience and require much effort. Regardless of the reach of the blog, however, bloggers put in the effort to run their sites in order “to express themselves creatively and to record their personal experiences.”²⁴³ What makes blogs a viral medium is the ability to link to other blogs and online material, and the tendency for readers to comment on blog entries.²⁴⁴ Most blogs offer readers the opportunity to not only comment on a particular posting, but also to link other sites to blog entries.²⁴⁵ Together, blogs have “restore[d] a real voice and personality to the citizenry at large—locally, nationally, globally.”²⁴⁶

Bloggging, YouTube, Twitter and Facebook do not constitute the entirety of the viral world. As of this writing, emerging social media sites include Pinterest,²⁴⁷ an

²³⁹ Verne G. Kopytoff, *Blogs Wane as the Young Drift to Sites Like Twitter*, N.Y. TIMES, Feb. 21, 2011, at B1.

²⁴⁰ A list of the 100 most popular blogs can easily be found online. See *Technorati Top 100*, <http://technorati.com/blogs/top100> (last visited Sept. 10, 2012). The best sources of information on blog readership are, naturally, other blogs. See, e.g., BLOGGERS BLOG, <http://www.bloggersblog.com/statistics/> (last visited Sept. 10, 2012).

²⁴¹ Amanda Lenhart & Susannah Fox, *Part 5: Audience*, PEW INTERNET & AM. LIFE PROJECT, <http://www.pewinternet.org/Reports/2006/Bloggers/07-Audience/01-Introduction.aspx>.

²⁴² Kopytoff, *supra* note 239.

²⁴³ Amanda Lenhart & Susannah Fox, *Part 3: Motivation and Content*, PEW INTERNET & AM. LIFE PROJECT, <http://www.pewinternet.org/Reports/2006/Bloggers/05-Motivation-and-Content/01-Introduction.aspx>.

²⁴⁴ See Tatum H. Lytle, *A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests*, 59 FED. COMM. L.J. 593, 600 (2007) (“A defining characteristic of a blog is when a blogger refers to an online source, then he links his blog to that source. This system of linking is what distinguishes a weblog from traditional media writing on the Internet.”).

²⁴⁵ For example, many blogs offer readers the opportunity to “tweet” or “like” a particular entry, linking it to the reader’s Twitter or Facebook account. Many blogs also contain links to other blogs that cover similar topics.

²⁴⁶ David Kline & Dan Burstein, *BLOG! HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE XXI* (2005).

²⁴⁷ PINTEREST HOME PAGE, <http://pinterest.com> (last visited Sept. 10, 2012).

online pin board that invites its members to “organize and share things you love,”²⁴⁸ and Tumblr,²⁴⁹ a “micro-blogging” site that allows users to easily post pictures, text, and video, and offers a “reblog” feature that “allows a meme to spread rapidly across thousands of blogs with just a click.”²⁵⁰ Internet giant Google has entered the social media realm with Google Plus,²⁵¹ and quickly grew to 50 million regular users.²⁵² MySpace, an early leader in social media before being eclipsed by Facebook, has shown signs of a resurgence.²⁵³ LinkedIn operates as a virtual business network and boasts more than 150 million members.²⁵⁴ Delicious²⁵⁵ and other social bookmarking tools provide a way for users to share web pages, allowing users to link or “tag” pages, facilitating the viral spread of information. Viral communication is fast becoming synonymous with communication in modern society; it is the way the world shares information. As the Millennial generation makes its way to adulthood, the Pew Research Center predicts that viral communication will become “a badge of generational identity.”²⁵⁶

B. Viral Communication in the Military

Like the rest of society, the military has taken advantage of the speed, ease, and networking capabilities of viral communication. While no studies exist that show the exact level to which viral communication has pervaded the military community, there is every reason to believe that the military is more plugged in to the viral network than society at large. Studies show that younger, middle income, educated, and ethnically diverse people are more likely to use social media sites—a description that fits the military community perfectly.²⁵⁷ Deployed military members in particular find social networking sites useful in relating their experiences

²⁴⁸ Mikal E. Belicove, *Emerging Social Media Sites to Attract Users*, ENTREPRENEUR, Jan. 16, 2012, <http://www.entrepreneur.com/blog/222634>.

²⁴⁹ TUMBLR HOME PAGE, <https://www.tumblr.com> (last visited Sept. 10, 2012).

²⁵⁰ TUMBLR ABOUT PAGE, <http://www.tumblr.com/about> (last visited Sept. 10, 2012).

²⁵¹ GOOGLE PLUS HOMEPAGE, <https://plus.google.com> (last visited Sept. 10, 2012).

²⁵² Nick Bilton, *Google Plus Battles Perceptions*, N.Y. TIMES, Mar. 12, 2012, at B4.

²⁵³ Ben Sisario, *MySpace to Declare One Million New Users*, N.Y. TIMES, Feb. 13, 2012, at B4.

²⁵⁴ LINKEDIN PRESS CENTER, <http://press.linkedin.com/about> (last visited Sept. 10, 2012).

²⁵⁵ DELICIOUS HOME PAGE, www.delicious.com (last visited Sept. 10, 2012).

²⁵⁶ *Millennials: A Portrait of Generation Next. Confident. Connected. Open to Change.*, PEW RESEARCH CENTER, Feb. 24, 2010, <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>.

²⁵⁷ See, e.g., Ken Burbary, *Facebook Demographics Revised—2011 Statistics*, SOCIAL MEDIA TODAY, Mar. 7, 2011, <http://socialmediatoday.com/kenburbary/276356/facebook-demographics-revisited-2011-statistics> (finding that 65 percent of Facebook users are age 34 or under); Aaron Smith & Lee Rainie, *Who Tweets?*, PEW RESEARCH CENTER, Dec. 10, 2010, <http://pewresearch.org/pubs/1821/twitter-users-profile-exclusive-examination> (examining Twitter use by demographic group and finding Internet users aged 18-29 are twice as likely to use Twitter as any other age demographic, Hispanic or black users are much more likely to use Twitter than whites, and users with a college education are significantly more likely to use Twitter than those with a high school diploma only). See also PEW INTERNET & AMERICAN LIFE PROJECT, <http://www.pewinternet.org/> (last visited Sept. 10, 2012) (generally discussing Internet usage in America, including demographic data).

and staying in touch with family members and friends.²⁵⁸ Military use of viral communication is not limited merely to keeping in touch or reporting from deployed locations, however. One commentator observed “the recent onslaught of social media used by soldiers to express their views on anything related to the military or War on Terror.”²⁵⁹ Military members are taking advantage of the full range of viral forums to share their experiences, develop networks, build support groups, and share common interests. A number of Facebook pages are aimed at military members and their families, such as a “Proud of Our Military” page that has drawn more than 100,000 “likes.”²⁶⁰ A number of Twitter accounts by military members draw a significant following.²⁶¹ Military members are also using viral communication to reduce the isolation they feel from the rest of American society, allowing them to connect with people outside military circles.²⁶² Regardless of whether they are using it to communicate among each other on military-related topics or with society at large to share information on general interest topics, “many thousands of troops . . . use blogs, Facebook, Twitter, and other social media sites to communicate with the outside world,” causing a “daily flood of posts, videos and photographs.”²⁶³

One particularly popular form of communication among military members has been blogging. Active duty members, along with veterans, spouses and parents, maintain thousands of military blogs.²⁶⁴ Popular military blogs (or milblogs) range from officially-sanctioned sites²⁶⁵ to unofficial sites concerning military matters of broad interest,²⁶⁶ to personal accounts of the life of military families.²⁶⁷ Some

²⁵⁸ Howard Altman, *Deployed Military Goes Digital*, TAMPA TRIB., Apr. 27, 2010, at 1.

²⁵⁹ David Johnsen, *Free Speech on the Battlefield: Protecting the Use of Social Media by America's Soldiers*, 44 J. MARSHALL L. REV. 1085, 1085 (2011).

²⁶⁰ PROUD OF OUR MILITARY FACEBOOK HOME PAGE, <https://www.facebook.com/ProudOfOurMilitary> (last visited Sept. 10, 2012).

²⁶¹ For a list of some of these popular sites, see MILITARY BOOTS NEWS, *Top 101 Military Twitter Accounts*, www.militaryboots.com/news/military-twitter-accounts/ (last visited Mar. 21, 2012). For a list of top Twitter user rankings, including accounts of members of the military community, see TWITAHOLIC HOME PAGE, www.twitaholic.com (last visited Sept. 10, 2012).

²⁶² Major Crispin J. Burke, *As Social Media Expands, Military Bloggers Find More Outlets at War*, N.Y. TIMES, Feb. 28, 2012, available at 2012 WLNR 4288265:

Despite the risks, social media remains an important tool for service members. And today, it is more important than ever. After 10 years of war, service members have begun to feel isolated from American society; not just physically—due to long, repetitive deployments—but often emotionally as well. But in the online world, you can follow and friend just about anyone. Service members can now stay connected, not just to each other, but to the rest of the nation that they serve.

²⁶³ James Dao, *As Troops' Blogging Increases, Military Tries to Keep Control: At Same Time, Pentagon Ramps Up Use of Social Networks*, ST. PAUL PIONEER PRESS, Sept. 9, 2009, at A2.

²⁶⁴ James Dao, *Once Underground, Military Blogging Goes Mainstream*, N.Y. TIMES, May 2, 2011, at A17.

²⁶⁵ See, e.g., U.S. AIR FORCE LIVE, <http://airforcelive.DoDlive.mil> (last visited Sept. 10, 2012); U.S. Navy CyberSpace Blog, <http://www.navycs.com/blogs/> (last visited Sept. 10, 2012).

²⁶⁶ See, e.g., BLACKFIVE, <http://www.blackfive.net/> (last visited Sept. 10, 2012); MICHAEL YON ONLINE MAGAZINE, <http://www.michaelyon-online.com> (last visited Sept. 10, 2012).

²⁶⁷ See, e.g., THE ARMY WIFE, <http://www.thearmywife.com> (last visited Sept. 10, 2012); THE JOURNEY

military blogs have become so popular that they receive tens of thousands of visits each day.²⁶⁸ Military blogging has become so popular that it is the subject of a large annual conference that draws a diverse group of authors.²⁶⁹

The military at times has struggled to adjust to the reality of its members' viral communication, particularly in regard to military matters. While military members have used social media and other viral tools since their inception, the Pentagon did not develop a policy on social media use until 2009 and many sites were blocked up until that time.²⁷⁰ Pentagon officials worried about malicious software, bandwidth issues, and how to avoid inadvertent release of sensitive information.²⁷¹ Before 2009, the military's general approach, according to a prominent military blogger, was "trying to put the last nail in the coffin of social media."²⁷² Similarly, once the military realized that service members were blogging, it came to see blogs as a threat. For example, when an Army Specialist's popular blog about life in a war zone revealed information about situations when his platoon came under fire, his battalion commander ordered him to clear all blog postings with his platoon sergeant out of concern for operational security.²⁷³

Within the last few years, though, the military has come to embrace viral communication, at least to a degree. In 2009, the Arab Spring demonstrated the power of viral media to effect change, and the Pentagon took notice.²⁷⁴ Defense Secretary Robert Gates realized that DoD was "way behind the power curve in this," and that the Pentagon could use viral media to get "better plugged in" with the Department's two million people, particularly its younger population.²⁷⁵ The Army created an Online and Social Media Division to lead its public affairs office in this medium.²⁷⁶ The Pentagon reversed bans on various forms of viral media in 2010, announcing that the benefits of the media outweighed security concerns.²⁷⁷ An official Pentagon directive mandated that government computer networks provide access to viral media across DoD for "[o]fficial uses of Internet-based capabilities

OF A NAVY WIFE, <http://thejourneyofanavywife.com> (last visited Sept. 10, 2012); MILITARY TEEN, <http://awvlkon1094.blogspot.com> (last visited Sept. 10, 2012).

²⁶⁸ Kiel, *supra* note 132, at 70.

²⁶⁹ Dao, *supra* note 264.

²⁷⁰ *For Military, An About-Face on Facebook, Blogging*, FEDERAL TIMES, Aug. 3, 2009; Sharon Gaudin, *Marines Solidify Ban of Facebook, Twitter*, COMPUTERWORLD, Aug. 4, 2009, available at http://www.computerworld.com/s/article/9136255/Marines_solidify_ban_on_Facebook_Twitter.

²⁷¹ Julian E. Barnes, *What's on the Pentagon's Mind? Facebook*, L.A. TIMES, Aug. 5, 2009, at 10.

²⁷² *For Military, An About-Face on Facebook, Blogging*, *supra* note 270.

²⁷³ Lytle, *supra* note 244, at 606.

²⁷⁴ Donna Miles, *Gates, Mullen: Communications Technologies 'Strategic Asset' for United States*, ARMED FORCES PRESS SERVICE, Jun. 18, 2009, <http://www.defense.gov/news/newsarticle.aspx?id=54834>.

²⁷⁵ *Id.*

²⁷⁶ *About-Face on Facebook, Blogging*, *supra* note 270.

²⁷⁷ *Military Eases Internet Access After Seven-Month Review of Benefits and Threats*, FT. WORTH STAR-TELEGRAM, Feb. 27, 2010, available at 2010 WLNR 4127775. The policy allows commanders to restrict access to these sites for security purposes. *Id.*

unrelated to public affairs” and “limited authorized personal use.”²⁷⁸ DoD established a “social media hub,” aimed at helping military members and civilian employees use social media and other similar capabilities responsibly and effectively.²⁷⁹ The hub actually instructs DoD members on how to start a blog, build a presence on Facebook, or “Twitter in Plain English.”²⁸⁰ DoD openly touts its embracing of viral media and boasts that it, and the military services combined, maintain thousands of Facebook pages.²⁸¹

C. DoD Policy on Political Speech in Viral Media

The military may have grown to welcome viral media, but its efforts to set ground rules for military members’ speech in the new media—particularly the minefield of political speech—have been inconsistent. At the DoD level, Directive-Type Memorandum (DTM) 09-026 establishes policy for “responsible and effective use of Internet-based capabilities, including social networking services.”²⁸² However, it contains little guidance for military members as to what communication is permitted and not permitted on viral media, and only covers use of government communications systems to access these sites. A more comprehensive DoD policy on viral communication does not exist as of this writing.

The services have attempted more complete efforts in this area. The Army Public Affairs Office, Online and Social Media Division, has published a “Social Media Handbook” that encourages soldiers and their families to make use of social media, but advises them to do so “in a safe and secure manner.”²⁸³ The handbook covers both official and unofficial communications in social media, though it mostly focuses on official communications and issues such as operational security and crisis communications. Its only statement that even tangentially relates to political speech is as follows: “Everything a leader says and does is more visible and taken more seriously. Leaders have a greater responsibility to speak respectfully and intelligently about issues they don’t intend to reflect on a command or the Army.”²⁸⁴

²⁷⁸ Memorandum from Deputy Secretary of Defense, to Chairman of Joint Chiefs of Staff et al, subject: Directive-Type Memorandum (DTM) 09-026—Responsible and Effective Use of Internet-based Capabilities (25 Feb. 2010) (C4, 9 May 12), available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-026.pdf> [hereinafter DTM 09-026].

²⁷⁹ DoD SOCIAL MEDIA HUB, <http://www.defense.gov/socialmedia/> (last visited Sept. 10, 2012).

²⁸⁰ DoD SOCIAL MEDIA HUB EDUCATION & TRAINING, <http://www.defense.gov/socialmedia/education-and-training.aspx/> (last visited Sept. 10, 2012).

²⁸¹ Tom Budzyna, *Social Media Shapes Markets, the Military and Life*, ARMED FORCES PRESS SERVICE, Aug. 31, 2010, <http://www.defense.gov/news/newsarticle.aspx?id=60665>.<http://www.defense.gov/news/newsarticle.aspx?id=60665>.

²⁸² DTM 09-026, *supra* note 278.

²⁸³ Office of the Chief of Public Affairs, Online and Social Media Division, U.S. Army Social Media Handbook, Jan. 2011, available at <http://www.slideshare.net/USArmySocialMedia/army-social-media-handbook-2011>.

²⁸⁴ *Id.* at 6.

The Navy also offers a social media handbook²⁸⁵ and has issued two all-Navy messages on the issue.²⁸⁶ The Navy handbook offers a much more extended discussion on political discourse, and besides repeating general guidance about not associating DoD with partisan politics, it offers several specific considerations for members engaging in political speech in social media. These considerations are worth repeating here:

You can express your political views on public issues or political candidates online, but not as part of an organized communication campaign.

If you are intent on voicing your opinion on a political issue you need to consider where you are going to comment (is it your personal Facebook account, or are you going to write it on a blog) and who the audience is (is it a professional forum or somewhere you use to communicate with your Sailors). In general, you should avoid political comments where they are likely to be viewed by your personnel.

Don't attempt to hide or obscure your affiliation with the Navy—this just makes what you say more suspect.

If your communication identifies you as a member of DoD/DON, fully disclose who you are by rank and/or title and disclaim that your opinions are not necessarily those of the Navy, for example: “. . . in the interest of full disclosure I am a Captain in the U.S. Navy and Commanding Officer of USS Neversail and the opinions expressed here are my own and not necessarily those of the U.S. Navy.”

Avoid discussing political issues, local or national, that are affiliated with the Navy and Department of Defense as there is a high potential for saying something inappropriate.

You cannot solicit votes for or against a party, candidate, cause.

You cannot participate in any interview or discussion as an advocate for or against a party, candidate, cause.

Avoid ad hominem attacks and keep your political discourse substantive.

²⁸⁵ Navy Command Social Media Handbook, Fall 2010, *available at* http://www.cnrc.navy.mil/pao/socialnetwrk/soc_med_hnd_bk.pdf.

²⁸⁶ ALNAV-056/10, Secretary of the Navy, subject: Internet-Based Capabilities Guidance—Official Internet Posts (Aug. 19, 2010); ALNAV-057/10, Secretary of the Navy, subject: Internet-Based Capabilities Guidance—Unofficial Internet Posts (Aug. 19, 2010).

Commissioned officers must avoid contemptuous words against the President, Vice President, SECDEF, Dept. Secretary (i.e. SECNAV), Governor and Legislature of any state he or she is on duty in or present²⁸⁷

Likewise, the Marine Corps has published a social media handbook, with some very direct, common-sense guidance on personal and official social media use.²⁸⁸ The Marine Corps publication offers “15 tips to stay safe and out of trouble online,” including a section entitled “Don’t get political” which essentially repeats DoDD 1344.10 guidelines.²⁸⁹ The handbook also offers a number of other guidelines that relate indirectly to political speech, such as “If you wouldn’t say it to your grandma, don’t post it,” and “Talk about what you know best.”²⁹⁰ The guide also offers some sound advice on all manner of communication in viral media, such as ensuring that members draw a distinction between personal opinions and official communication, and warning Marines that “the lines between your personal and professional life are easily crossed when communicating online.”²⁹¹

Finally, the Air Force offers a guide to use of “new media” that mostly offers general guidance on a variety of viral media.²⁹² The guide states that “in general, the Air Force views personal Web sites and blogs positively, and it respects the rights of Airmen to use them as a medium of self-expression.”²⁹³ However, it also cautions Airmen that they are “on duty 24-hours a day, 365-days a year” and that “[e]ven if Airmen state they are not representing the Air Force, other audiences may not interpret the information that way.”²⁹⁴ The guide also offers a “Top 10 Tips for New Media,” but does not offer any specific guidance on political speech.²⁹⁵

²⁸⁷ Navy Command Social Media Handbook, *supra* note 285, at 7, *internal citations omitted*.

²⁸⁸ The Social Corps: The U.S.M.C. Social Media Principles, http://www.au.af.mil/pace/handbooks/usmc_social_media_handbook-aug2011.pdf (last visited Oct. 27, 2012).

²⁸⁹ *Id.* at 41.

²⁹⁰ *Id.* at 36-37.

²⁹¹ *Id.* at 7.

²⁹² Air Force Public Affairs Agency, New Media and the Air Force, <http://www.af.mil/shared/media/document/AFD-090406-036.pdf> (last visited Sept. 10, 2012).

²⁹³ *Id.* at 7.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 17. As this article was being finalized, the Air Force also released Air Force Instruction 1-1, summarizing the high standards to which Airmen are held. The instruction includes a paragraph on use of social media, and reminds Airmen: “Compliance with the standards discussed in the instruction does not vary, and is not otherwise dependent on the method of communication used.” U.S. DEP’T OF AIR FORCE, INSTR. 1-1, AIR FORCE STANDARDS (7 Aug. 2012), ¶ 2.15, at 20-21. The instruction does not specifically discuss political speech, but it does instruct Airmen:

You must avoid offensive and/or inappropriate behavior on social networking platforms and through other forms of communication that could bring discredit upon the Air Force or you as a member of the Air Force, or that would otherwise be harmful to good order and discipline, respect for authority, unit cohesion, morale, mission accomplishment, or the trust and confidence that the public has in the United States Air Force.

IV. POLITICAL SPEECH AND VIRAL COMMUNICATION—AN ANALYTICAL FRAMEWORK

The contending concerns of free speech versus an apolitical military under civilian control have produced a stalemate for decades where the military retains political speech restrictions but exercises great restraint in how it enforces these restrictions. In part, perhaps, this restraint has convinced the courts to allow the restrictions to remain in place despite the scrutiny commentators have given them. As one law review author noted, “The lack of successful free speech challenges to personnel actions is a testament to the responsible use of this discretion by military commanders.”²⁹⁶

However, the rise of viral communication is challenging this status quo, whether commanders realize it or not. Military members are engaging in political speech in viral media, and commanders will increasingly face situations where they will need to decide how to respond to such situations. The emergence of viral communication presents at least four questions that will need to be resolved in determining how the military handles the challenge of political speech in this forum. First, how does the rise of viral communication affect the delicate balance the military has struck between military members’ free speech rights and the need for an apolitical, civilian-controlled military? Second, how do existing political speech restrictions translate to viral media, and is additional guidance required to sufficiently place military members on notice of what is and is not permissible? Third, should political speech restrictions be enforced more or less vigorously in the viral media context when violations occur? Finally, what standard of review should courts analyzing political speech restrictions in viral media use to balance the respective rights of both the military and service members?

A. Competing Interests Shaping Military Political Speech Restrictions in Viral Communication

1. Free Speech Considerations

There is a movement that argues that viral communication is different, and that the rules need to be different, or at least applied differently, in the viral media context.²⁹⁷ This perspective originates in part from the view that cyberspace—particularly viral communication—remains a uniquely open forum for free speech purposes. Free speech advocates retain a vision of a “Utopia of uncensored Internet access.”²⁹⁸ An Internet free speech movement has called for “the preservation of

Id. ¶2.15.3, at 21.

²⁹⁶ Carr, *supra* note 33, at 307.

²⁹⁷ See, e.g., ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.ORG/issues/free-speech> (“In countless ways the Internet is radically enhancing our access to information and empowering us to share ideas and connect with the entire world. Speech thrives online freed of limitations inherent in traditional print or broadcast media that are created by corporate gatekeepers.”)

²⁹⁸ Dawn C. Nunziato, *How (Not) to Censor: Procedural First Amendment Values and Internet*

cyberspace as an electronic frontier—a place where the locals can face unfettered the challenge of self-regulation as they explore the novel possibilities of their environment.”²⁹⁹ In particular, viral forums such as social media “have the potential to advance the First Amendment values of free speech, free association, and the petitioning of government for redress of grievances” because they “bring citizens together across boundaries of space and time that often separate them in the offline world.”³⁰⁰ The increasing reliance on the Internet to share thoughts, opinions, and grievances, combined with the “frontier” mentality of cyberspace, place Internet-based communication at the center of free speech values, something commentators recognized early in the Internet’s childhood. In the mid-1990s, commentators were already calling for greater First Amendment protection for Internet speech.³⁰¹ By 2004, a study of free speech culture recognized that “it seems clear enough that the Internet and other digital technologies are media for the communication of ideas, and an increasingly important way for people to express their ideas and form their opinions. They are central—and I would say crucial—media for the realization of a democratic culture.”³⁰²

Some have argued that service members should be allowed to speak more freely on political issues through viral means. A 2011 law review article argued that in the social media context, courts should allow military free speech restrictions only when the speech interferes with active combat operations, represents open disloyalty to the military, or undermines the chain of command through specific criticism of military officials.³⁰³ Others have suggested legislative or regulatory amendments to allow more freedom for military members to engage in free speech through blogging.³⁰⁴ It seems fair to say that there is a sizable element that believes viral media are somehow different—and should be more open to military members’ speech—than traditional means of communicating.

Censorship Worldwide, 42 GEO. J. INT’L L. 1123, 1124 (2011).

²⁹⁹ Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, 7 (1998).

³⁰⁰ Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2008 (December 2011).

³⁰¹ See, e.g., Bruce W. Sanford and Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137 (1996) (noting the important contributions the Internet makes to free speech and the difficulty applying rules regarding indecency, libel and defamation, intellectual property, and personal jurisdiction and choice of law to this new medium).

³⁰² Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 36 (2004).

³⁰³ Johnsen, *supra* note 14, at 1101-02.

³⁰⁴ See Lytle, *supra* note 244, at 610-13 (arguing for amendments to the UCMJ, DoD regulations, and general orders); Peter Colwell, “*If You Are Reading This, You are Engaged and Aware*”: *Serving the Diversity of Interests in Blogs Written by Service Members*, 36 WM. MITCHELL L. REV. 5249 (2010) (advocating for new legislation to establish a committee of military members and journalists to ensure that only blogs that represent true threats to security are prevented from publication, and that the committee should provide service members with clear information up front about what is and is not allowable to publish in blogs).

There is a certain allure to the view that viral communication should serve as a sort of “free speech sanctuary” for military members, particularly in matters of political speech. Providing special protections for military members’ political speech in viral media would promote the “safety valve” function discussed above, allowing military members a protected environment otherwise denied them. The military’s social media policies also recognize that encouraging military members to participate in the public debate through viral media has value for the military, as it helps ensure the military’s voice is heard on a variety of issues. In addition, the rise of viral communication coincides with an increasing need for military members to be more politically astute. Military members, particularly officers, are “increasingly assuming missions and responsibilities that explicitly require a greater understanding of the interplay between politics and military force.”³⁰⁵ The protected nature of political speech, the outlet viral communication provides to military members otherwise restricted from engaging in political speech, the potential for military members to add to the public dialogue on political issues, and the unique ability of viral communication to provide an open forum for free speech all suggest that, when it comes to social media, military members’ free speech rights should be interpreted more broadly and given more weight than in traditional media.

However, there is another side to this argument. Free speech considerations do not prohibit Congress or the military from prohibiting a wide variety of political speech, and even though viral media is different, it is speech nonetheless. There is also another point that commentators have ignored: It just may be that the nature of viral media tips the balance ever so slightly against free speech on political issues, not in favor of it.

2. Civilian Control of the Military and the Need for an Apolitical Military

Viral communication is sometimes assumed to be off-limits to government restrictions. Its frontier status, its often personal and informal nature, and its importance in modern society make some argue that military members’ free speech in this medium has “value worth protecting.”³⁰⁶ However, when military members take overt political stances in viral media, democratic society may be placed at risk to an even greater degree than when military members cross the line in their political speech in more traditional forums. The Supreme Court has hinted that “different media require a different First Amendment analysis,”³⁰⁷ meaning that different standards might apply to speech in one forum compared to the same speech in another forum. Viral communication is different, but its commentators have focused solely on how its difference weighs in favor of free speech. A closer examination reveals that the opposite is actually true. If concerns about civilian control, an apolitical military, and good order and discipline have justified pointed

³⁰⁵ Jason Dempsey, *OUR ARMY: SOLDIERS, POLITICS AND AMERICAN CIVIL-MILITARY RELATIONS*, Kindle edition, location 2373 (2010).

³⁰⁶ Colwell, *supra* note 304, at 5264.

³⁰⁷ *Id.* at 5262.

political speech restrictions in traditional forums for decades, those concerns apply even more in viral communication. Therefore, political speech restrictions in viral media should not only continue, but must be enforced even more vigorously.

Political speech in viral media presents several concerns that are either not present or present to a lesser degree in traditional forums. First, viral communication reaches a wide audience in a short period of time. An offending political comment by a military member on a sign appears once and is seen by dozens, perhaps hundreds of people. An offending political comment by a military member in a letter to the editor may be read by thousands, or perhaps tens of thousands of people. An offending political comment by a military member that goes viral has no limit to the number of people it can reach, as it is tweeted and re-tweeted, posted and re-posted, pinned, liked, tagged, shared, and Diggged.³⁰⁸ The very nature of viral media means that comments are shared and re-shared, potentially reaching an exponentially-growing audience as they progress through the web. An offending political statement in viral media can therefore quickly rise to the consciousness of the nation and beyond in a way military members' political speech never could before.

Viral communication also presents a paradox in that while political comments can spread to a wide audience quickly, offending political speech can also be difficult to discover. The sheer volume of traffic in viral media makes it nearly impossible for military leaders to detect offending political statements in these forums, unlike television and newspapers, which are much easier to monitor. In addition, the ability of users in some viral forums, such as Facebook, to limit exposure to their postings presents a troubling issue. The idea that a military member may be engaging in contemptuous, partisan, disloyal or otherwise offending political speech without the military's knowledge should disturb military leaders. While to some extent military members have always been able to communicate privately (for example, in letters), viral communication enables military members to broadcast their views on all manner of topics to a circle of people that may number in the hundreds while shielding that speech from military authorities.

Viral communication is also inherently direct and blunt, including comments concerning political matters. Generally, viral media involves shorter, more direct communication than traditional media; for example, Twitter posts must consist of 140 characters or less. This hardly allows for reasoned, balanced debate on complex political issues, much less a disclaimer that the post represents a military member's personal opinion, not his or her official stance. It is also the nature of viral communication that comments are often more direct, forceful, and controversial than speech in more traditional means, and the more notorious the comment is, the wider it will be distributed.³⁰⁹ The ability to comment from a distance—often with

³⁰⁸ Digg is a social bookmarking site that allows users to share and view user-submitted content from the Internet, and vote for a particular item, giving it more prominent coverage. DIGG INFORMATION PAGE, <http://about.digg.com/> (last visited Sept. 10, 2012).

³⁰⁹ See, e.g., Susan Krashinsky, *When Social Media Goes Anti-Social*, GLOBE & MAIL (TORONTO,

anonymity—is “the Web’s hallmark and its poison,” according to the Jerry Bowles, the co-founder of SocialMediaToday.com, which tracks the impact of social media on society.³¹⁰ “The Web seems to turn most people into adversaries,” Mr. Bowles said. “This is particularly true for politics on the Web, where the comments tend to run to the extremes and sometimes can be downright seditious. I find it scary.”³¹¹ The multimedia aspect of viral media also exaggerates this danger, as pictures or video can make an offending political statement appear much starker than mere words on a page. This presents a situation that requires firm application of political speech restrictions to prevent military members from sinking to the level of discourse they find all around them in viral communication.

The temptation for military members to post offending political comments in viral media is even greater because of the lack of opportunity for consideration. A military member has plenty of time to rethink his or her conduct before posting a sign in one’s yard, carrying a sign in a rally, or writing a letter to the editor. In viral media, this decision loop is measured in seconds. Similarly, a military member can violate political speech restrictions simply by forwarding or re-posting a comment, thereby adopting it as his or her own with a click or two of a mouse. Depending on the type of viral media employed, it may be next to impossible to get rid of the message once it is posted, because the poster quickly loses control of the posting as it is re-posted, linked, and otherwise spread. In an environment of such great temptation and opportunity to engage in impermissible political speech—almost without thinking—discipline is all the more important.

Finally, the rise of viral communication comes at a time of both partisan, bitter debate and eroding civilian control of the military. More than one commentator has noticed that ideology on both the political left and right has solidified in recent years, making compromise and civil discussion extremely difficult.³¹² To some extent, viral media feeds off this phenomenon, and may even harden people’s positions, as users are able to restrict their exposure to views that already conform to their own.³¹³ In such a heated environment, and at a time when the military remains a highly respected institution, political parties and candidates, along with special interest groups, see the military as a prime target to co-opt into weighing in

Can.), Mar. 30, 2012, at B6 (noting the “edgy atmosphere of the social Web” but explaining how a business’s controversial social media marketing strategy was seen as making a joke at the expense of sexual assault victims).

³¹⁰ Marco R. della Cava, *What Happened to Civility?*, USA TODAY, Sept. 15, 2009, at 1A.

³¹¹ *Id.*

³¹² See, e.g., Cathy Young, *Occupy and Tea Party Make Hate a Civic Virtue*, NEWSDAY, Jan. 20, 2012, at A40 (arguing that partisan extremists at both ends of the spectrum have “furthered political polarization, reinforcing the tendency to blame scapegoats and demonize opponents”); Clarence Page, Editorial, *The Art of Insults*, CHI. TRIB., Aug. 24, 2011, at 23 (decrying the prevalence of “umbrage wars,” the “endless contest to see which political side can express more outrage about what the other side has to say about it”); Jeff Zeleny, *After Protracted Fight, Both Sides Emerge Bruised*, N.Y. TIMES, Aug. 1, 2011, at A1 (noting the “deep partisan intransigence that has engulfed Washington.”).

³¹³ See Marc Fisher, *All the News that Confirms Your Views*, WASH. POST, Jan. 21, 2012, at A01.

on political disputes. However, the military has been able to maintain its respected status precisely because it has remained above politics.³¹⁴ Much like the YouTube video of young Corporal Thorsen raising his arms in triumph on stage and the Facebook page trumpeting his convictions, it may be difficult for many military members to avoid the temptation to broadcast their political views in viral media, when those views are so well-respected and draw the praises of so many in American society.

Political movements are using viral media like never before to spread their views through very blunt, pointed messages. Military members are tempted like never before to speak out and speak out forcefully on political matters when they see it all around them on Facebook, Twitter and the rest of the viral world. It is precisely because of this temptation that the military's interest in enforcing political speech restrictions becomes more compelling.

B. Political Speech Restrictions in Viral Communication: What Crosses the Line?

For the reasons outlined above, the restrictions on military members' political speech should be at least as great in viral media as they are elsewhere. The existing prohibitions against contemptuous words, disloyal statements and other violations of the general articles, unlawful attempts to use military authority to influence an election, and regulatory limits on political speech should all apply to viral media. These restrictions set no limit on the means used to convey the offending political speech. Contemptuous words, for example, are contemptuous words regardless of whether they appear on a t-shirt or a blog. The difficulty is how these restrictions apply in these non-traditional media, and whether additional guidance is necessary. Terms used in existing political speech restrictions do not always translate precisely to viral media, and though the existing statutory and regulatory restrictions themselves generally do not differentiate between different media, the idea persists that viral communication is somehow off-limits to political speech restrictions. Some level of clarification is necessary both to translate the concepts of existing prohibitions to new media, and to clarify that the rules still apply in these forums.

Proof that existing political speech restrictions must be translated to viral media was supplied as this article was being written. In March 2012, a Marine's actions thrust the issue of political speech in the viral world into the headlines. For years, Marine Sergeant Gary Stein ran a Facebook page called Armed Forces Tea Party Patriots to voice his views on a wide array of political and foreign policy topics. His superiors first cautioned him about the site in 2010 when he criticized President Obama's health care policy. In response, Sergeant Stein took down the page for a

³¹⁴ See Dempsey, *supra* note 54, at locations 125-137 (noting the steady rise of the American military's respect from society, the fact that "[a] significant portion of the military's prestige comes from its reputation as one of the most apolitical American institutions," and the paradox that "[a]s the stature of the military rises, so does its appeal as a political force.").

time and reviewed the military's policies toward political speech. He later re-started the page, which describes him as "a conservative blogger, speaker, the founder of the Armed Forces Tea Party and active-duty, eight-year Marine Corps veteran."³¹⁵ Sergeant Stein then became a subject of national media attention when he posted a message on his site asserting that he would not follow orders from President Obama.³¹⁶ He later softened his assertion, claiming that he would only disobey "unlawful orders," such as an order to carry out military action in Syria without first obtaining the approval and authorization of Congress.³¹⁷ Sergeant Stein also posted comments on Facebook calling the President a "coward" and "the economic and religious enemy."³¹⁸ Sergeant Stein also urged President Obama's defeat in the 2012 election, writing "screw Obama."³¹⁹ A full month after his misconduct came to light, his site still sold bumper stickers that read "NOBAMA 2012."³²⁰

It is difficult to imagine a clearer violation of existing political speech restrictions. Because Sergeant Stein was not a commissioned officer, Article 88 did not apply to him. However, his statement that he would not follow orders from a duly-elected commander-in-chief—even if he did later soften those to clarify that he would not follow "illegal" orders (presumably determined by him)—certainly were disloyal because they "attack[] the war aims of the United States" and "disavow[] allegiance owed to the United States by the declarant."³²¹ Given that Sergeant Stein's Facebook page specifically targeted other military members, and that he had already been cautioned about his political speech online, one would not think it difficult to prove that his statements were prejudicial to good order and discipline, in violation of Article 134. The notoriety of his statements and their reporting in major media outlets could have demonstrated that his conduct was service-discrediting as well. DoDD 1344.10 prohibits military members from using official authority or influence to solicit votes for particular candidates or issues, or from publishing partisan political endorsements that solicit votes for against a partisan party, candidate, or cause. Sergeant Stein violated these prohibitions, and may well have violated the statutory prohibition against using military authority to influence a military member's vote, given that his Facebook page was directed from a military member to other military members.

Surprisingly, despite the unashamed nature of these violations, the Marine Corps' response was tepid and public opinion was split, in large part due to the notion that Sergeant Stein's misconduct fell into some sort of legal gray area. After an investigation into Sergeant Stein's comments, the Marine Corps announced

³¹⁵ Julie Watson, *Debate Over Marine's Facebook Page*, L.A. TIMES, Mar. 11, 2012, at 29.

³¹⁶ *Id.*

³¹⁷ *The Situation Room*, CNN, Mar. 12, 2012 (transcript).

³¹⁸ Tony Perry, *Obama-Bashing Marine's Ouster Backed by Panel*, L.A. TIMES, Apr. 6, 2012, at 1.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ MCM, pt IV, ¶ 72(c) (2012).

that the matter would be handled “through administrative action.”³²² Eventually, an administrative discharge board recommended Sergeant Stein’s separation with characterization of under other than honorable conditions.³²³ Some media outlets recognized the wrongfulness of Sergeant Stein’s actions.³²⁴ However, many have sided with Sergeant Stein, including three Republican congressmen who urged the Marines to withdraw the administrative discharge action.³²⁵ The Armed Forces Tea Party Facebook page remains active as of this writing, and has garnered more than 29,000 “likes.”³²⁶ Hundreds of messages on the site—including many from purported military members—praise Sergeant Stein and criticize the military for restricting his speech. A group of people purporting to be military members started a “Patriots for Sgt Gary Stein” Facebook page, in which active duty military members are urged to exercise their “RIGHT to voice their personal opinions on ALL public officials, period.”³²⁷ In the blogosphere, writers commented upon the story, with many supporting the Marine.³²⁸ Supporters posted videos on YouTube,³²⁹ which were commented upon and linked to on countless Facebook pages, and Twitter feeds. News accounts of the incident posted in news outlets’ web pages prompted heated debate over the story, with many comments from readers supportive of the Marine’s actions.³³⁰

³²² Tony Perry, *Marine Faces Ouster Over Post on Obama*, L.A. TIMES, Mar. 22, 2012, at 5.

³²³ Julie Watson, *Panel Wants Marine Dismissed for Anti-Obama Postings*, WASH. POST, Apr. 7, 2012, at A02. Sergeant Stein later sought a preliminary injunction prohibiting the Marine Corps from involuntarily separating him, arguing in part that the Marine Corps’ response violated the First Amendment; a District Court judge denied the motion. Julie Watson, *Judge Won’t Block Discharge Effort Against Marine*, ASSOCIATED PRESS NEWS SERVICE, Apr. 13, 2012.

³²⁴ Editorial, *Marine’s Facebook Rants Earn Ticket Out of the Military*, USA TODAY, Apr. 13, 2012, at 8A; Dean Obeidallah, *Marine’s Facebook Posts on Obama Go Too Far*, CNN, Apr. 14, 2012, http://www.cnn.com/2012/04/14/opinion/obeidallah-marine-obama-facebook/index.html?iid=article_sidebar.

³²⁵ Obeidallah, *supra* note 324.

³²⁶ ARMED FORCED TEA PARTY FACEBOOK PAGE, <https://www.facebook.com/ArmedForcesTeaParty> (last visited Sept. 10, 2012).

³²⁷ Patriots for Sgt Gary Stein (USMC) Facebook Page, <https://www.facebook.com> (search “Patriots for Sgt Gary Stein”).

³²⁸ See, e.g., *The Facebook Firestorm of Sgt Stein*, USMC, <http://oathkeepers.org/oath/2012/03/24/the-facebook-firestorm-of-sgt-stein-usmc/> (supporting Sergeant Stein’s actions) (last visited Oct. 27, 2012).

³²⁹ See, e.g., *In Support of Marine Corps Sgt. Gary Stein*, <http://www.youtube.com/watch?v=4D4BPiVR1v4&feature=related> (last visited Sept. 10, 2012); *Gary Stein, Marine Sergeant’s ‘Armed Forces Tea Party Patriots’ Facebook Page Tests Military Rules*, http://www.youtube.com/watch?v=I7LQ_9c14I0 (last visited Sept. 10, 2012); *Sergeant Gary Stein: Defends His Oath and the Failure of the American People*, http://www.youtube.com/watch?v=pGAn8_2nJB0&feature=related (last visited Sept. 10, 2012).

³³⁰ See, e.g., Julie Watson, *Gary Stein, Marine Sergeant’s ‘Armed Forces Tea Party Patriots’ Facebook Page Tests Military Rules*, HUFFINGTON POST, Mar. 7, 2012, http://www.huffingtonpost.com/2012/03/08/gary-stein-marines-facebook_n_1332434.html. The story’s posting in this popular internet newspaper drew more than 100 comments from readers, 41 “tweets,” and more than 1,600 Facebook “likes,” according to data provided on the site. *Id.*

Meanwhile, media coverage speculated as to where the line should be drawn and whether military members have been given adequate guidance in this area. One online report noted:

What makes the situation particularly tricky is that there is little legal precedent in military free speech cases regarding social media . . . [DoDD 1344.10] was most recently revised in 2008—and while social media platforms have had widespread success long before that date, both military regulation and legal precedent tend to lag behind the success of the media. As such, Stein’s activity’s may have to be tried under related provisions regarding participation in public rallies, dissemination of printed materials, or appearance on TV, radio, or other programs. . . . Stein’s case could set a whole new precedent regarding the use of social media by personnel, and, depending on the outcome, could even lead to new provisions in Directives like [1344.10] when they are revised in the future.³³¹

Marine Corps leadership apparently agreed with this assessment. Immediately after Sergeant Stein’s discharge board took place, Marine Corps officials announced the Corps was seeking additional guidance from the Pentagon regarding service members’ use of social media.³³²

This article disputes that Sergeant Stein’s actions fell in some borderline area, given the blatant, pointed, insubordinate, and widespread nature of his comments. However, this is not to say that some gray area does not exist. As noted above, grumbling in the barracks is a time-honored military tradition, and therefore some amount of private speech must be protected in viral media as well. Just as in traditional forums, what crosses the line from private conversations to public pronouncements in viral media may not be clear in a given case. Additionally, some terms in DoDD 1344.10 must be updated to more directly relate to viral media. For example, the directive states that active duty military members may not “[p]articipate in any radio, television, or other program or group discussion as an advocate for against a partisan political party, candidate, or cause.”³³³ Whether Sergeant Stein’s actions violated this specific prohibition is open to interpretation; while Facebook is not a radio or television program, the tens of thousands of people who follow his Facebook page may qualify his comments as a “group discussion.” In addition, the directive states that active duty members may not “[a]llow or cause to be published partisan political articles, letters, or endorsements signed or written by the member that solicits votes for or against a partisan political party, candidate,

³³¹ Jonathan Fisher, *Marine Sergeant Gary Stein Faces Discharge for Tea Party Facebook Page*, WEBPRONEWS, Mar. 22, 2012, <http://www.webpronews.com/marine-sergeant-gary-stein-faces-discharge-for-tea-party-facebook-page-2012-03>.

³³² Julie Watson, *Marines Seek DoD Guidance on Social Media Use*, ASSOCIATED PRESS, Apr. 6, 2012, available at <http://www.businessweek.com/ap/2012-04/D9TVMMA00.htm>.

³³³ DoDD 1344.10, *supra* note 5, ¶ 4.1.2.6, at 3.

or cause.”³³⁴ Whether Sergeant Stein’s Facebook postings are the equivalent of “articles, letters, or endorsements” is not clear, though the intent of the regulation seems to be to cover public writings such as Sergeant Stein’s widespread Facebook page. DoDI 1325.06 at least recognizes that communications on websites, blogs, or other electronic means may be prohibited, but since it merely states that the language used must comply with federal law and DoD regulations, it offers little clarity in a case such as Sergeant Stein’s.

There is a pressing need for the Defense Department to issue more specific guidance as to what political speech is allowable in viral media. At a minimum, DoDD 1344.10 should be updated to use terminology more relevant to the age of new media, possibly building upon attempts that have already been made in other contexts. For example, the Office of Special Counsel has published guidelines for civil service employees as to how speech in social media may or may not violate the Hatch Act.³³⁵ The guidelines offer answers to specific questions, such as: “If a federal employee has listed his official title on his Facebook profile page, may he fill in the field provided for ‘political views’ on his Facebook profile?” and “May federal employees who are ‘friends’ with their subordinate employees advocate for or against a political party, partisan political group, or candidate for partisan public office on their Facebook pages?”³³⁶ The services, to varying degrees, have attempted to provide guidance on points such as this, but since some service handbooks offer more guidance than others and none is a binding punitive instruction, a DoD-level instruction or other guidance is necessary to help clarify some issues around the margin.

Nonetheless, for many instances of clear violations such as Sergeant Stein’s, existing political speech restrictions at least give commanders a solid foundation of guidance and put members on notice of the dangers of certain viral political commentary. The issue then becomes applying this guidance to the viral media context. Here, the issue of public versus private speech will be critical. In general, military speech restrictions allow for some distinction between protected private communication and unprotected public statements. The discussion to Article 88, for example, offers that “expressions of opinion made in a purely private conversation should not ordinarily be charged” while stating that “giving broad circulation to a written publication containing contemptuous words of this kind in the presence of military subordinates” aggravates the offense.³³⁷ Some Internet-based communication—such as e-mail or instant messaging between two

³³⁴ *Id.* ¶ 4.1.2.3, at 3.

³³⁵ The Hatch Act generally prohibits civil servants in the executive branch of the federal government (and certain other employees) from engaging in partisan political activity. The Hatch Act, 5 U.S.C. §§1501-1508 (2012). For an overview of the Hatch Act, see OFFICE OF SPECIAL COUNSEL, *Political Activity and the Federal Employee*, Dec. 2005, http://www.osc.gov/documents/hatchact/ha_fed.pdf.

³³⁶ <http://www.osc.gov/documents/hatchact/federal/Social%20Media%20and%20the%20Hatch%20Act%202012.pdf> (last visited Oct. 27, 2012).

³³⁷ *Supra* note 86 and accompanying text.

people—may not trigger a political speech concern, and where military members take precautions to keep their communications private in other media, such speech would be unlikely to violate existing restrictions. However, this point should not be taken too far when it comes to viral communication. As the Honorable James Baker, now Chief Judge of the military’s highest appellate court, stated:

The Internet profile is the modern equivalent of standing on a street corner in uniform with a sign saying, “I’m in the Army and I am a racist and Aryan extremist. This may not be a busy corner—we should hope that it is not—but it is a public corner nonetheless. Indeed, where the Internet is concerned, the impact of the metaphorical back alley protest may be magnified in time and distance in a manner distinct from that taking place in an actual back road or alley. Persons from all over the world may see it, and at a time when the street protestor in uniform has long ago put the placard away, the racist message on the Internet lingers.³³⁸

Viral media is today’s street corner, city hall, newspaper, and radio talk show. It is the place where people gather and debate social issues, and it will be very difficult for military members who make offending political remarks in viral media to claim that their speech is sufficiently private to escape the military’s reach. In the same case in which Chief Judge Baker made his comments about the public nature of Internet discussions, he quoted the following editorial by a retired Marine Colonel, which provides a penetrating insight into the issue about the Internet’s role in shaping public debate:

We cannot put the Internet genie back in the bottle. The World Wide Web is pervasive, unregulated, and a powerful molder of opinion. The average lance corporal . . . today does not remember a time when there was no Internet, no camera cell phone, and no text messaging. In that context he/she is a “digital native.” This means of communication is as natural to him/her as a letter home was to . . . previous generations. The status symbol today for the “wired generation” is how many friends you have on your MySpace or Facebook page. The difficult task for leaders . . . is to convince them that once they put on the [uniform] everyone who sees them, even if it is through social media, sees them as representatives of the United States [military].³³⁹

³³⁸ United States v. Wilcox, 66 M.J. 442, 462 (C.A.A.F. 2008) (Baker, J. dissenting).

³³⁹ John Keenan, Editorial, *The Image of Marines*, MARINE CORPS GAZETTE, May 2008, at 3.

Some additional guidance may be necessary to translate terms in existing political speech restrictions to viral media, but existing political speech restrictions do apply in this forum, and an application of established principles from traditional media demonstrates that the reach of these prohibitions into viral media will be broad.

C. Enforcing Political Speech Restrictions in Viral Media

For decades, commanders and other military leaders have generally handled political speech violations with kid gloves, electing to handle even flagrant violations that prejudice good order and discipline, discredit the armed forces, or even directly endanger civilian control of the military through quiet investigations, muted public affairs efforts, and lower level administrative actions. In part, the rationale for this lack of vigorous enforcement of military standards may be the fear of backlash for supporters of those who make offending statements. One military justice expert speculated that often “what authorities do not want is to create a martyr. That only tends to further embolden political dissidents in uniform. You don’t want to create heroes for the other side.”³⁴⁰ It may also be that commanders feel some reluctance about infringing on members’ free speech rights, so they resort to lower level actions. Commanders may also be concerned that courts may weigh the competing interests in this area differently than commanders do, causing commanders to resort to actions such as reprimands instead of courts-martial to avoid judicial scrutiny of their actions.

This status quo may have held for many years, but there are signs that it is crumbling, and commanders may be well advised—or forced—to ramp up their responses to political speech violations in viral media. Non-public responses such as reprimands and administrative discharges may not be sending a sufficient message. After all, a lengthy investigation and a quiet reprimand for Corporal Thorsen did not deter Sergeant Stein from committing similar misconduct just two months later, nor did it seem to send a strong enough message to the thousands of purported military members who rallied to their side on Facebook, YouTube, Twitter, blogs and related forums. Political speech violations seem to come in waves—from Vietnam, the controversy in the early 1990s over homosexuals serving in the military, the Monica Lewinsky scandal, and the Iraq War. The military may be facing another particularly strong wave of offending political speech in its ranks, requiring a stronger response. There are also signs that avoiding courts-martial for blatant violators is not preventing martyrdom or painting DoD in a positive light. Court-martial or not, a sizeable and vociferous element considers Corporal Thorsen and Sergeant Stein to be heroic figures fighting for their right to voice their convictions. The American Civil Liberties Union, representing Sergeant Stein, stated after his administrative discharge board that “it was an honor to fight for a hero like Sergeant Stein and every other Marine’s right to speak freely.”³⁴¹ At least some

³⁴⁰ Anna Mulrine, *Can a Marine Call Obama a ‘Religious Enemy’—and Still be a Marine?*, CHRISTIAN SCI. MONITOR, Apr. 6, 2012, available at 2012 WLNR 7359183.

³⁴¹ Watson, *supra* note 323, at A02.

element of society—including military members and three members of Congress—tends to agree. Finally, to the extent that commanders' reluctance to enforce such fundamental standards through more visible forums is rooted in a desire to avoid scrutiny, including judicial scrutiny, the current state of affairs is not avoiding that concern. As in Sergeant Stein's case, military members can obtain at least some sort of judicial review through collateral attacks on even administrative action through civilian Article III courts. One would think that military commanders would prefer to have their responses to political speech violations reviewed in military appellate courts, which may be more sympathetic to the government's position than civilian courts with little knowledge of how the military operates or what its concerns are. In addition, Sergeant Stein's case illustrates that the judiciary is not the only entity that may review even lower-level administrative action. Every military member is afforded a protected direct line to Congress,³⁴² and as with Sergeant Stein's case, Congressional members may not be shy about intervening in the military's reactions to political speech restrictions, either out of genuine concern for free speech rights or out of a desire to further political ends. The traditional media, which of course is generally sympathetic to free speech considerations, also may second-guess enforcement of political speech restrictions, and even if they do not, a sizable element in the world of viral communication is sure to spread opposing views through every possible channel.

Commanders' decisions to enforce political speech restrictions are going to be scrutinized, regardless of the level of response chosen. If there are genuine First Amendment concerns with existing political speech restrictions, or if there is vagueness in how these restrictions are applied to viral media, then it would be far better to have those issues resolved in the courts, rather than remaining in a situation where commanders are hesitant to fully enforce political speech standards out of fear of having their decisions overturned in the courts. Two great constitutional imperatives are competing to draw the line of appropriate and inappropriate political speech in viral media. Only the courts can properly strike this balance and provide definitive guidance for the military in this area.

While commanders may be well served to more aggressively enforce these standards and allow the courts to more definitely resolve the competing constitutional concerns involved, this new push should not take place in a vacuum. All the services have published their own guidelines for social media usage, but there is no evidence that the services have truly pushed this information out to their members. A vigorous training and education plan should take place prior to, or at least in conjunction with, tougher enforcement of standards, to preclude situations like Corporal Thorsen and Sergeant Stein, where throngs of military members rush to defend colleagues who have defamed the President and openly touted the mix of their military and political affiliations. A vigorous public affairs plan should also accompany tougher

³⁴² 10 U.S.C. § 1034(a) (2011) ("No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General.").

enforcement of standards. The need for a politically-neutral, civilian-controlled, disciplined military is a story the traditional media and the public at large will understand and accept (as some of the editorials in response to the Thorsen and Stein incidents demonstrated), even if some fringe element of society expressing itself in viral media will not. The military will never satisfy those who see free speech rights as absolute. It can, however, keep public opinion on its side by explaining how these restrictions on political speech enable a disciplined, trusted, politically-neutral and civilian-controlled military.

Finally, one more point concerning enforcement of political speech restrictions bears mentioning. For decades, the military has employed a different standard toward officers than it has toward enlisted members in this area. While most of the political speech restrictions outlined above apply to both officers and enlisted members, “officers tend to be held to a higher standard than enlisted troops.”³⁴³ Of course, Article 88 does not apply to enlisted members, though its prohibition against contemptuous statements may be chargeable under Article 134. The reasons for this different standard are not entirely clear, though it has been speculated that “the detrimental effect upon morale and discipline because of an enlisted man’s contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey.”³⁴⁴ That may still hold true today, but to the extent that the primary driving force behind military speech restrictions is the need for a civilian-controlled, apolitical military, it is uncertain that an enlisted members’ public partisan political comments harm this interest much less than officers’ comments do. In the age of the “strategic corporal,”³⁴⁵ the actions of low-ranking enlisted members can affect the nation’s interests just as much as the actions of high-ranking officers, if not more so, as demonstrated by situations such as Abu Ghraib, the YouTube video of Marines urinating on Taliban bodies, and an Army sergeant’s alleged massacre of Afghan villagers. In the area of political speech, the threat from enlisted members crossing the line in viral media may be as great or greater than that posed by officers. This risk is enhanced by the fact that the public does not always differentiate between officers and enlisted members, enlisted members are generally younger and more apt to be plugged into viral media, and enlisted members may be more easily duped into efforts to pull them into political campaigns (as Corporal Thorsen’s effusive display on stage demonstrates). Military commanders who more vigorously respond to political speech violations in viral media should consider holding enlisted members to similar standards as officers.

³⁴³ Mulrine, *supra* note 340.

³⁴⁴ Major Michael A. Brown, *Must the Soldier be a Silent Member of Our Society?*, 43 MIL. L. REV. 71, 101 (1969).

³⁴⁵ Marine General Charles Krulak first developed this term in the late 1990s to refer to “the strategic consequences of leadership and decision-making at the lowest levels of the American military, given the advent of the internet, television coverage, and propaganda campaigns in modern warfare.” Major Franklin D. Rosenblatt, *Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century*, 203 MIL. L. REV. 381, 386 n.32 (2010) (book review).

D. Judicial Review of Political Speech Restrictions in Viral Media

When military commanders enforce standards through courts-martial instead of behind-the-scenes reprimands, they will find a judiciary that generally defers to the decisions of Congress and the military to place certain political speech off limits, just as it has for decades in traditional forums. As discussed above, political viral communication is as much of a threat to a civilian-controlled, apolitical, disciplined military as is speech in traditional forums. Because courts have already upheld the political speech restrictions outlined in this article in traditional media, they should continue to do so in the context of viral communication.

The Court of Appeals for the Armed Forces (CAAF)—the military’s highest appellate court—provided an early look at political speech in a viral-type forum in *United States Wilcox*.³⁴⁶ In that case, Army Private First Class Wilcox was convicted of a handful of offenses, including “advocat[ing] anti-government and disloyal sentiments and encourag[ing] participation in extremist organizations . . . and advocat[ing] racial intolerance,” in violation of Article 134.³⁴⁷ The case arose when a police officer noted that PFC Jeremy Wilcox’s America OnLine profile, which advocated white supremacy views, identified him as a “US Army Paratrooper.”³⁴⁸ PFC Wilcox then made additional racist statements through electronic messages to an undercover investigator and encouraged the investigator to read various racist and anarchist websites and books.³⁴⁹

After a lengthy appellate history, CAAF overturned the conviction.³⁵⁰ The court first noted that the appellant’s speech, “while distasteful, constitute Appellant’s ideas on issues of social and political concern,” and therefore fell under the First Amendment’s protection.³⁵¹ The court recognized that military members may be punished for dangerous speech that “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.”³⁵² However, given the First Amendment implications in this case, the court ruled that in order to prove that the appellant’s conduct was prejudicial to good order and discipline, the government must prove a “reasonably direct and palpable” connection between an appellant’s statements and the military mission.³⁵³ If so, then the court need only “determine whether criminalization of that speech is justified despite First Amendment concerns.”³⁵⁴

³⁴⁶ *United States v. Wilcox*, 66 M.J. 442 (C.A.A.F. 2008).

³⁴⁷ *Id.* at 444.

³⁴⁸ *Id.* at 445.

³⁴⁹ *Id.* It appears from the discussion in the decision that some of the messages were sent to the undercover investigator in person-to-person fashion, while some may have been posted in a forum accessible by others.

³⁵⁰ *Id.* at 452.

³⁵¹ *Id.* at 446-47 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

³⁵² *Id.* at 448 (quoting *United States v. Brown*, 45 M.J. 389, 395 (C.A.A.F. 1996)).

³⁵³ *Id.* (quoting *Priest*, 45 C.M.R. at 343).

³⁵⁴ *Id.* at 449.

Applying this test, the court weighed “the gravity of the effect of the speech, discounted by the improbability of its effectiveness on the audience the speaker sought to reach, to determine whether the conviction is warranted.”³⁵⁵ The court held that in Private First Class Wilcox’s case, the record did not establish the requisite connection “between the speech and the military at all, let alone the military mission or the military environment,” and therefore “the balancing test is mooted by the legal insufficiency of the charged offense.”³⁵⁶

The *Wilcox* case may represent a subtle shift in granting more free speech rights to military members and less deference to decisions of commanders to punish political speech. It has been noted that the *Wilcox* decision “greatly eroded the legacy of *Priest*, *Parker*, and *Schenck*, and ushered in a new and more restrictive test for speech crimes in the military.”³⁵⁷ The *Wilcox* court also employed a “subtle but important” shift in the language used from the *Priest* case. In *Priest*, the court stated that the relevant inquiry was whether the accused’s statements were “palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect and remote sense.”³⁵⁸ This was a simple extension of case law concerning the Article 134 element of conduct prejudicial to good order and discipline, not any particular First Amendment principle. However, in *Wilcox* the court made a point of conflating the First Amendment issue with the Article 134 terminal element issue, holding that “[i]n the context of the First Amendment,” the government needed to prove a “reasonably direct and palpable connection” between the statements and the military mission.³⁵⁹ The court therefore used the First Amendment aspect of the case to move away from the “palpably prejudicial” to good order and discipline standard, instead requiring a “reasonably direct and palpable connection” between the statement and the mission. In essence, whereas the *Priest* case seemed to hold that certain speech could be so offensive and dangerous that it speaks for itself, giving rise to an inference of prejudice to good order and discipline, the *Wilcox* court seemed to require the government to demonstrate actual prejudice.³⁶⁰

While *Wilcox* certainly represents a departure from courts’ traditional deference in matters of military speech restrictions, one should not read too much into the decision and should not assume that commanders are now hampered in their ability to enforce political speech restrictions. Several factors lead to the conclusion that *Wilcox* represented, in the court’s own words, a “narrow issue.”³⁶¹ First, the unique procedural history of the case shaped the decision. The appellant was initially charged with several other offenses relating to his speech; he was

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ Major Michael C. Friess, *A Specialized Society: Speech Offenses in the Military*, ARMY LAW., Sept. 1999, at 18, 23.

³⁵⁸ *Priest*, 45 C.M.R. at 343 (quoting *United States v. Snyder*, 4 C.M.R. 15, 18 (C.M.A. 1952)).

³⁵⁹ *Wilcox*, 66 M.J. at 448 (quoting *Priest*, 21 C.M.A. at 569).

³⁶⁰ Friess, *supra* note 358, at 24.

³⁶¹ *Wilcox*, 66 M.J. at 443.

acquitted of several and others were either overturned or modified on appeal. The government had focused its evidence on these other charges and specifications, introducing little proof on the Article 134 specification at issue to show effect on good order and discipline. In addition, the case is really more significant for its effect on Article 134 than for any broader First Amendment issue. The case came on the leading edge of a series of CAAF decisions narrowing the reach of Article 134's terminal elements.³⁶² Also, the issue in *Wilcox* was framed as a legal sufficiency issue, not a constitutional one, though First Amendment considerations certainly helped shape the court's opinion. *Wilcox* seemed to grant less deference to the government's exercise of its interests than other political speech decisions have, but the narrow issue and unique facts presented in that case do not seem to signal a warning that the courts are about to suddenly shift their traditional position simply because viral media is involved.

Three other points should be noted about the *Wilcox* case. First, the majority opinion in *Wilcox* was not the case's only opinion. In a thorough dissent, Judge Baker (now the court's Chief Judge) argued both that the conviction was legally sufficient (because the trier of fact could infer the prejudicial nature of the statements from the evidence presented) and constitutional (because the government's interest survives a strict scrutiny analysis, which Judge Baker proposed should replace the clear and present danger test in the context of service-discrediting conduct). Second, *Wilcox* did not comment at all upon the level of proof necessary to pass constitutional muster in the context of other offenses such as Article 88 violations, convictions under 18 U.S.C. 609, or convictions for disobeying the DoD political activity regulations. To the extent that the *Wilcox* court was concerned about the possible vagueness issue with Article 134, those concerns are not present in other UCMJ articles that have "defined elements and evidentiary standards that judges, panels, and practitioners may feel more comfortable following than the General Article."³⁶³ Finally, *Wilcox* was not a true viral media case. Although the case involved Internet profile postings and person-to-person postings, they took place before viral media really took hold and the government did not demonstrate that "the profiles were directed at other members of the military, or that any military

³⁶² See *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (holding that government must allege at least one of the three clauses of Article 134 in the specification, either expressly or by necessary implication; otherwise the charge and specification fail to state an offense); *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) (holding that the Article 134 offense of indecent acts is not a lesser included offense of rape, since none of the elements of indecent acts are among the elements of rape, since the service discrediting or prejudicial to good order and discipline element is not implied in the offense of rape); *United States v. Miller*, 67 M.J. 385 (C.A.A.F. 2009) (holding that simple disorder is not per se included in every enumerated offense and therefore not a lesser included offense of resisting apprehension); *United States v. Medina*, 66 M.J. 21 (C.A.A.F. 2008) (holding that accused's guilty pleas to violations of clause 2 of Article 134 were not knowing and voluntary where the admission that demonstrated a violation of clause 2 was made in pleading guilty to an offense of violating clause 3 of the general article).

³⁶³ Friess, *supra* note 358, at 27.

member other than the investigators stumbled upon them or was likely to do so.”³⁶⁴ Because *Wilcox* did not involve a military member seeking to transmit messages to a large number of people, the government should have little difficulty meeting the burden of proof *Wilcox* requires in the viral media context.

The *Wilcox* case may not be typical of the level of scrutiny other courts give to matters of military political speech restrictions. However, the court in that case was not alone in asserting that free speech interests dictate a more critical view of military speech restrictions. Several commentators have also asserted that First Amendment considerations should cause courts to review restrictions on service members’ speech with more scrutiny.³⁶⁵ This article argues that the military’s interests in a civilian-controlled, apolitical, disciplined force are actually stronger in viral media. How this plays out in the courts is ultimately to be decided. However, the courts are precisely the place for this issue to be settled, and the place where the military should want its interests to be weighed. Even if the courts ultimately begin granting less deference to the military’s restrictions on political speech, they still will grant some deference. Even the *Wilcox* court was willing to uphold an Article 134 conviction for political speech, as long as the government could make a reasonable showing tying the speech to one of Article 134’s terminal elements. Congress, the media, and public opinion may not be as generous. Tougher enforcement of standards will lead to greater clarification as to whether *Wilcox* represents a new era of judicial scrutiny of political speech restrictions in viral media, or whether courts will continue to recognize and defer to the military’s interests in this area.

Viral media has changed the landscape of the uneasy standoff between free speech rights and the military’s interest in controlling this type of speech. However the balance is to be struck in this area, it would be far better to know the answer now than for the military to suffer “death by a thousand cuts” by a series of collateral challenges, congressional intervention, media coverage, and public protests. If *Wilcox* represents the new legal landscape in this area, then the military can adjust to this new reality and still enforce political speech restrictions. If it is not, then both the military and its members need to know this. Only the courts can properly strike this balance, and only by ceasing their efforts to skirt around the issue can commanders obtain a resolution of this issue.

³⁶⁴ *Wilcox*, 66 M.J. at 451.

³⁶⁵ See generally Johnsen, *supra* note 14, at 1085 (proposing a new test for determining when an infringement on the free speech rights of military members in a social media context is constitutional); Reuter, *supra* note 30, at 337 (advocating that while courts may give deference to the military in matters of speech restrictions, military judges should perform traditional First Amendment analysis within the military justice context when faced with cases involving free speech); Rosen, *supra* note 75 (noting courts’ highly deferential stance toward military regulations and asserting that federal courts should review military speech regulations through a more critical approach). *But see* Carr, *supra* note 33, at 368 (asserting that judicial deference to the military is necessary for the continued maintenance of the military as an effective and efficient fighting force).

V. CONCLUSION

Viral media is a powerful, pervasive and beneficial part of modern society. It allows people to connect as never before and it allows a forum for those who may never have enjoyed one before to reach large audiences in a short amount of time. It should be protected as a forum for open discourse, representing the very best of what a free society represents—a place for ideas of all sorts to be freely exchanged. Viral media is not, however, a legal safe haven for military members, nor should it be. Existing prohibitions against contemptuous speech, disloyal statements, service discrediting conduct, conduct prejudicial to good order and discipline, using military authority to influence an election, and engaging in impermissible political activities still apply in the viral environment. Moreover, the military's interest in restricting political speech is even stronger in viral media than it has been in traditional means. Protecting a civilian-controlled, apolitical, disciplined military may conflict with First Amendment principles allowing open discourse on political speech, but these conflicts are resolvable and military leaders should not hesitate to enforce political speech restrictions, particularly when the offending speech is transmitted virally.

In 1995, at the dawn of the Internet revolution, as a law student I authored one of the first law review articles applying First Amendment principles to cyberspace.³⁶⁶ The article called for requiring those defamed by computer bulletin board speech to prove “actual malice”—the same standard the First Amendment requires public figures to prove in order to recover damages—based in large part on the idea that, “If we truly are a nation that believes that ‘truth will out,’ then the courts must require a strongly speech-protective rule, such as the actual malice standard If ever a true marketplace of ideas existed, it exists where the cyberlibel plaintiff can make a nearly instantaneous and universal response on the bulletin board.”³⁶⁷

The Internet—and now more particularly viral media—still holds a special place under the First Amendment. However, the problem with political speech violations in the military is that the marketplace of ideas cannot correct the damage; in fact, it aggravates it. In other areas of free speech restrictions, such as libel law, our society counts on the exchange of ideas to correct falsehoods, enlighten participants, and allow the truth to emerge. In the context of military political speech restrictions, however, the truth is irrelevant. Instead, the speech itself is the harm. When a military member openly violates political speech restrictions, open debate about the points raised simply draw the military further into the political fray, aggravating the very real constitutional harms the restrictions seek to protect against and involving the military in matters in which it simply has no place. At the heart of the matter, this is why military political speech restrictions are justified and need to be vigorously enforced.

³⁶⁶ Jeremy S. Weber, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 CASE W. RES. L. REV. 235 (1995).

³⁶⁷ *Id.* at 277.

By the time this article is published, it is likely that DoD or the military services will publish additional guidance in this area. However, that additional guidance is not likely to fully resolve the problems that can arise when military members engage in viral political speech. The anticipated guidance may not answer the question about how commanders should respond to violations of the guidance or other existing political speech restrictions, or how commanders should balance the competing concerns of free speech and the need for an apolitical, civilian-controlled military. This issue is likely to become more frequent and more problematic as viral communication continues to grow in popularity and as the pressure for military members to engage in political speech through these means grows.

The age of viral communication is upon the U.S. military. It necessarily signals an end to the temperance commanders have demonstrated in exercising their authority. Military members—like most members of society at large—are plugged into viral networks, where frequent, spontaneous, and direct comments on all manner of controversial topics—particularly politics—is the norm. Commanders still need to exercise good judgment in enforcing political speech restrictions, but without vigorous enforcement of standards—accompanied by revised guidelines for the viral age, training initiatives and public affairs efforts—military members will yield to the temptation and opportunity viral media present. If nothing is done, military commanders will be faced with more frequent and blatant violations of political speech restrictions, more vociferous supporters of those who violate the restraints, and more widespread dissemination of the offending speech. The imperatives for a politically-neutral military, subject to the control of political civilian leadership, are jeopardized by offending political speech in viral media. When political speech by military members in viral media violates the statutes and regulations discussed in this article, this discredits the service, prejudices good order and discipline, and ultimately offends basic notions of the role of the military in a liberal democracy. That is a situation no one should “like.”

SACRIFICING THE LAW OF ARMED CONFLICT IN THE NAME
OF PEACE: A PROBLEM OF POLITICS

*MAJOR MATTHEW E. DUNHAM**

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*“There is nothing to be gained, and much to be lost, by stretching the concept of peace-keeping to cover . . . full-scale military operations to frustrate governments or other armed entities that are determined to fight for their objectives.”*¹

*“Peace enforcement, except in some rare circumstances . . . is another name for war-fighting, pure and simple.”*²

I. INTRODUCTION

Peace operations are the United Nation’s (UN’s) core business and its most visible activity.³ Between 1948 and 2012, the UN Department of Peacekeeping Operations (DPKO) conducted sixty-seven peace operations with the general purpose of ending violence.⁴ The worldwide presence of peace operation forces is even larger when one adds operations carried out by states under unified command.⁵

¹ Inis L. Claude, Jr., *The New International Security Order: Changing Concepts*, 47 NAVAL WAR C. REV. 9, 17 (1994).

² Major General John A. MacInnis, *Lessons from UNPROFOR: Peacekeeping from a Force Commander’s Perspective*, in THE NEW PEACEKEEPING PARTNERSHIP 178, 181 (ALEX MORRISON ED. 1998).

³ PEACEKEEPING BEST PRACTICES SEC., U.N. DEP’T OF PEACEKEEPING OPERATIONS, UNITED NATIONS PEACEKEEPING OPERATIONS: PRINCIPLES AND GUIDELINES 20 (2008); *60 Ways the United Nations Makes a Difference*, United Nations, <http://www.un.org/un60/60ways/> (last visited Sep. 8, 2012) (stating “peacekeeping has become an overriding concern of the United Nations, and the activities of the blue-helmeted peacekeepers have emerged as among the most visible”). In the last decade alone, the United Nations (UN) has authorized the North Atlantic Treaty Organization (NATO) to use of force in Afghanistan and Libya; it has conducted peacekeeping missions all over the world, including the Ivory Coast, East Timor, and Sudan; and it has approved sanctions and/or issued resolutions on volatile situations in Iran, North Korea, and many other nations. *See, e.g.*, S.C. Res. 1996, U.N. Doc. S/RES/1996 (July 8, 2011) (establishing UN peace operation in South Sudan); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (authorizing implementation of a no-fly zone and use of force to protect civilians in Libya); S.C. Res. 1929, U.N. Doc. S/RES/1929 (June 9, 2010) (imposing sanctions against Iran); S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009) (imposing sanctions against North Korea); S.C. Res. 1528, U.N. Doc. S/RES/1528 (Feb. 27, 2004) (establishing UN peace operation in the Ivory Coast); S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (establishing International Security Assistance Force in Afghanistan); S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (establishing UN Transitional Administration in East Timor). Discussing peace operations in Monrovia and Haiti, U.S. Secretary of State Hillary Clinton recently stated that the UN is “the single most important global institution.” Hillary Clinton, U.S. Sec’y of State, Remarks at the Council on Foreign Relations (Sept. 8, 2010), available at <http://www.youtube.com/watch?v=HpIKeAGkCms>.

⁴ *Peacekeeping Fact Sheet*, UN PEACEKEEPING, <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml> (last visited Nov. 5, 2012). Notably, peace operation forces frequently intervene in non-international armed conflict (NIAC)—the most prevalent form of armed conflict in modern times. Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, INT’L COMM. OF THE RED CROSS 5 (2008), http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf.

⁵ *See, e.g.*, S.C. Res. 1973, *supra* note 3 (authorizing implementation of a no-fly zone and use of force to protect civilians in Libya); S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004) (authorizing Multinational Interim Force in Haiti); S.C. Res. 1386, *supra* note 3 (establishing International

When conducting peace operations, the DPKO maintains that successful operations are based in the rule of law.⁶ This principle clearly follows from one of the major purposes of the UN to “maintain international peace and security . . . in conformity with the principles of justice and international law.”⁷ Nevertheless, to sustain political support for some peace operations, the UN and its member states intentionally ignore the applicability of the law of armed conflict (LOAC)⁸ by refusing to classify hostilities as an armed conflict and by wrongly denying that peace operation forces have become belligerents in armed conflict.

If the international community wishes to conduct high-intensity peace operations without causing the LOAC to be cast aside in future conflicts, it must promote the rule of law by ceasing to pretend that such operations are passive and impartial. This paper provides three examples where the UN and its member states improperly circumvented the LOAC. The first two examples concern intervention of peace operation forces in East Timor by Australia and then the UN between 1999 and 2000. Both Australia and the UN determined the LOAC did not apply to hostilities even though the facts on the ground required its application.⁹ The third example examines the UN’s intervention in the Ivory Coast in 2011, where the UN conducted air assaults against one party to a non-international armed conflict (NIAC). After the offensive, the UN Secretary-General implausibly denied the UN had become a party to the conflict, thereby denying the application of the LOAC as a matter of law to those UN actions.¹⁰

The UN and its member states sacrifice the LOAC in peace operations because of conflicting concepts of sovereignty and an unsustainable adherence to traditional peacekeeping doctrine. Under traditional peacekeeping doctrine, a peace operation force must gain consent from the parties, remain impartial to the conflict, and only use force in self-defense.¹¹ Traditional peacekeeping is based on a Westphalian concept of sovereignty, which absolutely prohibits interference in the

Security Assistance Force in Afghanistan); S.C. Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999) (establishing Intervention Force in East Timor); S.C. Res. 1088, U.N. Doc. S/RES/1088 (Dec. 12, 1996) (establishing NATO Stabilization Force in Bosnia and Herzegovina); S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995) (establishing NATO Implementation Force in Bosnia and Herzegovina); S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992) (authorizing Operation Restore Hope in Somalia).

⁶ *Rule of Law*, DEP’T. OF PEACEKEEPING OPERATIONS, <http://www.un.org/en/peacekeeping/issues/ruleoflaw/> (last visited Oct., 20, 2012) (stating that “upholding the rule of law is essential” for successful peace operations).

⁷ U.N. Charter art. 1, para. 1.

⁸ The law of armed conflict is also popularly known as international humanitarian law (IHL) or the law of war. See *War and International Humanitarian Law*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/index.jsp> (last visited Oct. 20, 2012).

⁹ See *infra* Part III.A.

¹⁰ See *infra* Part III.B.

¹¹ ALEX J. BELLAMY & PAUL D. WILLIAMS, UNDERSTANDING PEACEKEEPING 32-33, 196 (2d ed. 2010); TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS 4 (2002).

internal affairs of another state.¹² More recently, however, peace operations have become more robust and aggressive.¹³ Particularly since the mid-1990s, the UN Security Council has typically authorized peace operations under Chapter VII of the UN Charter to not only use force for individual and unit self-defense, but also to further the mission's mandate and protect civilians.¹⁴ These more aggressive peace operations are based on a post-Westphalian view that a sovereign's inability or unwillingness to protect its citizens could result in involuntary forfeiture of sovereignty.¹⁵

Further obscuring the application of the LOAC in peace operations is the fact that the international community lacks accepted definitions for peace operations and its different forms, such as "peacekeeping" and "peace enforcement."¹⁶ While the DPKO distinguishes five types of peace operations (conflict prevention, peacekeeping, peace enforcement, peacemaking, and peace building), it only generically describes the activities.¹⁷ The lack of clear definitions makes it difficult

¹² BELLAMY & WILLIAMS, *SUPRA* note 11, at 179 (noting that the "Westphalian character of traditional peacekeeping set the parameters for its techniques and defined its limits [leaving] no room for more forceful action when notional consent failed to translate into compliance with the UN's demands").

¹³ Corinna Kuhl, Chief, Peacekeeping Best Practices Section, UN, *The Evolution of Peace Operations: From Interposition to Integrated Missions*, Address Before 31st Round Table on Current Problems of International Humanitarian Law (Sept. 4-6, 2008), in *INT'L HUMANITARIAN L., HUM. RTS. AND PEACE OPERATIONS*, Sept. 2008, at 72; James Sloan, *The Use of Offensive Force in U.N. Peacekeeping: A Cycle of Boom and Bust?*, 30 *HASTINGS INT'L & COMP. L. REV.* 385, 387 (2007).

¹⁴ Sloan, *supra* note 13, at 388.

¹⁵ The United Nation's authorization to use force in Libya in 2011 may have validated the emergence of this new sovereignty paradigm (popularly known as the Responsibility to Protect or R2P principle), which, theoretically, makes it easier for States to intervene in the internal affairs of other states. See Stewart Patrick, *Libya and the Future of Humanitarian Intervention: How Qaddafi's Fall Vindicated Obama and RtoP*, *FOREIGN AFF.* (Aug. 26, 2011), <http://www.foreignaffairs.com/articles/68233/stewart-patrick/libya-and-the-future-of-humanitarian-intervention?page=show#> (asserting that "humanitarian imperative is a strong and growing impulse," and use of the Responsibility to Protect principle in Libya has demonstrated its viability); Spencer Baraki, *The New Humanitarian Precedent: Bosnia, Kosovo, and the Libyan Intervention of 2011*, *THE LYCEUM* (Sept. 2011), <http://ejournals.library.ualberta.ca/index.php/eudaimons/article/view/11879/9038> (arguing that the authorization for the use of force in Libya establishes a new humanitarian precedent for allowing intervention). However, R2P may also be short-lived. Russia and China, which hold veto-power at the Security Council, as well as Brazil, India and South Africa blocked actions condemning Syria for its violent attacks against its civilian population, a signal that humanitarian intervention may no longer be an appropriate justification to interfere in a nation's internal affairs. See Chris Keeler, *The End of the Responsibility to Protect?*, *FOREIGN POL'Y J.*, (Oct. 12, 2011), <http://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect/> (opining that the opposition to humanitarian intervention in Syria resulted in part from a belief that NATO overstepped its R2P mandate in Libya by seeking regime change).

¹⁶ BELLAMY & WILLIAMS, *supra* note 11, at 14.

¹⁷ PEACEKEEPING BEST PRACTICES SEC., *supra* note 3, at 17-19. For example, it describes peacekeeping as "a technique designed to preserve the peace, however fragile, where fighting has been halted, and to assist in implementing agreements achieved by the peacemakers." *Id.* at 18. It describes peace enforcement as

the application, with the authorization of the Security Council, of a range of coercive measures, including the use of military force...to restore international peace and security in situations where the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression.

to consistently apply the terms. While Part II of this paper generally distinguishes between peacekeeping and peace enforcement, the majority of the paper uses the generic term “peace operation” when feasible to emphasize the importance of consistency in the application of terms.¹⁸

The international community is forcing a square peg into a round hole by trying to apply traditional Westphalian principles of consent, impartiality, and the use of force in self-defense to robust peace operations justified under a post-Westphalian concept of sovereignty. To fit the peg into the Westphalian idea of a valid peace operation, the UN and its member states avoid objective classification of hostilities and proper characterization of participants in hostilities. Unfortunately, such political maneuvering sacrifices the LOAC—represented by the pieces shaved off the square peg as it breaks down to fit the round hole. Instead of avoiding the LOAC, peace operation forces should promote and respect the LOAC by objectively identifying their role and the nature hostilities. Otherwise, states may use examples of peace operations to justify unlawful actions in armed conflict.

The next section of this paper, Part II, focuses on the evolution of peace operations as background for considering why the UN and states conducting peace operations sacrifice the LOAC in the name of peace. It discusses the origin of peace operations under a Westphalian concept of sovereignty and shows how such operations have expanded with a shifting view of sovereignty. This section also examines the evolution of the application of the LOAC to peace operations—from an initial perspective that the LOAC never applies to peacekeepers, to a view that the LOAC will apply if peacekeepers become a party to a conflict. Despite theoretical progression on the application of the LOAC to peace operations, Part III analyzes hostilities in East Timor between 1999 and 2000, and the Ivory Coast in early 2011, to illustrate intentional avoidance of the LOAC in peace operations. Within these contexts, Part IV shows how peace operation forces in East Timor and the Ivory Coast applied traditional Westphalian peacekeeping principles to post-Westphalian peace operations for political purposes. Further, this section shows

Id. Though the DPKO lists five types of peace operations, these five categories are not universally recognized. For example, Bellamy and Williams note seven different categories (preventative deployments, traditional peacekeeping, wider peacekeeping, peace enforcement, assisting transitions, transitional administrations, and peace support operations). BELLAMY & WILLIAMS, *supra* note 11, at 18.

¹⁸ Notably, the term “peacekeeping” is in the title of the Department of Peacekeeping Operations, yet the DPKO also conducts peace enforcement activities. Hence, the terms can be misleading when used as classifications. This paper uses the term “peacekeeping” to refer to traditional peacekeeping operations when UN forces or forces under unified command interpose themselves between two hostile parties in order to facilitate a peace settlement. Invariably, traditional peacekeeping requires the consent of all parties, impartiality on behalf of the peacekeepers, and the use deadly force is limited to personal or unit self-defense. See *supra* note 11 and accompanying text. This paper’s use of the term “peace enforcement” signifies the UN Security Council authorized the peace operation under Chapter VII of the UN Charter. The terms “peacekeeper” or “peacekeeping forces” may be used for grammatical convenience and the terms refer to the individual or force involved in the peace operation mission.

why such political calculations undermine the LOAC. Finally, Part V argues the error in sacrificing the LOAC to justify humanitarian intervention. This section contends that intentional avoidance of the LOAC in peace operations creates a model for states to ignore the LOAC in other conflicts. It also shows that the apparent success in one peace operation undertaken by political maneuver may, in fact, be detrimental to the next humanitarian crisis. Accordingly, the UN and its member states must properly categorize hostilities and the participant's status if they wish to use military force in peace operations.

II. THE EVOLUTION OF PEACE OPERATIONS AND THE APPLICABILITY OF THE LAW OF ARMED CONFLICT

Peace operations are a core activity of the UN, which is charged with maintaining international peace and security in accordance with the rule of law. When conducting such operations, however, traditional notions of sovereignty undermine the ability of the UN and its member states to effectively adhere to the LOAC. To explore this problem, this section examines the origin of peace operations in light of the Westphalian concept of sovereignty in which they were developed,¹⁹ and it shows how the purpose of peace operations has expanded with a shifting concept of sovereignty. The section then discusses the types of circumstances that trigger the LOAC. Finally, it addresses the evolving application of the LOAC to peace operations and identifies the political dilemma of applying the LOAC to certain types of peace operations.

A. The Origin of Peace Operations and Shifting Views of Sovereignty

Three core principles govern traditional peacekeeping—consent of the parties, impartiality, and the non-use of force except in self-defense and defense of the mandate.²⁰ These limits to intervention are grounded in the Westphalian system of state sovereignty, which views all states as equal sovereigns and discourages states from intervening in the internal matters of another state.²¹

¹⁹ Notably, the term “peace operation” and its variations, such as “peacekeeping” or “peace enforcement,” are not defined or even found in the UN Charter. Rather, because of persistent Security Council vetoes during the Cold War, the UN developed peace operations to address worldwide regional conflicts. Joseph P. “Dutch” Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 7-9 (2001). “Peacekeeping is implied from the UN’s primary purpose...to maintain international peace and security. It follows that the UN should be empowered with the means to fulfill its purpose.” *Id.* at 8.

²⁰ PEACEKEEPING BEST PRACTICES SEC., *supra* note 3, at 31; Kuhl, *supra* note 13, at 73; BELLAMY & WILLIAMS, *supra* note 11, at 32-33, 196; Findlay, *supra* note 11, at 4.

²¹ Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 364 (2005). The Westphalian concept of sovereignty is central to the UN Charter. Article 2(7) states: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

The principles of consent, impartiality, and use of force in self-defense are so fundamental to peacekeeping that some commentators refer to them as the “holy trinity.”²² Accordingly, if a host nation withdraws consent, the UN force must either leave²³ or risk becoming a party to the conflict by transforming the mission into an enforcement action.²⁴ Similarly, impartiality turns on peace operation forces being “enablers, rather than enforcers.”²⁵ If one party perceives the force as being partial, the peace operation force may become an enemy to one or all parties to the conflict.²⁶ Finally, the principle of using force only in self-defense is critical to the concept of Westphalian peacekeeping.²⁷ Former UN Secretary-General Dag Hammarskjöld noted that the most fundamental element in peacekeeping operations is “the prohibition against any initiative in the use of armed force.”²⁸ Thus, under traditional peacekeeping doctrine, any compromise of the “holy trinity” runs the risk of transforming the mission into an offensive combat operation.²⁹

Contrary to traditional peacekeeping operations, the principles of the “holy trinity” are not inviolable in peace *enforcement operations*—at least in theory. The Security Council specifically authorizes peace enforcement operations under Chapter VII of the UN Charter,³⁰ and in terms of intrastate humanitarian intervention, they tend to be rooted in a post-Westphalian concept of sovereignty.³¹ The post-Westphalian theory of sovereignty is “based on the notion of ‘sovereignty as responsibility’—the idea that sovereigns enjoy the right to non-interference only insofar as they protect the fundamental rights of their citizens.”³²

U.N. Charter art. 2, para. 4. Notably, however, the UN Charter also contains elements of a post-Westphalian concept of sovereignty. These are evident in the human rights ideals advanced in the Charter, as well as the ability of the Security Council to intervene in the internal matters of a state in accordance with Chapter VII. BELLAMY & WILLIAMS, *supra* note 11, at 36.

²² BELLAMY & WILLIAMS, *supra* note 11, at 173, 196; Sloan, *supra* note 13, at 386.

²³ Bialke, *supra* note 19, at 13 (noting that “[c]onsent from the host nation remains the keystone of classical peacekeeping”).

²⁴ PEACEKEEPING BEST PRACTICES SEC., *supra* note 3, at 32.

²⁵ FINDLAY, *supra* note 11, at 4.

²⁶ *Id.* (stating that “[t]he abandonment of impartiality, whether deliberate or inadvertent, runs the risk of turning the peace force into an enemy of one or more of the parties”).

²⁷ Sloan, *supra* note 13, at 397-98.

²⁸ The Secretary-General, *Report of the Secretary-General on the Summary Study of the Experience Derived from the Establishment and Operation of the Force*, ¶ 179, delivered to the General Assembly, U.N. Doc. A/3943 (Oct. 9, 1958) [hereinafter *1958 UN Summary Study*].

²⁹ Bialke, *supra* note 19, at 19 (noting that combat operations are not a peacekeeping tool).

³⁰ BELLAMY & WILLIAMS, *supra* note 11, at 214.

³¹ “Post-Westphalian enforcement...refers to those occasions when the UN has authorized the use of force against a state or non-state entity in response to acts of violence that may have occurred primarily within the borders of a particular state, such as the massacre of civilians or attacks against UN personnel.” *Id.* at 220. Examples of peace enforcement actions taken by the UN Security Council under Chapter VII of the UN Charter include operations in Bosnia, Somalia, Sierra Leone, East Timor, Afghanistan, Haiti, Republic of Congo, Liberia, and Ivory Coast. *Id.* at 216.

³² *Id.* at 13.

After the Cold War, the Westphalian concept of “state mastery over internal affairs and border inviolability . . . began to erode more persistently.”³³ Between 1988 and 1993, the UN conducted more peace operations than in the previous four decades, and early successes seemed to validate the role of peace operations for implementing peace and promoting human rights and democratic values.³⁴ Unfortunately, increasingly complex missions deployed without sufficient troops, resources, or political support, ultimately leading to a series of disastrous failures in Somalia, Rwanda, and Bosnia between 1991 and 1995.³⁵ Consequently, in the latter half of the 1990s, states became more reluctant “to authorize, fund or participate in peace operations, despite the continuation of violence in many parts of the world.”³⁶ Thus, states seemed to retreat to a traditional Westphalian concept of peace operations.

In 1999, however, UN Secretary-General Kofi Annan referenced humanitarian crises in Kosovo and East Timor to call for change in the UN approach to peace operations.³⁷ In his article, *Two Concepts of Sovereignty*, Annan scrutinized the deficiency of the world’s reaction in Kosovo, where in absence of Security Council authorization, NATO intervened without authority to avert the potential of another disaster akin to that in Rwanda.³⁸ He further noted that the Security Council’s refusal to intervene in East Timor without Indonesia’s consent was problematic.³⁹ Annan claimed the Kosovo and East Timor operations were insufficient models for intervention in the twenty-first century and called for an adaptation of the system.⁴⁰

In response to Annan’s challenge, the Canadian government and a group of non-government organizations established the International Commission on Intervention and State Sovereignty (ICISS) to resolve the apparent incompatibility between state sovereignty and the UN’s interest in intervening in humanitarian crises.⁴¹ Their solution was to reformulate the Westphalian concept of absolute sovereignty to one that describes sovereignty as a state’s responsibility to protect its

³³ Kelly, *supra* note 21, at 395-96 (noting the world’s lack of response to genocide in Burundi and Iraq in 1988, versus U.S. action to stop Saddam Hussein from killing Kurdish minorities above Iraq’s 36th parallel in 1991, after the end of the Gulf War); *see also* BELLAMY & WILLIAMS, *supra* note 11, at 36 (noting that post-Westphalian concepts of sovereignty became more prominent after the end of the Cold War).

³⁴ BELLAMY & WILLIAMS, *supra* note 11, at 119. “From 1948 to 1988, the UN authorized only 13 peace operations. From 1988 to 1998 . . . the UN authorized thirty-six peace operations—over a 1000% increase from the preceding forty-year period.” Bialke, *supra* note 19, at 17.

³⁵ BELLAMY & WILLIAMS, *supra* note 11, at 119.

³⁶ *Id.* at 111.

³⁷ Kofi Annan, *Two Concepts of Sovereignty*, *Economist*, Sept. 16, 1999, available at <http://www.economist.com/node/324795>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESP. TO PROTECT 2* (2001), available at <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>.

citizens from genocide, war crimes, and crimes against humanity.⁴² When, in the eyes of the international community, a state cannot or will not fulfill this responsibility, the international community will adjudge such sovereign responsibility as waived to justify humanitarian intervention under international law.⁴³ This emerging sovereignty concept has been coined the “responsibility to protect” (R2P).⁴⁴ Notably, the UN General Assembly recognized R2P in a resolution at the 2005 World Summit—a significant declaration that sovereignty is not absolute.⁴⁵

Following Kofi Annan’s call for increased UN action after the Kosovo and East Timor crises, the tenor of peace operations consistently evolved into more forceful and robust operations.⁴⁶ In fact, since June 1999, the Security Council has frequently sanctioned peace operations under Chapter VII of the UN Charter, authorizing the use of “all necessary means” to achieve their mandates.⁴⁷

Paradoxically, despite agreeing to the principles of R2P and authorizing more forceful peace operations since 1999, at least one commentator notes the international community remains committed to the Westphalian system of sovereignty.⁴⁸ The differing reactions of Russia, China, and the West concerning humanitarian crises in Libya and Syria illustrate this divide. In 2011, with Russia and China abstaining, the Security Council authorized NATO to use force in Libya to protect civilians;⁴⁹ it was the first time the Security Council authorized the use of force to protect

⁴² *Id.* at 12-18. Notably, the shifting concept of sovereignty is not a new phenomenon. According to Michael Kelly, Westphalian principles of state sovereignty and equality were originally only meant to apply between and among the Great Powers, as the “purpose at the 1648 Peace Conference ending the Thirty Years’ War was to stabilize international relations and dampen the possibility of further warfare.” Kelly, *supra* note 21, at 366. However, “[a]s self-determination movements gained momentum with the post World War I collapse of empires (and in the mid-20th century when colonialism crumbled), Westphalian sovereignty principles were claimed by the new states and not expressly denied by the Great Powers.” *Id.*

⁴³ INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 41, at 16-17.

⁴⁴ INT’L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/> (last visited Oct. 20, 2012).

⁴⁵ G.A. Res 60/1, ¶¶ 138-139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

⁴⁶ Kuhl, *supra* note 13, at 72; Sloan, *supra* note 13, at 387.

⁴⁷ Sloan, *supra* note 13, at 388. “All necessary means,” or “all necessary measures,” or “all measures necessary” are UN Security Council euphemisms for the authorization to use force. FINDLAY, *supra* note 11, at 166-67. See e.g., S.C. Res. 1778, ¶ 6, U.N. Doc. S/RES/1778 (Sept. 25, 2007) (authorizing European Union to use “all necessary measures” to fulfill its mandate in border region between Chad and Sudan); S.C. Res. 1497, ¶ 5, U.N. Doc. S/RES/1497 (Aug. 1, 2003) (authorizing multinational force in Liberia to use “all necessary measures” to fulfill its mandate).

⁴⁸ BELLAMY & WILLIAMS, *supra* note 11, at 32 (stating that “[i]nternational commitment to the Westphalian order remains widespread and steadfast [and is] endorsed by a majority of states in the General Assembly”); see also Alex Bellamy & Paul Williams, *The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect*, 87 INTERNATIONAL AFFAIRS No. 4, 825, 843 (2011) (noting that China’s “long-established ‘five principles of foreign policy’ emphasize non-interference and the non-use of force,” a policy similar to Brazil).

⁴⁹ S.C. Res. 1973, *supra* note 3, ¶ 4.

civilians against the wishes of a sovereign state.⁵⁰ NATO proceeded with a bombing campaign that ultimately led to Muammar Qaddafi's death and regime change.⁵¹ Notably, Russia and China chastised NATO for overstepping its R2P mandate.⁵² As violence in Libya subsided, the Syrian government increased attacks against its civilian population, killing thousands.⁵³ Despite the devastation, Russia and China have vetoed resolutions for economic sanctions against Syria, as well as resolutions condemning Syria's actions.⁵⁴ According to several commentators, the vetoes signaled Russia and China's frustration with the Security Council's use of the R2P principle to interfere with the internal matters of other states.⁵⁵ Thus, despite the emergence of R2P and a decade of proactive intervention to protect civilian populations, there are significant political tensions over interpretations of sovereignty and the limits of humanitarian peace operations. As the examples of Libya and Syria show, as well as the examples of East Timor and Ivory Coast in Parts III and IV of this article, UN member states do not agree on how much the

⁵⁰ Bellamy & Williams, *supra* note 48, at 825 (noting the Security Council's action in Libya was the first time it cited R2P as justification for intervention into a functioning state, excluding action in Somalia in 1992 and 1994, due the absence of government in that country).

⁵¹ C.J. Chivers & Eric Schmitt, *Libya's Civilian Toll, Denied by NATO*, N.Y. TIMES, Dec. 18, 2011, at A1; CNN Wire Staff, *NATO Ends Libya Mission*, CNN.COM (Nov. 5, 2012), <http://www.cnn.com/2011/10/31/world/africa/libya-nato-mission/index.html>.

⁵² *China Says it was Forced to Veto UN Measure on Syria*, FOXNEWS.COM (Feb. 6, 2012), <http://www.foxnews.com/world/2012/02/06/china-defends-its-veto-un-measure-on-syria/> (reporting that "China's rare abstention . . . from the UN vote over a Libyan no-fly zone was later regretted by Chinese diplomats, who said NATO far overstepped its mandate and pledged not to permit any UN measures that could lead to similar action over Syria"); Keeler, *supra* note 15 (stating "[t]he failure to pass a resolution on Syria is directly related to the actions of the NATO-led intervention in Libya, during which the United States and its allies overtly overstepped the UN mandate authorizing action").

⁵³ Rick Gladstone & Neil MacFarquhar, *UN Official Rebukes Syria Over Violence*, N.Y. TIMES, Feb. 14, 2012, at A4; CNN Wire Staff, *General Assembly Passes Resolution on Syria as Deaths Mount*, CNN.COM (Feb. 16, 2012), http://articles.cnn.com/2012-02-16/middleeast/world_meast_syria-unrest_1_syrian-people-president-bashar-assad?_s=PM:MIDDLEEAST.

⁵⁴ George Lopez, *Russia and China: Sabotaging U.N. with Vetoes*, CNN.COM (Feb. 8, 2012), <http://www.cnn.com/2012/02/08/opinion/lopez-russia-sanctions-cold-war/index.html>; Keeler, *supra* note 15; Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, NYTIMES.COM (July 19, 2012), <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

⁵⁵ Lopez, *supra* note 54 (stating that the "Libyan case was the Russians' final straw for their claim that the Council had moved beyond the constraints that the charter places on UN infringement of national sovereignty, the use of force, and imposing economic sanctions"); R.L.G., *Libya Bitten, Syria Shy*, ECONOMIST.COM (Jan. 31, 2012, 8:59 PM), <http://www.economist.com/blogs/newsbook/2012/01/syria-and-un> (opining that Russia and China feel R2P has gone far enough, and that Russia felt duped after NATO's intervention in Libya became an air war against Qaddafi); Edith Lederer, *NATO bombing in Libya Added to Syria Vetoes*, GUARDIAN.COM (Oct. 6, 2011), <http://www.guardian.co.uk/world/feedarticle/9883190> (noting Russia's disagreement about the way the Libyan resolution was interpreted by NATO and its members, and its concern that a resolution against Syria might lead to a similar bombing campaign); Jack Goldsmith, *Walter Russell Mead on Why the Libya Intervention Harms The Duty to Protect Norm*, LAWFARE (Oct. 6, 2011, 3:24 PM), <http://www.lawfareblog.com/2011/10/walter-russell-mead-on-why-the-libya-intervention-harms-the-duty-to-protect-norm/> (opining that as a result of NATO overreaching, Libya will not usher in a new dawn for the R2P principle); Keeler, *supra* note 15.

UN should intervene in the internal matters of another state, or what constitutes impartiality or the use of force in self-defense.⁵⁶

In tandem with the shifting concept of peace operations, the application of the LOAC to peace operations has also evolved. The next section shows that in the first decades of peace operations, the UN maintained the LOAC did not apply to UN peacekeepers, but later changed to a view that the LOAC will apply if a peace operation force intervenes in an armed conflict and becomes a party to the conflict.

B. The LOAC and its Application to Peace Operations

Generally, the LOAC consists of the law of the Hague, which regulates the means and methods of warfare, and the law of Geneva, which protects the victims of armed conflicts.⁵⁷ Notably, the 1977 Protocols Additional to the Geneva Conventions merged much of the law of the Hague and the law of Geneva into two treaties.⁵⁸ Further, the vast majority of the LOAC has developed into customary international law, to which the United Nations considers itself bound when applicable.⁵⁹ To understand the applicability of the LOAC to peace operations, one must examine the criteria for its application and how the UN has historically applied the LOAC to peace operations.

1. Threshold Criteria for Determining the Existence of Armed Conflict

Not all armed hostilities taking place within a State rise to the level of armed conflict. If violence amounts to mere banditry, rioting, or some lesser form of violence, the applicable domestic law and human rights treaties apply, not the LOAC.⁶⁰ The LOAC only applies if an armed conflict of an international or non-

⁵⁶ BELLAMY & WILLIAMS, *supra* note 11, at 14. For example, as peacekeeping operations evolved, the definition of self-defense expanded to include the use of force in defense of the mission mandate, which force seems more in line with an enforcement action. Sloan, *supra* note 13, at 403-07.

⁵⁷ Brian Tittlemore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 64-65 (1997).

⁵⁸ *Id.* at 65. Additional treaties, such as the Chemical Weapons Convention, the 1980 U.N. Convention on Certain Conventional Weapons (and its five Protocols), etc., also make up the LOAC. INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 14 (2011).

⁵⁹ Tittlemore, *supra* note 57, at 65; Jaume Saura, *Lawful Peacekeeping: Application of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L.J. 479, 500 (2007); Paul Szasz, *UN Forces and International Humanitarian Law*, 75 INT'L L. STUD. 507, 512 (2000) (noting "[t]he United Nations has never denied that its military operations are subject to customary IHL or that the substance of most of the significant IHL treaties has passed into customary law"); Richard Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 MICH. J. INT'L L. 53, 78-79 (1995) (noting that most commentators conclude the rules regulating the means and methods of warfare and most of the provisions of Geneva Conventions I, II, III & IV, as well as Additional Protocol I and II, have become customary international law).

⁶⁰ See JEAN S. PICTET, COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (1958) (distinguishing armed conflicts of a non-international nature from acts of banditry and unorganized and short-lived insurrection); Protocol Additional to the Geneva

international nature exists.⁶¹ This article focuses on NIAC under Common Article 3 to the Geneva Conventions, as it is the most prevalent type of conflict.

The international community universally accepts Common Article 3 as customary international law.⁶² Generally, the article states that parties to a NIAC occurring in the territory of one of the member states must, at minimum, apply the provisions of Common Article 3.⁶³ Though the Geneva Convention delegates did not define NIAC,⁶⁴ many believe they purposely “avoided any rigid formulation that might limit the law’s field of application.”⁶⁵ At a basic level, a Common Article 3

Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, June 8, 1977, 1125 U.N.T.S. 609 (stating the Protocol does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”)[hereinafter Additional Protocol II]; Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (stating “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”).

⁶¹ Tittlemore, *supra* note 57, at 65-66; OLA ENGDahl, PROTECTION OF PERSONNEL IN PEACE OPERATIONS 95 (2007); Peter Chapman, *Ensuring Respect: United Nations Compliance with International Humanitarian Law*, 17 HUM. RTS. BRIEF 1, 3 (2009). Though an occupation will also trigger the LOAC, it is beyond the scope of this paper.

⁶² Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 114 (June 27); see also Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI INT’L & COMP. L. REV. 189, 193 (2004) (noting the customary nature of Common Article 3 is supported by the ICRC, as well as ICTY and ICTR jurisprudence and numerous scholars of international humanitarian law) (citations omitted); Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT’L L.J. 1042, 1055 (2011); Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INT’L REV. OF THE RED CROSS 189, 198 (2011). Notably, because every State has ratified all four Geneva Conventions, “the requirement that the armed conflict must occur ‘in the territory of one of the High Contracting Parties’ has lost its importance in practice,” as any armed conflict will take place on the territory of one of the Parties to the Convention. Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Mar. 2008), at 3, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

⁶³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The delegates to the Geneva Conventions included Common Article 3 because they recognized the “atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian principles.” Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 15 (2003). Its inclusion marked the first time the international community sought to regulate internal armed conflict. Bergal, *supra* note 62, at 1056 (citing Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 14 (2003)).

⁶⁴ JEAN S. PICTET, COMMENTARY ON GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49 (1952).

⁶⁵ Bergal, *supra* note 62, at 1056 (quoting Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 21 (2003)); see also Pictet, *supra* note 64, at 50 (noting that Common Article 3 should be “applied as widely as possible”).

NIAC occurs between state and non-state groups or between two or more non-state groups.⁶⁶ However, Common Article 3 does not provide a formula for the “threshold” of violence necessary to trigger its application.⁶⁷

Identifying the requisite threshold of violence triggering a NIAC is essential because the LOAC governs violence above the threshold whereas domestic and human rights law govern violence below the threshold.⁶⁸ Proper classification of hostilities is necessary to determine whether there are prohibitions against perfidy, the use of riot control agents, or other response methods that may not be prohibited in a law enforcement action. Most importantly, “authority to offensively target is only available during armed conflict.”⁶⁹

Additional Protocol II to the Geneva Conventions (AP II) sought to address the threshold issue for NIACs.⁷⁰ AP II is triggered during

armed conflicts . . . which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁷¹

Though AP II provides threshold criteria, the protocol does not apply to all Common Article 3 conflicts; rather, it only applies to high-intensity NIACs.⁷² However,

⁶⁶ Pejic, *supra* note 62, at 191; *but see* Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2468-69 (2008) (stating that there is no definitive definition of armed conflict).

⁶⁷ MICHAEL N. SCHMITT ET AL., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 3 (2006), available at <http://www.dur.ac.uk/resources/law/NIACManualYBHR15th.pdf>; Elizabeth Holland, *The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?*, 34 SUFFOLK TRANSNAT'L L. REV. 145, 156 (2011).

⁶⁸ Holland, *supra* note 67, at 150-51 (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)).

⁶⁹ Rob McLaughlin, *The Legal Regime Applicable to Use of Lethal Force*, 12 J. CONFLICT & SEC. L. 389, 397 (2007). “[W]hen analyzing an [sic] SC Chapter VII ‘all necessary means’ mandate, it is clearly arguable that the authority to offensively target and use lethal force (attack) against enemy forces and/or civilians taking a direct part in hostilities, outside situations of self-defence, should not necessarily be presumed to exist as a matter of law.” *Id.* at 417. “The armed conflict legal paradigm must formally apply before such authorizations can be legally permissible.” *Id.*

⁷⁰ Additional Protocol II, *supra* note 60, art. 1. Though Additional Protocol II supplements and develops Common Article 3, it does not modify “its existing conditions of application.” *Id.*

⁷¹ *Id.*

⁷² See YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1348 (1987) (noting Additional Protocol II “only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict”); *see also* Int'l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Mar. 2008, at 4, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

Article 1, Paragraph 2, applies to Common Article 3 by analogy.⁷³ That provision excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” as armed conflict.⁷⁴ Consequently, AP II helps define what is not a Common Article 3 NIAC.

The *Tadic Jurisdiction Decision* and its progeny filled the gap between Common Article 3 and AP II. In that case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated an armed conflict exists within a state if there is “protracted armed violence” between state authorities and an “organized armed group” or between such groups.⁷⁵ Thus, the definition focuses on two, fact-based criteria:⁷⁶ organization of the parties to the conflict and conflict intensity.⁷⁷

International jurisprudence provides additional assessment criteria for these two factors. Criteria for assessing the organization of non-state party actors (i.e., insurgents) include the existence of a command structure and headquarters; disciplinary rules; ability to procure, transport, and distribute arms; ability to plan, coordinate, and execute military operations, including troop movements and logistics; and other factors.⁷⁸ Further, the ICTY has applied the following assessment criteria to determine the requisite intensity of violence:

the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and caliber of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁷⁹

Common Article 3 is important because it requires all parties, whether a state actor or non-state group, to respect its provisions once a NIAC exists.⁸⁰ Accordingly,

⁷³ Holland, *supra* note 67, at 156 (citing Int’l Comm. of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, Mar. 2008, at 5, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>).

⁷⁴ Additional Protocol II, *supra* note 60, art. 1.

⁷⁵ Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

⁷⁶ Pejic, *supra* note 62, at 191-92.

⁷⁷ ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 122 (2010) (citing Prosecutor v. Tadic, Case No. IT-94-1-AR72, Trial Chamber Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997)).

⁷⁸ Pejic, *supra* note 62, at 192 (citing Fatmir Limaj et al., Case No. IT-03-66-T, Trial Chamber II Judgment, ¶ 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Ramush Haradinaj et al., Case No. IT-04-84-T, Trial Chamber I Judgment, ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008)).

⁷⁹ Ramush Haradinaj et al., Case No. IT-04-84-T, Trial Chamber I Judgment, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

⁸⁰ Cullen, *supra* note 62, at 194.

the *Tadic* progeny is critical because it provides the missing reference points for the existence of a Common Article 3 NIAC.⁸¹ While Parts III and IV of this paper discuss the classification of NIACs and the application of the LOAC to peace operations in East Timor and the Ivory Coast, it is necessary to first understand the evolution of the application of the LOAC to peace operations. The next subsection shows that only in the last two decades have the UN and its member states recognized the possibility that peace operation forces could be bound by the LOAC.

2. The Evolution of the Application of the LOAC to Peace Operations

The “distinction between combatants and civilians” in armed conflict is central to the LOAC.⁸² “Military personnel in a peace operation . . . enjoy the protection afforded to civilians if they act in the area of an armed conflict so long as they do not engage as a party to the conflict.”⁸³ Traditionally, the UN maintained its peacekeeping forces could not be considered combatants or a party to a conflict,⁸⁴ and therefore, the LOAC did not apply because they were not combatants engaged in offensive military operations.⁸⁵ However, this view changed as the Security Council increasingly authorized complex peace operations with mandates to protect civilians, “blur[ing] the distinction between self-defence and actions taken in an armed conflict.”⁸⁶

The traditional idea that the LOAC does not apply to UN forces follows Westphalian concepts of sovereignty for peace operations, which were addressed in the previous section of this paper. With one exception,⁸⁷ peace operations in

⁸¹ The *Tadic* definition of NIAC has been widely and consistently used as a formula for classifying hostilities by the International Criminal Courts for the Former Yugoslavia and Rwanda, the International Court of Justice, the International Criminal Court, and adopted by numerous experts, and LOAC manuals. CULLEN, *supra* note 77, at 120-21. Moreover, its incorporation “into the Rome Statute of the International Criminal Court has been cited as indicative of its customary status.” *Id.* at 121-22.

⁸² ENGDAHL, *supra* note 61, at 93.

⁸³ *Id.*

⁸⁴ Glick, *supra* note 59, at 73; Daphna Shrager, Senior Legal Officer, Office of Legal Affairs, UN, The Applicability of International Humanitarian Law to Peace Operations: From Rejection to Acceptance, Address Before 31st Round Table on Current Problems of International Humanitarian Law (Sept. 4-6, 2008), in INT’L HUMANITARIAN L., HUM. RTS. AND PEACE OPERATIONS, Sept. 2008, at 91; Bialke, *supra* note 19, at 37 (noting the UN’s traditional position was that peacekeepers were not bound by the LOAC but should follow the “principles and spirit” of the LOAC).

⁸⁵ Bialke, *supra* note 19, at 35.

⁸⁶ ENGDAHL, *supra* note 61, at 102.

⁸⁷ In February 1961, the UN Security Council authorized a UN peacekeeping force in the Congo (ONUC) to take “all appropriate measures,” including the use of force as a last resort, to prevent a recurrence of civil war. Sloan, *supra* note 13, at 399. Though Hammarskjöld initially forbade proactive use of force by peacekeepers, “he authorized pre-emptive action against conduct considered to be “[i]ncitement to or preparation for violence, including troop movements and confirmed reports of an impending attack, would warrant protective action by U.N. troops.”” *Id.* at 400-01. Sloan notes the U.N. has taken the view that ONUC maintained the self-defense principle, effectually stretching the definition of self-defense to include the use of force against those inciting violence, to expel

the four decades after the Korean War complied with the principles of the “holy trinity,” and the question of the application of the LOAC did not arise.⁸⁸ However, in the 1990s, “peacekeeping forces became increasingly involved in internal armed conflicts of extreme violence, human suffering and massive violations of international humanitarian law,” which involved the use of assertive force by peacekeepers under Chapter VII of the UN Charter.⁸⁹

Thus, as traditional Westphalian concepts of sovereignty began to shift in the 1990s, the UN relaxed its stance on the application of the LOAC to its peacekeeping forces through treaties and policy decisions. For example, the Convention on the Safety of United Nations and Associated Personnel contemplates the applicability of the LOAC to UN forces when they become a party to a conflict.⁹⁰ Specifically, the Convention criminalizes certain actions against UN and associated personnel,⁹¹ but it does not apply when UN forces are engaged in a Chapter VII peace enforcement mission as combatants in an international armed conflict.⁹² The Rome Statute of the International Criminal Court also recognizes the potential for UN forces to become party to a conflict, and thus, bound by the LOAC.⁹³

In addition to black letter treaty law, Kofi Annan issued a Secretary-General’s Bulletin in 1999, wherein he declared that the principles of the LOAC apply to UN forces when “actively engaged [in armed conflict] as combatants, to the extent and

mercenaries, to detain those preparing to attack U.N. troops and to prevent armed attack. *Id.* at 401. According to Sloan, “[i]t strains credulity to argue that the level of force authorized for ONUC was in the nature of self-defense.” *Id.* at 402.

⁸⁸ Shraga, *supra* note 84, at 91 (noting that the vast majority of peace operations in the UN’s first four decades were “consensual, ‘peaceful’ or so-called Chapter VI operations”).

⁸⁹ *Id.* (noting that such use of assertive force “blurred” the distinction between peacekeeping operations and enforcement actions).

⁹⁰ Ola Engdahl, The Legal Status of United Nations and Associated Personnel in Peace Operations and the Legal Regime Protecting Them, Address Before 31st Round Table on Current Problems of International Humanitarian Law (Sept. 4-6, 2008), in *INT’L HUMANITARIAN L., HUM. RTS. AND PEACE OPERATIONS*, Sept. 2008, at 126.

⁹¹ Convention on the Safety of United Nations and Associated Personnel art. 9, Dec. 9, 1994, 2051 U.N.T.S. 363 (Prohibited actions include murder, kidnapping or other attacks upon the person or liberty of such personnel, their premises or means of transportation) [hereinafter UN Safety Convention]; *see also* Shraga, *supra* note 84, at 95 (discussing the implications of the UN Safety Convention on the application of the LOAC to UN personnel).

⁹² UN Safety Convention, *supra* note 91, art. 2. Notably, it is still a crime to attack or capture UN and associated personnel in a NIAC, which makes sense because unprivileged belligerents in a NIAC cannot rely on the combatant exception and may be prosecuted under local criminal law. Engdahl, *supra* note 90, at 129.

⁹³ Rome Statute of the International Criminal Court art. 8(2)(b)(iii) & (e)(iii), July 17, 1998, 2187 U.N.T.S. 90. Article 8(2)(b)(iii) criminalizes the following act in international armed conflict: “Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.” Article 8(2)(e)(iii) uses the same language, but the provision applies to NIACs.

for the duration of their engagement.”⁹⁴ He specifically noted that the LOAC applies in “enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.”⁹⁵

Accordingly, both treaty law and UN policy clearly contemplate the potential for UN peace operation forces to be combatants in an armed conflict.⁹⁶ As noted by one commentator, “[b]y the mid 1990s there was no avoiding the question of the application of [the LOAC] to peacekeeping operations . . . it was no longer possible seriously to argue that UN forces were mere observers in the theatre of war.”⁹⁷

Based on the foregoing, it is now clear peacekeepers are not immune from the LOAC just because of their status as peacekeepers.⁹⁸ Accordingly, the ultimate question is not whether peace operation forces can be combatants, but rather, at what point do they become combatants? Just as the LOAC applies to the parties in an armed conflict, the LOAC will apply to a UN peace operation if two conditions exist: “an armed conflict (of whatever nature) in the area of its deployment, and the active engagement of the force in the conflict (in support of either or neither side) as combatant[s].”⁹⁹

Nevertheless, even when the facts on the ground fulfill these two criteria, the UN and its member states sometimes refuse to recognize their existence for political purposes.¹⁰⁰ The next section of this paper addresses three examples of

⁹⁴ U.N. SECRETARY-GENERAL’S BULLETIN ON THE OBSERVANCE BY UNITED NATIONS FORCES OF INTERNATIONAL HUMANITARIAN LAW, ¶ 1.1, UN DOC. ST/SGB/1999/13 (1999) [HEREINAFTER SECRETARY-GENERAL BULL. ON THE APPLICATION OF IHL]. Notably, “the UN has not clarified exactly what constitutes ‘actively engaged’ in combat or what applicable ‘to the extent and for the duration of their engagement’ means for the application of IHL.” Chapman, *supra* note 61, at 4.

⁹⁵ SECRETARY-GENERAL BULL. ON THE APPLICATION OF IHL, *supra* note 94, ¶ 1.1.

⁹⁶ The Secretary-General’s Bulletin “would seem to lay to rest any possible doubts as to both the obligation and the readiness of [peacekeeping] forces to comply with IHL in all appropriate situations, that is, when such forces are actually engaged in combat.” Szasz, *supra* note 59, at 524.

⁹⁷ Shraga, *supra* note 84, at 92; see also Philip Spoerri, Conclusions of the San Remo Round Table on International Humanitarian Law, Human Rights and Peace Operations, Address Before the 31st Round Table on Current Problems of International Humanitarian Law, Sept. 4-6, 2008, at <http://www.iihl.org/?pageid=page12195> (noting that the Round Table experts clearly indicated troops engaged in peace operations, whether under UN command or not, can become party to armed conflict and be bound by the LOAC).

⁹⁸ Chapman, *supra* note 61, at 4 (noting that the LOAC applies to peace operations “based on an objective test of the level of violence, not the moral status of the parties”).

⁹⁹ Shraga, *supra* note 84, at 94.

¹⁰⁰ Sometimes states and organizations refuse to recognize the existence of armed conflict because it highlights their failure to prevent the situation, it limits use of repressive measures, or there is a fear of legitimizing insurgents. Cullen, *supra* note 62, at 197 (emphasis original) (citing Kuwait, West Bank and East Timor as examples). In other instances, states and international organizations characterize hostilities based on international relations and politics. Mack, *supra* note 4, at 11. According to Cullen, “[p]erhaps the most important provision contained in Common Article 3 for its contemporary acceptance by state authorities is the final clause which states its application ‘shall not affect the legal status of the Parties to the conflict.’” *Id.* at 196. Thus, according to Pictet, Common Article 3 “does not in any way limit the right of a State to put down [rebellion, nor] does it increase in the slightest the authority of the rebel party.” PICTET, *supra* note 64, at 50. Notably, “refusal to

that dynamic—two peace operations in East Timor and one operation in the Ivory Coast. In each situation, the peace operation degraded the rule of law.

III. CREATING FICTION: AVOIDING THE LOAC IN EAST TIMOR AND IVORY COAST

In 1999, Australia led the multinational Intervention Force in East Timor (INTERFET) to end massive internal violence in the region. For political purposes, however, it refused to recognize armed conflict or the application of the LOAC even though the facts on the ground called for its application. When the UN Transitional Authority in East Timor (UNTAET) took over for INTERFET in 2000, the DPKO continued to perpetuate this fiction. Similarly, in the Ivory Coast in 2011, the UN claimed it had not become a belligerent in an ongoing NIAC in that country. Clearly offensive UN air assaults against one party to the conflict, however, contradict that claim.

This section is divided into two subsections. The first subsection provides background information leading up to INTERFET's intervention in East Timor. It then examines the facts on the ground during INTERFET and UNTAET, respectively, and how those missions classified hostilities during their operations. The second subsection examines the armed conflict in Ivory Coast in 2011, with specific attention to the offensive military intervention by the United Nations Operation in Côte d'Ivoire (UNOCI).

A. INTERFET & UNTAET: Armed Conflict in East Timor

East Timor is a former colony of Portugal.¹⁰¹ When Portugal withdrew from East Timor in 1975, Indonesia promptly invaded and annexed the territory.¹⁰² However, through a series of resolutions, “the UN Security Council and General Assembly rejected Indonesian claims of sovereignty over the territory.”¹⁰³ Significantly, Australia was one of few states to recognize Indonesia's sovereignty over East Timor, which it did in 1979.¹⁰⁴

Indonesia's takeover prompted two-and-a-half decades of fierce guerrilla warfare by East Timorese independence fighters, the most prominent being *Frente*

recognize de facto armed conflict does not decide the inapplicability of international humanitarian law.” Cullen, *supra* note 62, at 197.

¹⁰¹ *The East Timor Crisis: A Disaster for Indonesia*, INT'L INST. FOR STRAT. STUD., VOL. 5, NO. 8, OCT. 1999, at 1, <http://www.iiss.org/publications/strategic-comments/past-issues/volume-5---1999/volume-5---issue-8/the-east-timor-crisis/>; Moreen Dee, 'Coalitions of the Willing' and Humanitarian Intervention: Australia's Involvement with INTERFET, 8 INT'L PEACEKEEPING 1, 2 (2001).

¹⁰² BELLAMY & WILLIAMS, *supra* note 11, at 273.

¹⁰³ Michael J. Kelly et al., *Legal Aspects of Australia's Involvement in the International Force for East Timor*, 841 INT'L REV. OF THE RED CROSS (MAR. 31, 2001), available at <http://www.icrc.org/eng/resources/documents/misc/57jqz2.htm>.

¹⁰⁴ BELLAMY & WILLIAMS, *supra* note 11, at 273; Kelly et al., *supra* note 103.

Revolucionaria Timor Lest Independence (FRETILIN).¹⁰⁵ The civil war resulted in the death of approximately 800,000 people—nearly one-third of East Timor’s population.¹⁰⁶ Finally, in 1999, following massive pressure from the international community, the Indonesian government authorized a referendum vote on East Timor independence.¹⁰⁷

Elements of Indonesian society and the military did not appreciate their government’s decision, and they determined to stop it.¹⁰⁸ Prior to the referendum, organized militias attacked personnel from the United Nations Mission in East Timor (UNAMET) and conducted a campaign of intimidation and violence against the East Timorese, resulting in large internal displacement and many deaths.¹⁰⁹

In spite of the intimidation, the East Timorese population voted overwhelmingly for independence.¹¹⁰ Immediately, pro-Indonesian militia forces reacted by destroying property and ethnic cleansing.¹¹¹ Militias destroyed seventy percent of East Timor’s infrastructure,¹¹² killed between 1000 and 2000 East Timorese, and forcibly displaced another 250,000 people to West Timor.¹¹³ FRETILIN leader Xanana Gusmao labeled the violence as genocide and pleaded with the international community to intervene.¹¹⁴ But Indonesian President Bacharuddin Jusuf Habibie claimed his government was responsible for law and order in East Timor, and he threatened to forcibly oppose UN intervention.¹¹⁵ As the violence continued, however, international public opinion shifted to an inclination toward intervention.¹¹⁶

¹⁰⁵ BELLAMY & WILLIAMS, *supra* note 11, at 273; Dee, *supra* note 101, at 3; Kelly et al., *supra* note 103.

¹⁰⁶ *The East Timor Crisis: A Disaster for Indonesia*, *supra* note 101.

¹⁰⁷ BELLAMY & WILLIAMS, *supra* note 11, at 273. The un-armed UN mission was designated UN Assistance Mission for East Timor (UNAMET). Dee, *supra* note 101, at 4.

¹⁰⁸ DALE STEPHENS, *THE USE OF FORCE IN PEACEKEEPING OPERATIONS – THE EAST TIMOR EXPERIENCE* 12 (2005).

¹⁰⁹ *Id.*

¹¹⁰ BELLAMY & WILLIAMS, *supra* note 11, at 273; Marianne Jago, *InterFET: An Account of Intervention with Consent in East Timor*, 17 INT’L PEACEKEEPING 377, 378 (2010).

¹¹¹ BELLAMY & WILLIAMS, *supra* note 11, at 273; see also Dale Stephens, *Military Involvement in Law Enforcement*, 92 INT’L COMM. OF THE RED CROSS 453, 457 (2010).

¹¹² Rob McLaughlin, Professor, Australian National University, Address at the U.S. Naval War College International Law Conference 2011: NIAC in the 21st Century (June 21-23, 2011), available at [http://www.usnwc.edu/Research---Gaming/International-Law/Past-Events-\(1\)/International-Law-Conference/ILD2011.aspx](http://www.usnwc.edu/Research---Gaming/International-Law/Past-Events-(1)/International-Law-Conference/ILD2011.aspx); Dee, *supra* note 101, at 4. “Jarat Chopra, the initial head of the UNTAET Office of District Administration, claims that the ‘punitive destruction of East Timor’ which followed the vote ‘invites comparison with classical antecedents, such as the razing and salting of ancient Carthage or the sacking of Troy.’” *Id.*

¹¹³ STEPHENS, *supra* note 108, at 13 (noting that “East Timor underwent a paroxysm of violence initiated by such militia forces who seemed intent on destroying the very fabric of society”).

¹¹⁴ Jago, *supra* note 110, at 378.

¹¹⁵ Dee, *supra* note 101, at 4; see also Jago, *supra* note 110, at 379, 381 (noting Indonesia’s resistance to an international intervention force and that President Habibie considered declaring war against Australia for an anticipated violation of Indonesia’s sovereignty).

¹¹⁶ Derek McDougall & Kingsley Edney, *Howards Way? Public Opinion as an Influence on Australia’s Engagement with Asia*, 64 AUSTRALIAN J. OF INT’L AFF. 205, 215 (2010).

In Canberra, for example, Australians argued their government would not survive if it remained on the sidelines.¹¹⁷

With mounting public outrage, a number of international actors, including the UN Secretary-General, Security Council, UN member states, non-governmental organizations, and the media, coerced Habibie to consent to an intervention force.¹¹⁸ Specifically, the U.S. and Australia revealed a plan to cut all military ties with Indonesia.¹¹⁹ The U.S. also threatened to withdraw all financial assistance and shut down heavily relied upon International Monetary Fund and World Bank funding to Indonesia.¹²⁰ While members of the Security Council made it clear they would not support intervention absent Indonesian consent,¹²¹ during Security Council debate, U.S. Ambassador Richard Holbrook made a thinly veiled reference to NATO action in Kosovo without Security Council authorization.¹²² The French delegation made similar remarks.¹²³ Thus, faced with the possibility of a war with the West, Habibie relented.¹²⁴ Indonesian consent to an intervention force, although coerced, paved the way for the INTERFET and UNTAET missions described below.

1. INTERFET

a. *Facts on the Ground*

Having pressured Indonesia's consent, on 15 September 1999, the Security Council passed UN Security Council Resolution (UNSCR) 1264 pursuant to Chapter VII of the UN Charter.¹²⁵ It authorized a multinational force under unified command to use "all necessary measures" to "restore peace and security in East Timor," "protect and support UNAMET in carrying out its tasks," and "to facilitate humanitarian assistance operations."¹²⁶ Notably, to underscore the political acceptability of the intervention,¹²⁷ the Security Council uniquely referenced Indonesian consent in the resolution.¹²⁸ Moreover, UNSCR 1264 acknowledged ongoing "systematic,

¹¹⁷ BELLAMY & WILLIAMS, *supra* note 11, at 123; see also McDougall & Edney, *supra* note 116, at 215 (discussing strong support for intervention among the Australian populace).

¹¹⁸ See Jago, *supra* note 110, at 380-89 (chronicling events and actions taken by various international actors to coerce President Habibie to allow an intervention force to restore peace and security in East Timor); FINDLAY, *supra* note 11, at 17 (noting that Indonesia's consent to INTERFET and UNTAET was coerced).

¹¹⁹ Jago, *supra* note 110, at 385-87; Kelly et al., *supra* note 103.

¹²⁰ Jago, *supra* note 110, at 385-87.

¹²¹ STEPHENS, *supra* note 108, at 14; Jago, *supra* note 110, at 377-78.

¹²² Jago, *supra* note 110, at 383-84.

¹²³ *Id.*

¹²⁴ *Id.* at 389 (stating Habibie only acquiesced to intervention after he found himself "caught between international moral outrage and the apparent willingness of the UN to use force to protect the East Timorese").

¹²⁵ S.C. Res. 1264, *supra* note 5.

¹²⁶ *Id.* at 3.

¹²⁷ STEPHENS, *supra* note 108, at 14.

¹²⁸ S.C. Res. 1264, *supra* note 5 (stating that the Security Council welcomed "the statement by the

widespread and flagrant violations of international humanitarian . . . law,¹²⁹ clearly indicating the existence of an armed conflict.

INTERFET, a multi-national force led by Australia and comprised of twenty-two nations and approximately 12,600 troops,¹³⁰ faced a dire militia threat when it landed in East Timor on 20 September 1999.¹³¹ Prior to its deployment, senior Indonesian officials had warned “Australian soldiers might well meet the same fate as befell the 17 U.S. soldiers gunned down in Somalia.”¹³² Consequently, INTERFET deployed with a “major show of force” and ready for war.¹³³ Early firefights between INTERFET and militias resulted in militia deaths and INTERFET casualties.¹³⁴ David Kilcullen, who was on the ground in East Timor with INTERFET, described the situation as “extremely precarious.”¹³⁵ He noted that his company had “several minor brushes with local guerrillas,”¹³⁶ militias would attack international troops and installations,¹³⁷ and intelligence reports stated militias were staging in the jungle to wage a destabilization campaign.¹³⁸ According to Dr. Rob McLaughlin, a former Australian judge advocate and current professor at Australian National University, the facts on the ground in East Timor during INTERFET were “clearly intense” and “contextually similar” to those on the ground during the insurgency in Afghanistan.¹³⁹

b. *Classifying Hostilities During INTERFET*

According to the Commission for Reception, Truth, and Reconciliation Timor-Leste (hereinafter “the Commission”), an armed conflict existed in East Timor on 11 August 1975 and continued to at least 25 October 1999, when the Commission’s mandate terminated.¹⁴⁰ Further, the Commission noted that though

President of Indonesia on 12 September 1999 in which he expressed the readiness of Indonesia to accept an international peacekeeping force through the United Nations in East Timor”). Despite the political requirement for Indonesia’s consent for multinational intervention, “consent was completely irrelevant from a legal point of view [because] a Chapter VII operation does not need the agreement of the State against which it is addressed [and because] Indonesia had never been recognized as sovereign over the territory.” Saura, *supra* note 59, at 507.

¹²⁹ S.C. Res. 1264, *supra* note 5.

¹³⁰ Kelly et al., *supra* note 103.

¹³¹ Jago, *supra* note 110, at 388. For Australia, the deployment was the largest air mobility operation since the Vietnam War. DAVID KILCULLEN, COUNTERINSURGENCY 111 (2010).

¹³² Dee, *supra* note 101, at 11.

¹³³ Jago, *supra* note 110, at 388 (noting the force “was equipped to fight a war,” and included warships and numerous armored vehicles in its inventory).

¹³⁴ STEPHENS, *supra* note 108, at 17. Stephens notes that these firefights ceased after a few months. *Id.*

¹³⁵ KILCULLEN, *supra* note 131, at 112.

¹³⁶ *Id.* at 111.

¹³⁷ *Id.* at 110, 114, 132.

¹³⁸ *Id.* at 111.

¹³⁹ McLaughlin, *supra* note 112.

¹⁴⁰ COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, CHEGA! THE REPORT OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE: PART II - THE MANDATE OF THE COMMISSION 29 (2005), available at <http://www.etan.org/news/2006/cavr.htm>. UNTAET established the Commission under UNTAET Regulation 2001/10 to review LOAC and human rights violations

most of the Indonesian military and militias left East Timor by 25 October 1999, “there was continued armed conflict between Indonesian-controlled militia groups and international peacekeepers after UNTAET’s administration of the territory commenced.”¹⁴¹

Nevertheless, Australia determined the LOAC did not apply to INTERFET because there was no armed conflict.¹⁴² Michael Kelly, Timothy McCormack, Paul Muggleton and Bruce Oswald (hereinafter referred to as “K.M.M. & O.”) argue the facts on the ground did not meet the criteria for armed conflict under Common Article 3 and AP II.¹⁴³ However, Dr. McLaughlin acknowledges the facts on the ground met the criteria for armed conflict, and notes Australia made a conscious decision to classify hostilities as a domestic law enforcement operation due to political factors.¹⁴⁴ This subsection evaluates both approaches and concludes that the facts on the ground during INTERFET required the application of the LOAC, but Australia declined the classification for political reasons.

According to K.M.M. & O., Australia determined that no armed conflict existed between INTERFET and Indonesia because INTERFET was in East Timor with Indonesian consent, and therefore, the situation could not be an international armed conflict.¹⁴⁵ Further, they argue that no armed conflict existed between INTERFET and the militias because militia groups operated independently from each other outside a command structure.¹⁴⁶ Finally, K.M.M. & O. claim an armed conflict did not exist between militias and the East Timorese people because the militias did not “satisfy the criteria of an organized armed force, they did not control territory from which they could conduct sustained military operations and they were not fighting an opposing force.”¹⁴⁷

The assertion that no factual armed conflict existed during INTERFET is not viable. Significantly, in authorizing INTERFET pursuant to UNSCR 1264, the Security Council specifically referenced continuing violations of international humanitarian law.¹⁴⁸ It is impossible to have violations of the LOAC (international humanitarian law) unless there is an armed conflict. Notably, despite denying

between 25 April 1974 and 25 October 1999. *Id.* at 2. The Commission found that an IAC began in East Timor on 7 December 1975, when armed groups crossed the East Timor border. *Id.* at 29.

¹⁴¹ *Id.* at 29-30.

¹⁴² Kelly et al., *supra* note 103. Curiously, despite the declaration that there was no armed conflict, INTERFET justified several of its actions under the LOAC. *See infra* notes 149, 226 and accompanying text. It is also interesting that in his account of the Battle at Motaain Bridge on the boarder of East and West Timor, Kilcullen repeatedly refers to militias and the Indonesian troops supporting the militias as “the enemy.” KILCULLEN, *supra* note 131, at 109-45.

¹⁴³ Kelly et al., *supra* note 103.

¹⁴⁴ McLaughlin, *supra* note 112.

¹⁴⁵ Kelly et al., *supra* note 103 (claiming that Indonesia’s consent removed the possibility of an international armed conflict).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ S.C. Res. 1264, *supra* note 5.

the existence of an armed conflict, the Australian Defense Force used the LOAC to justify displaying the Red Cross emblem on light armored vehicles mounted with .50 caliber machine guns, as well as the use of orderlies to perform both security and medical duties.¹⁴⁹ This is significant because the LOAC provisions prohibiting perfidy¹⁵⁰ govern the use of the Red Cross emblem and functions of medical personnel in armed conflict. Use of the LOAC to justify its actions shows how Australia actually viewed the situation, and it belies Australia's assertion that an armed conflict did not exist.

In fact, hostilities on the ground satisfy the Common Article 3 *Tadic* criteria for protracted violence by organized armed groups.¹⁵¹ Given first-hand accounts from Kilcullen,¹⁵² and as documented by Captain Dale Stephens of the Australian Navy, it is clear the militias were responsible for protracted armed violence against INTERFET forces and the East Timorese, and were well trained, well armed, regionally grouped, and organized in a standard command structure.¹⁵³ Notably, K.M.M. & O. refrain from arguing the absence of armed violence between the militia groups and INTERFET.¹⁵⁴

Moreover, the facts on the ground arguably reflected the heightened criteria for an AP II conflict, which requires armed groups organized in a command structure to control territory for sustained operations.¹⁵⁵ As noted above, militia groups had organized themselves in a standard command structure.¹⁵⁶ Regarding their control of territory, it is important to understand two key facts: 1) Australia recognized East Timor as a province of Indonesia; and 2) though there had been a vote for independence, no international border actually existed because East Timor was still a part of Indonesia.¹⁵⁷ In fact, militias operated from within East Timor and

¹⁴⁹ Kelly et al., *supra* note 103. Regarding the display of the Red Cross, the ADF argued "the law of armed conflict permits personnel of military medical units to be armed and to use those arms in their own defense . . . [and] there is no relevant restriction regarding the type of weapons that may be used for defensive purposes." *Id.* Concerning orderlies performing security detail, the ADF determined that the Geneva Conventions and Additional Protocols only require doctors and nurses, not orderlies, to be exclusively engaged in medical duties. *Id.*

¹⁵⁰ Perfidy is defined in AP I as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1), Jun. 8, 1977, 1125 U.N.T.S. 3. Notably, "[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts." *Customary IHL: Rule 65. Perfidy*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65 (last visited Oct. 23, 2012).

¹⁵¹ See *supra* Part II.B.1.

¹⁵² KILCULLEN, *supra* note 131, at 110-12.

¹⁵³ STEPHENS, *supra* note 108, at 12-13.

¹⁵⁴ Kelly et al., *supra* note 103.

¹⁵⁵ Additional Protocol II, *supra* note 60, art. 1.

¹⁵⁶ KILCULLEN, *supra* note 131, at 110-12; Stephens, *supra* note 108, at 12-13.

¹⁵⁷ KILCULLEN, *supra* note 131, at 127.

from West Timor.¹⁵⁸ Whether their jungle bases were in East or West Timor, from an Australian perspective, the militias controlled the territory from which they were operating. Thus, the facts on the ground indicate militias controlled territory, operated in an organized and standard command structure, and conducted sustained attacks against INTERFET forces and the East Timorese. Accordingly, an armed conflict existed during INTERFET.

Despite K.M.M. & O.'s attempt to classify hostilities based on the *Tadic* and AP II criteria, political considerations were the actual reason Australia did not classify hostilities as armed conflict.¹⁵⁹ In a 2011 presentation at the U.S. Naval Justice School in Rhode Island, Dr. McLaughlin stated, "there were no belligerents in the [INTERFET] operation by decision."¹⁶⁰ He further noted that from the strategic political aspect, it would have been difficult to classify hostilities as armed conflict since Indonesia had invited the force, making "it difficult to say you're in a NIAC against Indonesian supported groups."¹⁶¹ According to Dr. McLaughlin, Australia resisted a NIAC classification because of its unique relationship with Indonesia and East Timor, and purposely referred to insurgent activity in criminal terms—"bullying, thugs, bad behavior and transients."¹⁶² Even K.M.M. & O. admit the impact of politics on the INTERFET operation, noting that different views on Indonesian sovereignty over East Timor affected the legal regime applied by INTERFET.¹⁶³

Indonesia's consent to intervention was critical for Australia because Australia maintained a traditional Westphalian view of Indonesian sovereignty over East Timor, and it did not want to be viewed as a party to a conflict with Indonesia.¹⁶⁴ Once it obtained consent, even though coerced, Australia locked itself into a traditional peacekeeper role by creating appearances of impartiality and the limited use of force in self-defense. Australia deemed the LOAC inapplicable because it could not afford the political cost of recognizing an armed conflict between

¹⁵⁸ *Id.* at 110; Dee, *supra* note 101, at 12-13; The East Timor Crisis: A Disaster for Indonesia, *supra* note 101, at 2 (noting that prior to INTERFET's arrival, many militia groups retreated into West Timor to regroup).

¹⁵⁹ McLaughlin, *supra* note 112; see also KILCULLEN, *supra* note 131, at 134-35 (discussing a "political whitewash" of a UN border commission that investigated the incident affirmed the Indonesian position regarding the placement of the border, but at the same time stated the firefight took place entirely within East Timor).

¹⁶⁰ McLaughlin, *supra* note 112 (emphasis added).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Kelly et al., *supra* note 103 (stating that "[d]iffering views on the status of Indonesia's claims to East Timor had an effect on key issues such as . . . the law applicable in East Timor after the multinational force was deployed").

¹⁶⁴ Dee, *supra* note 101, at 7. According to Dee, prior to INTERFET's intervention, despite massive public outcry in Australia for its leaders to do something about the East Timorese massacres, Australian leadership resisted intervention without U.S. support. *Id.* She states, "Australia's hesitation . . . rested on its policy-makers' fears that any uninvited intervention would be tantamount to an act of war, the political repercussions of which could have disastrous consequences for Australia's regional relationships." *Id.* Most probably, Australia's leaders feared the same result once INTERFET deployed if the force declared an armed conflict against Indonesian-backed militia.

INTERFET forces and the militias. Thus, despite facts on the ground calling for the application of the LOAC, Australia viewed its role as a police force. Indeed, UNTAET perpetuated this fiction.

2. UNTAET

a. *Facts on the Ground*

In February 2000, INTERFET transferred its security mission to UNTAET in accordance with UNSCR 1272.¹⁶⁵ The Security Council charged UNTAET with maintaining law and order, establishing governance, ensuring the delivery of humanitarian aid and establishing conditions for sustainable development.¹⁶⁶ It also authorized UNTAET to use “all necessary measures” to accomplish its mandate.¹⁶⁷ Like UNSCR 1264, UNSCR 1272 acknowledged ongoing “systematic, widespread and flagrant violations of international humanitarian . . . law.”¹⁶⁸ It also referenced Indonesia’s expressed intent to cooperate with INTERFET and UNTAET, while noting UN respect for Indonesia’s sovereignty and territorial integrity.¹⁶⁹

The situation on the ground in East Timor worsened during UNTAET’s first year. Organized militia groups had been regrouping in West Timor, and by early 2000, they started penetrating into East Timor in a “desperately violent” attempt to prevent East Timor’s independence.¹⁷⁰ It was a “decidedly hostile environment.”¹⁷¹ From March 2000, the number of armed engagements between militias and UNTAET forces increased, to include complex ambushes by large militia forces¹⁷² using “professional military tactics and weaponry.”¹⁷³ At least eleven incidents occurred between March and December 2000, where UNTAET forces sustained casualties, though these were only a fraction of the total contact incidents.¹⁷⁴ Consequently, by mid-2000, the UNTAET leadership realized enemy militia forces “were better

¹⁶⁵ STEPHENS, *supra* note 108, at 48; S.C. Res. 1272, *supra* note 3, ¶ 2.

¹⁶⁶ S.C. Res. 1272, *supra* note 3, ¶ 2.

¹⁶⁷ *Id.* ¶ 4.

¹⁶⁸ S.C. Res. 1272, *supra* note 3; S.C. Res. 1264, *supra* note 5.

¹⁶⁹ S.C. Res. 1272, *supra* note 3 (stating specifically, “recognizing the importance of continued cooperation between the Government of Indonesia and the multinational force,” and “[r]eaffirming respect for the sovereignty and territorial integrity of Indonesia”).

¹⁷⁰ Dale Stephens, *The Lawful Use of Force by Peacekeeping Forces: The Tactical Imperative*, INT’L PEACEKEEPING, vol. 12, no. 2, Summer 2005, at 157, 167; STEPHENS, *supra* note 108, at 17 (noting that “[o]rganized militia groups . . . sought to intimidate the general population and subsequently thwart the UNTAET mission through violent means”).

¹⁷¹ Stephens, *supra* note 170, at 167.

¹⁷² STEPHENS, *supra* note 108, at 49.

¹⁷³ Stephens, *supra* note 170, at 164.

¹⁷⁴ STEPHENS, *supra* note 108, at 49, 66-68; see also Stephens, *supra* note 111, at 457 (noting that “[t]he activities of the pro-Indonesian militia in opposing this transition were essentially military: They used tactics, techniques, and procedures that were military both in style and in substance. Numerous incidents of armed contact between the [peacekeeping forces] and the militias occurred, causing deaths on both sides.”).

trained, better armed, better skilled and more determined than they were initially assessed to be.¹⁷⁵

b. *Classifying Hostilities During UNTAET*

The situation on the ground in East Timor in 2000 amounted to an armed conflict.¹⁷⁶ Not only did UNSCR 1272 repeat the language of UNSCR 1264 referring to ongoing violations of the LOAC, but as noted above, the Commission determined an armed conflict existed between militia groups and UNTAET forces after 25 October 1999, when UNTAET began administration of East Timor.¹⁷⁷ Further, both Stephens and McLaughlin concede the facts on the ground satisfied the criteria for armed conflict. Nevertheless, the DPKO “did not accept the LOAC framework as applicable.”¹⁷⁸

The DPKO’s resistance to an armed conflict categorization is grounded in its identity. According to Stephens, the DPKO’s reluctance to recognize the existence of an armed conflict in East Timor is not surprising, as contemporary Security Council resolutions do not consciously recognize the application of the LOAC as governing the use of force in UN peace operations.¹⁷⁹ Thus, on a doctrinal level, the use of force in modern peace operations is generally limited to self-defense.¹⁸⁰ Notably, as illustrated by reactions to the August 2000 Brahimi report, which advocated for more robust peace operations,¹⁸¹ some states resisted the recommendations and argued for strict adherence to the principles of consent, impartiality, and minimum use of force in self-defense.¹⁸² Accordingly, it is evident that the DPKO intentionally avoided the armed conflict classification primarily because it was apprehensive with a UN force operating outside the “holy trinity.” This represents a strict Westphalian approach to peace operations.

Though critical of the DPKO’s decision not to recognize the belligerent status of the militias, and therefore, the existence of an armed conflict, Stephens asserts the DPKO was within its prerogative to make this decision.¹⁸³ Stephens

¹⁷⁵ STEPHENS, *supra* note 108, at 50.

¹⁷⁶ *Id.* at 46.

¹⁷⁷ COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, CHEGA!, PART II – THE MANDATE OF THE COMMISSION, *supra* note 140, at 29-30.

¹⁷⁸ STEPHENS, *supra* note 108, at 46.

¹⁷⁹ Stephens, *supra* note 111, at 461-62.

¹⁸⁰ *Id.* (stating “[i]n keeping with the Council’s doctrinal tradition, all authorized force in all contemporary peace missions is restricted to self-defense only”).

¹⁸¹ Chairman of the Panel on U.N. Peace Operations, *Rep. of the Panel on U.N. Peace Operations, transmitted by Note of the Secretary-General*, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000). The report is more commonly referred to as the Brahimi Report, in reference to Lakhdar Brahimi, the panel chairman.

¹⁸² BELLAMY & WILLIAMS, *supra* note 11, at 133. While the UN clearly undertakes more robust missions in the twenty-first century, it appears missions like UNTAET operated to expand the UN’s political capacity.

¹⁸³ STEPHENS, *supra* note 108, at 85-86.

states “the character of the activities of the [peacekeeping force] *vis-à-vis* the militia did qualify as an ‘armed conflict;’”¹⁸⁴ yet he concludes that such a characterization only raises “the *potential* of the application of LOAC.”¹⁸⁵ Similarly, McLaughlin claims states are “required to bring policy considerations to bear when classifying a conflict.”¹⁸⁶ Thus, according to McLaughlin and Stephens, the classification of hostilities depends upon the facts on the ground *and* the subjective determination of the state or participating international organization, which effectually adds an immeasurable element for determining the existence of an armed conflict.

Though treaty law and UN policy direct the application of the LOAC to peace operation forces if they operate in an area of armed conflict and then become a party to that conflict, for political purposes, Australia and the UN maintained the fiction that an armed conflict did not exist in East Timor in order to avoid the application of the LOAC. Another way a peace operation force avoids the LOAC is by denying its status as a party to an armed conflict. The UN’s action in the Ivory Coast in early 2011 is such an example.

B. UNOCI: Armed Conflict in the Ivory Coast

In the Ivory Coast in early 2011, an armed conflict existed between forces loyal to President-elect Alassane Ouattara and those loyal to incumbent President Laurent Gbagbo.¹⁸⁷ While the UN did not dispute the existence of an armed conflict, it denied becoming a party to the conflict after conducting airstrikes against Gbagbo in April 2011, thereby denying the application of the LOAC to UN forces as a matter of law. This subsection provides a brief overview of the armed conflict in the Ivory Coast, the situation leading up to UN military intervention, and the UN’s denial that it became a party to the conflict by its use of force. Following this section, Part IV discusses the problem of using political calculations to determine the facts that trigger the application of the LOAC.

¹⁸⁴ *Id.* at 70. Stephens argues that the scope, level, and intensity of the conflict in East Timor satisfied the test for armed conflict under Common Article 2 of the Geneva Conventions. *Id.* at 76. Though Stephens analyzes the potentiality of an International Armed Conflict because the militias were supported by the Indonesian military, the existence of an IAC versus a NIAC in East Timor is not material to this paper.

¹⁸⁵ *Id.* at 70 (emphasis added). Significantly, the Stephens’ article analyzes the state of international law in 2000. Since then, the applicability of the LOAC to UN forces in Peace Operations has become generally accepted. While Stephens’ “potential” qualifier relates in part to that open question in 2000, he also uses it to qualify the application of the LOAC even when it is determined that the LOAC can be applied to UN forces.

¹⁸⁶ McLaughlin, *supra* note 112.

¹⁸⁷ NICHOLAS COOK, CONG. RESEARCH SERV., RS21989, CÔTE D’IVOIRE POST-GBAGBO: CRISIS RECOVERY 1 (2011).

1. Civil War

In 2002, the Ivory Coast plunged into a north versus south civil war.¹⁸⁸ Recognizing a threat to international peace and security, in 2004, the Security Council authorized the United Nations Operation in Côte d'Ivoire (UNOCI) under Chapter VII of the UN Charter to help the Ivorian parties implement a 2003 peace agreement.¹⁸⁹ After being delayed for years, the Ivory Coast finally held presidential elections on 28 November 2010, after which Prime Minister Alassane Ouattara defeated incumbent President Laurent Gbagbo.¹⁹⁰ The international community, including the UN and the African Union, acknowledged Ouattara as the leader of the Ivory Coast.¹⁹¹ Gbagbo, however, retained control of the Ivory Coast's military and security forces and refused to step aside.¹⁹² Fighting escalated between Ouattara and Gbagbo's forces, resulting in a political stalemate.¹⁹³ Then, in late March 2011, forces loyal to Ouattara carried out a major offensive and quickly took control of the economic capital of Abidjan.¹⁹⁴

On 30 March 2011, during Ouattara's push, the Security Council passed UNSCR 1975 condemning Gbagbo for not accepting the results of the election and urging him "to immediately step aside."¹⁹⁵ It authorized UNOCI "to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence. . . . including to prevent the use of heavy weapons against the civilian population."¹⁹⁶ Because the Security Council authorized UNOCI to use "all necessary means" under Chapter VII of the UN Charter, the mission falls into the general peace enforcement category of peace operations. Its mandate to protect civilians is a post-Westphalian mandate.¹⁹⁷

¹⁸⁸ *Ivory Coast Strongman Laurent Gbagbo Arrested*, CBSNEWS.COM (Apr. 11, 2011), <http://www.cbsnews.com/stories/2011/04/11/501364/main20052728.shtml>.

¹⁸⁹ S.C. Res. 1528, *supra* note 3; *UNOCI Background*, UNOCI: U.N. OPERATION IN CÔTE D'IVOIRE, <http://www.un.org/en/peacekeeping/missions/unoci/background.shtml> (last visited Oct. 23, 2012).

¹⁹⁰ *Post-Election Crisis*, UNOCI: U.N. OPERATION IN CÔTE D'IVOIRE, <http://www.un.org/en/peacekeeping/missions/unoci/elections.shtml> (last visited Nov. 5, 2012).

¹⁹¹ *Post-Election Crisis*, *supra* note 189.

¹⁹² *Id.*; *Ivory Coast Strongman Laurent Gbagbo Arrested*, *supra* note 187.

¹⁹³ Press Release, U.N. Secretary-General, As Cotê d'Ivoire Plunges into Violence, Secretary-General Says United Nations Undertakes Military Operation to Prevent Heavy Weapons Use Against Civilians, U.N. Press Release SG/SM/13494 (Apr. 4, 2011).

¹⁹⁴ *Ivory Coast Strongman Laurent Gbagbo Arrested*, *supra* note 187; *see also UN Military Forces Retaliate in Ivory Coast*, CBSNEWS.COM (Apr. 10, 2011), http://www.cbsnews.com/2100-202_162-20052584.html (noting Gbagbo lost control of the country within two weeks as Ouattara's forces swept through the country into the capital of Abidjan).

¹⁹⁵ S.C. Res. 1975, ¶ 3, U.N. Doc. S/RES/1975 (Mar. 30, 2011).

¹⁹⁶ *Id.* ¶ 6.

¹⁹⁷ Nevertheless, some states sought to apply Westphalian principles to the UNOCI operation. For example, on 30 March 2011, a representative from China stated that UNOCI "should strictly abide by the principle of neutrality . . . and avoid becoming a party to the conflict." Bellamy & Williams, *supra* note 48, at 835. Similarly, a representative from India noted that the UNOCI "should not become a party to the Ivorian political stalemate . . . but [should] carry out its mandate with impartiality and while ensuring the safety and security of peacekeepers and civilians." *Id.*

As Ouattara's forces took over Abidjan, Gbagbo retreated to an underground bunker at the presidential residence in the city.¹⁹⁸ Meanwhile, Gbagbo's forces "intensified and escalated their use of heavy weapons such as mortars, rocket-propelled grenades and heavy machine guns against the civilian population."¹⁹⁹ His forces also attacked UNOCI headquarters and patrols with heavy weapons and sniper fire.²⁰⁰ Clearly, Gbagbo viewed UNOCI as a partisan belligerent.²⁰¹ His escalation of violence against civilians and UNOCI caused Secretary-General Ban Ki-Moon to implement the "all necessary means" provision of UNSCR 1975 against Gbagbo.

2. UN Military Intervention

On 4 April 2011, Secretary-General Ban Ki-Moon instructed UNOCI, with the support of French forces, to conduct a military operation to prevent the use of heavy weapons against the civilian population in Abidjan.²⁰² Subsequently, "[t]wo U.N. Mi-24 helicopters, piloted by Ukrainian peacekeepers, attacked two military bases controlled by Gbagbo's forces . . . [Reportedly, they] targeted heavy weaponry near the presidential palace and residence in Abidjan, as well as other installations under Gbagbo's control."²⁰³ Though UN peacekeepers had engaged Gbagbo's forces in the past, the helicopter assault was an unprecedented attempt to remove Gbagbo from power.²⁰⁴ Following Ouattara's offensive ground push, and as a result of the intensive UN and French air strikes, Gbagbo began to negotiate his surrender.²⁰⁵ Ouattara's forces arrested him in his bunker on 11 April 2011.²⁰⁶

¹⁹⁸ *Ivory Coast Strongman Laurent Gbagbo Arrested*, *supra* note 188.

¹⁹⁹ Press Release, U.N. Secretary-General, *supra* note 193.

²⁰⁰ *Id.*

²⁰¹ Bellamy & Williams, *supra* note 48, at 834 (stating that though UNOCI "enjoyed the support of the *de jure* authorities, Gbagbo's *de facto* regime in Abidjan viewed the peacekeepers as partisan opponents").

²⁰² Press Release, U.N. Secretary-General, *supra* note 193.

²⁰³ Colum Lynch, *U.N., France Strike at Ivory Coast Leader's Forces*, WASH. POST, Apr. 5, 2011, http://www.washingtonpost.com/world/un-france-strike-at-ivory-coast-leaders-forces/2011/04/04/AFoZhnfC_story.html; see also Patrick Worsnip, *Ban Ki-Moon Says U.N. Not Party to I. Coast Conflict*, REUTERS (Apr. 4, 2011), <http://www.reuters.com/article/2011/04/04/us-ivorycoast-un-ban-idUSTRE73364P20110404> (noting two UN attack helicopters fired missiles at pro-Gbagbo bases); Bruce Crumley, *Anatomy of an Intervention: Why France Joined the U.N. Action in Abidjan*, TIME.com (Apr. 6, 2011), <http://www.time.com/time/world/article/0,8599,2063613,00.html> (noting two UN Mi24 helicopters and French Puma and Gazelle attack helicopters attacked Gbagbo strongholds, including those storing heavy artillery and munitions, as well as Gbagbo's presidential residence, his personal home, two military bases and a munitions dump); *UN Military Forces Retaliate in Ivory Coast*, *supra* note 194 (noting eyewitness accounts of two UN Mi24 attack helicopters and a French helicopter opening fire on Gbagbo's residence).

²⁰⁴ Adam Nossiter, *U.N. and France Strike at Ivory Coast Strongman's Base and Residence*, N.Y. TIMES, Apr. 4, 2011, at A8 (noting that the UNOCI attacks "represented a notable increase in the international effort to force Mr. Gbagbo to step down since losing the election"); Bellamy & Williams, *supra* note 48, at 834 (noting that the UNOCI and French helicopter assaults helped "turn the tide of the battle decisively in Ouattara's favor").

²⁰⁵ Nossiter, *supra* note 204.

²⁰⁶ *Ivory Coast Strongman Laurent Gbagbo Arrested*, *supra* note 187.

Following the airstrikes, Gbagbo's foreign policy advisor criticized the UN for being partial towards Ouattara and for acting outside its mandate by conducting offensive attacks against the sovereignty of the Ivory Coast.²⁰⁷ Similarly, Russia criticized UNOCI for abandoning impartiality and becoming a party to the conflict.²⁰⁸ The African Union, which recognized Ouattara's presidency, also claimed the strikes were unjustified.²⁰⁹ Perhaps feeling pressure about how to justify an offensive assault against one party to a conflict, the BBC News reported the Security Council was "jittery about any suggestion that it has joined the fight on Mr. Ouattara's side."²¹⁰

In support of the UN's actions, the Secretary-General issued a statement to the press on 4 April 2011, to affirm UNOCI's impartial peacekeeping status. He stated that UNOCI and the French conducted the airstrikes "in self-defence and to protect civilians."²¹¹ He further declared, "[l]et me emphasize that *UNOCI is not a party to the conflict*."²¹² Despite the Secretary-General's claims, the *New York Times* reported the UN's actions risked bolstering Gbagbo's message that the UN attacked Ivorian sovereignty,²¹³ and the *Washington Post* claimed the air strikes "effectively placed peacekeepers on one side of the West African country's deepening civil war."²¹⁴

The Secretary-General's statement that UNOCI had not become a party to the conflict effectively denies the application of the LOAC to UNOCI's operations as a matter of law. Like Australia's declaration that armed conflict did not exist during INTERFET and the DPKO's declaration that armed conflict did not exist during UNTAET, the UN's decision not to apply the LOAC to UNOCI operations is based on politics and not the facts on the ground.

²⁰⁷ Lynch, *supra* note 203. The allegation that UNOCI exceeded its mandate is tenuous. UNSCR 1975 clearly authorized the use of force to prevent the use of heavy weapons against the civilian population. The UNOCI and French air strikes occurred after Gbagbo had actually used heavy weapons against civilians and UNOCI. Thus, it seems UNOCI acted well within its authorization to prevent future attacks.

²⁰⁸ Barbara Plett, *Did UN Forces Take Sides in Ivory Coast*, BBC NEWS (Apr. 7, 2011, 11:33 AM), <http://www.bbc.co.uk/news/world-africa-13004462> (noting that the Russian foreign minister "questioned the legality of the air strikes, suggesting the UN peacekeepers may have overstepped their mandate to be neutral"); Bellamy & Williams, *supra* note 48, at 835-36 (noting a Russian representative's statement that "it is unacceptable for United Nations peacekeepers to be drawn into armed conflict and, in effect, to take the side of one of the parties when implementing their mandate").

²⁰⁹ Plett, *supra* note 208.

²¹⁰ *Id.*

²¹¹ Press Release, U.N. Secretary-General, *supra* note 193. Similarly, UN spokesman Hamaoun Toure stated, the UN attack was "in retaliation for a series of attacks for the last three or four days not only against (the U.N.) but also against the civilian population—often with heavy weapons." *UN Military Forces Retaliate in Ivory Coast*, *supra* note 194.

²¹² Press Release, U.N. Secretary-General, *supra* note 193 (emphasis added).

²¹³ Nossiter, *supra* note 204.

²¹⁴ Lynch, *supra* note 203.

One of the primary purposes of the UN is to maintain international peace and security in accordance with international law,²¹⁵ and according to the DPKO, adherence to the rule of law is critical for the success of peace operations.²¹⁶ Nevertheless, despite the expanding purpose of peace operations and the evolution of thought towards applying the LOAC to peace operations, the INTERFET, UNTAET, and UNOCI examples illustrate the reluctance of the UN and its member states to conduct peace operations outside the principles of the “holy trinity.” By creating political fictions to maintain the appearance of consent, impartiality and the use of force in self-defense, the UN and its member states act against the very purpose of the UN. In the contexts of East Timor and the Ivory Coast, the next section of this paper examines the negative implications of sacrificing the LOAC to create politically acceptable circumstances for conducting peace operations.

IV. PEACE OPERATIONS, ARMED CONFLICT, AND THE PROBLEM OF POLITICS

The UN and its member states, particularly those who claim to promote the rule of law, should actively seek to apply the LOAC to peace operations when the facts on the ground trigger their application. Denying the existence of armed conflict or denying the UN’s status as a belligerent in an armed conflict for political purposes invites confusion on the ground regarding applicable legal regimes and will cause states to disregard the LOAC in other armed conflict situations. This section builds on Part III by examining some of the problems generated by the political fictions created in East Timor and Ivory Coast as related to the LOAC.

A. Denying the Existence of Armed Conflict: INTERFET and UNTAET

The existence of an armed conflict is not a political calculation; it is a matter of fact under international law.²¹⁷ For both INTERFET and UNTAET, Australia and the DPKO did not recognize hostilities as armed conflict even though the facts on the ground met the *Tadic* criteria for NIAC.²¹⁸ McLaughlin boldly claims that states must consider politics when classifying hostilities.²¹⁹ Similarly, though Stephens has acknowledged that “the scale, intensity, and scope of the armed force employed” determines the existence of a NIAC as a matter of fact,²²⁰ regarding UNTAET, he has discussed the application of the LOAC in terms of its “potential” application.²²¹ As

²¹⁵ U.N. Charter art. 1, para. 1.

²¹⁶ See *supra* note 6 and accompanying text.

²¹⁷ Saura, *supra* note 59, at 501; Glick, *supra* note 59, at 75; SANDOZ, ET AL., *supra* note 72, at 1343 (stating the determination of a NIAC “should not be dependent on the subjective judgment of the parties.”); Constantin von der Groeben, *The Conflict in Colombia and the Relationship Between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces*, 16 J. CONFLICT & SECURITY L. 141, 145 (2011) (noting that “as a matter of law, it is not up to the conflict parties to determine the character of the conflict”).

²¹⁸ See *supra* Parts III.A.1.b, III.A.2.b.

²¹⁹ See *supra* note 186 and accompanying text.

²²⁰ Stephens, *supra* note 111, at 461.

²²¹ STEPHENS, *supra* note 108, at 70. Discussing the problem of application of force in a peace operation

noted below, determining the application of the LOAC based on political calculation invites confusion and increases potential for the commission of war crimes.

1. Problems with Refusing to Recognize Armed Conflict

There are several problems with failing to recognize qualifying hostilities as armed conflict. For example, an issue may arise regarding the provision and priority of medical care peace operation forces must give to wounded and sick insurgents. If peace operation forces have limited medical supplies and have casualties on their side, they may be able to give priority to friendly forces if hostilities do not amount to an armed conflict.²²² However, if there is an armed conflict, peace operation forces must provide proper medical care to wounded and sick enemy combatants and may not discriminate between friendly and enemy soldiers.²²³

Perhaps the most significant problem with not recognizing armed conflict, however, is that the intervening force cannot legally use offensive force to counter the threat. At the beginning of UNTAET, the rules of engagement (ROE) required a Soldier to go through the following graduated self-defense sequence before applying deadly force: “verbal negotiation and/or visual demonstration; unarmed force (i.e., use of riot control equipment); charging of weapons; warning shots and then finally the application of armed force.”²²⁴ According to Stephens, these rules were “far too limiting.”²²⁵

Consequently, the UNTAET Peacekeeping Force (PKF) Headquarters (HQ) requested authorization to conduct offensive operations based on the LOAC, though the request did not explicitly acknowledge an armed conflict.²²⁶ The DPKO declined

in a separate publication, Stephens, states, “either a peacetime environment [exists] wherein the right of ‘self-defence’ is invoked to achieve mission/mandate objectives, or a wartime environment [exists] wherein the law of armed conflict applies.” Stephens, *supra* note 169, at 167-68. However, he maintains the ability of a State to make political determinations regarding the existence of an armed conflict when he states, there is “an enormous grey area in the middle whereby opposing forces or spoilers in a mission area apply significantly lethal military force, but either not of sufficient scope or intensity to amount to an armed conflict or else of such a scope but not accepted by participating countries as an armed conflict.” *Id.*

²²² Marco Sassoli, International Humanitarian Law and Peace Operations: Scope of Application *Ratione Materiae*, Address Before 31st Round Table on Current Problems of International Humanitarian Law (Sept. 4-6, 2008), in INT’L HUMANITARIAN L., HUM. RTS. AND PEACE OPERATIONS, Sept. 2008, at 102.

²²³ *Id.* (noting that it is a war crime not to provide appropriate medical care to the enemy).

²²⁴ STEPHENS, *supra* note 108, at 51.

²²⁵ *Id.* According to Stephens, the ROE did not permit deviation from the sequence of escalation except in the most urgent and unexpected attacks by an aggressor. *Id.*

²²⁶ *Id.* at 52. While Stephens does not explicitly state that the UNTAET PKF HQ recognized the situation on the ground as armed conflict, it is implicit. Otherwise, the use of offensive force would not be justified. Stephens also notes that the application of the LOAC in East Timor “would have had a desirable consequence for the conduct of UNTAET PKF operations . . . [to include] the right to have undertaken offensive operations that specifically and lawfully targeted militia forces.” *Id.* at 62.

the request to conduct offensive targeting operations based on the LOAC.²²⁷ Instead, it issued “amplified ROE,” which expanded the scope of self-defense beyond any definition previously imagined.²²⁸

The new self-defense ROE allowed a UNTAET soldier to engage militia personnel who were “dressed distinctively,” “carrying their arms openly and [in a manner] ready for immediate use,” and “undertaking tactical patrolling.”²²⁹ A UNTAET soldier also had to form a subjective and reasonable belief that the militia member represented an imminent threat.²³⁰ But according to Stephens, whenever militias conducted patrols in East Timor and encountered UNTAET forces, the militias consistently attacked the UNTAET force.²³¹ Thus, under the new ROE, UNTAET forces could infer a militia member’s hostile intent by their mere presence in East Timor and engage militia patrols without warning.²³²

Stephens admits the DPKO stretched the concept of self-defense to the “outer limit.”²³³ In effect, however, the amplified ROE were status-based targeting rules disguised as conduct-based targeting rules, and they went well beyond what would be allowed in a law enforcement operation against thugs, bullies, and transients.²³⁴ If one accepts the INTERFET and UNTAET premise that no armed conflict existed in East Timor, then hostilities must be something less than armed conflict—perhaps a massive riot. In a riot situation, domestic and human rights law dictate the rules

²²⁷ McLaughlin, *supra* note 69, at 411 (noting that when the revised ROE were issued, “the ability to take more robust action to counter [the] threat remained self-defence based, rather than armed conflict based”).

²²⁸ STEPHENS, *supra* note 108, at 46, 52 (noting that the definition of self-defense was expanded “beyond what traditionally narrow conceptions of self-defence have previously contemplated”). Though he defends the concept on the basis of operational and political reality, Stephens acknowledges that enhanced self-defense formulations can promote confusion and uncertainty. *Id.* at 57-58. He further states that enhanced self-defense “raise[s] the spectre of the crossover point to armed conflict.” *Id.* at 57. Notably, in discussing UNTAET’s amplified self-defense concept, it appears Stephens is stating that UNTAET’s use of force paradigm is the factor driving the classification of hostilities. However, the classification of hostilities must be viewed in terms of the *Tadic* criteria not the intervening force’s ROE. An armed conflict can exist on the ground, but the intervening force may choose not to respond with offensive force for mission purposes.

²²⁹ *Id.* at 52.

²³⁰ *Id.* at 52-53.

²³¹ *Id.* at 58 (stating “there was ample evidence in East Timor that when militia elements undertook combat patrols within East Timor, they invariably attacked PKF members when they encountered the PKF”).

²³² *Id.* at 68.

²³³ *Id.* at 47, 57.

²³⁴ McLaughlin, *supra* note 112. The actions by INTERFET and UNTAET forces in response to militia groups belie their categorization as thugs, bullies and transients. According to Stephens, opposing forces “conduct[ed] offensive operations, in a full military tactical manner.” STEPHENS, *supra* note 108, at 51. Further, “there was a very clear differentiation between military and police functions and [responsibilities, and] it was the military component who conducted patrols and engaged the militia during the critical period, not the civilian police, who neither desired the role nor had the resources or training to confront the militia threat.” *Id.* at 85. Notably, Stephens states that once UNTAET implemented amplified ROE, UNTAET achieved a “military victory” over the militia groups and from early 2001 no further incidents with the UNTAET were reported. *Id.* at 52.

for taking life and depriving liberty, and they are more restrictive than targeting rules in armed conflict under the LOAC.²³⁵ However, under the amplified ROE, where patrolling militias were deemed to have demonstrated hostile intent simply by their presence in East Timor, an East Timorese civilian could have shot a patrolling militia member dead on sight under the guise of self-defense.²³⁶ Such a notion is absurd on its face, as violence would quickly escalate out of control. Further, in a riot situation, it is difficult to envision a situation where a police officer would be justified or authorized to shoot armed gang members on site and without warning, having formed a subjective belief that the gang member, simply by his presence in the area, sought to cause serious or deadly bodily harm to another. As indicated by the international community's response to situations in Libya and Syria, nation states should not be permitted to use offensive military force against rioters and criminals in its own population. Yet by refusing to acknowledge the existence of an armed conflict, INTERFET and UNTAET provide a sort of precedent for such actions in a domestic law enforcement environment.

In 1958, UN Secretary-General Dag Hammarskjöld warned that a broad interpretation of self-defense would “blur the distinction” between peacekeeping and combat.²³⁷ UNTAET's interpretation of self-defense was so broad that the term “self-defense” is hardly appropriate. While UNTAET expanded the definition to conform operations to traditional Westphalian peacekeeping doctrine, common sense dictates that peace operation forces cannot endlessly manipulate the concept of self-defense to avoid the LOAC.²³⁸ Otherwise, there will be no distinction whatsoever between peacekeeping and combat operations.

2. The Politics Behind the Refusal to Recognize Armed Conflict

In light of the level of violence and the DPKO's decision not to declare hostilities an armed conflict, both Stephens and McLaughlin describe the initial limitation of the use of force in self-defense as a “conundrum.”²³⁹ The conundrum, however, resulted from INTERFET and UNTAET's refusal to classify hostilities as armed conflict—a determination based in part on the commitment to maintaining the elements of the “holy trinity.”²⁴⁰ As noted in Part II, *supra*, it is important to

²³⁵ Pejic, *supra* note 62, at 197.

²³⁶ It may be argued that UN forces should have a special status. However, “if UN forces were privileged with *superior* rights as to the use of force in a peace-enforcement operation, the law of armed conflict could become much more difficult to enforce in other conflicts against other parties.” Bialke, *supra* note 19, at 43.

²³⁷ 1958 UN Summary Study, *supra* note 28, ¶ 179.

²³⁸ ENGDahl, *supra* note 61, at 103 (stating “[t]he argument of self-defence cannot be relied upon indefinitely in order to escape the application of international humanitarian law”).

²³⁹ STEPHENS, *supra* note 108, at 49; McLaughlin, *supra* note 112.

²⁴⁰ See BELLAMY & WILLIAMS, *supra* note 11, at 191 (noting that “[t]he powerful legacy of the ‘holy trinity’ frequently restrict[s] imaginative thinking when peacekeepers [are] deployed in [internal wars].”); see also TITTEMORE, *supra* note 57, at 80, 106 (stating, “traditional peacekeeping appears to be incompatible with U.N. forces that have assumed the role of belligerents in war or with

emphasize that the purpose of the “holy trinity” is to ensure peace operation forces do not become a party to the conflict.²⁴¹

The UN views the principle of limited use of force in self-defense as essential for preventing a peace operation force from becoming a party to a conflict.²⁴² According to one anecdote relating to UN operations in the Congo in the 1960s, to alleviate concern that the peace operation forces would become belligerents in the conflict, the Secretary-General opined that the UN “could not become a party to an armed conflict so long as it was engaged in defensive operations.”²⁴³ Even during the Cold War, “commentators and the United Nations itself were content to maintain the artifice that the self-defense principle in peacekeeping existed—even in the face of facts to the contrary.”²⁴⁴

Interestingly, by restricting the use of force to self-defense, peace operation forces hope to demonstrate their impartiality.²⁴⁵ Further, by maintaining the self-defense facade, host-states consent more readily and troop-contributing states provide access to their forces because they believe the intervention will be non-violent.²⁴⁶ Accordingly, the limited use of force in self-defense appears to be the most important aspect of the “holy trinity.” However, if the principle of self-defense sustains the principles of impartiality and consent, the justification that a force is not a party to a conflict becomes circular if the concept of self-defense is stretched beyond credulity.

the application of the law of armed conflict,” and “[t]o the extent that humanitarian law applies intrinsically to *adversaries* and effectively confers a *belligerent* status on their armed forces, its application to U.N. peacekeeping forces is inconsistent with the neutrality and impartiality attributed to peacekeeping functions”) (emphasis original).

²⁴¹ See *supra* notes 22-29 and accompanying text.

²⁴² Sloan, *supra* note 13, at 397; Glick, *supra* note 59, at 77.

²⁴³ Glick, *supra* note 59, at 77 (citing The Secretary-General, Report of Secretary-General on Steps to Implement S.C. Res S/4741 of 21 Feb. 1961, U.N. Doc. S/4752 (1961)). Thus, “UN forces carrying out a Security Council Chapter VII peace-enforcement mandate may very well find it desirable and appropriate to operate under some Chapter VI peacekeeping principles tailored to the specific mission.” Bialke, *supra* note 19, at 47.

²⁴⁴ Sloan, *supra* note 13, at 407.

²⁴⁵ Bialke, *supra* note 19, at 20.

²⁴⁶ Sloan, *supra* note 13, at 407. Further, Sloan notes “[i]t is [its non-violent nature] that makes peacekeeping forces acceptable both to the government and parties engaged in conflict, and to the governments that contribute the troops.” *Id.* Sloan’s thoughts echo those of Tittmore, who states that much of the hesitation for recognizing UN forces as belligerents in an armed conflict is that it “has serious implications for the legal status and corresponding rights and obligations of the peacekeeping force and its members: U.N. troops may no longer be considered international civil servants entitled to protection from personal injury, but rather must be viewed as combatants constituting lawful military targets.” Tittmore, *supra* note 57, at 82. Tittmore also notes that “the application of humanitarian law also increases the danger that participants in a conflict will target U.N. forces as enemies.” *Id.* at 110.

In East Timor, the UN manufactured consent and then justified its impartiality (and maintained consent) by labeling its activity as a self-defense law enforcement action. The DPKO stretched the “holy trinity” element of self-defense to absurdity, not to prevent UNTAET from becoming a party to a conflict *per se*, but as an effort to shape perceptions that an armed conflict between the militias and UNTAET did not exist.

In reality, state-led peace operation troops operating in a territory engaged in an armed conflict, conducting offensive-style military operations under an “all necessary means” Security Council authorization—despite being labeled self-defense—are engaged in the armed conflict as combatants.²⁴⁷ They cannot ignore their duty to follow the LOAC just because their cause may be fair and just or because the international community sanctioned the action through the Security Council.²⁴⁸

Further, there is no acceptable reason not to apply the LOAC to UN Blue Helmet troops conducting the exact same operations as peace enforcement troops under a unified command. When the Security Council authorizes UN forces to use “all necessary means” at the start of an operation, “it is likely the level of hostilities will exceed the threshold” necessary to trigger the application of the LOAC.²⁴⁹ Moreover, by using offensive force, UN forces forsake the “holy trinity” elements of impartiality and limited use of force in self-defense and become partisan belligerents.²⁵⁰ The real barrier to the application of the LOAC is political acceptance that peace operation forces can become belligerents in armed conflicts—a status more quickly realized in a post-Westphalian world where the Security Council authorizes the use of offensive force to protect civilians and mission mandates.²⁵¹

The UN and its member states that deny the application of the LOAC out of their own self-interests undermine respect for the LOAC.²⁵² In the case of Australia, it is clear Australia’s recognition of Indonesian sovereignty over East Timor impacted its ability to classify hostilities against militias supported by the Indonesian military as armed conflict. While Australia was the best logistical choice to lead INTERFET, it may not have represented the best choice from a rule

²⁴⁷ Saura, *supra* note 59, at 494 (stating that troops conducting state-led “peace enforcement” operations under Chapter VII Security Council authorization are “belligerents’ in every sense of the term”).

²⁴⁸ *Id.* (stating that the “fairness of [the] purpose, or the fact that [national troops] have the blessings of the Security Council, is irrelevant to their duties to uphold the laws of war”)

²⁴⁹ Tittlemore, *supra* note 57, at 109.

²⁵⁰ *Id.* at 82 (stating that “the use of offensive force by peacekeepers against parties to conflicts may render the U.N. force a partisan belligerent rather than a neutral arbiter”).

²⁵¹ See Saura, *supra* note 59, at 495 (noting that “[t]he main theoretical problem with compelling peacekeeping operations to abide by international humanitarian norms is that it is difficult to consider the blue helmets as ‘belligerents’ in the traditional sense of the word”).

²⁵² Glick, *supra* note 59, at 72. According to Glick, “[s]uch obvious manifestations of organizational self-interest breed a cynicism that corrodes the overall integrity of the IHL rule system.” *Id.* at 77. See also Mack, *supra* note 4, at 11 (noting that the failure to objectively determine the existence of an armed conflict makes it difficult for an intervening state to apply and enforce the LOAC).

of law point of view. Concerning the Department of Peacekeeping Operations, even its title denotes a commitment to traditional “peacekeeping.” In East Timor, the DPKO’s futile adherence to the principles of the “holy trinity” compromised its ability to apply the very humanitarian principles the UN should be promoting.²⁵³ If the UN does not abide by the LOAC in its operations, other states may feel justified in ignoring its application—a consequence that arguably would lead to greater suffering, destruction, and devastation.²⁵⁴

Just as Australia and the DPKO prevented application of the LOAC by denying the existence of armed conflict, the UN Secretary-General quashed application of the LOAC to UNOCI forces in 2011, by denying their belligerent status in an armed conflict in the Ivory Coast. The next section demonstrates that the Secretary-General made his statements based on political pressure to appear impartial. Further, it shows how denying the applicability of the LOAC out of vain adherence to the principles of “holy trinity” can create practical problems for peace operation forces.

B. Feigning Impartiality: UNOCI

Prior to the year 2000, “a culture of impartiality” guided peace operations, and UN member states “resisted the temptation to take proactive and forceful measures to protect civilians.”²⁵⁵ However, the culture shifted after 2000, in large part due to the international community’s pledge at the 2005 World Summit to apply the R2P principle.²⁵⁶ Notably, the UN Security Council has committed itself in several resolutions to ensuring peace operation mandates specifically address the protection of civilians when relevant.²⁵⁷ However, while the socio-political climate has shifted away from absolute non-interference, the UN and its member states strive to maintain the appearance of impartiality even when it no longer exists.

As identified in Part II, *supra*, distinguishing between civilians and combatants is at the heart of the LOAC.²⁵⁸ Peace operation forces operating in an

²⁵³ Bialke, *supra* note 19, at 41 (stating “[t]he UN should be at the forefront of respecting, and promoting respect among its Members States for the international law of armed conflict”).

²⁵⁴ Tittlemore, *supra* note 57, at 105 (stating that “less than strict adherence to the law of armed conflict by UN-authorized forces engaged in hostilities may actually encourage other parties to armed conflicts to disregard humanitarian law *vis-à-vis* UN forces . . . compound[ing] rather than reduc[ing] devastation, suffering, and waste”).

²⁵⁵ BELLAMY & WILLIAMS, *supra* note 11, at 337.

²⁵⁶ *Id.* at 338.

²⁵⁷ See, e.g., S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006) (reaffirming the Security Council’s commitment to the responsibility to protect principle as established at the 2005 World Summit and stating its intention to ensure the protection of civilians is clearly outlined in future mandates); S.C. Res. 1296, U.N. Doc. S/RES/1296 (Apr. 19, 2000) (noting the Security Council’s commitment to the protection of civilians); S.C. Res. 1265, U.N. Doc. S/RES/1265 (Sept. 17, 1999) (noting the Security Council’s willingness to take actions when civilians are targeted and to consider how its peacekeeping mandates might assist in the protection of civilians).

²⁵⁸ See *supra* notes 82-83 and accompanying text.

area of armed conflict enjoy civilian protections “so long as they do not engage as a party to the conflict.”²⁵⁹ To maintain civilian status, Westphalian peacekeeping doctrine requires peacekeepers to adhere to the “holy trinity”—consent, impartiality, and limited use of force in self-defense. In the Ivory Coast, despite claims by the Secretary-General to the contrary, the elements of impartiality and self-defense collapsed. UNOCI conspicuously took sides in favor of Ouattara, Gbagbo viewed UNOCI as an enemy, and the airstrikes were offensive in nature.²⁶⁰ Clearly, UNOCI became a party to the conflict.

From the outset, UNOCI’s partiality is evident in UNSCR 1975. Not only does it emphatically urge Gbagbo to step aside,²⁶¹ it implores all Ivory Coast state institutions to accept Ouattara’s authority as president.²⁶² According to one French diplomat, “[t]he objective in the Ivory Coast [was] to allow the president elected in a fair, democratic election by a majority of his citizens to take his rightful office.”²⁶³ He further noted “[t]he international community, via the UN, had agreed on what must happen in the Ivory Coast long ago.”²⁶⁴

UNOCI’s partiality is also illustrated by the fact that Gbagbo’s forces were not the only forces perpetrating violence against civilians.²⁶⁵ According to the UN, Ouattara’s forces killed 230 civilians in the town of Duékoué during his offensive sweep to Abidjan.²⁶⁶ Some reports put the number of suspected civilian deaths at the hands of Ouattara’s forces closer to 1,000.²⁶⁷ Yet the UN took no major military action against them.

Moreover, UNOCI and French forces conducted the airstrikes just as Ouattara’s forces converged on Abidjan to remove Gbagbo from power.²⁶⁸ As Gbagbo’s regime teetered, the airstrikes convinced many of Gbagbo’s senior military leadership to switch sides.²⁶⁹ In fact, one UN official admitted the airstrikes “seriously

²⁵⁹ ENGDahl, *supra* note 61, at 93.

²⁶⁰ Bellamy & Williams, *supra* note 48, at 834 (stating that as the situation on the ground deteriorated, the UN and French forces took “more obviously partisan positions”).

²⁶¹ S.C. Res. 1975, *supra* note 195.

²⁶² *Id.* Specifically, the provision “[u]rges all Ivorian State institutions, including the Defence and Security Forces of Côte d’Ivoire (FDSCI), to yield to the authority vested by the Ivorian people in President Alassane Dramane Ouattara.” *Id.*

²⁶³ Crumley, *supra* note 203.

²⁶⁴ *Id.*

²⁶⁵ See Bellamy & Williams, *supra* note 48, at 836 (stating that “[t]he civilian protection argument appears somewhat weaker, given that UNOCI did little to prevent or punish massacres by [Ouattara’s] forces and their allies”).

²⁶⁶ Colum Lynch, *Ivory Coast Conflict Intensifies Amid Reports of a Massacre*, WASH. POST, APR. 2, 2011, http://www.washingtonpost.com/world/ivory-coast-conflict-intensifies-amid-reports-of-a-massacre/2011/04/02/AFhRiRC_story.html. “Ouattara’s forces have been accused of carrying out reprisal killings and extrajudicial executions of prisoners.” Lynch, *supra* note 202; Bellamy & Williams, *supra* note 48, at 834.

²⁶⁷ Crumley, *supra* note 203; Lynch, *supra* note 266.

²⁶⁸ Plett, *supra* note 208.

²⁶⁹ Antonios Tzanakopoulos, *The UN/French Use of Force in Abidjan: Uncertainties Regarding the*

degrade[d]” Gbagbo’s forces, “includ[ing] the national army.”²⁷⁰ Significantly, it appears Gbagbo actually viewed UNOCI as an enemy, which is further evidence UNOCI transitioned from enabling peaceful conflict resolution to enforcing a particular result.²⁷¹

UNOCI’s airstrikes against Gbagbo’s compound and forces are congruent with NATO’s action against Muammar Qaddafi in Libya shortly thereafter. In Libya, NATO conducted repeated airstrikes in Tripoli, the location of Qaddafi’s compound, to facilitate rebel forces as they converged on the city.²⁷² Ultimately, NATO’s airstrikes in support of the rebels resulted in the death of Qaddafi and a regime change.²⁷³ Clearly, NATO was a belligerent in the Libya conflict. Similarly, the timing of the UNOCI’s airstrikes against Gbagbo’s compound as Ouattara’s forces advanced in Abidjan reveals UNOCI’s partiality towards Ouattara, and it indicates UNOCI’s status as a belligerent in the Ivory Coast armed conflict.

Significantly, UNOCI’s airstrikes did not constitute a limited use of force in self-defense.²⁷⁴ There is a diversity of views regarding when a peace operation force’s use of force makes it a party to a conflict. Some assert a higher threshold of violence must be met before the LOAC will apply to peace operations authorized under Chapter VII of the UN Charter.²⁷⁵ However, the concept of a higher threshold of hostilities to trigger the LOAC is immeasurable. Further, it is the product of the incompatibility of Westphalian peacekeeping doctrine with the post-Westphalian practice of authorizing peace operation forces to use force to accomplish a mandate, specifically, to protect civilians.

Recognizing a higher threshold or special status for peace operation forces using offensive force within an armed conflict to avoid triggering the LOAC is

Scope of UN Authorizations, BLOG OF THE EUROPEAN J. OF INT’L L. (Apr. 9, 2011), <http://www.ejiltalk.org/the-un-use-of-force-in-abidjan/> (stating that “there is little doubt that the outcome of the airstrikes against the compound was the en masse surrender and defection of many pro-Gbagbo generals and a substantial contribution to Ouattara’s forces’ attempts to forcibly remove Gbagbo from power”).

²⁷⁰ Plett, *supra* note 207.

²⁷¹ See *supra* notes 25-26, 201 and accompanying text.

²⁷² Keeler, *supra* note 15.

²⁷³ *Id.*

²⁷⁴ See Nossiter, *supra* note 204 (characterizing UN and French action as an offensive); Lynch, *supra* note 202 (noting that the use of the 9,000-member peacekeeping force for offensive operations might draw the UN into the civil war, and that such “robust peacekeeping” by the UN is essentially an offensive military operation). While UNOCI was authorized to use all necessary means to protect civilians, the use of force contemplated by a mandate does not automatically mean such force was used in self-defense. Such a conclusion would obliterate the meaning of self-defense and render the term “offensive force” obsolete.

²⁷⁵ Bialke, *supra* note 19, at 6 (stating “the armed conflict threshold for forces acting under the authority of the UN Security Council is somewhat higher than it is for conflicts between nation-states”); ENGBAHL, *supra* note 61, at 100 (citing Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 YEARBOOK OF INT’L HUMANITARIAN L., 3, 24 (1998) (noting that “Greenwood contends that a higher level of force is tolerated in certain peace operations, so that IHL would not apply”).

unworkable. The following anecdote is illustrative, especially in light of the UNOCI airstrikes. During the Bosnia conflict, some NATO states claimed their bomber pilots were “UN experts on a mission” and not combatants under the LOAC because NATO could legitimately conduct bombing operations while the Bosnian Serbs could not legally fight back.²⁷⁶ Theoretically, Bosnian Serbs would have to immediately release downed NATO pilots based on their status as “UN experts on mission.”²⁷⁷ However, when Bosnian Serbs actually shot down two French pilots, France immediately recognized the implausibility of the construct and claimed that the Geneva Conventions applied.²⁷⁸ According to the raconteur, any pilot would rather argue for Geneva Convention protections over telling his captors, “I am right and you are wrong, you are criminals by the sole fact that you shot me down, and now release me immediately so that I can join again my forces and tomorrow I shall bomb you again.”²⁷⁹ Put simply, any claim that pilots who bomb a party to a conflict are not themselves combatants in that conflict is illogical.

Others argue UN peace operation forces become a party to a conflict when they actively engage in a combat mission or use force in defense of the mandate.²⁸⁰ Though peace operation forces should be able to retain a protected status if they use force in self-defense (i.e., force that would be legitimate under domestic and human rights law), any use of force beyond self-defense implicates the LOAC.²⁸¹ Thus, if a peacekeeper uses force that a police officer would be prohibited from using in a domestic law enforcement situation, the applied force is not self-defense, and the individual employing such force is either a combatant under the LOAC or a criminal. Unlike the immensurability of the higher threshold approach, applying the LOAC in this manner is both measurable and logical.

Unfortunately, the Secretary-General did not apply this latter construct in Ivory Coast. Rather, his declaration that UNOCI did not become a party to the conflict was a vain attempt to maintain an image of impartiality. UNOCI clearly

²⁷⁶ Sassoli, *supra* note 222, at 105.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ See Glick, *supra* note 59, at 77; ENGDahl, *supra* note 61, at 100 (citing Daphna Shraga, The Applicability of International Humanitarian Law to United Nations Operations, in *Blue Helmets: Policemen or Combatants?* 17, 30 (1997)).

²⁸¹ ENGDahl, *supra* note 61, at 102. In order for this paradigm to work, however, the situation on the ground must amount to an armed conflict. Elsewhere, Engdahl states “in operations where forces are entitled to use force to achieve their mandated objective, the force used does not necessarily mean that those involved become combatants engaged in an armed conflict.” *Id.* at 98. To illustrate her point, she analogizes the use of force by law enforcement to the use of force by peacekeepers. She states, “[t]he police are authorized to use force to protect the interest of peaceful citizens, for example, by quelling a riot. This does not mean that they are biased or that they act as soldiers in an armed conflict in relation to the rioters.” *Id.* However, the level of force used by the police is irrelevant as a measure of their status. In Engdahl’s example, the police are not combatants because the context of their situation is a riot, not an armed conflict under Common Article 3.

took sides in the matter, Gbagbo viewed UNOCI as an enemy, and the airstrikes went beyond the type of self-defense envisioned by Westphalian peacekeeping. Moreover, if Gbagbo had shot down a UNOCI helicopter and captured the pilot, based on the Secretary-General's assertions, Gbagbo may have pursued criminal sanctions against the downed pilot under domestic law. Yet, in all likelihood, the UN would have claimed the pilot qualified for Geneva Convention protections under the LOAC, just as the French claimed for its downed pilot in Bosnia. While retaliatory airstrikes may be "self-defense" in terms of legal justification under the UN Charter, generally, UNOCI's attacks go well beyond the type of self-defense a law enforcement officer would be permitted to take against a criminal in a domestic escalation of force situation. Thus, while the LOAC clearly applied to the operation, the UN valued politics over express adherence to the rule of law.

Instead of actively promoting the rule of law in its peace operations, the UN and Australia purposely avoided the LOAC in East Timor and the Ivory Coast by denying essential facts necessary to trigger its application. By denying the existence of armed conflict in East Timor to appease political concerns, Australia and the DPKO created confusion on the ground regarding the appropriate legal regime governing the operations. Further, by redefining the concept of self-defense beyond recognition, the DPKO erased all distinction between traditional peacekeeping and combat operations. Similarly, by denying its status as a party to the Ivory Coast conflict to maintain an image of impartiality, the UN disregarded the application of the LOAC to its combat activities. Such political manipulation damages the credibility of peace operations and the importance of the rule of law.

V. CONCLUSION

If the international community wishes to promote the rule of law, then there must be an evolution of thought regarding how the UN and its member states conceive peace operations. While concepts of sovereignty have evolved to permit more robust and proactive peace operations, in reality, many states remain committed to traditional Westphalian concepts of sovereignty.²⁸² Thus, the UN and its member states appease interested parties by applying Westphalian peacekeeping principles to post-Westphalian peace operations. Trying to fit such a square peg into a round hole sacrifices the LOAC in the name of peace.

Traditional Westphalian peacekeeping doctrine requires peace operation forces to adhere to the principles of consent, impartiality, and the limited use of force in self-defense when acting within a host nation.²⁸³ However, peace operation forces using overt military force to accomplish their objectives are not impartial forces acting in self-defense—they are pursuing international policy through war

²⁸² See *supra* notes 33-56, 84-89 and accompanying text.

²⁸³ See *supra* notes 20-29 and accompanying text.

fighting.²⁸⁴ Though facts compel its application, the UN and its member states sacrifice the LOAC to maintain the principles of the “holy trinity.”

This article illustrated this problem with examples from East Timor between 1999 and 2000,²⁸⁵ and the Ivory Coast in 2011.²⁸⁶ In East Timor, Australia and the UN refused to classify hostilities as armed conflict during INTERFET and UNTAET, respectively, despite facts on the ground that called for the application of the LOAC. This resulted in confusion on the ground as to the applicable legal regime, and it produced a warped concept of self-defense that mirrored status-based targeting under the LOAC in all but name. In the Ivory Coast, the Secretary-General denied UNOCI’s status as a party to the conflict even though Gbagbo viewed UNOCI as an enemy, the Security Council favored Ouattara over Gbagbo, and UNOCI and French helicopters assaulted Gbagbo’s forces. These operations stretched the principles of the “holy trinity” beyond recognition, denying the application of the LOAC to maintain political acceptability for the missions.

Nothing is gained but much may be lost by sacrificing the LOAC in the name of peace.²⁸⁷ Denying the existence of armed conflict or the fact that peace operation forces have become a party to a conflict creates uncertainty for soldiers on the ground.²⁸⁸ More importantly, if the UN and states conducting peace operations do not respect and promote the LOAC when applicable, other states may be encouraged not to follow the LOAC when it should be applied.²⁸⁹ Specifically, the use of offensive military force in a situation where the peace operation force claims there is no armed conflict is tacit approval for similar uses of offensive military force in domestic law enforcement situations. Further, by denying its status as a party to an armed conflict, a peace operation force cannot logically claim Geneva Convention protections for its forces who offensively engage a party to the conflict. Ironically, the failure of peace operation forces to adhere to the LOAC when it is applicable may lead to less protection for its own forces and greater suffering, destruction, and devastation someplace else.²⁹⁰

If it wishes to engage in robust peace operations involving the use of military force to protect civilians and achieve certain mandates, the international community must recognize situations for what they are in fact. Further, the UN and its member states must reasonably identify the anticipated status of the intervening peace force. One way of doing this would be for the Security Council to use more meaningful

²⁸⁴ See *supra* note 2 and accompanying text.

²⁸⁵ See *supra* Parts III.A, IV.A.

²⁸⁶ See *supra* Parts III.B, IV.B.

²⁸⁷ See *supra* note 1 and accompanying text.

²⁸⁸ See *supra* Part IV.A.1 and notes 276-79 and accompanying text.

²⁸⁹ Bialke, *supra* note 19, at 43 (arguing that if UN peacekeepers are not accountable under the LOAC, then “the other parties to the conflict could very well believe they also should not be held accountable.”).

²⁹⁰ See *supra* note 254 and accompanying text.

language when it authorizes the use of force.²⁹¹ This would require “international actors to engage in messy and complicated national and international politics,”²⁹² and of course, such honesty could lead to a situation where UN intervention is warranted but a nation blocks action via a veto in the Security Council. However, placating nation states by couching peace operations in terms of the “holy trinity” should not be the remedy—it is dishonest and prone to backfire. As the examples of Ivory Coast, Libya, and Syria illustrate, the Security Council may authorize “all necessary means” to affect a certain mandate, but the use of force to reach a favorable result in one conflict may later result in the retention of a different brutal dictator and the loss of different, but perhaps more lives.

There is potential for peace operations to be a consistently effective humanitarian tool. If the international community is truly committed to protecting civilians, as it affirmed at the 2005 World Summit,²⁹³ then it must recognize that becoming a party to a conflict to implement a just cause is not an evil to avoid. Peace operation forces maintain moral authority because their cause is just, not because they adhere to the “holy trinity.” In fact, peace operation forces lose moral authority when they determine the rules of war do not apply to their actions because of their just causes. Surely, recognizing peace operation forces as belligerents will not be immediately politically acceptable, and it may prevent deployment in the near future. However, as humanitarian crises continue to plague the globe, if the international community is genuine about enforcing R2P then the deployment of peace operation forces under the LOAC will eventually become an exercise in persuasion. To effectuate this evolution of thought, the UN and its member states must sacrifice political expediency for the rule of law.

²⁹¹ FINDLAY, *supra* note 11, at 361 (arguing the Security Council should avoid using “all necessary means” in its resolutions and should take responsibility for its actions by being specific as to the level of force a peace operation force may use).

²⁹² Bellamy & Williams, *supra* note 48, at 837-38.

²⁹³ See *supra* notes 41-45 and accompanying text.

FOREIGN MILITARY SALES (FMS), PSEUDO-FMS,
AND A RESPONSE TO THE GAO—IS PSEUDO-FMS
THE WAY FORWARD?

*MAJOR DEREK A. ROWE**

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*The United States cannot defend the free world's interests alone. The United States must, in today's world, not only strengthen its own military capabilities, but be prepared to help its friends and allies to strengthen theirs through transfer of conventional arms and other forms of security assistance. . . . Prudently pursued, arms transfers can strengthen us.*¹

—President Ronald Reagan

I. INTRODUCTION

In March 1941, President Franklin D. Roosevelt financially thrust the United States into WWII by signing the Lend-Lease Act.² Under Lend-Lease, the United States supplied the United Kingdom, the Soviet Union, China, and other nations with defense articles and supplies from 1941-1945.³ Historians widely agree that this U.S. assistance was critical to the allied victory.⁴ Through Lend-Lease the United States sent over \$48 billion (\$611 billion in 2012) worth of defense articles and supplies overseas, making the United States the “Arsenal of Democracy” even before entering the war.⁵ The effect of Lend-Lease was soon apparent—Germany could not compete with the Allied powers when the United States reached full production of planes and tanks.⁶

Another example of foreign military assistance changing the course of war occurred in 1986 when the United States supplied 700 Man Portable Air Defense (MANPAD), FIM-92 Stinger missiles to the Mujahideen during the Soviet occupation of Afghanistan.⁷ The Stingers were part of U.S. support for Operation Cyclone, a Central Intelligence Agency program to equip the Afghan Mujahideen.⁸ Prior

¹ President Ronald Reagan, *National Security Decision Directive 5*, THE FEDERATION OF AMERICAN SCIENTISTS, July 8, 1981, <http://www.fas.org/irp/offdocs/nsdd/23-1464t.gif>.

² An Act to Further Promote the Defense of the United States, 22 U.S.C. §§ 411-419 (1941). This act is commonly referred to as Lend-Lease.

³ *Id.* Accord R.G.D. Allen, *Mutual Aid Between the US and The British Empire, 1941—5*, 109 J. ROYAL STAT. SOC'Y 243, 245 (1946).

⁴ Roger Munting, *Lend-Lease and the Soviet War Effort*, 19 J. OF CONTEMP. HIST. 495, 503 (1984) (quoting Russian historian N.S. Khrushchev, “without Spam we should not have been able to feed our army”). Munting also notes that the United States shipped 409,256 military trucks to the U.S.S.R. alone and that one-quarter of all supplies sent was food items. *Id.* See also W. AVERELL HARRIMAN & ELIE ABEL, SPECIAL ENVOY TO CHURCHILL AND STALIN, 1941-1946, 277 (1st ed. 1975) (quoting Josef Stalin, “The United States is a country of machines. Without the use of these machines, we would lose this war.”).

⁵ WARREN F. KIMBALL, THE MOST UNSORDID ACT: LEND-LEASE, 1939-1941 147 (Kimball, 1st ed. 1969).

⁶ GEORGE MELLINGER, SOVIET LEND-LEASE FIGHTER ACES OF WWII 6 (Tony Holmes, ed., 1st ed. 2006) (noting that “scores of thousands of military aircraft” were transferred to U.S. allies as part of Lend-Lease).

⁷ COLONEL (COL) EDWARD B. WESTERMAN (RET.), THE LIMITS OF SOVIET AIRPOWER: THE BEAR VERSUS THE MUJAHIDEEN IN AFGHANISTAN, 1979-1989 77 (1st ed. 1997).

⁸ Robert D. Billard, *Operation Cyclone: How the United States Defeated the Soviet Union*, 3.2

to introducing the Stingers, Soviet helicopters terrorized cities at will.⁹ Less than a year after the Stingers arrived, at least 270 Soviet helicopters were shot down, decisively changing the course of the Afghan conflict.¹⁰

As these examples demonstrate, foreign military assistance is an important part of U.S. foreign policy.¹¹ This fact is underlined by upward trends in U.S. arms export value.¹² The United States has been the world's largest exporter of arms since 1992.¹³ Since 2000, the United States sold defense articles and services to over 100 countries.¹⁴ The primary method, by dollar value, of arming U.S. allies and friendly countries is Foreign Military Sales (FMS).

FMS reached \$28 billion in sales in 1993, largely due to the Gulf War.¹⁵ 2008 FMS figures exceeded \$28 billion, and in 2009, FMS agreements reached \$30.6 billion.¹⁶ Pseudo-FMS is also a type of foreign security cooperation in which the United States, instead of selling arms or services to a foreign country, procures them from defense contractors using U.S.-appropriated funds and transfers the arms to allies or friendly countries.¹⁷ Pseudo-FMS agreements totaled an additional \$6.5 billion in 2009.¹⁸ Thus, FMS and Pseudo-FMS transfers are big business in terms of dollars, and they can have even greater foreign policy effects by shaping the outcome when armed conflicts erupt.¹⁹

In spite of the increasing effects of FMS and Pseudo-FMS, many judge advocates are unfamiliar with the programs. This article will focus on orienting judge

UNDERGRADUATE RES. J. U.C.C.S. 25 (2010).

⁹ WESTERMAN, *supra* note 7, at 80.

¹⁰ *Id.* at 75 (noting that “it is clear that both the psychological and physical impact of the Stinger proved decisive”). See also Dr. Robert F. Baumann, *Compound War Case Study: The Soviets in Afghanistan*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/library/report/2001/soviet-afghan_compound-warfare.htm (last visited Jan. 25, 2012) (noting that the Stinger’s impact on the Soviets was “unmistakable”).

¹¹ CASSADY CRAFT, WEAPONS FOR PEACE, WEAPONS FOR WAR: THE EFFECTS OF ARMS TRANSFERS ON WAR OUTBREAK, INVOLVEMENT, AND OUTCOMES 2 (1999).

¹² DEF. SEC. COOPERATION AGENCY (DSCA), HISTORICAL FACTS BOOK 20 (2010).

¹³ ANTHONY J. PERFILO, FOREIGN MILITARY SALES HANDBOOK 2 (2011). Also noting that in 1992, “U.S. exports accounted for more than half the total value of all arms sales to third world countries.” *Id.* at 4.

¹⁴ DSCA, *supra* note 12, at 2 (totaling 104 countries with Foreign Military Sales (FMS) agreements since 2000).

¹⁵ PERFILO, *supra* note 13, at 4. See also CRAFT, *supra* note 11, at 4 (noting that upward trends in arms transfers follow armed conflicts, citing U.S. transfers to Saudi Arabia following the first Gulf War as an example). Interestingly, the largest customers in dollar value of FMS from 1950-2009 are Saudi Arabia, Egypt, Israel, and Taiwan, in that order. DSCA, *supra* note 12, at 24-36.

¹⁶ DSCA, *supra* note 12, at 3.

¹⁷ DEF. INST. OF SEC. ASSISTANCE MGMT. (DISAM), THE MANAGEMENT OF SECURITY ASSISTANCE (Greenbook) 6-3 (2011).

¹⁸ *Id.* at 1-2. See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-454, DEFENSE EXPORTS—FOREIGN MILITARY SALES NEEDS BETTER CONTROLS FOR EXPORTED ITEMS AND INFORMATION FOR OVERSIGHT 1 (2009).

¹⁹ CRAFT, *supra* note 11, at 2.

advocates to the basic framework of FMS and Pseudo-FMS procedures. After the overview, it will evaluate recent Government Accountability Office (GAO) reports that are critical of two aspects of the Department of Defense's (DoD) implementation of FMS and Pseudo-FMS, namely, end-use monitoring (EUM) and tracking of transferred military equipment. Finally, it will conclude that the upward trend in both FMS and Pseudo-FMS indicates that these are the preferred methods of accomplishing foreign security cooperation in the future.

II. FOREIGN MILITARY SALES FRAMEWORK

*It is not an understatement to say that FMS has a language of its own and that learning and communicating with the numerous acronyms, special terms, and organizational symbols is very often half of the battle.*²⁰

Current U.S. arms transfer law is based on two statutes, one regulation, and a DoD manual: the Foreign Assistance Act of 1961 (FAA) as amended, the Arms Export Control Act of 1976 (AECA) as amended, the International Traffic in Arms Regulation (ITAR), and the Security Assistance Management Manual (SAMM).²¹ The FAA and the AECA are within Title 22, Foreign Relations and Intercourse, and under the general control of the Department of State (DOS).²² The ITAR is the implementing regulation for the AECA and is likewise under the control of the DOS.²³ However, the DoD, primarily through the Defense Security Cooperation Agency (DSCA), administers the FMS program for the DOS.²⁴

Foreign Military Sales is not the only vehicle for foreign military assistance. Under the FAA and AECA umbrellas, the United States provides security assistance to other countries through twelve different programs.²⁵ While FMS is the largest of

²⁰ DISAM, *supra* note 17, at 5-13.

²¹ Foreign Assistance Act, 22 U.S.C. §§ 2151-2296 (1961); Arms Export Control Act, 22 U.S.C. §§ 2751- 2799 (1976). *Accord*, PERFILO, *supra* note 13, at 23. *See also* DISAM, *supra* note 17, at 2-2 (noting that the Arms Export Control Act (AECA) was originally enacted in 1968 under the name Foreign Military Sales Act, then revised and renamed the Arms Export Control Act in 1976). Since 2003, any amendments to and authorizations under the Foreign Assistance Act (FAA) and AECA have been included in other legislation such as the National Defense Authorization Act or the annual foreign operations appropriations acts. *Id.*

²² DISAM, *supra* note 17, at 4-3. The "bulk of the workload" is performed by Department of Defense (DoD) personnel, however, security cooperation in general and FMS in particular are administered on behalf of the Ambassador. *Id.* Additionally, a U.S. military member working at a Security Cooperation Office (SCO) may serve two masters: complying with DoD guidance while ensuring the work is compatible with the Ambassador's goals for the host nation. *Id.*

²³ U.S. DEP'T OF STATE. DIRECTORATE OF DEF. TRADE CONTROLS, http://www.pmdtcc.state.gov/regulations_laws/itar.html (last visited Sept. 30, 2011).

²⁴ DISAM, *supra* note 17, at 1-1. *See also* Executive Order No. 11,958, 3 C.F.R. (1976-1980) (signed by President Jimmy Carter in 1977, detailing precisely which responsibilities under AECA are delegated to the Department of State (DOS), and which are delegated to DoD).

²⁵ DISAM, *supra* note 17, at 1-1. The twelve programs are: 1) FMS; 2) Foreign Military Construction

these programs by dollar value, other programs share the same overall purpose of building the defense and security capabilities of U.S. allies and friendly countries.²⁶ One of the programs, Direct Commercial Sales (DCS), is discussed briefly below because it can be an alternative to FMS.²⁷

A. Policy Guidance and Regulations

The AECA identifies four conditions that must be met before the United States will sell a defense article or service to a customer country:

- (1) The President must find that the sale would strengthen the security of the United States and promote world peace;
- (2) The recipient country must agree not to transfer the arms or defense services to a third country without prior approval of the President;
- (3) The recipient country must agree to maintain the security of the arms or defense services; and
- (4) The recipient country must otherwise be eligible to purchase or lease defense items.²⁸

These criteria have not changed since the AECA was passed, and the current SAMM reiterates them, and also provides definitions, purpose statements, and

Services (non-appropriated program for sale of design and construction services); 3) Foreign Military Financing Program (FMF) (appropriated grants and loans to purchase defense articles and services through FMS or Direct Commercial Sales); 4) Leases (of defense articles for up to five years) (a non-appropriated program administered by DSCA); 5) Military Assistance Program, (MAP was merged with FMF in 1990 but remains a current security assistance program because the U.S. must continue end-use monitoring of all MAP provided defense articles); 6) International Military Education and Training (IMET) (appropriated grant financial assistance, primarily for training foreign military members in U.S. military programs); 7) Drawdown (non-appropriated provision of U.S. DoD articles and services to a foreign country during a crisis); 8) Economic Support Fund (appropriated support administered by United States Agency for International Development (USAID)); 9) Peacekeeping Operations (appropriated funds primarily for United Nation (U.N.) peacekeeping efforts in tense regions administered by DOS); 10) International Narcotics Control and Law Enforcement (appropriated grant program administered by DOS to suppress worldwide narcotics operations); 11) Nonproliferation, Antiterrorism, Demining, and Related Programs (appropriated grant program administered by DOS); and, 12) Direct Commercial Sales (DCS) (commercial exports by U.S. industry directly to a foreign government). Additionally, "Security Assistance" now falls into the broader category of "Security Cooperation." *Id.*

²⁶ DISAM, SECURITY MANAGER'S TRAINING, 4, <https://disam.blackboard.com> (last visited Dec 2, 2011).

²⁷ DISAM, *supra* note 17, at 15-4.

²⁸ 22 U.S.C. § 2753 (1976); PERFILIO, *supra* note 13, at 30. The same criteria are restated in the Security Assistance Management Manual (SAMM), *infra* note 29, at Table C4.T1.

a procedural overview.²⁹ Further, the SAMM maintains a current listing of the countries and international organizations that meet the above eligibility criteria for FMS.³⁰ Most countries are eligible—out of 196 sovereign countries, only 18 are ineligible.³¹ Other regulations that govern all U.S. federal procurement activities, including FMS and Pseudo-FMS are the Federal Acquisition Regulation (FAR), and for the DoD, the FAR as supplemented by the Defense Federal Acquisition Regulation Supplement (DFARS).³²

B. How FMS Works

At its core, FMS is an exchange of information, money, and defense articles or services, in that order. This section gives a brief description of how the process works, touching on the main FMS milestones: eligibility, requirement generation, Letter of Request (LOR), Price and Availability (P&A), Letter of Offer and Acceptance (LOA), and administration/closeout. It also introduces a few essential concepts and terms, as necessary.

Foreign Military Sales begin with eligibility. As described above, a country listed at SAMM Table C4.T2 is generally eligible.³³ However, current events in the country may result in the customer's FMS eligibility being terminated or suspended.³⁴

If a country is eligible, the next step is for the country to generate requirements based on that country's security objectives.³⁵ This determination may be the result of a threat analysis.³⁶ In deciding what to request, customer countries may require specific information on defense systems. Throughout the requirement generation process, the customer country may consult with and receive defense information

²⁹ DSCA, SECURITY ASSISTANCE MGMT MANUAL (SAMM), <http://www.dsca.osd.mil/samm> (last visited Jan. 25, 2012).

³⁰ *Id.* at C4.T2.

³¹ *Id.* Sovereign countries currently ineligible include Andorra, Aruba, Belarus, Bhutan, Cuba, Cyprus, South Sudan, Indochina, Iran, North Korea, Liechtenstein, Monaco, Montenegro, Nauru, San Marino, Syria, Western Sahara, and Yemen.

³² PERFILO, *supra* note 13, at 26. In addition to the DFARS, there is a supplement for each military service, i.e., the Army Federal Acquisition Regulation Supplement (AFARS), the Air Force Federal Acquisition Regulation Supplement (AFFARS), and the Navy-Marine Corps Acquisition Regulation Supplement (NMCARS).

³³ 22 U.S.C. § 2753. Additionally, sale or lease of defense articles and services is limited to countries and international organizations; persons are not eligible. *Id.*

³⁴ SAMM, *supra* note 29, at C4.2.4; Perfilio, *supra* note 13, at 51. One of the probable scenarios resulting in a customer's eligibility suspension is a human rights violation, such as a customer's military using deadly force to quell a riot. Not paying back a previous loan from the U.S. may also restrict eligibility. Many scenarios leading to ineligibility are discussed by Perfilio, *Id.* at 51. Additionally, an easy to follow eligibility chart is maintained by the DOS at http://www.pmdtc.state.gov/embargoed_countries/index.html (last visited Jan. 25, 2012).

³⁵ SAMM, *supra* note 29, at C1.3.2.7 ("Foreign governments determine their security objectives based on their own priorities.").

³⁶ DISAM, *supra* note 17, at 5-2. A threat analysis is similar to a "needs assessment" described in the SAMM, *supra* note 29, at C1.3.3.2.

from U.S. representatives, principally the in-country U.S. Security Cooperation Organization (SCO).³⁷

Also during the requirement generation stage, a U.S. Security Assistance Survey Team will, if requested by the customer country, conduct an in-country survey to review military capabilities and make recommendations.³⁸ These teams are generally funded by the customer through an FMS case, i.e., paid for by the customer country.³⁹

When specific written requirements are drafted, the country makes an official request to the United States in the form of a Letter of Request (LOR).⁴⁰ A country that is familiar with the specific requirements of interest, cost, and U.S. delivery capabilities may also request a sales offer directly in the LOR. In this case, the response from the United States government would be a Letter of Offer and Acceptance (LOA), which becomes a contract when executed.⁴¹ However, if the requestor does not yet have enough information, the LOR may request price and availability (P&A) data only.⁴²

The P&A data are rough estimates of cost and projected availability of defense articles and services.⁴³ These data are important because the United States obtains its own defense articles and services from the same defense contractors who may sell the requested items to a customer country.⁴⁴ Thus, P&A allows the customer country to determine whether it can afford a certain defense system, and

³⁷ DISAM, *supra* note 17, at 5-2. A SCO is an office located in the host-nation, frequently at the embassy, that operates under the authority of the Senior Defense Official/Defense Attaché sponsored by DSCA. *Id.* The SCO “acts as the primary interface with the host nation on all security assistance issues”. *Id.* at 4-1. The FAA limits the number of active duty military members permanently assigned to a SCO to six. FAA § 515 (22 U.S.C. § 23211); DISAM, *supra* note 17, at 17-1. However, there are exceptions to this limitation, particularly in SCOs where Judge Advocates serve, such as Afghanistan, Iraq, and Pakistan. DISAM, *supra* note 17 at 4-2. Additionally, the DoD only began using the term SCO in 2008 and before that used the now outdated term “security assistance office (SAO).” *Id.* at 4-3.

³⁸ SAMM, *supra* note 29, at C1.3.4.2; DISAM *supra* note 17, at 5-17.

³⁹ SAMM, *supra* note 29, at C1.3.4.2.

⁴⁰ *Id.* at C5.1.2 (listing LOR requirements). Also, LORs can be and typically are submitted via email. *Id.* at C5.1.3.4.

⁴¹ DISAM, *supra* note 17, at 6-7 (sample FMS LOA). For a sample Pseudo-FMS LOA see *id.* at 6-13. In practice, the more closely the LOR and LOA mirror each other, the smoother and faster the process leads to agreement. Interview with Major Thomas Barrow, Contract Div. Instructor, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, VA (Nov. 7, 2011).

⁴² DISAM, *supra* note 17, at 5-3.

⁴³ *Id.* at 5-7.

⁴⁴ Memorandum from Deputy Sec’y of Def., Gordon England to the Honorable Carl Levin, Chairman, Senate Armed Services Comm. (SASC) (Nov. 14, 2007) (on file with SASC) (“There is no separate acquisition system for FMS. The DoD buys for FMS just as it does for U.S. forces.”). See also DISAM, *supra* note 17, at 9-4 (“The DoD does not maintain a separate acquisition infrastructure just for FMS. Instead, the DoD supports FMS by using the same acquisition infrastructure already established to support its own acquisition and logistics needs.”).

more importantly, approximately when it could be delivered. Procedurally, if an initial LOR only requests P&A, a second LOR must be made to request a LOA.⁴⁵ The LOA represents a *bona fide* offer by the U.S. government to sell the described items at the indicated prices, until the offer expires.⁴⁶

Once the U.S. government has a binding contract, the acquisition/procurement engine within each military department addresses the request as if it came from a U.S. military unit.⁴⁷ For example, if the request is for F-16s, the Air Force's Program Management Office (PMO) is notified. That PMO team includes members of various disciplines (engineering, testing, contracting, logistics, financial management) currently procuring F-16s for various FMS customers, such as Iraq.⁴⁸ The PMO will then increase the quantity of its current procurements in order to gain economy of scale cost savings and efficiencies, as well as additional business for U.S.-based defense contractors.⁴⁹ The transaction would be advantageous to the United States even though it no longer purchases new F-16s for itself, because it continues maintenance for the F-16s in its inventory.⁵⁰

The accompanying support and maintenance items for F-16s and other Major Defense Equipment (MDE) benefit the United States and other countries for the same reasons, but have the additional benefit of a certain degree of U.S. control. When the United States sells MDE to another country, and then breaks diplomatic relations with that country for any reason, it can stop continued support, maintenance, and logistics for that system, forcing the country to seek these items on the black market or attempt to reverse-engineer them in order to continue use of the MDE.⁵¹ This action, particularly for high maintenance MDE such as aircraft, can significantly limit hostile use of U.S.-supplied MDE.⁵²

During the contracting process, the U.S. government negotiates with defense contractors via a contracting officer using standard forms.⁵³ The contracting officer consults with the FMS purchaser as necessary concerning LOA clarification,

⁴⁵ DISAM, *supra* note 17, at 5-7.

⁴⁶ *Id.* at 5-13. The offer expiration date appears on the first page of the LOA.

⁴⁷ DISAM, *supra* note 17, at 9-1, 9-2, 9-4.

⁴⁸ Dave Majumdar, *Iraq Places Order for 18 F-16 Falcons*, AIR FORCE TIMES, Dec. 6, 2011, <http://www.airforcetimes.com/news/2011/12/defense-iraq-orders-f-16s-120611/> (last visited Jan. 25, 2012) (noting that the FMS agreement to sell 18 F-16s was reached in December 2011). Additionally, the United States sold F-16s to 25 other countries. *See infra* note 50.

⁴⁹ DISAM, *supra* note 17, at 15-6. Interoperability with customer countries is also a benefit arising from both FMS and Pseudo FMS. *Id.* at table 15-1 (chart comparing pros and cons of FMS).

⁵⁰ *F-16 Fighting Falcon*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/systems/aircraft/f-16.htm> (last visited Mar. 6, 2012) (noting that the U.S. Air Force took delivery of the last F-16 in 2005).

⁵¹ *Iranian Air Force*, GLOBALSECURITY.ORG, <http://globalsecurity.org/military/world/iran/airforce.htm> (last visited Mar. 6, 2012). Cutting off F-14 Tomcat support reduced Iran from 77 operational U.S.-supplied F-14s to only 10 in less than 8 years. *Id.*

⁵² *Id.*

⁵³ SAMM, *supra* note 29, at C6.3.5.2.

identification of any special warranty provisions, requests for release of documents, and any minor or major amendments or modifications, among other issues.⁵⁴ Disputes arising between subcontractors, pre- or post- award, are dealt with in accordance with the Federal Acquisition Regulation (FAR), including litigation of disputes.⁵⁵ Additionally, there are several legal reviews of the developing and completed case file, as required by each military department.⁵⁶

The final step is delivery of the defense articles and services. Although conceptually simple, delivery of FMS items is the subject of much GAO criticism.⁵⁷ For standard FMS cases, judge advocates providing oversight should be aware of the integral role of the transportation plan.⁵⁸ The export form DSP-94 is required for all FMS cases for permanent export, as well as all FMS cases for classified items.⁵⁹ For all Pseudo-FMS cases, the DoD transports, making the DSP-94 a DoD responsibility.⁶⁰

C. The Primary Players in the Process

While several agencies may be involved, the majority of the work in the FMS process is done by a few key personnel. One of these is the case manager.⁶¹ If not earlier in the process, the military department that corresponds to the type of article or training involved (Navy for maritime equipment, Air Force for aircraft, etc.) will assign a case manager to each FMS case during either P&A or LOA preparation.⁶² There is only one case manager for each FMS case.⁶³ The case manager has primary responsibility for LOA content, as well as meeting the milestones toward offer, acceptance, delivery, follow-on support, and ultimately case closure.⁶⁴

⁵⁴ *Id.* Note that the DoD obtains the same warranties for FMS as it does for itself, which is one benefit a customer country receives by purchasing through FMS. *Id.* at C6.7.1.6.2.

⁵⁵ Protests, Disputes, and Appeals, FEDERAL ACQUISITION REG. pt. 33 (Jul. 1, 2011).

⁵⁶ U.S. DEP'T OF AIR FORCE, AIR FORCE FED. ACQUISITION REG. SUPP. pt. 5301.602-2 (Jan. 12, 2012); U.S. DEP'T OF ARMY, ARMY FED. ACQUISITION REG. SUPP. pt. 5101.602-2 (Apr. 1, 2010, revision #25); U.S. DEP'T OF NAVY, NAVY-MARINE CORPS ACQUISITION REG. SUPP. pt. 5206.303-90 (Jul. 1, 2011). These legal reviews are generally required for procurements over certain monetary thresholds. Additionally, these reviews, along with all other administrative responsibilities, are paid for by the customer in the 3.7% administrative fee. DISAM, *supra* note 17, at 12-16.

⁵⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-454, DEFENSE EXPORTS—FOREIGN MILITARY SALES NEEDS BETTER CONTROLS FOR EXPORTED ITEMS AND INFORMATION FOR OVERSIGHT (2009).

⁵⁸ DISAM, *supra* note 17, at 11-6. Some FMS customer countries use freight forwarders, which do not require transportation plans.

⁵⁹ *Id.* at Table 7-2.

⁶⁰ *Id.* at 11-12. Note that there could be multiple transport methods for one case, as well as multiple ports from which equipment will be shipped. *Id.* See also DISAM, *supra* note 17, at note 45 (discussing “above the line” and “below the line” transportation charges, which must be correct because transportation cost of MDE is a significant part of the procurement).

⁶¹ SAMM, *supra* note 29, at C2.4; DISAM, *supra* note 17, at 5-14.

⁶² SAMM, *supra* note 29, at C2.4; DISAM, *supra* note 17, at 5-14.

⁶³ DISAM, *supra* note 17, at 5-15.

⁶⁴ *Id.* at 5-14. SAMM, *supra* note 29, at C2.T2 contains a complete listing of case manager responsibilities.

Throughout the SAMM and DISAM Greenbook, tasks are also frequently ascribed to the “Implementing Agency,” which is either a U.S. military department or one of eight security-related executive agencies.⁶⁵ As with other procuring activities, the contracting officer and judge advocate play a significant part.⁶⁶

D. Items Sold Through FMS

There are several categories of defense articles sold through FMS. In ascending complexity and control, they are: Non-Significant Military Equipment (Non-SME), SME, Major Defense Equipment (MDE), classified items, and sensitive or missile-related technology.⁶⁷ Significant Military Equipment is items on the U.S. Munitions List because they require increased export control.⁶⁸ Generally, the more complex the items are, the greater the approval requirements.⁶⁹ Examples of FMS items sold include combat boots, military uniforms, airfield lighting, 105-155mm artillery, F-15SAs, F-15 upgrade packages, Apache and Blackhawk helicopters, various small arms, and Night Vision Devices (NVDs).⁷⁰

E. Direct Commercial Sales

A DCS is an agreement directly between a customer country and a U.S. defense contractor.⁷¹ For various reasons, a customer country may prefer to contact a U.S. defense contractor directly to purchase defense articles and services.⁷² As FMS is a government-to-government purchase, some countries perceive political difficulties in such transactions.⁷³ DCS may also be preferred because for some items, it may be a faster process than FMS.⁷⁴ In DCS, the U.S. contractor obtains

⁶⁵ SAMM, *supra* note 29, at Chapter 5; DISAM, *supra* note 17, at Chapter 5 (using the phrase “implementing agency” over 50 times). “Implementing Agency” is generally referring to a case manager responsibility within a military department that corresponds to the FMS item.

⁶⁶ DISAM, *supra* note 17, at 17-12. In Afghanistan, Iraq, and Pakistan, the SCO has its own contracting officer(s) in country. Generally, for standard FMS cases, the contracting officers are CONUS based. Ordinarily, the only warranted contracting officer in country is a DOS employee attached to the embassy. *Id.*

⁶⁷ SAMM, *supra* note 29, at C5.1.3.2; DISAM, *supra* note 17, at 5-6.

⁶⁸ DISAM, *supra* note 17, at 5-5.

⁶⁹ SAMM, *supra* note 29, at C5.1.3.3.

⁷⁰ Interview with Major Thomas Barrow, Contract Div. Instructor, The Judge Advocate Gen’s Legal Ctr. & Sch., in Charlottesville, VA (Mar. 1, 2011); Telephone interview with COL Ron Todd (Ret.), former DSCA Deputy Gen. Counsel, (Oct. 31, 2011); Telephone interview with Walter Pupko, former DSCA Case Writing Div. Attorney, (Sept. 30, 2011). Examples of Pseudo-FMS items transferred include Mi-17 (Russian helicopters), High Mobility Multi-purpose Wheeled Vehicles (HMMWV), modified Ford Rangers, and various training services. *Id.*

⁷¹ DISAM, *supra* note 17, at 15-1.

⁷² *Id.*

⁷³ *Id.* at 15-4.

⁷⁴ *Id.* at 15-6. The customer may take more administrative/managerial/support risk in exchange for a faster procurement in the case of non-SME support items. For DoD inventoried items, FMS will generally be faster.

the export license rather than the SCO, and any other support associated with the procurement is negotiated directly between the customer and contractor.⁷⁵

While there is no U.S. policy preferring FMS over DCS, there are certain items which—due to security, safety, and/or transportation reasons—are designated by the Defense Technology Security Administration (DTSA) for transfer through FMS only.⁷⁶ Such items include, for example, Airborne Warning and Control (AWAC) systems, cryptographic equipment, MANPADs, and Precise Position Service (U.S. military GPS).

Additionally, it is U.S. policy to sell “standard” U.S.-utilized defense articles and services rather than “non-standard” defense articles and services.⁷⁷ The policy promotes U.S. standard items to better take advantage of economy of scale cost-savings, and diplomatic weapon control as described above. Additionally, Foreign Military Financing (FMF) funding must be spent through the FMS process, vice DCS.⁷⁸

III. PSEUDO-FOREIGN MILITARY SALES

Pseudo-FMS is the name of the process that uses the FMS procedural framework, but instead of selling defense articles and services to a customer country, the United States funds the purchase and transfer using appropriated funds.⁷⁹ Pseudo-FMS cases, in their present form, began after September 11, 2001.⁸⁰ In 2007, Senator Carl Levin, then-Chairman of the Senate Armed Services Committee, visited Iraq and found that FMS cases averaged 250 days in length from LOR to delivery.⁸¹ Senator Levin wrote that half that time (125 days) is “still too long,” which may have prompted processing of Pseudo-FMS cases in Iraq.⁸² However, regardless of when Pseudo-FMS began, it is designed to arm U.S. allies and friendly countries

⁷⁵ *Id.* at 15-4. Generally, the customer assumes more risk through DCS because defense contractors are more likely to stop production of maintenance items or go bankrupt than the U.S. government.

⁷⁶ SAMP, *supra* note 29, at C9.7.4.1.1.

⁷⁷ SAMP, *supra* note 29, at C4.3.3.2 (describing exceptions to this policy); DISAM, *supra* note 17, at AB-30 (main policy). An example of a “standard” U.S. military item is an M-16 rifle; a non-standard item would be an AK-47 rifle because it is not generally used by the U.S. military.

⁷⁸ DISAM, *supra* note 17, at 15-4. However, there is an exception that effectively follows this general rule: FMF is permitted to finance DCS to ten eligible countries (Israel, Egypt, Jordan, Morocco, Tunisia, Turkey, Portugal, Pakistan, Yemen, and Greece). SAMP, *supra* note 29, at C9.7.4.1.1; Perfilio, *supra* note 13, at 172-174. Also, the use of FMF to purchase items through DCS is known as Direct Commercial Contracting (DCC). Perfilio, *supra* note 13, at 172.

⁷⁹ DISAM, *supra* note 17, at 6-4.

⁸⁰ The author contacted Lieutenant Colonel (Lt Col) John “Ricou” Heaton, DSCA Deputy Gen. Counsel; COL Ron Todd (Ret.), former DSCA Deputy Gen. Counsel; and Lieutenant Colonel (LTC) Brett Floro (Ret.), DSCA Country Program Director. None could say definitively when Pseudo cases began, but all agreed it was after Sep. 11, 2001.

⁸¹ Memorandum from Deputy Sec’y of Def., Gordon England to the Honorable Carl Levin, Chairman, Senate Armed Services Comm. (SASC) (Nov. 14, 2007) (on file with SASC).

⁸² *Id.* Additionally, one reason the FMS process ended up being used for Pseudo-FMS cases is that it was faster than attempting to develop a new acquisition approach from scratch. E-mail from Lt Col John “Ricou” Heaton, DSCA, Deputy Gen. Counsel (Feb. 24, 2012, 08:59 EST) (on file with author).

that may lack financial resources, and to do so more rapidly than through traditional FMS procedures.⁸³

The funds used for Pseudo-FMS are generally found in the National Defense Authorization Act (NDAA) and the Department of Defense Appropriations Act (DoDAA).⁸⁴ However, supplemental appropriations that are currently being used to fund Pseudo-FMS cases include the Afghanistan Security Forces Fund (ASFF), the Iraq Security Forces Fund (ISFF), the Pakistan Counterinsurgency Fund (PCF), and the Pakistan Counterinsurgency Capability Fund (PCCF).⁸⁵

A. Pseudo-FMS Framework and Pseudo-FMS Players

Pseudo-FMS does not fit under the same AECA provisions that FMS does because it is not a sale to a foreign country or authorized customer,⁸⁶ which may be why it is referred to as “Pseudo.”⁸⁷ In implementing the AECA, the ITAR addresses the FMS program at section 126.6(c), but even the most current version dated April 1, 2011, fails to mention Pseudo-FMS.⁸⁸ Although Pseudo-FMS procedures largely mirror FMS procedures, as prescribed by the SAMM, the statutory authority for Pseudo-FMS falls under either the FAA, section 632(b), or a different AECA provision, section 38(b)(2).⁸⁹ This can be a source of confusion for export licensing

⁸³ E-mail from Lt Col John “Ricou” Heaton, DSCA, Deputy Gen. Counsel (Feb. 24, 2012, 08:59 EST) (on file with author). This does not mean that Pseudo-FMS cases are only processed for U.S. partners who lack financial resources. Iraq and Pakistan, for example, have purchased items through FMS at the same time they received items through Pseudo-FMS cases. *Id.* Additionally, Pseudo-FMS cases are generally processed faster than FMS cases. E-mail from COL Ron Todd (Ret.), former DSCA Deputy Gen. Counsel (Feb. 11, 2012 16:32 EST) (on file with author).

⁸⁴ DISAM, *supra* note 17, at 6-4. No fund authorizations are required for standard FMS cases because they are sales, and because administrative costs are paid by the purchaser via a 3.7% fee. *Id.* at 12-16. Note also that FMS cases are generally exceptions to the Anti-Deficiency Act in that deferred payment sales, payment on delivery, and dependable undertakings are permissible.

⁸⁵ DISAM, *supra* note 17, at 1-8. Other funds not listed but also used for Pseudo-FMS cases include Afghanistan Infrastructure Fund (AIF), Coalition Readiness Support Program (CRSP), DoD Counterdrug Program, Global Train and Equip (1206), and Coalition Solidarity Funds (CSF). *Id.* Additionally, supplemental funds such as ASFF are not used exclusively for either FMS or Pseudo-FMS; a significant part of those funds are currently used in local direct procurement administered by CSTC-A. Telephone interview with COL Ron Todd (Ret.), former DSCA Deputy Gen. Counsel, (Oct. 31, 2011).

⁸⁶ 22 U.S.C. § 2751, 38(b)(2). The introductory language of the AECA specifically refers to approving “sales,” and items which are “sold” and “exported.” *Id.* Credit for this observation, and for the remainder of this subsection belongs to Lt Col John “Ricou” Heaton, DSCA Deputy Gen. Counsel, via e-mail (Nov. 1, 2011, 1608 EST) (on file with author).

⁸⁷ A pseudo-FMS transaction has the appearance of a FMS transaction, but is not actually one because it is not a sale to a foreign customer. The author suggests that a more transparent name could be helpful to those not generally familiar with FMS, such as Military Assistance Program via FMS Procedures.

⁸⁸ International Traffic in Arms Regulation (ITAR), 22 C.F.R. §§ 120-130 (2009).

⁸⁹ DISAM, *supra* note 17, at 6-5; practitioners consulted disagreed. This section of the FAA is codified at 22 U.S.C. 2392. Section 38(b)(2) of the AECA authorizes an exception to licensing requirements when the export is for “carrying out any foreign assistance or sales program authorized

purposes because the ITAR, 126.6(c), exempts all FMS cases from licensing requirements, while Pseudo-FMS cases are not exempt.⁹⁰

Although the administrative procedures are similar for Pseudo-FMS and FMS, the personnel typically performing Pseudo-FMS procedures are more frequently active duty military.⁹¹ The majority of funds spent on Pseudo-FMS cases during the last fiscal year went through Combined Security Transition Command-Afghanistan (CSTC-A) and the Iraq Security Assistance Mission (ISAM).⁹² Both CSTC-A and ISAM are under the control of United States Central Command (CENTCOM).⁹³ Additionally,

[t]he organizations in Afghanistan and Iraq can loosely be termed “pseudo-SCOs” for a variety of reasons. First, their mission, including operational advice and training, exceeds that of a normal SCO under U.S. law. Second, these organizations are part of operational commands, rather than U.S. embassy country teams. As such, they do not report to the U.S. Ambassador, but to the GCC [Geographic Combatant Commander] through [military] channels.⁹⁴

Thus, at CSTC-A and ISAM, where high volumes of Pseudo-FMS cases are processed, judge advocates play an essential role.⁹⁵ As the number and value of Pseudo-FMS cases continues to rise, more judge advocates who understand FMS and Pseudo-FMS will be necessary.

by law.”

⁹⁰ 22 C.F.R. at § 126.6(c). For an example of confusion caused by the licensing difference, see pg. 18 of the proposed charging letter, charging Xe (formerly Blackwater) for failing to secure an export license. See U.S. DEP’T OF STATE DIRECTORATE OF DEF. TRADE CONTROLS, Aug. 13, 2010, http://www.pmdtc.state.gov/compliance/consent_agreements/pdf/Xe_PCL.pdf; E-mail from Lt Col John “Ricau” Heaton, DSCA Deputy Gen. Counsel (Nov. 1, 2011, 1608 EST) (on file with author). See also Ronald J. Sievert, *Urgent Message to Congress—Has the Time Finally Arrived to Overhaul the U.S. Export Control Regime?*, 37 TEX. INT’L L. J. 89, 92 (2002) (observing that export control is generally confusing and the control regime is a “national embarrassment”).

⁹¹ DISAM, *supra* note 17, at Table 4-1 (noting that CSTC-A and ISAM are military organizations under CENTCOM operational control, while FMS case work is generally done by U.S. embassy country teams under DOS control).

⁹² Telephone interview of COL Ron Todd (Ret), former DSCA Deputy Gen. Counsel (Oct. 31, 2011). See also DISAM, *supra* note 17, at 1-8 (stating that the \$11 billion 2011 Afghanistan Security Forces Fund (ASFF) and the \$2 billion Iraq Security Forces Fund (ISFF) are funds that are “often, but not always” spent using Pseudo case procedures).

⁹³ U.S. CENTRAL COMMAND, *Area of Responsibility: Countries*, <http://www.centcom.mil/area-of-responsibility-countries> (last visited Mar. 6, 2012).

⁹⁴ DISAM, *supra* note 17, at Table 4-1.

⁹⁵ *Id.* (showing CSTC-A and ISAM as two of nineteen SCO-type offices where Judge Advocates perform Security Cooperation duties that include either FMS or Pseudo-FMS). Also, Judge Advocates are required to review Pseudo-FMS agreements at various stages and with either similar monetary thresholds or the presence of similar risk factors as required by DFARS pt. 170 (Nov. 2011).

B. Pseudo-FMS and FMS Timelines

Processing timelines vary widely based on the complexity, value, and availability of the article or service being procured.⁹⁶ Most FMS and Pseudo-FMS cases occur within one year,⁹⁷ but for major weapon systems may take up to seven years from LOR to case closeout.⁹⁸ It takes the DoD similar periods of time to acquire its own MDE, such as the Mine Resistant Ambush Protected (MRAP) vehicle (over three years),⁹⁹ Tomahawk Cruise Missile (eight years),¹⁰⁰ and the F-22 (nineteen years).¹⁰¹ FMS and Pseudo-FMS tend to work faster because articles sold or transferred are already in production for the United States, so no research and development is necessary.¹⁰² Production and manufacturing time is still required in most cases.¹⁰³

For both FMS and Pseudo-FMS, the longest phase of the life cycle is the execution phase.¹⁰⁴ The period from LOR to LOA, or for Pseudo-FMS, from Memorandum of Request (MOR) to LOA, is relatively short, i.e., one to six months in most cases.¹⁰⁵ In Afghanistan, for example, MOR to LOA averaged approximately 40 days.¹⁰⁶ The LOA preparation is significantly faster for Pseudo-FMS LOAs because the customer is the military department instead of a foreign country.¹⁰⁷

⁹⁶ E-mail from Lt Col John “Ricou” Heaton, DSCA Deputy Gen. Counsel (Jan. 11, 2012, 1630 EST) (on file with author) (noting there is no single source of processing times maintained by DSCA).

⁹⁷ E-mail from COL Ron Todd (Ret.), former DSCA Deputy Gen. Counsel (Feb. 11, 2012 16:32 EST) (on file with author).

⁹⁸ DISAM, *supra* note 17, at 5-1. *Contra* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-454, DEFENSE EXPORTS—FOREIGN MILITARY SALES NEEDS BETTER CONTROLS FOR EXPORTED ITEMS AND INFORMATION FOR OVERSIGHT 16 (2009) (stating that the average “life of the agreement,” [presumably until case close out] is twelve years); RICHARD COOPEY, GRAHAM SPINARDI, & MATTHEW UTTLEY, DEFENSE SCIENCE AND TECHNOLOGY: ADJUSTING TO CHANGE 158 (Richard Coopey et al eds., 1st ed. 1993) (noting that “lead time for major defence (sic) projects can be ten years or more”).

⁹⁹ Peter Eisler, *The Truck the Pentagon Wants and the Firm that Makes it*, USA TODAY, Oct. 2, 2007, http://www.usatoday.com/news/military/2007-08-01-force-protection-mraps_N.htm (last visited Oct. 25, 2012) (noting that the MRAP made by Force Protection took over three years to deliver).

¹⁰⁰ Greg Goebel, *ALCM and SLCM*, VECTORSITE, http://www.vectorsite.net/twcruz_4.html (last visited Mar. 1, 2012) (noting that Tomahawk development began in 1972 and reached initial operational capability in 1980).

¹⁰¹ JEREMIAH GERTLER, CONGRESSIONAL RESEARCH SERVICE, AIR FORCE F-22 FIGHTER PROGRAM: BACKGROUND AND ISSUES FOR CONGRESS 3 (2009) (noting the F-22 took nineteen years to deliver).

¹⁰² DISAM, *supra* note 17, at 5-14.

¹⁰³ *Id.* Although the United States does stockpile some items on the U.S. Munitions List, a typical FMS case for standard equipment includes items both from U.S. stocks and from new procurement. *Id.*

¹⁰⁴ SAMM, *supra* note 29, at C6.2.

¹⁰⁵ SAMM, *supra* note 29, at C5.4.2.1 (indicating the processing time from LOR complete date to Anticipated Offer Date (AOD) is 120 days for Defined Order LOAs). Note that the MOR for Pseudo-FMS cases is the functional equivalent of the LOR for FMS cases.

¹⁰⁶ Telephone interview with Brett Floro, DSCA Country Program Director (Oct. 26, 2011).

¹⁰⁷ SAMM, *supra* note 29, at C11.3.3 (noting that the Pseudo LOA is not signed by the country receiving defense articles or services).

The previous sections introduce a judge advocate to FMS and Pseudo-FMS by describing, among other things, the potential for this form of security cooperation to change the course of war, the policy, statutory, and regulatory framework, and key procedural steps. A few benefits highlighted include interoperability, economy of scale cost-savings, business for U.S.-based defense contractors, and diplomatic weapon control. In the current trend of tightening budgets and defense cutbacks, these benefits are especially attractive, according to Mr. Frank Kendall, Acting Under Secretary of Defense for Acquisition, Technology, and Logistics.¹⁰⁸ However, in spite of the benefits, the processes have been criticized by the GAO, providing a valuable perspective for judge advocates to appreciate.

IV. EVALUATING GAO CRITICISMS OF FMS AND PSEUDO-FMS

The GAO has been critical of FMS, and to a lesser extent Pseudo-FMS, over the last decade.¹⁰⁹ Specifically, the GAO “reported on numerous weaknesses in the [defense] export control system.”¹¹⁰ Interestingly, notwithstanding the criticism, Congress continues to confirm growing figures of FMS agreements and pass increasing appropriations that fund Pseudo-FMS.¹¹¹ A recent example is the \$30 billion FMS of 84 F-15SAs (Saudi Avanced) to Saudi Arabia, finalized in December 2011.¹¹² The upward trend of both FMS and Pseudo-FMS suggests that the benefits of these programs outweigh the costs. This section will evaluate recent GAO criticisms in light of AECA’s statutory requirements.¹¹³

Since January 2009, the GAO ramped up reporting on weaknesses of FMS and Pseudo-FMS, issuing seven reports to date.¹¹⁴ These reports claim FMS

¹⁰⁸ Transcript of Cowen and Co. 33rd Annual Aerospace/Def. Conference, Feb. 9, 2012, in New York, New York, at 5, WALL STREET WEBCASTING, <http://www.wsw.com/webcast/cowen5/III/> (quoting Frank Kendall, “We’ve always been supportive of FMS, but I think we can up our game a little bit. . . . [W]e’re going to be encouraging Foreign Military Sales. . . . I think that the benefits both on the policy side for International Relations and for cooperation for interoperability to achieve our strategic aims in the world, as well as the economic advantages are all well We have positive balance of payments and its good for the economy obviously, so there’s that as well.”).

¹⁰⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-135R, EXPORT CONTROLS: AGENCY ACTIONS AND PROPOSED REFORM INITIATIVES MAY ADDRESS PREVIOUSLY IDENTIFIED WEAKNESSES, BUT CHALLENGES REMAIN 1 (2010).

¹¹⁰ *Id.* at 1.

¹¹¹ DSCA, *supra* note 12, at 2-3 (showing the upward trend in FMS agreements since FY 2000).

¹¹² *U.S. Finalizes Sale of F-15s to Saudi Arabia*, FOX NEWS, Dec. 29, 2011, <http://www.foxnews.com/politics/2011/12/29/us-to-sell-f-15s-to-saudi-arabia-officials-say/> (Last visited Oct. 25, 2012).

¹¹³ Arms Export Control Act, 22 U.S.C.A. § 2753(a) (1976). The first AECA requirement is to promote world peace. Some sources contend arms transfers only promote war; however, there isn’t “clear, consistent, and systematic evidence to this effect.” CRAFT, *supra* note 11, at 2.

¹¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-135R, EXPORT CONTROLS: AGENCY ACTIONS AND PROPOSED REFORM INITIATIVES MAY ADDRESS PREVIOUSLY IDENTIFIED WEAKNESSES, BUT CHALLENGES REMAIN (2010); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-89, PERSIAN GULF—IMPLEMENTATION GAPS LIMIT THE EFFECTIVENESS OF END-USE MONITORING AND HUMAN RIGHTS VETTING FOR U.S. MILITARY EQUIPMENT (2011); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-454, DEFENSE EXPORTS—FOREIGN MILITARY SALES PROGRAM NEEDS BETTER CONTROLS FOR EXPORTED ITEMS AND INFORMATION

and Pseudo-FMS, as currently implemented, have significant problems including, ineffective end-use monitoring, and ineffective tracking/reporting of military equipment. As shown below, these claims miss the mark when the statutes and data are closely examined.

A. Effectiveness of FMS End-Use Monitoring

The AECA requires U.S. government agencies involved in arms transfers to monitor the use of those arms by the recipient country, i.e., end-use monitoring (EUM).¹¹⁵ The DOS shares EUM responsibilities with the DoD: DOS administers EUM for Direct Commercial Sales under a program called Blue Lantern, while DoD administers EUM for all FMS under a program called Golden Sentry.¹¹⁶

The EUM statutory requirements are to “improve accountability” for defense articles, to provide “reasonable assurance” that the articles are used consistent with the “purposes for which they are provided,” and to prevent diversion, i.e., theft or illegal re-transfer.¹¹⁷ Under Golden Sentry, there are two types of EUM: routine and enhanced.¹¹⁸ Generally, EUM under Golden Sentry focuses on accountability, security, use and transfer or disposal of FMS articles.¹¹⁹ Enhanced EUM measures—such as greater physical security/accountability requirements and possibly a compliance assessment visit by DSCA—are required for sensitive articles and technologies such as NVDs, MANPADs, Advanced Medium Range Air-to-Air Missiles (AMRAAM), cruise missiles (Tomahawk), and Unmanned Aerial Vehicles (UAV).¹²⁰ Routine EUM often consists of a post-shipment check to ensure delivery of the articles by the SCO, in conjunction with other duties.¹²¹

The recent GAO report discussing EUM highlights the difference between DoD and DOS EUM procedures and database capabilities.¹²² The report found

FOR OVERSIGHT (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-267, LACK OF SYSTEMATIC TRACKING RAISES SIGNIFICANT ACCOUNTABILITY CONCERNS ABOUT WEAPONS PROVIDED TO AFGHAN NATIONAL SECURITY FORCES (2009); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-952, DEFENSE EXPORTS -REPORTING ON EXPORTED ARTICLES AND SERVICES NEEDS TO BE IMPROVED (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-918, PERSIAN GULF-U.S. AGENCIES NEED TO IMPROVE LICENSING DATA AND TO DOCUMENT REVIEWS OF ARMS TRANSFERS FOR U.S. FOREIGN POLICY AND NATIONAL SECURITY GOALS (2010); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-557, EXPORT CONTROLS-OBSERVATIONS ON SELECTED COUNTRIES' SYSTEMS AND PROPOSED TREATIES (2010).

¹¹⁵ 22 U.S.C. § 2785 (1996).

¹¹⁶ DISAM, *supra* note 17, at 18-1. Blue Lantern is statutory, but the Golden Sentry program is not, rather it was created by DoDD 5111.1 and implemented by the SAMM and DoDI 4140.66 to provide protection equal to the requirements of the Blue Lantern program.

¹¹⁷ 22 U.S.C. § 2785 (1996).

¹¹⁸ SAMM, *supra* note 29, at C8.2.

¹¹⁹ DISAM, *supra* note 17, at 4-7. Less formally, EUM answers the questions “does the transferee still have the article and is it being used legally?”

¹²⁰ SAMM, *supra* note 29, at C8.3. AMRAAMs must have a serial number inventory twice a year. *Id.*

¹²¹ DISAM, *supra* note 17, at 4-7.

¹²² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-89, PERSIAN GULF-IMPLEMENTATION GAPS LIMIT THE

that the DoD EUM database, the Security Cooperation Information Portal (SCIP), was capable of confirming whether past inventories were conducted, but could not confirm whether the inventories were conducted on schedule. The report concluded, “DoD does not currently have assurance that its personnel in the Gulf countries completed past inventories on time, which may have resulted in gaps in accounting for sensitive equipment shipped through FMS.”¹²³ While the conclusion may be accurate, the report may also mislead readers regarding DoD EUM compliance. Specifically, Golden Sentry’s inventory schedule is self-imposed; AECA only requires “improved accountability,” “reasonable assurance” of end-use and diversion prevention.¹²⁴ Measured against statutory requirements, DoD is certainly compliant.

The same section of this report shows that the six Gulf countries surveyed purchased a total of 14,367 defense articles requiring enhanced EUM as of August 2011, but 63 articles were lost or could not be observed.¹²⁵ The report does not put the facts in context—specifically, 63 lost articles represent less than one-half of one percent over three decades of FMS with six different countries.¹²⁶ Moreover, the majority of articles (73%) transferred are small, personal-sized NVDs which were sold beginning in the 1990s.¹²⁷ This feat of moveable property accountability is remarkable by any standard, but particularly for a military endeavor.¹²⁸ Such positive results frequently escape U.S. military units conducting inventories of U.S. equipment in garrison.

As these two examples show, FMS EUM in the Gulf countries meets or exceeds statutory requirements and has an effective accountability record. These positive aspects of FMS EUM are not mentioned in the report, and tend to undermine the conclusion of the report captured in the title, “Implementation Gaps Limit the Effectiveness of End-Use Monitoring.”¹²⁹

EFFECTIVENESS OF END-USE MONITORING AND HUMAN RIGHTS VETTING FOR U.S. MILITARY EQUIPMENT 15 (2011).

¹²³ *Id.* The report also repeats the same point at p. 17.

¹²⁴ Arms Export Control Act, 22 U.S.C.A. § 2785 (1996).

¹²⁵ GAO, *supra* note 122, at Table 5.

¹²⁶ *Id.* $63/14,367 = .0043$.

¹²⁷ *Id.* See e-mail from Drew Lindsey, GAO Analyst-in-Charge for referenced report (Jan. 18, 2012, 10:50 EST) (on file with author) (confirming NVD’s were transferred during 1990’s). Also, NVD technology has developed rapidly much like computer technology, so that an NVD from 1995 is comparable to a laptop from 1995: while still functional it is worth much less and the threat is reduced.

¹²⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-943, DoD EXCESS PROPERTY: CONTROL BREAKDOWNS PRESENT SIGNIFICANT SECURITY RISK AND CONTINUING WASTE AND INEFFICIENCY 3 (2006) (describing how garrison property disposition generally lacks effective accountability controls resulting in significant quantities of lost or missing items).

¹²⁹ GAO, *supra* note 122, at 1.

B. Effectiveness of NVD EUM in Afghanistan

One section of another GAO report has a similar flaw. In GAO-09-267, “Afghanistan Security: Lack of Systematic Tracking Raises Significant Accountability Concerns about Weapons Provided to Afghan National Security,” the report discusses EUM of NVDs provided via Pseudo-FMS to the Afghan National Security Forces (ANSF).¹³⁰ Specifically, the report criticizes Combined Security Transition Command-Afghanistan (CSTC-A) because 15 months after transfer, “[o]f the 2,410 [NVDs] issued, 10 are currently unaccounted for, according to CSTC-A.”¹³¹

To be fair, this section of the GAO report also pointed out that EUM of the NVDs had a slow start because DSCA was not aware of CSTC-A’s transfer.¹³² Yet the accountability result is similar; 10 NVDs unaccounted for out of 2,410 is less than one-half of one percent. Given the widespread illiteracy of Afghan Army personnel,¹³³ the historical culture of corruption,¹³⁴ and the fact that CSTC-A is building a military from the ground up, the accountability of 2,400 out of 2,410 NVDs over a year after transfer is a resounding success story. Thus GAO’s findings regarding equipment tracking fail to support the conclusion claimed by the title, “Lack of Systematic Tracking Raises Significant Accountability Concerns.”

V. CONCLUSION

This article serves as an introduction and starting point for a judge advocate assigned to work involving FMS or Pseudo-FMS. It concentrates on FMS rather than Pseudo-FMS because Pseudo-FMS builds on the FMS foundation, as shown in section III. After reviewing the basic framework of both processes, it highlighted benefits to the U.S. including interoperability, economy of scale cost-savings, business for U.S.-based contractors, and diplomatic weapon control. This article also introduced judge advocates to a sample of GAO reports critical of two aspects of FMS, and determined that the criticisms are misplaced.

The trend in value of defense articles and services sold or transferred is upward.¹³⁵ As noted in section III, Mr. Frank Kendall identifies with the benefits of FMS, and plans to encourage the program. The upward climb in value of Pseudo-

¹³⁰ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-267, LACK OF SYSTEMATIC TRACKING RAISES SIGNIFICANT ACCOUNTABILITY CONCERNS ABOUT WEAPONS PROVIDED TO AFGHAN NATIONAL SECURITY FORCES 4 (2009).

¹³¹ *Id.* at 5.

¹³² *Id.*

¹³³ Jennifer Griffin, *Afghan Army Literacy Improves, Still Poses Problems*, May 23, 2011, FOX NEWS, <http://politics.blogs.foxnews.com/2011/05/23/afghan-army-literacy-improves-still-poses-problems> (last visited Oct. 25, 2012) (noting that in May 2011, 86 percent of Afghan Army recruits were illiterate).

¹³⁴ EARNEST LEONARDO, ASSESSMENT OF CORRUPTION IN AFGHANISTAN, 1 (Qasim Akhgar ed., 2009) (noting that corruption has been a significant problem throughout the country’s history).

¹³⁵ DSCA, *supra* note 12, at 2.

FMS transfers is particularly steep, surpassing all other appropriated security cooperation program values in 2010.¹³⁶ Therefore, FMS and Pseudo-FMS appear to be the foreign security cooperation vehicles of choice in the near future, making a basic understanding of these processes invaluable to the judge advocate's skill set.

¹³⁶ DISAM, *supra* note 17, at 1-3 (showing the second largest appropriated fund -program, FMF, at \$5.4 billion, and the third largest, IMET, \$108 million).

18 U.S.C. § 1382: PRECEDENT OR PREDICAMENT
IN THE NINTH CIRCUIT?

*CAPTAIN AIMEE R. HANEY**

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I. INTRODUCTION

“This isn’t a protest. This is an anti-test. Stop your missile testing now!” The voices of protestors on megaphones cut through the midnight stillness at the front gates of Vandenberg Air Force Base, California. Protestors and military personnel alike anxiously waited on opposite sides of the street—protestors were standing in the designated protest area along Highway 1 and California Boulevard while Vandenberg Security Forces personnel monitored the protestors every movement from the Visitor’s Center on the opposite side of California Boulevard. Everyone waited for the Minuteman III to launch from the western shores of California. Several protestors had been previously debarred from Vandenberg Air Force Base by the Installation Commander for failing to remain in the designated peaceful protest area, for acts of civil disobedience, or, as in the case of John Apel, for throwing his own blood on a Vandenberg entrance sign in 2003. Their debarment orders forbade them to even stand in the designated protest area to protest.

Why were Security Forces personnel standing by and allowing the debarred protestors to remain? Their inaction stemmed from advice given to them from the base legal office as a result of a recent Ninth Circuit decision, *United States v. Parker*.¹ In *Parker*, the three-judge panel, while examining the specific property at Vandenberg Air Force Base, ruled that precedent and case law in sister circuits demanded the court find the Government lacked the requisite ownership and control of its own property to protect its land from trespassers. The *Parker* decision held that 18 U.S.C. § 1382, *Entering a Military, Naval, or Coast Guard Property*, was unavailable to the military in this particular case. Instead, the court held that a military installation must have absolute ownership or exclusive possession or control sufficient to charge a violation of that statute when debarred individuals are standing in an easement in an area of concurrent jurisdiction.²

An installation commander’s authority to debar individuals from base is enforced by statute; if an individual violates a valid debarment order, he can be charged with a violation of 18 U.S.C. § 1382. While the text of 18 U.S.C. § 1382 does not include the term “trespass,” courts and installations alike frequently refer to that statute as one prohibiting trespass onto a military installation. One court even noted that the text of the statute seemed to derive from the common law of trespass.³ Rather than relying upon common law principles of trespass, a relatively small and intertwined body of case law has developed in the circuits regarding trespass onto military installations. This article will explore the origins of 18

¹ *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011).

² *Id.*

³ *See United States v. McCoy*, 866 F.2d 826, 831 n.4 (6th Cir. 1989) (referring to common law legal history from England and from Michigan to propose that an action of trespass could be brought by one with a superior possessory right). *But see United States v. Mowat*, 582 F.2d 1194, 1203 (9th Cir. 1978) (noting “if any inference based on a comparison with the common law is appropriate, it is that Congress sought to divorce this statute from the requirements of common law trespass.”)

U.S.C. § 1382 and pertinent case law in the Supreme Court and several circuits. In particular, this article will also review the apparent addition of an element of absolute ownership or exclusive possession and control into 18 U.S.C. § 1382 analysis by the courts. The *Parker* court stated it was following precedent. However, a closer look reveals that establishing a precedent is troublesome when nearly every court has created a different definition for absolute ownership or exclusive possession and control. This issue is ripe for Supreme Court review because of the numerous inconsistencies in the circuits. As a bottom line, base legal offices should be aware of how the recent trend in the line of trespass cases may impact its advice to their installation commander as well as the steps it may take when 18 U.S.C. § 1382 is not available as a base defense.

II. LEGAL AUTHORITIES FOR DEFENDING MILITARY PROPERTY

A. Generally

Installation commanders are responsible for protecting the property and persons under their command in order to effectuate their military mission.⁴ Inherent in that responsibility is the authority to issue appropriate rules and regulations to ensure the security of the installation and to exclude or remove persons that may present a threat to the security of the installation or mission.⁵ The United States Supreme Court has held that the military has the authority to protect or limit access to its property under the War Powers in the Constitution, Article 1, Section 8, clauses 11-14.⁶ Notably, the Supreme Court upheld the inherent power of the legislative and

⁴ 32 C.F.R. § 809a.2(a) (2012).

⁵ See 50 U.S.C.A. § 797 (2006); see also 32 C.F.R. § 809a.2(b) (2012).

⁶ *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 890 (1961) [hereinafter *Cafeteria Workers*], accord *Greer v. Spock*, 428 U.S. 828, 837-838 (1976). Another line of cases, stemming from *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-405 (1917), hold that the United States retains power over its land under the property clause of the Constitution, art. IV, § 3, cl. 2. The *Utah Power & Light* Court acknowledged:

For many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with the full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may require rights in them From the earliest times Congress by its legislation, applicable alike in the states and territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of the way over them for highways And so we are of the opinion that the inclusion within a state of the lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power.

See also, *United States v. Seward*, 687 F.2d 1270, 1277 (10th Cir. 1982) (upholding a conviction for

executive branches of the federal government to create regulations to protect military property under Article 1, Section 8 in *Cafeteria and Restaurant Workers Union v. McElroy*: “The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President.”⁷ In that case, the Supreme Court concluded a Navy installation commander could deny a cafeteria worker’s access to the installation without a hearing if she failed to meet the security clearance requirements without violating the Due Process Clause of the Fifth Amendment.⁸ The *Cafeteria Workers* Court cited to opinions of the United States Attorney General and of the various services’ Judge Advocate General as proof of the “historically unquestioned power of the a commanding officer summarily to exclude civilians from the area of his command.”⁹ While *Cafeteria Workers* did not address 18 U.S.C. § 1382, the Court upheld the Secretary of the Navy’s authority to enforce a naval regulation giving the commanding officer the discretion to authorize the presence of particular tradesmen or their agents on the military property.¹⁰ Also reliant upon the constitutional power, under Article 1, Section 8, Congress authorized the ability to prosecute unauthorized access to military installations under 18 U.S.C. § 1382 and 50 U.S.C. § 797 as a means for installation commanders to legally protect the property under their command.¹¹ Armed with the authority of 18 U.S.C. § 1382 and 50 U.S.C. § 797, an installation commander may issue written regulations forbidding unauthorized entry to the base or a written debarment order preventing one from re-entering base property.

B. Debarment¹²

An installation commander’s authority and duty to protect the installation under his or her command by debarring individuals is delineated in Department of Defense Instruction 5200.08, *Security of DoD Installations and Resources and the Physical Securities Review Board*.¹³ An installation commander is charged,

trespass at Rocky Flats Nuclear Plant site on the basis of the property clause).

⁷ *Cafeteria Workers*, 367 U.S. at 890.

⁸ *Id.* at 899.

⁹ *Id.* at 892-893. The Court cited to 3 Op.Atty.Gen. 268, 269, for the proposition that the Superintendent of the Military Academy considered “citizens resident within the public limits . . . even though they own houses on the public grounds, or occupy buildings belonging to the United States . . . as tenants at will, and liable to be removed whenever . . . the interests of the academy require it.”

¹⁰ *Id.* at 892 (referencing Articles 0701 and 0734 of Navy Regulations enacted on November 15, 1956, specifically giving the commanding officer authority to exclude persons from the installation unless he authorized their presence).

¹¹ 50 U.S.C.A. § 797 (2006).

¹² While sources vary between the term “debar” or “bar” in discussing preventing an individual from returning to a military installation, this paper will use the term debar. According to Webster’s II New Riverside University Dictionary, debar means “to bar or exclude: shut out” or “to forbid, hinder, or prevent.” WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 351 (1994).

¹³ DEPARTMENT OF DEFENSE, INSTR. 5200.8, SECURITY OF DoD INSTALLATIONS AND RESOURCES AND THE PHYSICAL SECURITY REVIEW BOARD (PSRB) (Dec. 10, 2005, *incorporating Change 1*, May 19, 2010) [hereinafter DoDI 5200.8].

therein, for taking “reasonably necessary and lawful measures” to protect the persons and property on the installation.¹⁴ The power to protect the installation includes the ability to issue debarment orders so long as the individual threatens “the orderly administration of the site,” the debarment orders are based upon reasonable grounds, and the debarment orders are not issued in an “arbitrary, unpredictable, or discriminatory manner.”¹⁵ In the event an individual violates the debarment order, the installation commander may take appropriate legal action in accordance with 18 U.S.C. § 1382.¹⁶ Consistent with the Department of Defense policy, the Air Force issued two instructions that further specify debarment requirements. Air Force Instruction 31-201, *Integrated Defense*, allows an installation commander to “deny access to the installation through the use of a barment order.”¹⁷ A more recent Instruction, AFI 31-113, *Installation Perimeter Access Control*, allows an installation commander to deny access to the installation for individuals whose prior actions are inherently threatening to the orderly administration of the base.¹⁸ For example, an individual may be debarred if he has a known “involvement in the commission of a criminal offense, when access is inconsistent with the interests of national security, . . . or when access adversely affects the health, safety, or morale of personnel on that installation.”¹⁹ An installation commander can decide the terms and the length of time for debarment orders, from short term to permanent orders.²⁰ Base legal offices play an important gate-keeper role in this process as all debarment orders are first subject to review by the servicing Staff Judge Advocate.²¹

An installation commander’s authority to issue debarment orders has rarely been questioned by courts. Courts frequently defer to an installation commander’s discretion in issuing a debarment order in spite of the duration or other underlying reason for issuing the order. For example, in *United States v. Albertini*, the respondent was issued a debarment order nine years prior to the incident in question which forbade him to “reenter the confines of [Hickam Air Force Base] without the written permission of the Commander or an officer designated by him to issue a permit of reentry.”²² While the *Albertini* Court questioned, without deciding, whether a lifetime debarment order would be valid because of either military regulations or due process, the Court held that the nine-year debarment order was valid on its

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. DEPT. OF AIR FORCE, INSTR. 31-101, INTEGRATED DEFENSE 38 (8 Oct. 2009, incorporating *Change 1*, 20 Sept. 2010) (FOUO) [hereinafter AFI 31-101].

¹⁸ U.S. DEPT. OF AIR FORCE, INSTR. 31-113, INSTALLATION PERIMETER ACCESS CONTROL, 59 (26 Jan. 2012) [hereinafter AFI 31-113].

¹⁹ *Id.* An installation commander may also debar individuals after a fitness determination if the individual presents “a threat to the good order, discipline, and morale of the installation” or meets any of eighteen criteria laid out in the same AFI. *Id.* at 57-58.

²⁰ *Id.* at 57.

²¹ *Id.* at 59; AFI 31-101, note 20 at 38.

²² *United States v. Albertini*, 472 U.S. 675, 677 (1985).

face.²³ The Court further bolstered debarment orders in *Albertini* by holding that “[w]here a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public.”²⁴ While not discussing a debarment order per se, the Supreme Court upheld the installation commander’s denial of defendants’ request to enter exclusive federal jurisdiction for the purpose of distributing political leaflets in *Greer v. Spock*.²⁵ In its holding, the Court noted that several Army regulations empowered the installation commander to prohibit certain actions and speech on the installation and also referenced *Cafeteria Workers* for the proposition that the installation commander has “historically unquestioned power . . . to exclude civilians from the are of his command.”²⁶ In similar fashion, some circuit courts have upheld debarment orders or orders limiting an individual’s actions on base without providing an in-depth analysis.²⁷

C. 18 U.S.C. § 1382

1. Legislative History of 18 U.S.C. § 1382

Before muddying the waters with the interpretation of the statute by case law, it is important to understand the plain language of the statute at issue. Since its inception in 1909, 18 U.S.C. § 1382 has had relatively few alterations. The 1909 version of the statute reads as follows:

Whoever shall go upon any military reservation, army post, fort or arsenal, for any purpose prohibited by law or any military regulation made in pursuance of law, or

Whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.²⁸

The current version of 18 U.S.C. § 1382, *Entering Military, Naval, or Coast Guard Property*, reads virtually the same:

²³ *Id.* at 682-683.

²⁴ *Id.* at 687.

²⁵ *Greer v. Spock*, 424 U.S. 828, 834 (1976) (holding that a an installation commander’s denial of defendants’ request to distribute political materials did not violate the First Amendment because no constitutional right of free public assembly or unrestricted freedom of speech exists).

²⁶ *Id.* at 838, quoting *Cafeteria Workers*, 367 U.S. 886, 893 (1961).

²⁷ *See United States v. Walsh*, 770 F.2d 1490 (9th Cir. 1985) (upholding a permanent debarment order after the defendant trespassed two times on Davis-Monthan Air Force Base); *see also United States v. McCoy*, 866 F.2d 826, 834 (comparing the ability of the installation commander in *McCoy* to the authority of the installation commander in *Albertini* to prevent unauthorized behavior within the confines of the installation).

²⁸ Act of March 4, 1909, ch. 321, § 45, 35 Stat. 1097.

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined under this title or imprisoned not more than six months, or both.²⁹

As one can see, the phrase “within the jurisdiction of the United States” was added along with an expanded definition of military property that would qualify under the statute’s protections.

The Supreme Court has affirmed that when courts interpret statutory language, such as 18 U.S.C. § 1382, the court “‘must follow the plain and unambiguous meaning of the statutory language.’”³⁰ The Court held that because Congress has the power to make law, courts should assume that the ordinary meaning of the statute applies, rather than insert legal requirements from legislative history without a pressing need.³¹ Few cases, then, have had reason to comment upon the legislative history of the statute. In *United States v. Albertini*, the Court did ultimately examine the legislative history of 18 U.S.C. § 1382 in a case where a debarred defendant entered Hickam Air Force Base during an open house event. According to the Court’s interpretation of legislative history, 18 U.S.C. § 1382 was designed not only to protect the military mission, but also to “punish spies and panders for repeated entry into military installations” because there was no other law to punish them.³² The Court held that 18 U.S.C. § 1382 did not just apply to closed military installations; instead, the statute reasonably applied to bases that were open to the public.³³

2. Elements

Even from its origin, the 18 U.S.C. § 1382 created two separate and distinct types of trespass: initial trespass and subsequent trespass. Initial trespass, applies where an individual enters military property for a purpose prohibited by law or regulation. The prohibited purpose, however, “can consist of unauthorized entry

²⁹ 18 U.S.C.A. § 1382 (1994).

³⁰ *United States v. Albertini*, 472 U.S. 675, 680 (1985). (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984)).

³¹ *Id.*

³² *Id.* at 681.

³³ *Id.* at 682-685.

itself, and no ‘specific intent,’ in the strict sense, to violate the law or regulation prohibiting such entry need be shown.”³⁴ The Government does not need to show that the prohibited purpose was the commission of a serious crime or even that the individual knew that he was violating a law or regulation.³⁵ Rather, the Government need only show that the individual acted with the intent to enter the property and the individual knew such entry was prohibited.³⁶ Subsequent trespass is trespass for unauthorized entry or reentry after being removed or debarred. In order to prevail under a subsequent trespass theory, the Government must show that the individual been previously removed or ordered not to return to the property.³⁷ Thus, under a subsequent trespass theory, it does not matter what the individual’s purpose is for being present on military property, only that he has been removed previously and ordered not to return. As one court noted, “motive is not a component of the offense charged under the second paragraph of § 1382.”³⁸

An additional element of the statute is that the Government prove that the defendant was within the jurisdiction of the United States and on military property. The text of 18 U.S.C. § 1382 does not require a specific type of criminal jurisdiction over the area involved. Relying upon *Utah Power and Light Co.* to distinguish between the exercise of control over territorial jurisdiction and legislative jurisdiction, the *United States v. Holmes* court determined that the term “jurisdiction” in 18 U.S.C. § 1382 was meant to refer “to the situs of the geographical areas within which the statute applies rather than to any concept of the particular type of jurisdiction or control which the United States Government exercises over said geographical areas.”³⁹ The *Holmes* court’s plain-language analysis of the jurisdiction requirement in 18 U.S.C. § 1382 demonstrates that the statute applies regardless of the nature of the Government’s legislative jurisdiction.⁴⁰

3. The Onerous Ownership Element

While the plain language of 18 U.S.C. § 1382 does not require the Government to prove, as an element of the crime, that the Government has absolute ownership or exclusive right of possession or control of the property, several cases

³⁴ *United States v. Parrilla Bonilla*, 648 F.2d 1373, 1377 (1st Cir. 1981) (referencing *United States v. Mowat*, 582 F.2d 1194, 1204 (9th Cir. 1978), where the Mowat court determined “Congress clearly did not make motive or intent a factor in determining guilt . . . and the absence of Mens rea does not invalidate the statute.”)

³⁵ *Parilla Bonilla*, 648 F.2d at 1377.

³⁶ *Id.*

³⁷ *Id.* at 1377-1378.

³⁸ *Holdridge v. United States*, 282 F.2d 302, 311 (8th Cir. 1960).

³⁹ *United States v. Holmes*, 414 F.Supp. 831, 836-837 (Dist. Ct. Md. 1976) (referring to *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917) to explain that exclusive legislative jurisdiction is not essential in order for the federal government to protect land within its territorial jurisdiction).

⁴⁰ *But see United States v. Parker*, 651 F.3d 1180, 1182 (9th Cir. 2011) (noting that the base had concurrent jurisdiction on a road easement in the ultimate holding that the Government could not prevail under 18 U.S.C. § 1382).

suggest that this requirement exists.⁴¹ The plain language of the statute only requires that the individual must be “within the jurisdiction of the United States.”⁴² Even in its lengthy examination of the legislative history, the *Albertini* Court did not address whether the statute demanded a showing of ownership.⁴³ One could reasonably presume that because the ownership requirement was not in the plain language of the statute or of importance for the Supreme Court to discuss in the legislative history, ownership was not a key to the crime for the *Albertini* Court. In distinguishing and limiting a previous Supreme Court decision, the *Albertini* Court did note that the military needed to exercise some amount of control over the area from which it sought to exclude persons, but ownership of the property itself was not addressed.⁴⁴ Despite the Supreme Court’s lack of discussion of an ownership element in *Albertini*, ownership has nonetheless become an issue in 18 U.S.C. § 1382 cases.

Criminalizing trespass onto a military installation is tantamount to a means of defense for the base. The Court in *Albertini* recognized the impetus behind drafting 18 U.S.C. § 1382: the military installation needs to protect the mission against threats from repeated and unwanted entries onto the base.⁴⁵ Unauthorized personnel may not be present on a military installation without consequence. Even if that person lacks criminal intent, that person may be removed from the installation and cited with trespass in violation of 18 U.S.C. § 1382.⁴⁶ Unique missions make the military familiar with and a target of those who would wish to speak out against it. Trespass citations are common to those military bases with protestors wishing to make a statement by being arrested for their cause. Because military bases across the United States rely upon 18 U.S.C. § 1382 to protect the installations and missions, it is important to understand the view of the circuits across the country. The next section will provide a discussion of prominent case law from several circuit courts.

III. THE CIRCUITS’ APPROACH TO THE “OWNERSHIP PRONG”

In *United States v. Parker*, the Ninth Circuit held that a finding of either absolute ownership or the exclusive right of possession is necessary for a successful prosecution under 18 U.S.C. § 1382.⁴⁷ Case law has created or interpreted that absolute ownership or exclusive right of possession or control is a required element of 18 U.S.C. § 1382. A closer look reveals that these terms are used loosely without a clear definition and without a consistent use between courts or circuits. This section will review the key federal circuit decisions so that the base practitioner may develop a working knowledge of the primary cases in this area.⁴⁸

⁴¹ *See id.*

⁴² *Holmes*, 414 F.Supp. at 831.

⁴³ *See United States v. Albertini*, 472 U.S. 675, 677 (1985) for a discussion of the statute’s legislative history which is notably silent on ownership as an element of the crime.

⁴⁴ *Albertini*, 472 U.S. at 685 (distinguishing *United States v. Flower*, 407 U.S. 197 (1972)).

⁴⁵ *See Albertini*, 472 U.S. at 682.

⁴⁶ *United States v. Parrilla Bonilla*, 648 F.2d 1373, 1377 (1st Cir. 1981).

⁴⁷ *United States v. Parker*, 651 F.3d 1180, 1182 (9th Cir. 2011)..

⁴⁸ To the extent possible, this article will use the term “ownership prong” in the generic sense to

A. Fourth Circuit, 1948

The Fourth Circuit's *United States v. Watson* case was the first in line of cases to specifically mention the ownership prong as an element of 18 U.S.C. § 1382. In *Watson*, the defendant was debarred from the Marine Corps Barracks at Quantico, Virginia because of previous misconduct. The defendant was then cited for trespass in violation of 18 U.S.C. § 1382 when he was stopped on a roadway for reckless driving as he was passing through the installation. The roadway pre-existed the creation of the base. Even though the Marine Corps took the land by fee simple absolute in 1918, the public was allowed to continue using the road because it was the only way to reach the landlocked village of Quantico, Virginia.⁴⁹ The court concluded that there was an implied easement on that particular road for public necessity and held that the Government could not cite the defendant for trespass when the defendant was on the implied easement. The *Watson* court held:

[T]he United States must show an absolute ownership, or an exclusive right to the possession, of the road, in order to enforce the commandant's interdiction of the defendant. To punish an infraction of the order, as an offense under title 18, section 1382, U.S.C.A., proof of criminal jurisdiction of the road alone was not enough. Sole ownership or possession, as against the accused, had to be in the United States or there was no trespass.⁵⁰

Seemingly, the *Watson* case is the first time that the terms of absolute ownership or exclusive right of possession appear in the 18 U.S.C. § 1382 line of cases. Several circuits have either relied upon or distinguished the facts and resulting law of the case, even though the *Watson* court did not rely upon or cite to any other cases in its trespass analysis.⁵¹ Even though the military took the area in fee simple absolute and maintained exclusive legislative jurisdiction of the road area, the Government had insufficient control of the area because the condemnation proceedings did not expressly include the highway and the public relied upon and continued to use the road.⁵² The court opined,

[e]vidence that the road is within the area taken does not alone justify the sweeping inference that the capture destroyed the strip as a road, and dissolved all rights of use theretofore held by the public or by certain persons having a special interest therein. Such evidence may prove absolute ownership or possession.⁵³

simplify the “absolute ownership or exclusive right of possession” terminology.

⁴⁹ *United States v. Watson*, 80 F.Supp. 649, 651 (E.D. Va. 1948).

⁵⁰ *Id.* at 651.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

A broad reading of the *Watson* case, standing alone, leads to the conclusion that in order for a trespass case to be upheld, the Government must be the only entity that could be using the property at the time of the trespass. Therefore, the terms absolute possession and exclusive right of possession are interchangeable. As such, instead of carving out an exception for a debarred defendant to traverse a public road through a base, the *Watson* court created a new element for 18 U.S.C. § 1382. Since this decision, sister-circuit decisions have either limited *Watson* to its facts or embraced the broad strokes of the opinion.

B. Eighth Circuit, 1960

Twelve years later, the Eighth Circuit decided *United States v. Holdridge*. In that case, the defendants were caught climbing over a fence onto Mead Ordnance Depot in Nebraska after having been removed and ordered not to reenter that same day.⁵⁴ The defendants were cited with violating 18 U.S.C. § 1382(b).⁵⁵ At issue was whether the Government could bring a trespass charge where it allowed tenants to remain in possession of homes with a right of ingress and egress across the property for a period of time after it took the land in condemnation proceedings.⁵⁶ The court also reviewed evidence that several public roads existed on the land prior to the Government's fee simple ownership.⁵⁷ Even though the defendants were not tenants on the property or even making use of the roads mentioned, the defendants argued that the Government's actions destroyed its absolute ownership under the *Watson* standard.⁵⁸ The *Holdridge* court interpreted, as an element, the requirement that the Government would need "exclusive possession of the property" but it did not address the disparate term "absolute ownership."⁵⁹ The *Holdridge* court distinguished the *Watson* court's implied easement by holding that the Government took fee simple absolute ownership in the condemnation proceedings regarding the land at issue where the county roads were now clearly within the missile site.⁶⁰

The *Holdridge* court found that the Government could maintain exclusive possession of the property even if landowners retained limited possession of their homes and were permitted ingress and egress.⁶¹ The *Holdridge* court held that exclusive possession did not mean absolute ownership where the Government was the only entity using the property, contrary to the *Watson* court. Instead, *Holdridge* implies that while exclusive possession of the property is an element, it can be met by a less strict standard than that proposed by *Watson*. Further, in the absence of

⁵⁴ *Holdridge v. United States*, 282 F.2d 302, 304 (8th Cir. 1960).

⁵⁵ *Id.*

⁵⁶ *Id.* at 307.

⁵⁷ *Id.*

⁵⁸ *Id.* at 304-307.

⁵⁹ *Id.* at 306.

⁶⁰ *Id.* at 308.

⁶¹ *Id.*

the term “absolute ownership,” the *Holdridge* decision implies that requirement may not exist in the Eighth Circuit.

C. Early Ninth Circuit, 1964 - 2001

1. *United States v. Packard*

Four years after *Holdridge*, the Ninth Circuit issued its decision in *United States v. Packard*. In *Packard*, the defendant was cited with violating 18 U.S.C. § 1382 when he reentered an area of base housing on Mare Island Naval Shipyard, California, in order to solicit door-to-door sales after having been ordered not to reenter.⁶² In its two-page opinion, the court’s holding does not address whether the Government owned the base housing area in fee or whether the property was subject to any easements, even though the property was outside of the base’s perimeter fence.⁶³ The defendant relied upon *Watson*, claiming that the *Watson* court’s reasoning should prevail—that “the United States must show absolute ownership or an exclusive right to the possession, of the road.”⁶⁴ Instead of following *Watson*’s analysis, the court relied upon several factors to find that the Government had the “requisite ownership or possession” of a housing area outside of the base perimeter fence: patrol of the area by military police; signs at the entrance to the area; and notices that the area was government property.⁶⁵ The *Packard* court held that the Government prevailed under the ownership prong by loosely referencing the terms “requisite ownership or possession” and noting the factors above.⁶⁶ Whereas *Watson* held that the Government must show that it destroyed all other rights in the property in order to show absolute ownership, *Packard* held that Government ownership could be shown by a variety of factors.⁶⁷ Further, the *Packard* court distinguished the defendant’s actions as being integral in its holding: the defendant was not just making regular use of a public thoroughfare as in *Watson*, rather, the defendant was making use of the property in base housing beyond the roadways.⁶⁸ Absent further rationale in the court’s holding, one could argue that a defendant would be trespassing if using Government property inconsistent with the public’s regular use of the property.

In three separate opinions, the Fourth, Eighth, and Ninth Circuits have all used different wording in discussing the ownership prong: “absolute ownership or exclusive right to possession”;⁶⁹ “exclusive possession of the premises”;⁷⁰ and

⁶² *United States v. Packard*, 236 F.Supp. 585 (9th Cir. 1964), *aff’d*, 339 F.2d 887 (9th Cir. 1964).

⁶³ *Id.* at 586.

⁶⁴ *Id.* at 586 (quoting *United States v. Watson*, 80 F.Supp. 649, 651 (E.D. Va. 1948).

⁶⁵ *Id.* at 586.

⁶⁶ *Id.* at 586.

⁶⁷ *See Packard*, 236 F.Supp. at 586.

⁶⁸ *Packard*, 236 F.Supp. at 586.

⁶⁹ *Watson*, 80 F.Supp. at 651.

⁷⁰ *Holdridge v. United States*, 282 F.2d 302, 308 (8th Cir. 1960).

“requisite ownership or possession.”⁷¹ The *Packard* court seemingly relied upon the outward and apparent demonstration of government control of the area in order to meet the ownership prong. Even though the public could pass through base housing, the Government maintained the authority to control the area and to protect it from trespassers. It is unclear whether the courts created a factors test or whether the Government must meet certain minimum requirements to establish ownership. Certainly, through 1964, an exacting standard of ownership and control had not been established when all circuits seem to have a different understanding and interpretation of the requirement.

2. *United States v. Mowat*

A new wrinkle appeared in 1978, just fourteen years after the *Packard* decision in another Ninth Circuit case. In *United States v. Mowat*, the defendants were attempting to gain unauthorized entry onto the island of Kahoolawe, which then belonged to the Fourteenth Naval District.⁷² The Hawaiian island was transferred to the United States during the annexation of Hawaii in 1898 and had been designated for Navy use since 1953.⁷³ Additionally, the Navy published a regulation that restricted the public’s access to the island.⁷⁴ The court held that “[t]he parties agree that the Government was required to prove, as an element of the offense, absolute ownership or the exclusive right to the possession of the property upon which the violation occurred.”⁷⁵ In making that comment, the court cited to the Eighth Circuit’s *Holdridge* decision and the Ninth Circuit’s *Packard* decision as a basis of that stipulation.⁷⁶ Aside from recognizing the parties’ agreement that the ownership prong was an element, the court did not explicitly hold that this was always a requirement for sustaining a conviction under 18 U.S.C. § 1382. Conversely, in finding the Government had established of the ownership prong, the court noted that “[e]ven if the Navy did not possess a fee simple absolute title to the Island of Kahoolawe, the maintenance of the ‘naval reservation’ there suffices to support the convictions under 18 U.S.C. § 1382.”⁷⁷ The court recognized that by merely establishing and maintaining control of a military installation, the Government would meet the requirement to prove absolute ownership or exclusive right to possession, even if they did not own the land in fee upon which the installation rested.⁷⁸ This language illustrates that the requirement for “absolute ownership or the exclusive right to the possession” is far less exacting than might be assumed from the plain language of the standard. Furthermore, this language is far less exacting than the *Watson* requirement that all other rights be expressly extinguished.

⁷¹ *Packard*, 236 F.Supp. at 586.

⁷² *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978).

⁷³ *Id.* at 1197-1198.

⁷⁴ *Id.* at 1198.

⁷⁵ *Id.* at 1206.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1208 (citation omitted).

⁷⁸ See *United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978).

This statement, that fee simple absolute title was not required, makes it apparent that the Government can meet the ownership prong by exercising the degree of control necessary to establish an installation along with the need for the Government to safeguard such installation. Reliance upon *Packard* and *Holdridge* for the strict requirement language from *Watson* is misplaced since neither court actually relied upon a strict use of the phrase “absolute ownership or the exclusive right of possession.” On the contrary, the *Mowat* court was not reliant upon fee simple absolute ownership to determine the Government had met its burden.

3. *United States v. Douglass*

In the same year as *Mowat*, the Ninth Circuit also decided *United States v. Douglass*.⁷⁹ In that case, the defendant was previously debarred from entry to Naval Submarine Base, Bangor/Bremerton, Washington, after an act of civil disobedience during a protest.⁸⁰ Nonetheless, the defendant crossed a white boundary line into base property to use a public phone booth to contact the media that other protestors were being arrested.⁸¹ After being charged with 18 U.S.C. § 1382, the defendant claimed that the Government lacked sufficient ownership of the property in question because the area was outside the base perimeter fence and gate and it was open to the public.⁸² The defendant did not claim that the Government did not own the area or that the area was subject to an easement.⁸³ The *Douglass* court addressed whether the Government had an “exclusive right of use” or the “requisite ownership and possession” of the property.⁸⁴ That case stated that “[m]ere toleration of certain uses by the public designed for their convenience does not result in the loss of the right to exclusive use.”⁸⁵ While *Douglass* cited to *Packard*, it did not use the terms absolute possession or exclusive right of control in its discussion.⁸⁶ Instead, *Douglass* used terms that applied a less exacting standard.

The *Douglass* court relied upon several factors to hold that the Government met the ownership prong of trespass even though the area was outside the secured area, specifically: there was no evidence of an easement, either by grant or reservation; the Government had not relinquished control of the area; and the white boundary line of the military reservation was clearly marked.⁸⁷ The court held, therefore, the use of an area by the public, therefore, is not sufficient to destroy the government’s exclusive right of use.⁸⁸ Rather than further define the requirements of possession or creating elements for the ownership requirement, the *Douglass*

⁷⁹ *United States v. Douglass*, 579 F.2d 545, 547 (9th Cir. 1978).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 547-548.

⁸⁵ *Id.* at 548.

⁸⁶ *Id.* at 547-548.

⁸⁷ *Id.*

⁸⁸ *See Douglass*, 579 F.2d at 547.

court, like *Packard*, merely discussed factors. While the court noted the apparent absence of an easement, the court did not go so far as to hold that an easement automatically diminishes the requisite ownership. Again, one can see the absolute ownership or exclusive right to possession terms are used loosely, if used at all, to convey many different meanings.

4. *United States v. Vasarajs*

In 1990, the Ninth Circuit again examined the ownership prong in *United States v. Vasarajs*.⁸⁹ In *Vasarajs*, a defendant was barred from reentry onto a military installation after committing misconduct involving illegal drugs on the base.⁹⁰ Base police stopped the defendant at the main gate of Fort Richardson, Alaska as she exited a main highway that bisected the base.⁹¹ The access road from the highway leading to the main gate marked with two signs that notified her that she was on the base and subject to search at any time.⁹² The defendant was charged with trespass under 18 U.S.C. § 1382 at the main gate of the base.⁹³ The defendant admitted that the Government owned the access road upon which she was detained but alleged that the Government relinquished requisite control over the area because the public was allowed to traverse the roadway comprising part of the installation, i.e.—the Government no longer had absolute ownership because the road was open to the public.⁹⁴ The *Vasarajs* court then focused its analysis on the “absolute ownership” portion of the ownership prong rather than the “exclusive right to the possession.” Citing to *Watson*, the court noted that mere title to the property in question is insufficient to show that the property is still a part of the base.⁹⁵ However, the *Vasarajs* court also cited *Douglass* for the proposition that the Government did not lose control over its property simply by allowing the public to use it.⁹⁶ The court did not specify whether the government owned the land in fee but it noted lack of evidence of an express easement or easement by necessity.⁹⁷ Ultimately, the *Vasarajs* court concluded that the property at issue was unquestionably owned by the Government.⁹⁸ The court’s analysis thus fell under the “absolute ownership” portion of the ownership prong, and the only issue to be decided was whether the Government had relinquished the requisite control of the property by inaction.⁹⁹ The court assumed that the Government must exercise actual control “over its property

⁸⁹ *United States v. Vasarajs*, 908 F.2d 443 (9th Cir. 1990).

⁹⁰ *Id.* at 445.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 445-446.

⁹⁵ *Id.* (citing *United States v. Watson*, 80 F.Supp. 649, 651 (E.D. Va. 1948)).

⁹⁶ *Id.* at 446 (quoting *United States v. Douglass*, 579 F.2d 545, 547 (9th Cir. 1978): “[m]ere toleration of certain uses by the public designed for their convenience does not result in the loss of the right to exclusive use.”).

⁹⁷ *Id.* at 447.

⁹⁸ *Id.* at 445-446.

⁹⁹ *Id.*

in order to preserve the right to exclude others from it pursuant to 18 U.S.C. § 1382.¹⁰⁰ In *Vasarajs*, two signs indicating base property was a sufficient showing of control from the court's viewpoint.¹⁰¹ Thus, the Government ultimately prevailed in *Vasarajs* under the *Watson* standard, but the court failed to squarely address the ownership prong or explain its reasoning behind the holding.

Although the court in *Vasarajs* did discuss easements, it did so in the context of supporting “the uncontroversial proposition that record title does not unfailingly denote the title holder’s ‘absolute ownership, or an exclusive right to the possession’ of the property in question.”¹⁰² Even though the court mentions that servitude might draw into question the title holder’s absolute ownership or exclusive right to possession, it did not address whether the ownership prong would not be satisfied in all cases. Despite this mention of easements, the court in *Vasarajs* did not make any holdings regarding the effect of easements on absolute ownership or exclusive right to possession. While *Vasarajs* was decided by the same circuit twelve years after *Mowat*, the *Vasarajs* court did not tie the parties strictly to the terminology or explanation of the ownership prong as discussed in *Mowat*. Even some forty years after the *Watson* decision, the circuits have not developed the ownership prong into a strict standard or exacting requirement. The *Vasarajs* case is not the last Ninth Circuit opinion regarding trespass. However, the two most recent Ninth Circuit decisions will be discussed at the end of this section because it is important to first understand the intermediate cases in other sister-circuits.

D. The Sixth Circuit, 1989

Around the same time as the Ninth Circuit’s *Vasarajs* decision, the Sixth Circuit decided *United States v. McCoy*.¹⁰³ In that case, the Sixth Circuit held that the ownership prong required a mere demonstration of possessory interest or occupation or control. Mrs. McCoy, the defendant, had been previously debarred from Wurtsmith Air Force Base, Michigan.¹⁰⁴ On the occasion in question, she was leafleting in a paved area at a driveway along a highway in front of the base when she was detained and cited for trespass in violation of 18 U.S.C. § 1382.¹⁰⁵ The county had a right-of-entry easement over a highway in front of Wurtsmith Air Force Base and over the driveway at the entrance to the base. However, the court held that easement was insufficient to prove that the base did not own the property in question.¹⁰⁶ The defendant called the Director of Surveys from the County Road Commission to testify that the Government “had granted a right-of-entry to the State Highway Department for construction of a highway and the Highway Department

¹⁰⁰ *Id.* at 447.

¹⁰¹ *Id.*

¹⁰² *Id.* at 446 (citing *Watson*, 80 F.Supp. at 651).

¹⁰³ *United States v. McCoy*, 866 F.2d 826, 827 (6th Cir. 1989).

¹⁰⁴ *Id.* at 827.

¹⁰⁵ *Id.* at 828.

¹⁰⁶ *Id.* at 827, 831.

subsequently released its right-of-entry to the county.¹⁰⁷ However, because the county did not own the road in fee and only had a right-of-entry easement, the *McCoy* court found sufficient evidence to hold that “the entire area up to at least the center of the road, if not beyond, is a part of the military base”¹⁰⁸ The *McCoy* court held that the Government need not demonstrate legal title, or that the area where the defendant was cited was outside of the right-of-way easement, because the area was visibly part of the base.¹⁰⁹ The *McCoy* Court did not stop its analysis here, however. In fact, the *McCoy* court opined that even if the military airstrip, upon which the defendant had previously trespassed,

[H]ad been built on land owned outright by Iosco County, instead of on land leased from the State of Michigan by the United States, the airstrip would still have been part of a military installation possessed and operated by the United States—and it would still have been off-limits to anyone barred from the base under § 1382.¹¹⁰

The *McCoy* case noted that “centuries of legal history support the Government’s refusal to concede that anything more than a possessory interest had to be shown.”¹¹¹ The court in *McCoy* juxtaposed its interpretation of the requirement for possessory interest with the absolute ownership or exclusive right to possession standard in *Mowat*. Even so, the holding in *McCoy* indicates that the ownership prong should not be interpreted as requiring more than a showing of a possessory interest. Therefore, the Sixth Circuit’s holdings support a possessory interest requirement, and not the exacting standard of the ownership prong discussed in other decisions.¹¹²

E. The Second Circuit, 1991

In *United States v. Allen*, the Second Circuit held the defendants were guilty of trespass when they entered a security zone around the *U.S.S. Pennsylvania*, a Trident nuclear submarine, while docked at a pier in the Thames River.¹¹³ Three defendants traveled up the river in a canoe to the pier and climbed onto the submarine while another defendant swam up to the submarine.¹¹⁴ All defendants began to

¹⁰⁷ *Id.* at 827.

¹⁰⁸ *Id.* at 831 (quoting the district court’s finding).

¹⁰⁹ *Id.* at 830; *see also* *United States v. LaValley*, 957 F.2d 1309 (6th Cir. 1992). *LaValley* is a near mirror-image of the *McCoy* case as the debarred defendants were walking in the highway easement near the entrance of Wurtsmith Air Force Base. This court did not hesitate to follow *McCoy*: “[t]he mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base after being previously barred.” *Id.* at 1313.

¹¹⁰ *McCoy*, 886 F.2d at 831

¹¹¹ *Id.*

¹¹² *See* *United States v. Parker*, 651 F.3d 1180, n.2. (9th Cir. 2011).

¹¹³ *United States v. Allen*, 924 F.2d 29, 30 (2nd Cir. 1991).

¹¹⁴ *Id.*

attack the submarine's hull with hammers despite the warnings of the guards.¹¹⁵ The defendants argued that they were not guilty of trespass because never entered the confines of the naval reservation; they were only in the waters on the border of the reservation.¹¹⁶ The *Allen* court upheld a trespass conviction in an area "designated as a 'security zone' by federal regulation" because the United States exercised dominion and control over the area and could exclude the general public.¹¹⁷ The court relied upon the Ninth Circuit's *Mowat* holding to conclude that occupation and control of the waters designated as part of the security zone, and not absolute ownership, were sufficient to invest the Navy with exclusive right to occupy the area even though area was not owned by the Navy.¹¹⁸ In fact, the *Allen* court held "[g]overnment ownership of the property in question is not a requisite to violating Section 1382."¹¹⁹ Furthermore, the *Allen* court reviewed a First Circuit case, *United States v. Parrilla Bonilla* to point out that even the First Circuit Court "did not reject the theory that the boundaries of a reservation may extend beyond what the Government owns in fee."¹²⁰ In fact, the *Allen* court did not even use the terminology "absolute ownership" or "exclusive right of possession" in its analysis. As a result of the holdings in *McCoy* and *Allen*, the Second and Sixth Circuit Courts require the least exacting standard of the ownership prong; ownership in fee is not a prerequisite for an 18 U.S.C. § 1382 violation in those circuits.

F. The First Circuit, 2001

Ten years after the Second Circuit's *Allen* decision, the First Circuit reached a similar decision in *United States v. Ventura-Melendez*.¹²¹ The defendant in that case was charged with trespass during a peaceful protest on a beach belonging to the Navy's Camp García in Vieques, Puerto Rico.¹²² The beach was approximately 200 yards from a live impact area used for military exercises, but the defendant claims that she was not standing on the Government's side of the mean high tide line.¹²³ As an initial matter, the court concluded that "[g]overnment ownership of the property in question is not a requisite to violating Section 1382."¹²⁴ Citing to *Allen*, *McCoy*, and *Mowat*, the *Ventura-Melendez* court ruled that "[i]n accord with these courts, we hold that, when the Government does not own the land, § 1382 requires only that the Government demonstrate either a possessory interest in, or occupation or control of, the area reserved by the military."¹²⁵ The *Ventura-Melendez*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 31.

¹¹⁸ *Id.* at 30.

¹¹⁹ *Id.* at 31 (referencing *McCoy*, 866 F.2d at 830-832).

¹²⁰ *Id.* at 31 (quoting *United States v. Parrilla Bonilla*, 648 F.2d 1373, 1384-1386 (1st Cir. 1981)).

¹²¹ *United States v. Ventura-Melendez*, 275 F.3d 9 (1st Cir. 2001).

¹²² *Id.* at 11.

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 17 (quoting *United States v. Allen*, 924 F.2d 29, 30 (2nd Cir. 1991) and *McCoy*, 866 F.2d at 830-832).

¹²⁵ *Id.* at 17. The *Ventura-Melendez* court held that the area beyond the mean high tide could be

court did not use the *Watson* court's terminology of absolute ownership or exclusive right to possession of the property.¹²⁶ Instead, it relied upon the Second, Sixth, and Ninth Circuit decisions to reach its holding with a newly-coined "occupation-or-control test" rather than the ownership prong.¹²⁷ Further, the court held that even though Puerto Rico had jurisdiction over its beaches, that jurisdiction was subject to United States' control.¹²⁸ By reviewing a series of factors, the court concluded that the Government had exercised control of the area: the area was frequently used for military purposes; security personnel frequently patrolled the area; and the base was designated as a base closed to the public.¹²⁹ Thus, the United States had superior control, albeit not exclusive control, sufficient to pursue a charge under § 1382. Clearly, the terms exclusive or absolute did not play a role in the *Ventura-Melendez* decision.

IV. A DEPARTURE—THE NINTH CIRCUIT, 2011-2012

The First, Second, Sixth, and Ninth Circuit Courts have all, at times, used a less-exacting interpretation of the ownership prong of 18 U.S.C. § 1382 than that in *Watson*. This raises the question: is there really a precedent for anything more than the "occupation-or-control" test as synthesized by the *Ventura-Melendez* court? In the past few years, the Ninth Circuit has veered away from prior case law and has asserted there is a precedent for a more rigorous interpretation of the ownership prong, not only among the Ninth Circuit's decisions, but among the decisions from other circuits as well. The recent Ninth Circuit decisions, *Parker* and *Apel* are at direct odds with the Sixth Circuit. In addition, these two decisions are more stringent than any ownership requirements required by the First, Second, and other Ninth Circuit decisions. A detailed analysis of each of these decisions is necessary to understand the current state of interpretation in the Ninth Circuit.

The Ninth Circuit decided *United States v. Parker* in 2011 and *United States v. Apel* in 2012. Both *Parker* and *Apel* involve similar fact patterns: debarred protestors returned to Vandenberg Air Force Base in violation of the debarment order. While not written in the text of the statute, the Ninth Circuit stated that many courts have seemed to require that the Government prove absolute ownership to prevail under 18 U.S.C. § 1382.¹³⁰ While Vandenberg Air Force Base is just one of hundreds of military bases across the country, the *Parker* and *Apel* decisions may have a widespread impact. At the very least, these decisions affect seventeen Air Force bases in the Ninth Circuit alone. In addition, because the litigation in this arena is so tightly intertwined, other circuits may begin to rely upon these recent

appropriately designated as a "danger zone" by federal regulation since the Navy frequently used a nearby area for live fire exercises. *Id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 17-18.

¹³⁰ *United States v. Parker*, 651 F.3d 1180, 1184-1185 (9th Cir. 2011).

decisions to restrict the military's use of 18 U.S.C. § 1382. In order to appreciate the nuances at play in these 18 U.S.C. § 1382 cases, it is necessary to first outline a basic history of how the Air Force acquired the land at Vandenberg Air Force Base and how the protestors came to claim their designated protest area in the middle of base property along a highway near the base's main gate. By understanding the facts at play in these cases arising from Vandenberg Air Force Base, base legal offices can better prepare for any potential litigation that may arise at another base.

A. Background

1. Acquisition of the Land

The land now known as Vandenberg Air Force Base, the third largest base in terms of acreage in the Air Force, was acquired by the Federal Government in 1941 and 1942 for use as an Army base and became known as Camp Cooke.¹³¹ In 1943, the Secretary of War accepted exclusive jurisdiction over the property.¹³² In 1957, the Army transferred the property to the Air Force.¹³³ Shortly thereafter, in 1962, the United States granted easements pursuant to 10 U.S.C. § 2668 to the County of Santa Barbara, California for a right-of-way for a road or street through the base property.¹³⁴ Subsequently, two highways were formed that bisect Vandenberg Air Force Base property: Highway 1, which is near the main gate; and Highway 246, which provides public access to a railroad stop at Surf Station. The Government maintained exclusive jurisdiction over the entire acquisition until 1981, at which point the jurisdiction of Highway 1 and 246 were changed to concurrent prosecutorial jurisdiction with the County of Santa Barbara.¹³⁵ Portions of both highways are encompassed by the base; the base maintains ownership and exclusive federal jurisdiction on both sides of the roadways.

2. Federal Grant Easements

The use of the easements on Vandenberg has always been "limited to road maintenance and vehicular travel. . . use and occupation of the area is for these purposes only, and is subject to such rules and regulations the [Installation

¹³¹ Letter from Henry L. Stimson, Secretary of War, to Earl Warren, Governor of California (Jan. 8, 1943) (on file with Army Corps of Engineers, Los Angeles District and copy on file with author). Exhibit A lists California military reservations, the number of acres acquired, the dates of the directives, and how each property was acquired. Camp Cooke was acquired in fee simple through purchase and condemnation of over 87,000 acres.

¹³² *Id.*

¹³³ *U.S. Air Force Fact Sheet*, http://www.vandenberg.af.mil/library/factsheets/factsheet_print.asp?fsID=4606&page=1 (last visited Apr. 30, 2012).

¹³⁴ DEPT. OF THE AIR FORCE, EASEMENT FOR ROAD OR STREET DA-04-353-ENG-8284 1 (Jul. 12 1962) [hereinafter EASEMENT].

¹³⁵ Letter from Edmund G. Brown, Jr., Governor of California, to Joseph C. Zengerle, Assistant Secretary of the Air Force (Jul. 21, 1981) (on file with Army Corps of Engineers, Los Angeles District and copy on file with author).

Commander] may prescribe from time to time in order to properly protect the interests of the United States,” as per the easement language and as per the easement statute, 10 U.S.C. § 2668.¹³⁶ Specifically, the statute provides, “the Secretary may grant, upon such terms as the Secretary considers advisable, easements for the rights-of-way over, in, and upon public lands permanently withdrawn or reserved for the use of that department, and other lands under the Secretary’s control for . . . roads and streets.” Additionally, the Secretary of the military department may terminate all or part of any easement granted under § 2668 for failure to comply with the terms of the grant.¹³⁷

3. Closed Base Orders

Vandenberg Air Force Base, like many military bases, is a closed base, which means that non-military and non-DoD personnel may not enter without the express permission of the Installation Commander.¹³⁸ The Installation Commander has granted limited permission to individuals who have not been previously barred from the installation, to engage in peaceful protest activity in the designated area adjacent to the intersection of State Highway 1 and California Boulevard, known as the “highway easement.”¹³⁹

4. Protest History

Over two decades ago, a large number of protestors demonstrated against the military launch programs at Vandenberg Air Force Base.¹⁴⁰ The base responded with an extensive use of base resources to control the crowds. During subsequent litigation in 1989, the Installation Commander entered into a settlement at the United States District Court for the Central District of California. Pursuant to this settlement, the Installation Commander agreed to issue a policy authorizing a designated peaceful protest area (Protest Activity Notice) at the intersection of California Boulevard/Highway 1 at the main gate of the base so long as the protestors did not encumber roadways or engage in activities that would be unsafe or materially interfere with the military mission.¹⁴¹ The installation commander’s

¹³⁶ EASEMENT, *supra* note 134 at 1; *see also* 10 U.S.C. §2668 (2008).

¹³⁷ 10 U.S.C. §2668 (d) (2008).

¹³⁸ Memorandum from Col Nina Armagno, 30th Space Wing Installation Commander, Vandenberg Air Force Base, to the General Public (not dated), <http://www.vandenberg.af.mil/shared/media/document/AFD-060906-011.pdf> (last visited May 1, 2012). For example, DoD civilian employees, and active duty military, their dependants, and their short-term guests are granted access to the base. All other personnel, such as contractors, tourists, and delivery personnel may be granted access to the base only after each individual undergoes a criminal background check. Access to the base is primarily controlled through security personnel at base entry points.

¹³⁹ Order from Col Nina Armagno, 30th Space Wing Installation Commander, Vandenberg Air Force Base, to the General Public (not dated), <http://www.vandenberg.af.mil/library/factsheets/factsheet.asp?id=4562> (last visited May 1, 2012).

¹⁴⁰ Government’s Motion in Response to Defense Motion to Dismiss at Exhibit 7, *United States v. Kelly*, Nos. 2686661, 2686227, 2686662 (C.D. Cal. Sept. 15, 2011).

¹⁴¹ *Fahrner v. Olivero*, No. CV 88-05627, (C.D. Cal. May 9, 1989) (creating a stipulation for

Protest Activity Notice implements requirements for providing notice of protests to the base, designating the area where the protestors may stand, and limiting items that may be brought to the protest area.¹⁴² The designated protest area sits on the boundary of the highway easement, but the entire area is within Vandenberg Air Force Base property. While the highway easements are subject to concurrent jurisdiction with Santa Barbara County, Vandenberg Air Force Base retains and exercises the sole authority for prosecuting uniquely federal crimes along with any crimes that are of special importance to the base security and safety.¹⁴³ The highway passes through United States property that is owned in fee simple and is subject to exclusive federal jurisdiction.

The protestors claim that highways, regardless of any underlying easement, are traditional public forums which give them an absolute, unrestricted First Amendment right of free speech that cannot be regulated or disallowed absent a compelling reason.¹⁴⁴ Therefore, they argue that the Government has no authority to create the Protest Activity Notice, debar protestors who violate the Protest Activity Notice, or charge criminal trespass for violating a debarment order.

B. The Parker Decision, 2011

In 2006, Hobert Parker, Jr. protests without prior authorization on an easement for a public road through Vandenberg Air Force Base. He received three citations for trespass in violation of 18 U.S.C. § 1382.¹⁴⁵ Additionally, the Installation Commander debarred Parker from the base. Before the federal magistrate, the defendant argued the easement and concurrent jurisdiction destroyed the Government's absolute ownership. Parker was convicted under 18 U.S.C. § 1382; the district court upheld his convictions on appeal.¹⁴⁶ The district court analyzed *Mowat*, *Vasarajs*, and *Holdridge* and noted that while the ownership prong was not a stated element of 18 U.S.C. § 1382, that element had developed through case law based upon the common law of trespass.¹⁴⁷ As a result of its analysis of

compromise settlement and order of dismissal).

¹⁴² Order from Col Nina Armagno, 30th Space Wing Installation Commander, Vandenberg Air Force Base, to the General Public (not dated), <http://www.vandenberg.af.mil/library/factsheets/factsheet.asp?id=4562> (last visited May 1, 2012).

¹⁴³ Government's Motion in Response to Defense Motion to Dismiss at Exhibit 7, *United States v. Kelly*, Nos. 2686661, 2686227, 2686662 (C.D. Cal. Sept. 15, 2011).

¹⁴⁴ The protestors have relied upon *United States v. Flower*, 407 U.S. 197 (1972), to support their argument that the designated protest area is a public forum. See *United States v. Apel*, No. 1981283-RCF, slip op. at 7 (C.D. Cal. Jul. 21, 2010). Protestors have also argued that *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), supports the theory that any public highway or street, whether it rests on an easement or otherwise, is a traditional public forum.

¹⁴⁵ *United States v. Parker*, 651 F.3d 1180, 1181 (9th Cir. 2011).

¹⁴⁶ *United States v. Parker*, No. CR 09-515, slip op. at 10-11 (C.D. Cal. May 3, 2010).

¹⁴⁷ *Id.*

Eighth and Ninth Circuit case law, the district court held the easement did not destroy the Government's exclusive possession of the road.¹⁴⁸ Parker appealed.

In an un-published decision dated 24 May 2011, the Ninth Circuit reversed the district court's decision, holding that an easement and concurrent jurisdiction defeated the absolute ownership and control elements necessary for the Government to prevail on 18 U.S.C. § 1382 prosecutions.¹⁴⁹ What at first was a potentially inconsequential, unpublished Ninth Circuit decision, became a published decision with significant ramifications. The published decision mirrored the unpublished decision exactly: "We have interpreted section 1382 to require the government to prove its absolute ownership or exclusive right of possession of the property upon which the violation occurred."¹⁵⁰ The court relied upon *Packard*, *Vasajaras*, and *Douglass* to conclude that exclusive possession—without an easement—was necessary for a successful prosecution under 18 U.S.C. § 1382.¹⁵¹ In reaching this result, the *Parker* court noted multiple courts had reaffirmed and applied the ownership prong.¹⁵² The *Parker* court cited the Second Circuit's *Allen* decision and the Eighth Circuit's *Holdridge* decision for the proposition that other circuits had concluded that either absolute ownership or exclusive right of possession was necessary for an 18 U.S.C. § 1382 charge.¹⁵³ Interestingly, the opinion even singled out the United States Attorney's Manual as a source, because, in the court's view, the manual adopted exclusive possession and control as necessary elements of trespass.¹⁵⁴ *Parker* seemed to merge a series of interpretations of the ownership prong into the strict *Watson* standard from 1948. Ultimately, the court decided that the road where the defendant was cited for trespass was "established pursuant to a public road easement" and "subject to concurrent jurisdiction" and ultimately held "the government does not have an exclusive right of possession" over the property.¹⁵⁵

After the Ninth Circuit issued its relatively short, unpublished opinion without much analysis, one of the protestors asked the Ninth Circuit panel to publish the decision.¹⁵⁶ The protestor insisted that the *Parker* decision not only clarified a rule of law, but also carried legal significance because of the number of roadway

¹⁴⁸ *Id.*

¹⁴⁹ See *United States v. Parker*, 2011 WL 2006347 (9th Cir. May 24, 2011) (unpublished in the Federal Reporter).

¹⁵⁰ *Parker*, 651 F.3d at 1181.

¹⁵¹ *Id.*

¹⁵² *Id.* at n.2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*, see also UNITED STATES DEPARTMENT OF JUSTICE, *Title 9, Protection of Government Property—Military Bases*, in UNITED STATES ATTORNEY'S MANUAL § 1634 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01634.htm (last visited 1 May 2012) (citing *Holdridge*, 282 F.2d at 309, for the proposition that § 1382 "applies to any military . . . installation over which the United States has exclusive possession").

¹⁵⁵ *Parker*, 651 F.3d at 1184.

¹⁵⁶ Request for Publication of Disposition at 1, *United States v. Parker*, 651 F.3d 1180 (No. 10-50248) (9th Cir. Jul. 18 2011).

easements that passed through military installations.¹⁵⁷ Additionally, the protestor noted that *United States v. Apel* was on appeal before the Ninth Circuit on similar grounds.¹⁵⁸ The Ninth Circuit granted the request and changed the designation of the *Parker* decision from unpublished¹⁵⁹ to published—without an opportunity for the Government to object¹⁶⁰—in a move that changed the rules of engagement for the military.

C. *United States v. Apel*, 2012

While the Ninth Circuit was deliberating over *Parker*, another Vandenberg Air Force Base protest case was winding its way through the appellate process. In *United States v. Apel*, John Apel, the defendant and a regular protestor, had been debarred from Vandenberg Air Force Base in 2003 for throwing his own blood on an entrance sign near the designated protest area. In January and March 2010, he was cited for trespass for reentering the base at the designated protest area, thus violating his debarment order. At the time of the initial trial in July 2010, the *Parker* case had not even been argued before the Ninth Circuit. Regardless, only a few facts distinguished the two cases. First, the *Apel* case arose from the Highway 1 easement in a Government-maintained, designated protest area, whereas the *Parker* case arose from the shoulder of Highway 246. Second, the granting document for the Highway 1 easement at issue in *Apel* contained an additional phrase that expressly reserved authority for the installation commander to prescribe rules to “protect the interests of the United States.”¹⁶¹ Finally, the Memorandum of Understanding between the United States Air Force and the District Attorney had changed since *Parker* arose; Vandenberg Air Force Base reserved sole prosecutorial authority over protest-related activities.¹⁶²

At federal magistrate court, the defendant filed a motion to dismiss the charges on First Amendment grounds, claiming that the designated protest area was a traditional public forum from which he could not be excluded.¹⁶³ The magistrate

¹⁵⁷ *Id.* at 2.

¹⁵⁸ *Id.*

¹⁵⁹ *United States v. Parker*, 2011 WL 2006347 (9th Cir. May 24, 2011) (unpublished in the Federal Reporter).

¹⁶⁰ *United States v. Parker*, Nos. 10-25028, 10-50250, 1050251, slip op. at 1 (9th Cir. Aug 22, 2011) (per curiam) (stating “[t]he Memorandum disposition filed May 24, 2011, is redesignated as a per curiam Opinion and refiled as of this date. No new petition for rehearing or rehearing en banc will be entertained”).

¹⁶¹ EASEMENT, *supra* note 134 at 1. Assuming, *arguendo*, that since both easements for roadways were granted pursuant to 10 U.S.C. § 2668, the installation commander’s authority to proscribe rules is inherent in both documents.

¹⁶² Government’s Motion in Response to Defense Motion to Dismiss at Exhibit 7, *United States v. Kelly*, Nos. 2686661, 2686227, 2686662 (C.D. Cal. Sept. 15, 2011).

¹⁶³ Courts have generally divided Government property into three categories of public fora: traditional public fora, designated public fora, and nonpublic fora. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964 (9th Cir. 1999). Although the area of law regarding designated public fora has been

judge disagreed, holding that the designated protest area was not a traditional public forum under *Flower* or *Albertini* and the Installation Commander could preclude individuals from the area.¹⁶⁴ On appeal to federal district court, the defendant raised two errors: the magistrate judge erred in finding the area was a limited public forum, and the government lacked absolute ownership or exclusive right to possession of the property in question.¹⁶⁵ Notwithstanding the defendant's arguments, the district court ruled for the Government and held that the designated protest area was a limited public forum.¹⁶⁶ More importantly, the district court found that the Government's substantial control over the designated protest area was sufficient to sustain the defendant's conviction.¹⁶⁷ Citing to the Ninth Circuit's *Vasarajs* decision and the First Circuit's *Ventura-Melendez* decision, the district court determined "[i]t is undisputed that the Government owns the land. . . . [a]lthough the ownership interest is subject to the easement," the federal grant of the easement is subject to limitations in order to protect the interests of the United States.¹⁶⁸ The district court rejected a strict interpretation of the ownership prong and instead used *Ventura-Melendez*'s occupation or control test. *Apel* appealed the decision to the Ninth Circuit, again, before *Parker* was decided.

A few months after the district court decision and *Apel*'s appeal to the Ninth Circuit, the *Parker* court issued an unpublished decision in May 2011 and then the published decision in late August 2011. The Government was at a crossroads whether to continue with the *Apel* appeal given the similarities in the cases. Hopeful that *Parker* could be affected in some manner by *Apel*, the Government presented oral arguments before a three-judge panel of the Ninth Circuit on 13 April 2012. Just a few days later, on 25 April 2012, the Ninth Circuit released its published decision in the *Apel* case.¹⁶⁹ In a bittersweet opinion, the court stated that "[a]lthough we question the correctness of *Parker*, it is binding, dispositive of this appeal, and requires that *Apel*'s convictions be reversed."¹⁷⁰ The defendant's trespass conviction was thus overturned. The Ninth Circuit recently denied an *en banc* rehearing.

subject to some confusion, the Ninth Circuit recognizes that designated public fora include a further subcategory of limited public fora. Hopper, 241 F.3d at 1074. This approach has also been adopted by the Supreme Court. See *Good News Club v. Milford Central School*, 533 U.S. 98, 106-107 (2001).

¹⁶⁴ *United States v. Apel*, No. 1981283-RCF, slip op. at 7 (W. Div. C.D. Cal. Jul. 21, 2010) (order denying defendant's motion to dismiss) (citing *United States v. Albertini*, 472 U.S. 675, 685 (1985), and distinguishing *United States v. Flower*, 407 U.S. 197, 198 (1972), for the propositions that the closed base order and restrictions placed upon the designated protest area "do[] not alter the primary mission of the base and is not sufficient to transform the protest area into a traditional public forum" from a limited public forum).

¹⁶⁵ *United States v. Apel*, No. CR 10-830-JFW, slip op. at 3 (C.D. Cal. Dec. 28, 2010).

¹⁶⁶ *Id.* Additionally, the district court "conclude[d] that, whether or not the designated protest area . . . is a public forum, the military may properly exclude recipients of valid bar letters . . . without violating the First Amendment." *Id.* at 5.

¹⁶⁷ *Id.* at 5.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

D. Critique of the Ninth Circuit's Approach

1. No Clear Standard for the Ownership Prong

Courts since *Watson* have contemplated whether the Government must demonstrate some type of an ownership element in order to prevail on an 18 U.S.C. § 1382 charge. However, no federal district court or federal circuit court has used the terms “absolute ownership or exclusive right of possession” in a consistent manner. Indeed, no court has explained where the requirement originated! For example, the *Douglass* court used the terms “exclusive right of use,” but found the exclusivity was not destroyed by allowing the public to traverse the roadway.¹⁷¹ The *Packard* court, like the *Douglass* court, relied upon the less exacting standard of “requisite ownership and control” holding that the Government met its burden even when the public had access to the area.¹⁷² Finally, the *Vasarajs* court only addressed “absolute ownership” and not “exclusive right to possession” in order to answer the limited question of whether control was necessary to maintain ownership.¹⁷³ Because evidence existed to show that the Government owned the land, the *Vasarajs* court did not rule on whether an easement may affect absolute ownership or exclusive right of possession. The *Vasarajs* holding, then, is of little value in the *Parker* case absent any discussion of an easement. Indeed, *Mowat* was the only court to use the strict language of the ownership prong from *Watson*.¹⁷⁴ The *Mowat* case, however, is silent regarding the origin of the requirement. Rather, it appears that in *Mowat*, the element was used because the parties stipulated to the need for the Government to prove absolute ownership or exclusive right of possession. If anything, *Parker*'s reliance upon these Ninth Circuit cases, which lack analysis or consistency, leaves one wondering what facts are truly required to meet the now-strict ownership prong.

2. No True Precedent

The *Parker* court's reliance upon and interpretation of other Ninth Circuit cases falls short. To begin, *Parker*'s analysis is based on an incorrect reading of the holding in the *Packard* case. *Parker*'s holding quotes “absolute ownership, or an exclusive right to the possession, of the road” as tied to the *Packard* court's holding.¹⁷⁵ However, a closer look at *Packard* reveals that the court was only quoting *Watson* to explain the basis of the defendant's claim; the court never used the “absolute” and “exclusive” language in its decision.¹⁷⁶ Additionally, because the Ninth Circuit itself has inconsistently addressed the ownership prong, its reliance upon those cases offers an incomplete analysis of 18 U.S.C. § 1382. The *Parker*

¹⁷¹ *United States v. Douglass*, 579 F.2d 545, 547 (9th Cir. 1978).

¹⁷² *United States v. Packard*, 236 F.Supp. 585, 586 (9th Cir. 1964), *aff'd*, 339 F.2d 887 (9th Cir. 1964), *Douglass*, 579 F.2d at 547.

¹⁷³ *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990).

¹⁷⁴ *See United States v. Mowat*, 582 F.2d 1194, 1206 (9th Cir. 1978).

¹⁷⁵ *Packard*, 236 F.Supp at 586.

¹⁷⁶ *Id.*

court also falls short in analyzing the other circuit opinions and in citing the United States Attorney's Manual as having precedential value. For example, the *Parker* court relied upon the *Allen* decision to support a strict interpretation of the ownership prong, but the *Allen* court did not require ownership at all as an element of 18 U.S.C. § 1382.¹⁷⁷ Further, the Attorney's Manual failed to analyze any cases other than *Holdridge* and is an insufficient resource upon which to base precedent. Therefore, although the *Parker* court may have felt bound by previous cases,¹⁷⁸ in fact only the *Parker* court and the *Watson* court have found that the Government lacked the ability to charge the defendant with trespass.

3. Lack of Analysis

The *Parker* court's holding that the Ninth Circuit has "interpreted section 1382 to require the government to prove its absolute ownership or exclusive right to possession of the property"¹⁷⁹ lacks any useful analysis. The *Parker* court's analysis of the facts in the case is contained in a few sentences.

[E]vidence conclusively shows that Ocean Avenue had been established pursuant to a public road easement. . . . The road is subject to concurrent jurisdiction . . . with the county exercising primary responsibility for the enforcement of criminal laws. . . . Because the government does not have an exclusive right of possession over Ocean Avenue. . . [the offenses] cannot constitute violations of section 1382.¹⁸⁰

The court fails to analyze the terms of the federal easement at issue. Certainly, the terms of the federal easement, as noted by the district court in the *Apel* decision, should be illustrative of the federal government's ability to maintain control over the easement. Additionally, *Parker's* analysis of concurrent jurisdiction is sketchy at best. The court failed to determine whether concurrent jurisdiction serves to undermine the ability to protect federal property pursuant to 18 U.S.C. § 1382's protections.

V. ALTERNATIVE APPROACHES WHERE 18 U.S.C. § 1382 IS UNAVAILABLE

So, where do we go in the aftermath of *Parker*? At this juncture, one may argue that it is only the easement and not concurrent jurisdiction that would destroy

¹⁷⁷ *United States v. Allen*, 924 F.2d 29, 31 (1991). The *Allen* court held that the government ownership of the land was not required to support a trespass conviction in waters around a Navy vessel.

¹⁷⁸ *See United States v. Parker*, 651 F.3d 1180, 1183-1184 (9th Cir. 2011). "[O]ur circuit's requirement that the government prove absolute ownership or exclusive right of possession . . . has been reaffirmed and applied by multiple panels We must therefore follow this precedent as the law of the circuit Only the en banc court can overturn a prior panel precedent."

¹⁷⁹ *Id.* at 1181.

¹⁸⁰ *Id.* at 1184.

the Government's ability to prevail on a protest theory. That argument, however, may not succeed. Because *Parker* mentions concurrent jurisdiction as a barrier to exclusive right of possession without further analysis, a defendant may argue that *Parker* stands for the proposition that concurrent jurisdiction also destroys the Government's absolute ownership or exclusive right to possession.¹⁸¹ With the Ninth Circuit's recent denial of an *en banc* rehearing of the *Apel* decision, military bases in the Ninth Circuit are potentially limited to only citing for trespass in those cases where an individual is on exclusive jurisdiction without an easement. The government can only utilize trespass as a recourse on federal enclaves. One thing seems clear, however: the Ninth Circuit's *Parker* and *Apel* decisions have narrowed an installation commander's ability to protect all persons and property under her command. The Ninth Circuit has thus narrowed the scope of an installation commander's control.

While the *Parker* and *Apel* decisions concerned the actions of some protestors, the impact of these cases is much broader. One needs only consider the number of bases that have areas of concurrent jurisdiction or easements throughout base or in base housing. As such, the military has relied upon 18 U.S.C. § 1382 to protect its property from threats to base safety and security. In light of *Parker*, even those individuals who have been debarred from a military installation may be able to enter those areas on easements or concurrent jurisdiction. Provided they do not commit other criminal acts, an installation commander's debarment order is a feeble weapon without the threat of charging the violator with trespass.

A. A 50 USC § 797 Alternative

An individual charged with 18 U.S.C. § 1382, a class B misdemeanor, faces a maximum penalty of a six-month term of imprisonment, probation, and a fine under Title 18, United States Code.¹⁸² Without trespass in the base defense arsenal, another alternative may be to publish a security regulation limiting those who could come onto the installation. That regulation can include requirements similar to a Protest Advisory: only those individuals who are not otherwise debarred from the installation may be present in the designated protest area. Anyone who violates that security regulation¹⁸³ could then be cited with a violation of 50 U.S.C. § 797, *Penalty for violation of security regulations and orders*.¹⁸⁴ If charged with a violation of 50 U.S.C. § 797, a Class A misdemeanor, an individual is subject to

¹⁸¹ See *id.* (citing *United States v. Vasarajs*, 908 F.2d 443, 447 (9th Cir. 1990) as supporting “the view that the government ‘must exercise control over its property in order to preserve the right to exclude other’s from it pursuant to § 1382.’”).

¹⁸² 18 U.S.C.A. § 1382 (1994).

¹⁸³ See DoDI 5200.8, note 12, at 2. Commanders should “comply with the policies and procedures established by the Head of the DoD Component concerned with disseminating security regulations. All security orders and regulations shall be submitted for review to ensure legal sufficiency by the servicing Judge Advocate or other legal advisor to the command.”

¹⁸⁴ 50 U.S.C.A. § 797 (2006).

one year imprisonment, probation, and a fine under Title 18, United States Code.¹⁸⁵ This statute also requires that certain elements be met: a military officer, or listed equivalent, must issue or approve the defense property regulation or order; the regulation must protect a Department of Defense property; and the regulation must address one of the listed issues, to include entry onto the base or removal of unauthorized persons.¹⁸⁶ Although some courts have held that such a regulation must be published in the Federal Register,¹⁸⁷ this method may still be a viable alternative with proper planning.

B. Revising Debarment Letters

One important duty of the base legal office is to advise installation commanders on debarment orders and any language that can be legally included in that written order. Usually, that advice will include modifying language that places limits where the debarred person can and cannot go. For example, debarment orders may allow the individual to access the base to obtain medical care. Likewise, debarment orders typically include a long list of areas where the individual cannot go, with language that violating terms of the debarment order may result in a trespass citation pursuant to U.S.C. § 1382. Post-*Parker*, base legal offices, especially for those bases in the Ninth Circuit, should re-examine their debarment orders to determine whether all of its terms are enforceable by 18 U.S.C. § 1382.

The numerous possibilities of base jurisdictions and easements amongst bases make it difficult to provide one legal fix to all debarment letters. However, once the base legal office understands the local issues, crafting an appropriate debarment letter becomes easier. First, the base legal office should become familiar with how the base property was initially acquired before identifying all of the easements and types of jurisdiction on the base property. Meeting with Security Forces, the Real Property office, and the base historian would be a helpful initial step. Second, the base legal office should analyze what areas of base property may be impacted by *Parker* and *Apel*, such as easements for rights-of-way, public roads that were carved out in the initial property transaction documents, or easements by necessity. Finally, draft the debarment letter to allow debarred individuals to use impacted roads or areas. For example, such easement debarment language may read: “you may travel on Highway 1 through base property and make use of the shoulders of Highway 1 for emergency use only.” Finally, if a base legal office determines that 18 U.S.C.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Compare *United States v. Hall*, 742 F.2d 1153, 1155 (9th Cir. 1984) (finding that a Davis-Monthan Air Force Base regulation denying entry to the base need not be published “so long as the appellants had actual and timely notice of its terms” in accordance with 50 U.S.C. § 797 where defendant was being charged with 18 U.S.C. § 1382), with *United States v. Aarons*, 310 F.2d 341, 346 (2nd Cir. 1962) (holding that while a Coast Guard order restricting harbor access during a submarine launch should have been published according to 44 U.S.C. § 301-314, the Federal Register Act, the failure to publish was not fatal where the defendant had actual knowledge of the regulation).

§ 1382 would be largely ineffective given the base's jurisdiction, consider writing the debarment letter in conjunction with a security regulation to warn trespassers they may be cited with 50 U.S.C. § 797 if they enter certain areas of base property.

C. Considering Base Jurisdiction

Additionally, base legal offices may wish to evaluate whether allowing jurisdictional changes in leased housing areas or other areas on base would be in an installation commander's best interest. Alternately, base legal offices may wish to evaluate charging alternatives to 18 U.S.C. § 1382 based upon the base's jurisdiction. Under *Parker*, debarring individuals from areas of concurrent jurisdiction may prove problematic in the Ninth Circuit. Because jurisdictional changes involve several parties and can be a lengthy process, evaluating base jurisdiction should include an analysis of each base's unique situation, proximity to local law enforcement, and the surrounding community. If a base has several easements or large areas of concurrent jurisdiction, Memoranda of Understanding and healthy working relationships with local law enforcement may serve to adequately protect the base's interests. If the base is unable to act because of the Ninth Circuit's rulings, local law enforcement may be able to secure the area by enforcing local ordinances. Obviously, the *Parker* decision does not diminish the installation commander's ability to protect the military installation in the event of an actual crime: assault and malicious mischief, or any number of state crimes may be assimilated to fit a given situation in order to protect the situation. Evaluation of these additional federal or assimilated crimes would be another tool in the legal office's arsenal in these situations.

VI. CONCLUSION

With a distinct split between the Sixth and Ninth Circuits and with inconsistent use of terminology for 18 U.S.C. § 1382 prosecutions, this issue is ripe for Supreme Court review. Even though *Parker* held that precedent required that the Government prove absolute ownership or exclusive right of possession, that opinion is in direct conflict with the Sixth Circuit's *McCoy* holding that the Government's possessory interest would be sufficient for the Government to prevail under 18 U.S.C. § 1382. Further, the body of 18 U.S.C. § 1382 case law does not define a clear standard for ownership of the property, nor does a clear precedent emerge. Overall, a lack of analysis of the ownership prong leaves one wondering what standard the Government must meet to prevail on this charge. While the Supreme Court did not directly rule on the ownership prong in *Albertini*, that Court's reasoning and deferral to the authority of an installation commander cannot be easily rationalized with the *Parker* court's reasoning. Certainly, the impact of *Parker* in the Ninth Circuit is yet to be fully grasped. Meanwhile, base legal offices should be aware of these cases in order to be proactive with solutions to help installation commanders protect their people, property, and missions.

THE HUNT FOR HOME: EVERY MILITARY FAMILY’S BATTLE
WITH STATE DOMICILE LAW

CAPTAIN DEAN W. KORSAK*

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I. INTRODUCTION

Domicile impacts every servicemember and military family, regardless of service branch, rank, or length of service. For purposes of state income taxation, servicemembers and their spouses enjoy statutory protection of their domicile...if they take steps to protect it. The intent of this article is to increase the legal assistance practitioner's competence in advising clients on domicile and more specifically when a state challenges domicile. Advice provided to servicemembers and their spouses must be more preventive than responsive because litigation involving domicile with state tax authorities has increased with the enactment of the Military Spouses Residency Relief Act (MSRRA), a recent amendment to the Servicemembers Civil Relief Act (SCRA). Without proper planning and documentation, servicemembers and their spouse can easily trigger tax litigation by claiming exemption from state income tax under the MSRRA, but who may not meet the requirements of the MSRRA or have the documentation to prove their position.

This article is organized with a flow from academic to practical. Section II begins with the history of the legal concept of domicile, discusses when domicile may be important, and when the SCRA and MSRRA protect domicile. Cases decided by the Supreme Court of the United States where domicile was in focus are used to explain the history and concept of domicile in the United States. Section III discusses how the United States Congress altered traditional domicile analysis for servicemembers and their spouses for tax purposes. This provides the background information for the discussion in Section IV which analyzes how states have pursued servicemembers and their spouses for income tax. Section IV also includes a sampling of specific state tax litigation involving the SCRA and MSRRA. Section V presents a position that advocates how the SCRA and MSRRA should preempt the current domicile analysis employed by the courts. Traditional domicile analysis is still used by states to determine if a servicemember or spouse have sufficient contacts with a state to declare it as a person's domicile. The position advocated in this article is that servicemembers and spouses engage in certain activity that is inherent to living in a state pursuant to military orders that should not be held against them in light of the SCRA and MSRRA. This position concludes that certain actions should be taken to protect servicemembers and their spouses, including: amending the SCRA, increasing preventive law activities, and increased awareness for legal assistance attorneys on how to prevent and respond to domicile litigation.

II. DOMICILE PROPER

When attempting to understand a topic it is useful to understand the history of key words. The word domicile¹ in noun form is inherited from the Middle French

¹ The spelling of the word has changed over time, commonly spelled "domicil" in older cases, but presently spelled "domicile."

with the same spelling.² The basis of the word is from the Latin *domus*, meaning house, and *colere*, meaning dwell.³ Another source reveals that there is evidence of the word domicile in use as early as 1442 A.D. in noun form, derived from the Latin *domicilium*, “probably from earlier *domo-colyom*,” meaning “house-dwelling (*domus* house + *colere* dwell).”⁴ The word domicile has long been in use and concisely summarizes a legal concept applicable in many areas of the law.

Domicile is relevant in many areas of the law and can change every time a person relocates to a new state. Both the English common law and American courts have struggled with the concept of domicile. For those who frequently move to different states, this struggle has resulted in the need to be continually cognizant of where one calls home and the legal pitfalls that could ensnare the unaware. A summary of the cases which follow is that the concept of domicile involves two elements: physical presence and intent to permanently remain. The physical presence aspect is fairly settled; if a person has had no presence in a jurisdiction then that person cannot be domiciled there. It is the issue of intent that creates the legal difficulty in domicile analysis.

A. Common Law Roots

Regarding the struggle of the courts to define what type of intent is required coupled with presence to result in domicile, an 1820 decision declared that “[an] acquired domicil is not lost by mere abandonment, but continues until a subsequent domicil is acquired, which can only be, *animo et facto*...toward an intended domicil.”⁵ At issue in that case was the domicile of Dr. Munroe, a surgeon in the late 1700s; more specific, whether he intended to remain and die in Scotland or if he was simply visiting.⁶ The Munroe case provides a new well-settled guidepost that domicile cannot be haphazardly changed; the change must be by intentional act.

This intent “*animo et facto*” was again used to articulate that a change of the domicile a person chooses “can only be effected *animo et facto*—that is to say, by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends.”⁷ Of much importance to the present discussion, *Udny v. Udny* held that a domicile of choice (which is basically where a person settled), once abandoned, reverted back to the domicile of origin (which is usually the place of birth, the parents’ or mother’s domicile).⁸ In *Udny*, the respondent’s father was born in Scotland, then leased a house in London, left an

² THE WORLD BOOK DICTIONARY 624 (2003).

³ *Id.*

⁴ THE BARNHART DICTIONARY OF ETYMOLOGY (Robert K. Barnhart ed., 1988).

⁵ *Munroe v. Douglas* (1820) 56 Eng. Rep 940 (Ch.).

⁶ *Id.* at 940-41.

⁷ *Udny v. Udny*, (1869) L.R. 1 H.L. Sc. 448 (Lord Hatherley LC).

⁸ *Id.* at 460.

uninhabitable castle in Scotland, frequently visited Scotland, then sold the London lease and fled to France to avoid creditors, later returned to Scotland where he had relations with the respondent's mother, resulting in the respondent's birth.⁹ Where was the father's domicile?

One of the Lords commented, "[that] which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicile, no such difficulty arises if it be simply held that the original domicile revives."¹⁰ Another Lord explained:

Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation.¹¹

These authorities are among those forming the essence of domicile and help document the struggle courts have encountered in definitively deciding what constitutes domicile.¹² The reasoning from these authorities makes clear the person affected determines domicile, not external forces. In addition, actions demonstrate a person's intent. These guideposts establish a context and timeless principle for understanding issues of domicile for military families. Before delving into analysis on what American courts have said about domicile, one must understand why this issue is so important.

B. When Domicile is Important for Servicemembers and Spouses

There are certain events where domicile is key. In a broad sense, domicile dictates our rights and obligations relating to a jurisdiction. Other resources exist that provide a comprehensive discussion on when domicile is important.¹³ The important aspect of domicile to note for purposes of this article is that different statutes control domicile for different purposes. This impacts the history and development of

⁹ *Id.* at 450.

¹⁰ *Id.* at 458 (Lord Westbury).

¹¹ *Id.* (stated by Lord Westbury).

¹² Joseph Henry Beale, *Social Justice and Business Costs – A Study in the Legal History of Today*, 49 Harv. L. Rev. 593, 595-96 (1936).

¹³ See e.g. Major Wendy P. Daknis, *Home Sweet Home: A Practical Approach to Domicile*, 177 MIL. L. REV. 49 (2003) (discussing various aspects of domicile and providing a checklist of items relevant to domicile analysis).

domicile because certain laws defining domicile will only apply for a specific purpose. For example, a municipal elections code impacted a high profile run for particular political office.¹⁴ Domicile for political office is of little relevance to active duty personnel, so the article does not focus on issues like this. States often provide benefits to those domiciled there, but a servicemember or spouse may not qualify for a benefit if required qualifications are not maintained. Alaska law provides a great example of a benefit that the SCRA and MSRRA may not extend to because the domicile protections are for purposes of taxation.¹⁵

Alaska has what is called a Permanent Fund Dividend (PFD) established by amendment to the state's constitution, funded by a percentage of proceeds from state-owned mineral leases, and distributed to qualifying Alaskans.¹⁶ Provision is made in the PFD for Alaska domiciled servicemembers to continue to benefit from the payments even though they are absent from the state due to military orders.¹⁷ Even if a resident satisfies the basic domicile requirements, the resident must still satisfy the PFD's allowable absence provisions.¹⁸ There is a presumption that residency or domicile for purposes of the PFD distribution is lost after five years of living elsewhere, and this is applied to servicemembers claiming Alaska domicile.¹⁹ Federal law did not protect a servicemember's domicile in Alaska for PFD distributions where the servicemember failed to overcome the "presumption that after five years of absence from Alaska, he was no longer a resident."²⁰ This is because Alaska's PFD has been distinguished from falling "within the rubric of taxation," instead being described as "an economic benefit," as opposed to the "detriment" of taxation.²¹ State benefits should not be the focus of domicile litigation involving the SCRA or MSRRA.

Another area where domicile is important but not the focus of this article is litigation involving domestic relations. Domicile analysis for domestic relations is anything but uniform within the United States. For example, a servicemember may be able to petition for divorce in a state that is not necessarily the member's domicile if residency for a mere thirty days,²² six weeks,²³ or six months²⁴ is satisfied.

¹⁴ *Maksym v. Board of Election Com'rs of City of Chicago*, 950 N.E.2d 1051 (Ill. 2011) (involving Rahm Emmanuel's candidacy for mayor of the City of Chicago, who previously served as the Chief of Staff for the President of the United States).

¹⁵ 50 U.S.C. App. § 571 (2012).

¹⁶ ALASKA STAT. § 37.13.010 (2012) (enacting the PFD created under Article IX, Section 15 of Alaska's constitution).

¹⁷ ALASKA STAT. § 43.23.008(a)(3)(A) (2012).

¹⁸ *Schikora v. Dep't. of Revenue*, 7 P.3d 938 (Alaska 2000) (discussing ALASKA STAT. §§ 01.10.055, 43.23.005(a)(2-4), 43.23.095(8) (1997)).

¹⁹ *Eagle v. Dep't of Revenue*, 153 P.3d 976 (Alaska 2007).

²⁰ *Id.* at 977.

²¹ *Id.* at 979.

²² ALASKA STAT. § 25.24.900 (2012) (stating "A person serving in a military branch of the United States government who has been continuously stationed at a military base or installation in the state for at least 30 days is considered a resident of the state for the purposes of this chapter.").

²³ NEV. REV. STAT. § 125.020 (2012).

²⁴ N.M. STAT. § 40-4-5 (2012) (stating that for purposes of dissolving a marriage, jurisdiction

This raises the issue of whether a domiciliary provision for the convenience of a servicemember and spouse should be counted against them as a declaration of domicile. North Carolina provides that military personnel may obtain a divorce after meeting a six month residency requirement, but has interpreted that law (which does not expressly state a domiciliary related purpose) to still require physical presence and the requisite intent to establish domicile.²⁵ Unlike North Carolina, Alaska, has only a thirty day residency requirement for divorce and dissolution of marriage actions, and this alone vests jurisdiction, even if a servicemember is domiciled elsewhere.²⁶ States like Alaska, with a more generous statute, provide servicemembers with a marked advantage over states with laws like North Carolina. But, the provisions in the SCRA and MSRRA do not exist for protecting the domicile of servicemembers or spouses for purposes of domestic relations. It is the issue of income taxation that is the focus of the SCRA and MSRRA domicile protections, and that will be the focus of analysis later in the article.²⁷

No matter the legal issue involved, the English common law to decisions by the Supreme Court of the United States make one thing clear: while domicile involves a person's choice to abandon and expressly choose a new domicile, courts never accept a person's declaration alone on the matter as proof certain of intent. Intent requires corroborating evidence, which is why a factors based analysis has developed in domicile analysis.

C. Supreme Court Development of Domicile Analysis

The English common law holdings establishing domicile require both a physical presence and the intent to remain with permanency were adopted by courts in the United States.²⁸ This section discusses cases decided by the Supreme Court of the United States on the issue of domicile and traces the Court's development of common law doctrine. These decisions provide an understanding of traditional domicile analysis. The Court's domicile analysis provides a basis to understand how the SCRA and MSRRA alter traditional domicile analysis, and also some legal guideposts when analyzing domicile.

is premised on six months residency prior to filing suit and domicile in the State, but military personnel residing or orders in the State "for such period of six months shall, for the purposes hereof, be deemed to have a domicile of the state and county where such military base or installation is located....").

²⁵ N.C. GEN. STAT. § 50-18 (2012); *see also* *Martin v. Martin*, 118 S.E.2d 29, 31 (1961) (interpreting Section 50-18 as only satisfying the State's residency requirement and leaving intact the traditional domicile requirements, stating that "[there] must be both residence and animus manendi" for jurisdiction to vest).

²⁶ *Lauterbach v. Lauterbach*, 392 P.2d 24 (Alaska 1964) (holding that an Alaska court had jurisdiction over a divorce action filed by an Air Force officer who met the then one-year residency requirement to file such actions, and that the officer's being domiciled in another state was immaterial, expressly holding that "[d]omicile is not the sole jurisdictional basis for divorce unless made so by statute.").

²⁷ *See infra*, Section V.

²⁸ *See Mitchell v. United States*, 88 U.S. 350 (1874).

1. Early Supreme Court Domicile Precedent

An early case involving domicile was decided in an era when war was fought in the backyards of America, not overseas. A person noted only as “Mitchell” in an opinion was domiciled in Louisville, Kentucky. In July 1861, Mitchell obtained a pass from a Federal officer and travelled into the insurgent States.²⁹ Mitchell was on a business venture and purchased a large quantity of cotton, accumulating 724 bales, worth over \$120,000.00.³⁰ When Union troops overtook Savannah, Georgia, they seized Mitchell’s cotton and sold it; the proceeds were placed into the Treasury of the United States.³¹ Mitchell sued to get his money back.³² The case turned upon whether Mitchell was domiciled in a loyal state or that of an insurgent state.³³ The Court agreed with Mitchell, that his domicile in Louisville prevented the confiscation of the cotton.³⁴ The Court reasoned that there was no evidence Mitchell intended to abandon his domicile in Louisville when he departed.³⁵

The parties in *Mitchell* did not dispute his domicile in Louisville at the time of his departure for his business venture. In its analysis, the Court noted some established rules of domicile. Among them was that a “domicile once acquired is presumed to continue until it is shown to have been changed.”³⁶ Also, the burden of proving a change in domicile rests with the accuser. A new domicile requires the following:

First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject.³⁷

The Court concluded by stating that factors used to establish “the *animus manendi* are: Declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business.”³⁸ Because Mitchell’s

²⁹ *Id.* at 351.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 352.

³⁴ *Id.* at 353.

³⁵ *Id.*

³⁶ *Id.* at 353.

³⁷ *Id.*

³⁸ *Id.*

travels over a three-year period never changed his domicile, his transactions were accomplished as if he had remained in Louisville and sent an agent in his stead.³⁹

The outcome in *Mitchell* was determinative of a subsequent case; only the opposite result was achieved because the litigant was a domiciliary of New Orleans, Louisiana.⁴⁰ In a third case, the Court reiterated the same principles discussed in *Mitchell*, stating:

Domicile is acquired by residence and the *animus manendi*, the intent to remain. A *permanent residence* is acquired in the same way. In neither case is the idea involved that a change of domicile or of residence may not thereafter be made. But this in no wise affects the pre-existing legal *status* of the individual in either case while it continues.⁴¹

The Court's opinions in *Mitchell*, *Desmare*, and *Newton*, were authored by Associate Justice Noah Haynes Swayne, nominated to the Court by Abraham Lincoln.⁴² Decades later, the Court's domicile analysis remained unchanged but continued to become more refined. In *Williamson v. Osenton*, the Court stated that the "essential fact that raises a change of abode to a change of domicil is the absence of any intention to live elsewhere."⁴³ The facts leading up to this holding involve the type of drama in soap operas. Mr. C. W. Osenton married Katherine Osenton.⁴⁴ C. W. became physically and emotionally involved with another woman, Margaret H. Williamson.⁴⁵ Katherine did not take kindly to these events. She moved from West Virginia (where she had lived with her husband) to Virginia for the purpose of creating diversity of citizenship for federal court jurisdiction.⁴⁶ Katherine won a verdict of \$35,000 against Margaret for the "alienation of the affections of her husband."⁴⁷ The Court reviewed the question of whether Katherine had successfully changed her domicile.⁴⁸

In its review, the Court made its analysis of intent crystal clear. Included in the record was that Katherine moved to Virginia "with the intention of making her home in that state for an indefinite time. . . ."⁴⁹ On this record the Court said the statement "for an indefinite time" meant "for a time to which the plaintiff did not

³⁹ *Id.*

⁴⁰ *See Desmare v. United States*, 93 U.S. 605, 610 (1876).

⁴¹ *Newton v. Mahoning Cnty. Comm'rs*, 100 U.S. 548, 562 (1879) (emphasis in original).

⁴² *See MEMBERS OF THE SUPREME COURT OF THE UNITED STATES*, <http://www.supremecourt.gov/about/members.aspx> (last visited Oct. 8, 2012)

⁴³ *Williamson v. Osenton*, 232 U.S. 619, 624 (1914) (citing "Story, Conflict of Laws, § 43").

⁴⁴ *Williamson v. Osenton*, 220 F. 653, 655 (4th Cir. 1915).

⁴⁵ *Id.*

⁴⁶ *Williamson*, 232 U.S. at 623-4.

⁴⁷ *Williamson*, 220 F. at 655.

⁴⁸ *Williamson*, 232 U.S. at 623.

⁴⁹ *Id.* (internal quotation marks omitted).

then contemplate an end.”⁵⁰ The Court also noted that “the motive for the change was immaterial,” even though she moved to create diversity of jurisdiction.⁵¹ The value of *Osenton* to the present discussion of servicemembers’ and their spouses’ domicile is profound. If a member decides to change domicile (with a physical presence, intent to abandon the former domicile, and intent to remain permanently in a place) then the motive is not relevant, even if it is to take advantage of a more attractive taxation model.

Building on the domicile discussion in *Osenton*, one year later, the Court noted the following understanding of domicile as proper: “If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period.”⁵² Also, the Court quoted with approval the following: “The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.”⁵³ Applying these principles to the list of factors presented to the Court, the conclusion was that, at best, the person in question had only a floating intention of returning to a previous domiciliary state.⁵⁴ But, before discussing how the Court arrived at that conclusion, an examination of the facts is helpful.

Gilbert v. David originated from an oral contract entered into on November 8, 1883 between three people: Isaac Selleck, Benjamin Selleck, and Darius Selleck, all of whom were deceased by the time the case ascended to the Supreme Court.⁵⁵ The deal was that Isaac would give Benjamin and Darius certain personal property, and, in exchange, Benjamin and Darius agreed they would “indemnify and save Isaac and his father William... and his mother... from pecuniary liability” from some notes that Isaac and his mother signed to help out William.⁵⁶ The creditor of the notes obtained judgment against Isaac, his mom and dad, which Isaac then paid.⁵⁷ This laid the foundation for collection on the oral indemnity agreement between Isaac and Benjamin and Darius. The sole issue decided by the Supreme Court was if diversity of citizenship existed between the parties.⁵⁸ This issue turned on where exactly Isaac was domiciled, Michigan or Connecticut?⁵⁹ This brings us to the Court’s analysis of factors in the record which demonstrated Isaac’s intent.

⁵⁰ *Id.* at 625.

⁵¹ *Id.*

⁵² *Gilbert v. David*, 235 U.S. 561, 569 (1915) (internal quotation marks and citations omitted).

⁵³ *Id.* (quoting *Price v. Price*, 27 A. 291, 293 (1893)).

⁵⁴ *Id.*

⁵⁵ *Gilbert v. Selleck*, 106 A. 439 (Conn. 1919) (providing the details of the case previously decided by the Supreme Court).

⁵⁶ *Id.* at 439.

⁵⁷ *Id.*

⁵⁸ *Gilbert*, 235 U.S. at 565.

⁵⁹ *Id.*

The Court held that the lower court was correct in determining that Isaac had acquired a Connecticut domicile and was not domiciled in Michigan, therefore no diversity of citizenship existed.⁶⁰ The Court reached its conclusion because Isaac basically had more connections with Connecticut than Michigan as determined by an involved factors analysis.⁶¹

This evidence led the Court to conclude that Isaac most likely had “some floating intention of returning to Michigan” after litigation had ended and if he could sell his Connecticut property.⁶² However, “a floating intention of that kind was not enough to prevent the new place, under the circumstances shown, from becoming his domicile. It was his place of abode, which he had no present intention of changing; that is the essence of domicile.”⁶³

2. Mid-1900s Supreme Court Domicile Precedent

There are some notable Supreme Court cases that expand domicile analysis. One such case involved a sizeable amount of estate tax at stake. Four States: Massachusetts, New York, Florida, and Texas, all litigated the domicile of a decedent in hopes of collecting the tax.⁶⁴ The decedent was one Edward Howland Robinson Green.⁶⁵ He was one wealthy man with a net estate worth approximately \$36,000,000.⁶⁶ Texas sued the other three states and estate beneficiaries, which were Edward’s surviving spouse and his sister.⁶⁷ Each state averred that Edward was in fact domiciled in that respective state, and each state was preparing to enforce hefty tax liens against the estate.⁶⁸ The absurd fact of the case is that if the United States and each of the four states imposed the taxes each claimed on the estate, the sum total would have exceeded the assets of the estate by some \$2,510,704.⁶⁹ The Court noted that Edward had connections to each of the four states sufficient to provide a “substantial basis for the claim that he was domiciled within it, with fair probability that the claim would be accepted and favorably acted upon if there were no participation by the other states in the litigation.”⁷⁰ The Court then turned to an analysis of factors to determine where Edward was domiciled.

The evidence of domicile was “obscured by numerous self-serving statements of decedent as to his domicile, which, because made for the purpose of avoiding liability for state income and personal property taxes levied on the

⁶⁰ *Id.* at 570.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 571.

⁶⁴ *See* *Texas v. Florida*, 306 U.S. 398 (1939).

⁶⁵ *Id.* at 402.

⁶⁶ *Id.* at 410.

⁶⁷ *Id.* at 404.

⁶⁸ *Id.* at 408.

⁶⁹ *Id.* at 409 n.2.

⁷⁰ *Id.* at 411.

basis of domicile, tended to conceal rather than reveal the true relationship in this case.⁷¹ Also important to note is that, unlike many states today, the four states at the time did not have any laws governing the issue of domicile, so common law controlled.⁷² The evidence gathered by the Special Master appointed to that task is too numerous to recite here. It is sufficient to say that Edward was a man of many interests, making the case which recites the general nature of his life worth a read. His travels and residency in each of the four states was in part due to scheduled business on behalf of his mother and also for personal adventure.⁷³ It must be noted that Edward, in 1906, refused the Republican nomination for Governor of Texas because his mother did not want him to take it, but instead was appointed a colonel on the Texas Governor's staff for a short period of time.⁷⁴ After his mother died, he spent millions building what could properly be described as a small community on family property in Massachusetts, including an airport and school for aviators.⁷⁵ The Court was faced with the question of domicile for a multimillionaire who owned property in, spent time in, and had strong connections to four states.

The Court held that the evidence demonstrated that Edward had "established" himself in Massachusetts because "all the circumstances of his life indicated that his real attitude and intention with respect to his residence there were to make it his principal home or abiding place to the exclusion of others...by centering there all the activities related to his chief interests..."⁷⁶ The evidence also demonstrated that he curtailed his stays in Massachusetts to avoid the potential of Massachusetts taxation, but this could not override his nexus to the state.⁷⁷

The Court's take on Edward's life does not provide any novel understanding of domicile. Rather, it seems to be an application of settled domicile principles discussed in cases like *Mitchell, David*, and *Osenton*, all of which are cited in the analysis.⁷⁸ One point gleaned from the case is that although the principles of domicile are settled, the application of these principles to cases is extremely fact specific. In specific cases that are not as dramatic as Edward's case, with over two-dozen attorney's involved, it is fair to say that different authorities can easily arrive at different conclusions on the same facts.

In addition to an estate tax case, the Court has also reviewed a domestic relations case due to the substantial constitutional implications involved. The cases, which will be referred to as *Williams I*⁷⁹ and *Williams II*⁸⁰ involve a story of two

⁷¹ *Id.*

⁷² *Id.* at 413.

⁷³ *Id.* at 417.

⁷⁴ *Id.*

⁷⁵ *Id.* at 421.

⁷⁶ *Id.* at 425-26.

⁷⁷ *Id.* at 426.

⁷⁸ *Id.* at 424-27.

⁷⁹ *Williams v. North Carolina*, 317 U.S. 287, (1942).

⁸⁰ *Williams v. North Carolina*, 325 U.S. 226, (1945).

lovers who apparently were willing to travel a great distance to more quickly and fully unite. O. B. Williams and Lillie Shaver Hendrix were legally married to their then-living spouses, all residing in North Carolina.⁸¹ The two traveled to Nevada, obtained divorce decrees without their spouses present, although their spouses were each notified of the respective filings, then returned to North Carolina and lived together.⁸² After their new beginning together, North Carolina successfully prosecuted Williams and Hendrix for bigamous cohabitation.⁸³ The lovers challenged the convictions, escalating the litigation to two trips to the highest Court in the land. In the end, the Court affirmed the North Carolina Court affirmation of the convictions and in the process provided insightful changing domicile analysis.

The Court, in *Williams I*, concluded that “a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada’s finding of domicile was not questioned though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina.”⁸⁴ The question presented in *Williams II* was “whether North Carolina had the power to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide domicil was acquired in Nevada.”⁸⁵

The Court began its analysis by noting what the founders of our nation recognized that jurisdiction for many actions is based on domicile, and “since 1789 neither this Court nor any other court in the English-speaking world has questioned it.”⁸⁶ The sum of *Williams II* is that a determination of domicile in a host state (which supposedly had jurisdiction based on domicile) does not prevent a successful challenge to domicile (and therefore jurisdiction of the previous action) in the home state of domicile.⁸⁷ The state of actual domicile, however, must act properly in determining if the underlying facts of the alleged domicile in a host state improperly provided jurisdiction for the action.⁸⁸ Such review is subject to the scrutiny of the Court to ensure “that the reciprocal duty of respect owed by the States to one another’s adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.”⁸⁹ The decision of the North Carolina Court withstood the Court’s scrutiny for this reason:

⁸¹ Williams, 317 U.S. at 289-91.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Williams, 325 U.S. at 227 (summarizing Williams I).

⁸⁵ *Id.* (internal quotation marks omitted).

⁸⁶ *Id.* at 229.

⁸⁷ *Id.* at 230-32.

⁸⁸ *Id.*

⁸⁹ *Id.* at 233.

North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicile in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.⁹⁰

The facts, as determined by a North Carolina jury, demonstrated that Williams and Hendrix “left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife.”⁹¹ Therefore, the findings and conclusions settled by the North Carolina Court could stand. Nevada had no power to “liberate the petitioners from amenability to the laws of North Carolina governing domestic relations.”⁹²

The holding of *Williams II* should send shivers down the spine of any attorney advising a client on a contested divorce. One of the lessons from *Williams II* is that domicile can be collaterally challenged, even where a person had notice of pending litigation. This holding also demonstrates that unless a party submits to the jurisdiction of a court, an adverse party with an opposing interest (such as a home state desiring to prosecute) can challenge whether a host state had jurisdiction over a matter. The issue of domicile in domestic relations cases continues to be a hotly contested issue in litigation.⁹³ Military practitioners have ample resources today when providing advice on how domicile can impact a divorce proceeding.⁹⁴ The issue of domicile should be handled with due attention when advising clients.

In a case that may resonate more with servicemembers, the Court was faced with situations where federal statutes and their legislative history had something to say on the issue of domicile. The Court was presented with a taxation case in *District of Columbia v. Murphy*,⁹⁵ two combined cases, in which the District challenged the domicile of two federal Civil Service employees, Henry Murphy and Paul De Hart.⁹⁶ If the two men were deemed to be domiciled in the District then they would each be subject to income taxation there.⁹⁷ If however, they retained their home domicile outside of the District no such taxation would be proper. The value of *Murphy* to the present discussion regarding domicile analysis is that it involved many federal employees working in the District who took only a hiatus from their state of domicile

⁹⁰ *Id.* at 236.

⁹¹ *Id.* at 235.

⁹² *Id.* at 239.

⁹³ See e.g. *Brandt v. Brandt*, 268 P.3d 406 (Colo. 2012).

⁹⁴ MARK E. SULLIVAN, *THE MILITARY DIVORCE HANDBOOK* 418-421 (2d. ed. 2011) (identifying unique issues and providing excellent guidance on the issue of domicile in divorce proceedings involving servicemembers).

⁹⁵ *District of Columbia v. Murphy*, 314 U.S. 441 (1941).

⁹⁶ *Id.* at 445-47.

⁹⁷ *Id.* at 445.

for the sake of government service; the legislative history of the Act allowing for taxation recognized as much.⁹⁸

The District of Columbia Income Tax Act at issue in *Murphy* used domicile as the qualifier for who was subject to taxation, but the Act did not provide a statutory definition for that term.⁹⁹ The Court engaged in a lengthy recitation of legislative history, some of which expressly intended that the Act would not subject to taxation “[federal] employees who have been brought into the District from the various States of the Union to serve their country in the National Capital, provided such employees have not of their own volition surrendered their domiciles in the States and have voluntarily acquired domiciles within the District of Columbia.”¹⁰⁰ Other statements in the legislative history demonstrated that Congress only intended to impose the tax on those who abandoned their home domicile and “chosen to establish within the District of Columbia their permanent places of abode and to abandon their domiciles within the States.”¹⁰¹ The Court explained that the term “permanent” was not to be understood in a literal sense because “it cannot be known without the gift of prophecy whether a given abode is ‘permanent’ in the strictest sense. But beyond this, it is frequently used in the authorities on domicile to describe that which is not merely ‘temporary,’ or to describe a dwelling for the time being which there is no presently existing intent to give up.”¹⁰²

The Court noted that not many federal employees in the District could truly answer when their date of service may expire, and that people desire “quite naturally and properly, to continue family life and to have the comforts of a domestic establishment for whatever may be the term of their stay....”¹⁰³ Also important was that the Court recognized existing judicial precedents that “one who comes to Washington to enter the Government service and to live here for its duration does not thereby acquire a new domicile.”¹⁰⁴ The Court then recited precedents on point,¹⁰⁵ and recognized a policy against a person serving in a federal employment losing domicile.¹⁰⁶

⁹⁸ *Id.* at 449-50.

⁹⁹ *Id.* at 449.

¹⁰⁰ *Id.* at 450 (quoting 84 Cong. Rec. 8824 (statements of Sen. Overton, chairman of the Senate conferees)).

¹⁰¹ *Id.* at 451 (quoting 84 Cong. Rec. 8825 (statements of Sen. Overton, chairman of the Senate conferees)).

¹⁰² *Id.* at 451 n.2.

¹⁰³ *Id.* at 452.

¹⁰⁴ *Id.* at 453.

¹⁰⁵ *Id.* (citing and quoting *Atherton v. Thornton*, 8 N.H. 178, 180 (1835) (stating “It has generally been considered that persons appointed to public office under the authority of the United States, and taking up their residence in Washington for the purpose of executing the duties of such office, do not thereby, while engaged in the service of the government, lose their domicile in the place where they before resided, unless they intend on removing there to make Washington their permanent residence.”)); *See also Id.* at 453 n.6.

¹⁰⁶ *Id.* at 454.

This led the Court to hold that “the present cases are not governed by the tests usually employed in cases where the element of federal service in the Federal City is not present,” (the Court cited *Osenton* and *David* as containing the analysis to be distinguished from the present case) and that a person “does not acquire a domicile in the District simply by coming here to live for an indefinite period of time while in the Government service.”¹⁰⁷ Going further, the Court declared that “Congress did not intend that one living here indefinitely while in the Government service be held domiciled here simply because he does not maintain a domestic establishment at the place he hails from.”¹⁰⁸ However, this holding did not absolve those from taxation who fulfill the intent requirement of establishing domicile while being physically present in the District.¹⁰⁹

On the issue of intent, the Court listed various factors that could be considered when making a domicile determination for taxation, but did not create a bright line rule or formula for handling these cases. The specifics of intent need not be established, such as a return date, and could also be contingent, possibly on something such as employment opportunity.¹¹⁰ In summary, “intention must not waver before the uncertainties of time, but one may not be visited with unwelcome domicile for lacking the gift of prophecy.”¹¹¹

While reciting that a person’s established domicile is settled “until facts adduced establish the contrary,” the Court seemed to shift the burden to the potential taxpayer, stating, “[it] is not an unreasonable burden upon the individual, who knows best whence he came, what he left behind, and his own attitudes, to require him to establish domicile elsewhere if he is to escape the tax.”¹¹² What a taxation authority seeking to impose a tax must find is that a person’s connections to a home domicile have “withered gradually in consequence of dissolving associations elsewhere and growing interests in the District.”¹¹³ Something more than a “mere sentimental attachment” to a home domicile is required to maintain a home domicile.¹¹⁴

Among the factors the Court noted to determine a person’s intent include: testimony of a person’s intent, voting activity or absence of it, the type of position including a fixed or transient nature, whether a dwelling was purchased or rented, accompaniment of family members, was personal property brought to the dwelling, local religious and civic activities, the strength of roots in the home domicile, family connections, taxes paid in the home domicile; basically any and all “facts which go to show the relations retained to one’s former place of abode are relevant in determining

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 454-55.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 455 n.9.

¹¹² *Id.* at 455.

¹¹³ *Id.* at 455-56.

¹¹⁴ *Id.* at 456.

domicile. What bridges have been kept and what have been burned?”¹¹⁵ The Court reversed and remanded the cases to be considered in light of this controlling precedent.¹¹⁶

Although the statute governing taxation in the District made domicile the controlling factor for the tax, the Court followed common law domicile analysis because the statute did not provide an express definition of the term. The following case presented to the Court a question of how the use of the term domicile in a federal statute impacted the analysis.

3. Recent Supreme Court Domicile Precedent

At issue in *Mississippi Band of Choctaw Indians v. Holyfield*¹¹⁷ was the definition of domicile within the federal Indian Child Welfare Act of 1978 (ICWA).¹¹⁸ The ICWA established nearly exclusive jurisdiction in tribal courts of litigation involving all Indian children “who [reside] or [are] domiciled within the reservation of such tribe.”¹¹⁹ The ICWA did not define domicile so a question in focus was the meaning of “domicile” in the Act.¹²⁰

In its analysis of what Congress intended the term to mean, the Court first concluded that Congress did not intend the term to be interpreted through state law.¹²¹ The Court began with the following assumption: “in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.”¹²² Next, the Court noted that a basis for this assumption is that federal statutes “are generally intended to have uniform nationwide application,” and that state law control of a federal initiative could impair its design.¹²³ The Court concluded that Congress intended that the ICWA domicile provision be uniform federal law.¹²⁴

To define domicile as used in the Act, the Court engaged a standard statutory interpretation framework; it looked to “the generally accepted meaning of the term ‘domicile’ and to the purpose of the statute.”¹²⁵ The Court found it useful to “borrow established common-law principles of domicile to the extent that they are not inconsistent with the objectives of the congressional scheme.”¹²⁶ The Court did

¹¹⁵ *Id.* at 456-58.

¹¹⁶ *Id.* at 458.

¹¹⁷ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

¹¹⁸ *Id.* at 36 (citing Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1989)).

¹¹⁹ *Id.* (quoting § 1911(a)).

¹²⁰ *Id.* at 42-43.

¹²¹ *Id.* at 43.

¹²² *Id.* (internal quotation marks and citations omitted).

¹²³ *Id.* (citations omitted).

¹²⁴ *Id.* at 47.

¹²⁵ *Id.*

¹²⁶ *Id.* at 47-48.

not break any new ground in its analysis. It simply reiterated that domicile is an important legal notion, it is not necessarily the same as residence (so a person can reside in one location and be domiciled in another), and adults establish a domicile of choice with physical presence in a location coupled with “a certain state of mind concerning one’s intent to remain there.”¹²⁷

From *Mitchell* to *Holyfield*, one learns that domicile has always and still involves two elements: presence and intent. While the concept of domicile is clearly established, the difficulty in determining a person’s intent presents complications. Establishing physical presence and intent, like other issues to be determined through the judicial process, are not proved using divine powers; they are evidentiary issues.

A person’s intent must be demonstrated, not merely averred. In essence, the Court acknowledged the age-old saying that actions speak louder than words. But, when Congress alters traditional domicile analysis by statute, words become the focus. The SCRA and MSRRA alter domicile analysis for servicemembers and their spouses. However, the application of statutory alteration of domicile analysis is far from settled.

III. CONGRESSIONAL ALTERATION OF DOMICILE FOR SERVICEMEMBERS AND SPOUSES

The development of domicile as a legal concept serves as the backdrop of how the SCRA and MSRRA modify domicile analysis. The United States was not the first sovereign entity to provide relief to those in service of the sovereign. There are established legal protections for those engaged in the service of their sovereign¹²⁸ extending to stay court actions¹²⁹ and contractual matters.¹³⁰ During the Civil War states passed laws protecting servicemembers from civil process while in military service.¹³¹ During times of internal national turmoil, Congress took the extraordinary step of suspending statutes of limitations due to conflict.¹³² World War I again brought the need for servicemembers to be sheltered from civil affairs so they could devote their full attention to their duties and also not to prejudice them

¹²⁷ *Id.* at 48.

¹²⁸ See PHILIPPE DE REMI BEAUMANOIR, *COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR* (F. R. P. Akehurst trans., Univ. of Penn. Press 1992) (a collection of French legal customs and traditions compiled in 1283).

¹²⁹ *Id.* at 53.

¹³⁰ *Id.* at 378.

¹³¹ See *e.g.* *Breitenbach v. Bush*, 44 Pa. 313, 1863 WL 4799 *3 (1863) (holding constitutional the Stay Law of April 18, 1861, P.L. 409 which provided in Section 4 that “No civil process shall issue or be enforced against any person mustered into the service of this state or of the United States, during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom: Provided, that the operation of all statutes of limitation shall be suspended upon all claims against such person during such term.”).

¹³² See *Stewart v. Kahn*, 78 U.S. 493, 493-94 (U.S. 1871) (holding the Act of Congress, June 11, 1864, 13 Stat. 123, as valid and applicable to federal and state courts, suspending prescription period (statute of limitations) when service of process could not be affected upon a person due to the conflict).

in judicial proceedings. Congress passed what the Court has described as “the first comprehensive national soldiers’ relief Act.”¹³³ While the purpose of the Act was to provide the same protections as the Civil War era laws, Congress intended it to be distinct in two principle ways.¹³⁴ First, it would produce a disposition “uniform throughout the Nation.”¹³⁵ Second, it provided judicial discretion on whether a servicemember should benefit from a protection due to prejudice in an action or if the servicemember would not be disadvantaged in any way.¹³⁶ Of importance is that the Act had a built in term of expiration six months after World War I ended.¹³⁷ Then came World War II.

The 1940 Act went into effect just prior to the United States entering World War II. Congress expressed that the purpose of the Act was to “expedite the national defense under the emergent conditions which are threatening the peace and security of the United States....”¹³⁸ It was not until 1948 when Congress “extended the life of the Act indefinitely....”¹³⁹ Until the enactment of the Servicemembers Civil Relief Act, the 1940 Act remained in effect and a strong protection for both servicemembers who were temporarily activated¹⁴⁰ and also for those who chose the military profession as a career.¹⁴¹ In the wake of September 11, 2001, the military quickly found itself in what could only be described as the new norm: increased operations tempo with more frequent deployments. Congress again found it necessary to refine the age-old protections for servicemembers. On December 19, 2003, the SCRA became law, revamping the 1940 Act.¹⁴²

A. Intent and Interpretation of the SCRA Domicile Provision

The purpose of the SCRA is this:

(1) to provide for, strengthen, and expedite the national defense through protection extended by this Act [said sections] to

¹³³ *Conroy v. Aniskoff*, 507 U.S. 511, 520 (1993) (citing 55 Cong. Rec. 7787 (1917)).

¹³⁴ *Id.* at 521 (internal quotation marks and citations omitted).

¹³⁵ *See Id.*

¹³⁶ *See Id.*

¹³⁷ *See Id.* at 522 (citing Soldiers’ and Sailors’ Civil Relief Act of 1918 § 603, 40 Stat. 449 (1918)).

¹³⁸ 50 U.S.C. App. § 510 (1940).

¹³⁹ *Conroy*, 507 U.S. at 515. *See also* 507 U.S. 515 n.8 (citing Section 14 of the Selective Service Act of 1948, 62 Stat. 623, providing that the 1940 Act “shall be applicable to all persons in the armed forces of the United States” until the 1940 Act “is repealed or otherwise terminated by subsequent Act of the Congress.”)

¹⁴⁰ SSCRA protections were extended to activated members of the National Guard meeting certain conditions as provided in the Veterans Benefits Act of 2002, Pub. L. 107-330 § 305, 116 Stat. 2820 (2002).

¹⁴¹ A decision by the United States Court of Appeals for the Fifth Circuit did hold that the provisions of the SSCRA did not extend to career servicemembers. *Pannell v. Continental Can Co., Inc.*, 554 F.2d 216 (5th Cir. 1977). However, that reasoning and conclusion is invalid. *See Conroy v. Aniskoff*, 507 U.S. 511, (1993); *Crouch v. General Elec. Co.*, 699 F.Supp. 585 (S.D.Miss. 1988); *Bickford v. United States*, 656 F.2d 636 (Ct.Cl. 1981).

¹⁴² Servicemembers’ Civil Relief Act of 2003, Pub. L. 108-189, § 1, 117 Stat. 2835 (2003).

servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.¹⁴³

It is with this understanding and context that the domicile protections of the SCRA can be fully appreciated. In the words of the Court, one must “follow the cardinal rule that a statute is to be read as a whole...since the meaning of statutory language, plain or not, depends on context.”¹⁴⁴ Also important is the Court’s guidance that such laws “must be read with an eye friendly to those who dropped their affairs to answer their country’s call,”¹⁴⁵ and are “always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”¹⁴⁶

Presently, the central provision relevant to this article is found at Section 571¹⁴⁷ of the Appendix to Title 50 of the United States Code, entitled “Residence for tax purposes,” which is Section 511 internal to the SCRA. For servicemembers, the protections provided under Section 571 are these:

(a) Residence or domicile

(1) In general

A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.

(b) Military service compensation

Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember

¹⁴³ 50 U.S.C. App. § 502 (2003).

¹⁴⁴ King v. St. Vincent’s Hosp., 502 U.S. 215 (1991) (citing Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).

¹⁴⁵ Le Maistre v. Leffers, 333 U.S. 1, 6 (1948) (quoting Boone v. Lightner, 319 U.S. 561, 575 (1943)).

¹⁴⁶ Boone, 319 U.S. at 575.

¹⁴⁷ The internal Sections of the Act are not used in this article. Section 50 U.S.C. App. § 571 is internally Section 511 of the SCRA.

is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.

The “Residence for tax purposes” section in the Soldiers’ and Sailors’ Civil Relief Act (SSCRA)¹⁴⁸ was located at Section 574.¹⁴⁹ Both the old (SSCRA) and new (SCRA) “Residence for tax purposes” provisions remain substantively unchanged. The former language still included the following:

For the purposes of taxation...such person shall not be deemed to have lost a residence or domicile...solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of [any jurisdiction] while, and solely by reason of being, so absent.¹⁵⁰

This demonstrates that the domicile protection for servicemembers has remained the same for decades. The congressional intent of the SCRA provision has also been the subject of litigation for decades.

An early challenge to the SSCRA domicile provision argued that it provided tax immunity to servicemembers.¹⁵¹ In *Dameron*, the Court plainly spoke to the meaning of the domicile provision, stating: “this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments.”¹⁵² That case involved a personal property tax assessment on an Air Force officer who challenged the assessment because he was “a citizen and a resident of the state of Louisiana...and remains a domiciliary of that...state, and a citizen and resident of said state...in which...[he] was and is a qualified voter.”¹⁵³ The case went before the Colorado Supreme Court,¹⁵⁴ on appeal, which held that the SSCRA protected servicemembers from tax only if there was multiple taxation.¹⁵⁵

The Court reversed the Colorado Supreme Court, reasoning in part that the domicile provision¹⁵⁶ and personal property¹⁵⁷ provision, and indeed the entire Act itself, was a compensating benefit Congress provided to servicemembers because of the “especial burdens of required service with the armed forces....”¹⁵⁸ The Court held that the Act was constitutional under the power of Congress to declare war

¹⁴⁸ The SSCRA is the forerunner to the SCRA.

¹⁴⁹ 54 Stat. 1178, the SSCRA of 1940.

¹⁵⁰ *Id.*

¹⁵¹ *Dameron v. Brodhead*, 345 U.S. 322 (1953).

¹⁵² *Id.* at 325.

¹⁵³ *Id.* at 323 (internal quotation marks omitted).

¹⁵⁴ *Id.* (citing *Cass v. Dameron*, 244 P.2d 1082 (Colo. 1952).

¹⁵⁵ *Cass*, 244 P.2d at 1084.

¹⁵⁶ *Dameron*, 345 U.S. at 324, 327 (noting that this provision was added in large part in 1942).

¹⁵⁷ *Id.* (noting that this provision was added in a 1944 amendment).

¹⁵⁸ *Id.* at 325 (citations omitted).

and to raise and support armies.¹⁵⁹ Of importance is that the Court also held that the Act “in no way affects the reserved powers of the states to tax. For this statute merely states that the taxable domicile of servicemen shall not be changed by military assignments.”¹⁶⁰

The State of Colorado was unsuccessful in arguing, based on legislative history, that the provisions were only designed to prevent multiple taxation.¹⁶¹ The Court answered by pointing out the Act made “no suggestion that the state of original residence must have imposed a property tax,” and there is no condition precedent to its application.¹⁶² In the eyes of the Court, the plain language of the statute demonstrated this Congressional intent:

Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence whether or not that state exercised the right. Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces.¹⁶³

The import of *Dameron* to the present discussion is that Congress expressly established that the home state retained the power to tax a servicemember who was absent from that jurisdiction and present in a host state under the compulsion of military orders. This holding rings of English common law, that no change in domicile occurs where a person departs the former and resides in the present under compulsion.¹⁶⁴

Perhaps the domicile provision simply recognizes what has been settled law for centuries. Even so, the domicile protections for servicemembers do not extend to every tax. The SCRA nor its predecessors prohibit a state from charging non-resident servicemembers state sales or use taxes because such taxes are not dependent on a person’s domicile.¹⁶⁵ The Court decided the cases of *California v. Buzard* and *Snapp v. Neal* on the same day.

In *Snapp*, the Mississippi *ad valorem* tax against a house trailer was struck down as violating the Act.¹⁶⁶ The Court’s decision in *Buzard* controlled the outcome

¹⁵⁹ *Id.* (citing U.S. Const. Art. I, § 8, cl. 11, cl. 11-12).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 325-26 (citing H.R. Rep. No. 2198, 77th Cong., 2d Sess., p. 6).

¹⁶² *Id.* at 326.

¹⁶³ *Id.* (internal citation omitted).

¹⁶⁴ *Udny v. Udny*, (1869) L. R. 1 H. L. Sc. 448 (Lord Hatherley L.C.).

¹⁶⁵ *See Sullivan v. United States*, 395 U.S. 169 (1969). *See also California v. Buzard*, 382 U.S. 386 (1966), and *Snapp v. Neal*, 382 U.S. 397 (1966).

¹⁶⁶ *Snapp*, 382 U.S. at 397-98.

that if a servicemember pays a license, fee, or excise tax in the home state, the nonresident state may not charge the member.¹⁶⁷ In *Snapp*, the ad valorem tax was “not such an exaction” so the action of the home state, South Carolina for Sergeant Snapp, was irrelevant to whether Mississippi could require the tax, it could not.¹⁶⁸ This brings us to the more involved case of *Buzard*, a criminal prosecution, not a civil case.

Captain Buzard was domiciled in the State of Washington.¹⁶⁹ The Air Force ordered him to Castle Air Force Base in California and sent him on temporary duty to Alabama.¹⁷⁰ Captain Buzard purchased a vehicle in Alabama and registered the vehicle there.¹⁷¹ California refused to accept the Alabama registration and license plates as valid, requiring Captain Buzard to pay both a California registration fee and a “license fee” in the amount of 2% of the vehicle’s worth (in lieu of taxes).¹⁷² On the basis of the SSCRA protection, he refused, and California prosecuted and convicted him of violating its motor vehicle code.¹⁷³ Although the Supreme Court of California reversed the conviction which a lower California court had affirmed, the Court granted certiorari to answer the question of whether the SSCRA domicile provision¹⁷⁴ barred California from imposing the 2% tax as a prerequisite for Captain Buzard to register his vehicle.¹⁷⁵

The Court concluded that the California “license fee” was indeed a tax because its purpose was to generate revenue.¹⁷⁶ Such taxes may not be imposed against nonresident servicemembers present solely in compliance with military orders.¹⁷⁷ The record in *Buzard* demonstrated that he would have paid to register his vehicle had it not been for the prerequisite of paying the 2% tax.¹⁷⁸ In arriving at this holding, the Court provided a clear understanding of the SSCRA’s purpose. The Court stated that the domicile provision in the SSCRA (substantively the same as the SCRA) were designed “to relieve [servicemembers] of the burden of supporting the governments of the States where [they are] present solely in compliance with military orders... whether or not the home state imposes or assesses such taxes....”¹⁷⁹ Three years after the Court decided *Buzard* and *Snapp*, it again reviewed the domicile provision of the Act.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Buzard*, 382 U.S. at 387-89.

¹⁷⁰ *Id.* at 388.

¹⁷¹ *Id.* at 388-89.

¹⁷² *Id.* at 389.

¹⁷³ *Id.*

¹⁷⁴ The SSCRA provision was located at Section 514 of the Act at that time, later changed to Section 574, then to the present Section 571.

¹⁷⁵ *Buzard*, 382 U.S. at 389.

¹⁷⁶ *Id.* at 392-96.

¹⁷⁷ *Id.* at 393.

¹⁷⁸ *Id.* at 396.

¹⁷⁹ *Id.* at 393.

In *Sullivan*,¹⁸⁰ the Court confirmed that the Act, as clarified by the amendments to it in 1942, 1944, and 1962, prohibited the imposition of ad valorem taxes on personal property taxes, those which occur annually.¹⁸¹ Included in the discussion is the point that the Connecticut taxes at issue in *Sullivan* provided for a credit if the tax was paid to another jurisdiction.¹⁸² These taxes were distinguished from the type at issue in *Buzard* and *Snapp*.¹⁸³

This line of cases settles the point that if a servicemember's home state does not impose a tax designed for revenue generation (such as income taxation), that fact is not relevant to the discussion of whether a host state is then allowed to impose such a tax. This is why litigation against servicemembers is focused on their intent to abandon the home state of domicile and intent to remain permanently (in the present state of mind) in a nonresident state.

There is ample Supreme Court precedent of what Congress intended the SCRA to do for servicemembers. The SCRA historically did not extend to spouses of servicemembers, but the MSRRA amendment to the SCRA changed that. There is now a new front to the battle between host states and military families.

B. Enactment and Intent of the MSRRA Domicile Provision

The First Session of the 111th Congress passed Public Law 111-97 amending the SCRA with the "Military Spouses Residency Relief Act" (MSRRA).¹⁸⁴ The MSRRA became law on November 11, 2009.¹⁸⁵ As the Act proclaims, its purpose is "[to] amend the Servicemembers Civil Relief Act to guarantee the equity of spouses of military personnel with regard to matters of residency, and for other purposes."¹⁸⁶ In all, the MSRRA amended four sections of the SCRA. Section 501 of the Appendix to Title 50 was amended simply to add the title of the MSRRA amendments.¹⁸⁷ Section 568 was amended to include a servicemember's spouse in the land rights protections.¹⁸⁸ Section 595 was amended to extend voting protections to spouses.¹⁸⁹ That brings us to the final section the MSRRA amended, Section 571, extending to spouses the physical presence exemption to determining domicile and taxation of income.¹⁹⁰

¹⁸⁰ *Sullivan v. United States*, 395 U.S. 169 (1969).

¹⁸¹ *Id.* at 176-77.

¹⁸² *Id.* at 180.

¹⁸³ *Id.* at 181-82.

¹⁸⁴ 123 Stat. 3007 (2009).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

Prior to the MSRRA, spouses enjoyed none of the provided exemptions, and could even be penalized in the form of paying higher state income taxes due to being married to a non-resident servicemember.¹⁹¹ It is possible that some spouses could make a very good argument that their domicile did not change due to temporarily moving locations to be with a servicemember spouse, but it was likely impractical to do so. Still, without the MSRRA, a spouse's enjoyment of protections often was only a benefit trickling down from the servicemember's protections under the. One case provides a frightening example of how one servicemember's spouse was treated and how the member's then SSCRA protections won the day.

Mr. Walter Strange and his spouse were born and domiciled in Indiana, but were living at Davis Monthan Air Force Base pursuant to Mr. Strange's active duty orders.¹⁹² Mr. Strange registered his vehicle in Indiana and had Indiana license plates on the vehicle. His spouse drove the vehicle to and from work off base.¹⁹³ The local Arizona authorities arrested Mrs. Strange while she was driving home from work merely for having Indiana license plates on her vehicle.¹⁹⁴ To stop the Arizona officials from auctioning the seized vehicle, the Stranges procured license plates issued from Arizona, then sued to recover the fees incurred from the ordeal.¹⁹⁵ The Arizona appellate court held that since Mr. Strange "retained his Indiana domicile and paid to Indiana all the required license fees for his automobile, [the SCRA domicile provision] exempted his automobile from any Arizona vehicle tax."¹⁹⁶ It was because of the protection afforded to the servicemember (Mr. Strange) that the spouse was shielded from a potential grave injustice.

Another example of how servicemembers and spouse were treated differently prior to the MSRRA is with federal income taxation. Prior to the MSRRA, for tax purposes, federal executive agencies had determined that a servicemember's status had almost no impact on the spouse. For example, the Internal Revenue Service, citing Treasury Regulations, concluded that spouses had no protection under the SCRA:

Does the military member's State of Legal Residence designation convey to their non-military spouse? The "State of Legal Residence" or "Home of Record" of members of the U.S. Armed Forces does not generally apply to the non-military spouse, under the SCRA. However, in a situation where the non-military spouse is a resident of a State (e.g., Texas), and both spouses move from Texas to a U.S.

¹⁹¹ *United States v. Kansas*, 580 F.Supp. 512, 517 (D. Kan. 1984) (refusing to strike down Kansas law from "keying progressive rates of taxation to military compensation of nonresident servicemen....").

¹⁹² *Christian v. Strange*, 392 P.2d 575 (Ariz. 1964). Mr. Strange's rank is not provided in reported case.

¹⁹³ *Id.* at 575.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 576.

¹⁹⁶ *Id.* (citing *Woodroffe v. Village of Park Forest*, 107 F.Supp. 906 (N.D.Ill.1952)).

Possession (e.g., Guam), it is possible that both spouses could claim that they are residents of Texas for federal tax purposes. See Treas. Reg. § 1.935-1(b)(1). Also, note that we refer to the residence of the spouse with the higher AGI in making the determination of whether a joint return should be filed with the United States (or Guam). See I.R.C. § 935(b)(3).¹⁹⁷

The MSRRRA does more than just change the analysis for interplay between a spouse and servicemember, it makes questions like the one asked by the IRS irrelevant. Spouses now have their own protection of domicile if they meet the qualifications of the Act. Thus, they can now directly enjoy the protections under the SCRA, not needing to be shielded by the servicemember's protections.

The language from the amended Section 571 relevant to spouses is this:

(a) Residence or domicile

(2) Spouses

A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.

(c) Income of a military spouse

Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the jurisdiction solely to be with the servicemember serving in compliance with military orders.¹⁹⁸

The plain language of this Section extends the protection of domicile enjoyed by servicemembers to spouses who meet certain criteria: first, being absent or present in any tax jurisdiction of the United States; second, the spouse is absent from or present in a tax jurisdiction solely to be with the servicemember; third, the absence or presence is due to compliance with the servicemember's military orders; and fourth,

¹⁹⁷ I.R.S. Chief Couns. Mem. 200518071, 2005 WL 1061025 (May 6, 2005).

¹⁹⁸ 50 U.S.C. App. § 571 (2009).

the residence or domicile is the same for the servicemember and the spouse.¹⁹⁹ It is apparent that spouses now enjoy greater protection than servicemembers.

In fact, there are two protections which spouses enjoy that extend beyond those enjoyed by servicemembers. The first extended protection is obvious; all of a spouse's income (at the election of the spouse) is subject only to income taxation by the home state.²⁰⁰ For servicemembers, only income received from military service is subject exclusively to the taxation of the home state.²⁰¹ The second extended protection is more general. Civilian spouses now have a federal law protecting their domicile even though they have no direct federal control or connection.²⁰² This leaves open the possibility of a constitutional challenge to the MSRRA, the question being whether these protections are allowed under the constitutional authority of Congress to maintain the armed forces and its war powers.

Servicemembers are subject to being under the orders of superiors at all times; they live under a unique criminal code with global jurisdiction, and have limited exercise of constitutional rights such as free speech.²⁰³ Protections for servicemembers have existed for centuries. Now spouses are enjoying these same protections being under no such superiors or limitations as servicemembers experience. So why exactly did Congress deem the MSRRA necessary?

The legislative history to the MSRRA contains comments in support of the SCRA amendments and comments opposing them. The Committee on Veterans' Affairs, which favorably reported Senate Bill 475, the MSRRA, to the full Senate, viewed the purpose of the Act "to guarantee the equity of spouses of military personnel with regard to matters of residency"²⁰⁴ In support of the Act, Senator Richard Burr, the Senator who originally introduced the MSRRA on February 25, 2009, provided Supplemental Views.²⁰⁵ Although the comments reproduced below are lengthy, they are worthy of inclusion. Senator Burr documents for us the following:

[T]oday, the burdens of the Nation are not borne by servicemembers alone; they are shared by the military spouses who move around the country and the world in support of our Nation's all-volunteer force. These spouses leave behind their homes, friends, and jobs in order to put servicemembers and the military ahead of their own needs. Indeed, studies by the RAND Corporation have found that military wives move farther and more often than their civilian counterparts;

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Uniform Code of Military Justice, 10 U.S.C. §§ 801-803; 877-934 (2012).

²⁰⁴ S. REP. NO. 111-46, at 1 (2009).

²⁰⁵ *Id.* at 19-21.

are more likely to be unemployed than the average civilian spouse; and, even if they do find work, tend to earn less than civilian wives. See “Working Around the Military: Challenges to Military Spouse Employment and Education,” at 18, 48 (2004); “Working Around the Military” Revisited, at 1, 3 (2007).

In addition to making great personal sacrifices to support the military, it is now widely recognized that military spouses play an important role in the success of our Armed Forces. In fact, Military Spouse Day was first proclaimed by President Ronald Reagan 25 years ago to acknowledge “the profound importance of spouse commitment to the readiness and well-being of servicemembers * * * and to the security of our Nation.” Proclamation 5184 (April 17, 1984). More recently, the RAND Corporation stressed in its 2004 study that “[s]uccessful recruiting and retention of the active duty force relies in large part on the extent to which servicemembers and their spouses experience both job satisfaction and contentment with life in the military.” “Working Around the Military: Challenges to Military Spouse Employment and Education,” at xvii.

...

Unfortunately, the SCRA has not yet been updated to recognize the role of military spouses or to ease their burdens as they move to new duty stations with their servicemember-spouses. For example, under the SCRA, if a servicemember moves to a new state in compliance with military orders, the servicemember may continue to vote in the state he or she considers home; the servicemember’s military pay may be taxed only in that home state; and any personal property the servicemember brings to the new state will not be subjected to taxation in that state. See 50 U.S.C. App. 571, 595. However, if a servicemember’s spouse leaves the same state and travels to a new state with that servicemember, the spouse is not afforded similar protections. The spouse may have to register to vote and file tax returns in every state in which they live. Also, in some states, the family assets must be held solely in the servicemember’s name in order to protect them from being taxed by those states.²⁰⁶

While the MSRRA provides useful protection for military spouses, it does not do for spouses what the SCRA does not do for servicemembers. The MSRRA leaves spouses exposed to the same vulnerability as servicemembers: a host state challenge to domicile in an effort to tax income. Both political and practical concerns exist regarding the MSRRA. Some have come to fruition while others may take

²⁰⁶ *Id.* at 20.

time to identify. Some of these concerns were documented in the process of drafting the MSRRA, including comments from the Department of Defense.

C. Concerns Raised by the MSRRA

The opposition to the MSRRA provides a glimpse of potential problems that could arise from its passage. The Department of Defense (DOD) opposed the key provision of the MSRRA, Section 3, amending 50 U.S.C. App. § 571, extending to spouses who meet certain conditions the ability to retain domicile in a home state and pay income tax to the that state even while working in a host state.²⁰⁷ The concerns raised are valid and foresee the possibility of problems, for example, providing states the opportunity to challenge a taxpayer's domicile.

The Department's opposition to the amendment to Section 571 raised a variety of concerns.²⁰⁸ The first concern was that a spouse's income would be shielded from taxation in the host state where the spouse was co-located with the servicemember.²⁰⁹ The term "shield" overstates the impact of the amendment. The MSRRA simply provides a spouse an option. There is no indication of the number of spouses who will actually invoke the provision to pay the income tax of the home state and not that of the host state.

The SCRA without the MSRRA amendment would still provide a supposed windfall for a family where the servicemember's home state has no income tax. What one state chooses to tax or refuses to tax should have no impact on a host state's ability to tax a servicemember.²¹⁰ The same reasoning should apply to the spouse's income when faced with a choice between having to, in effect, abandon domicile in the spouse's home state to be with the servicemember or retain the home state domicile by minimizing contacts in the host state, such as employment. Just like the exemption for a host state to tax a servicemember's military income, the same reasoning should apply to a spouse's income.

The Department's comments went on to assert that the MSRRA amendment to Section 571 upsets the entire theory of taxation because the spouse receives the benefits of services and employment protections provided by the host state.²¹¹ However, a few paragraphs later, the point is made that "approximately 24 States currently do not pay spouses unemployment benefits when they are forced to relocate under military orders with their military member spouse."²¹² The Department has

²⁰⁷ See *Id.* at 10-13 (providing the comments submitted by the Office of the Under Secretary of Defense (Personnel and Readiness)).

²⁰⁸ *Id.* at 10.

²⁰⁹ *Id.*

²¹⁰ See *Dameron v. Brodhead*, 345 U.S. 322 (1953).

²¹¹ S. REP. NO. 111-46, at 10-11 (2009).

²¹² *Id.* at 11.

been unsuccessful in having those states change their position.²¹³ The reality is that many states, understandably, engage in practices most favorable to themselves. Servicemembers need an advocate and received one in the form of the SCRA. Spouses who frequently uproot their lives to serve alongside and enable servicemembers to serve also deserve advocacy on their behalf in the form of the MSRRA.

The Department viewed the purpose of the MSRRA amendment at Section 571 “to encourage military members and their spouses to seek assignments to one of the seven States that do not have a personal income tax and to become a domiciliary of that State.”²¹⁴ However, nothing currently prevents servicemembers, or any other citizen, from taking advantage of establishing domicile in a state that derives revenue from methods other than taxing income. The problem is that servicemembers and their spouses do not have the freedom to move to one of these states because the servicemember is being ordered to live in a particular location.

Theories of taxation differ between states. How governments obtain revenue is still and will remain an evolving experiment. There is no single theory of taxation that could be upset by the MSRRA. Just by being present in a tax jurisdiction, those present will pay a significant amount of tax to a host state. Consider that rent for housing includes funds the landowner must pay to the state and local government; taxes are paid on purchases of gasoline, household goods, entertainment, nearly everything one purchases. Many of the actions incidental to moving and residing in a location will also generate taxed transactions.

One may argue there exists an “inherent unfairness” where a state is “prohibited from taxing compensation earned within their borders by those who live there and use its resources and services.”²¹⁵ However, there is a tradeoff available to states. Military installations create an economic boon to local economies. Installations create incidental revenue in states through civilians working in civil service, contractors, and an increase in private sector positions that exist to sustain the demands of increased population in a local area. Why would states fight over pocket change? The cost to states involved in litigating a domicile challenge could likely cost more than the individual tax revenue received from a servicemember or spouse. Even so, some states have pursued servicemembers and now spouses for income taxes who claimed they are exempt from an income tax under the SCRA or MSRRA.

IV. A MILITARY FAMILY NIGHTMARE: BEWARE IN VIRGINIA, MINNESOTA, AND OREGON

Imagine a servicemember receives orders to a new duty location and begins to settle in and get her family situated. There is no present expectation to stay in this particular place and would probably have never lived here if the military had

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

not sent her. Then, on one normal day she is served a summons. The state in which she lives filed a lawsuit against her for not paying state income tax. She checks her Leave and Earning Statement and her home of record (a different state than the one she lives in) is correct. Finance confirms her home of record on file and refers her to the base legal office. The fledgling young attorney, who is new to practicing law and to the military, tells her it is beyond the scope of his competence or the scope of military legal assistance to advise her, other than to say she really has to respond to the summons with an answer by a certain date. She leaves the legal office knowing what was plainly stated on the front of the summons, to respond by a certain date, and with the recommendation to retain civilian counsel. More can be done and should be done for servicemembers in this situation.

This scenario is not a concern in states that do not tax income or that exempt military pay from income tax.²¹⁶ Included in this section are the cases of a few military families that have encountered some form of litigation from a state attempting to tax income. These cases illustrate that any servicemember or spouse could find themselves involved in this issue. The details of a person's life then come into focus for an objective determination of where a person intends to call home.

A. The MSRRA Slide into Tax Litigation: The Virginia Example

There are many cases where states have sued servicemembers and spouses on the issue of domicile in order to enforce a state income tax. At the close of 2012, the Department of Taxation for the Commonwealth of Virginia decided at least eighteen income tax decisions involving the SCRA.²¹⁷ Three of these decisions, on appeal, were decided favorable to a spouse claiming MSRRA protection,²¹⁸

²¹⁶ See Lieutenant Colonel Samuel W. Kan, *What We Know: A Brief Tax Update*, 2012-MAY Army Law. 15 (2012) (providing current information with statutory reference for each state's treatment of military pay); see also U.S. Navy Office of the Judge Advocate General, Legal Assistance Policy Division, *State Tax Guide*, <http://www.jag.navy.mil/organization/documents/tax/StateTaxGuide.pdf> (last visited Nov. 20, 2012).

²¹⁷ See cases cited *infra* notes 218-220.

²¹⁸ See Department of Taxation, Commonwealth of Virginia, PD 12-16, 2012 WL 906792 (Mar. 5, 2012); PD 11-90, 2011 WL 2266800 (Jun. 2, 2011); PD 10-220, 2010 WL 4593994 (Sep. 16, 2010) (all holding MSRRA provisions met, refund awarded on appeal).

ten were decided against a servicemember or spouse claiming SCRA or MSRRA protections,²¹⁹ and five addressed other aspects of SCRA based claims.²²⁰

An example of a routine case that legal assistance offices may experience involves a spouse claiming MSRRA exemption but not including sufficient information in the tax filing.²²¹ The spouse and member were both domiciled in “State A.”²²² When first reviewed, the spouse’s claim for exemption under the MSRRA for the 2009 tax year was denied because there was insufficient evidence that both the member and spouse shared the same domicile in State A.²²³ Virginia interpreted the MSRRA to require both spouses to have the same domicile and issued Tax Bulletin VTB 10-1 (1/29/2010) stating as much.²²⁴ The spouse appealed the assessment and provided sufficient information that both the member and spouse shared the domicile of State A.²²⁵ The assessment was then abated.²²⁶

Important to note is the analysis employed by the Virginia Department of Taxation. Critical overt acts that demonstrated a person’s intent to establish domicile

²¹⁹ See Department of Taxation, Commonwealth of Virginia, Policy Decisions: PD 12-120, 2012 WL 3262849 (Jul. 26, 2012) (denying MSRRA protection where spouse took overt acts to establish same domicile as servicemember but never had a physical presence in servicemember’s home state); PD 12-59, 2012 WL 1666586 (Apr. 27, 2012) (denying MSRRA protection where spouse maintained sufficient contacts with Virginia upon moving to Virginia pursuant to servicemember’s military orders); PD 12-11, 2012 WL 767403 (Feb. 27, 2012) (denying MSRRA protection due to contacts with Virginia and not maintaining same domicile as servicemember); PD 11-158 (Sep. 16, 2011) (denying MSRRA protection because spouse did not have same domicile as servicemember prior to moving to Virginia pursuant to military orders) (available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf> (last visited Nov. 16, 2012)); PD 11-119, 2011 WL 4056781 (Jun. 24, 2011) (denying MSRRA protection because both spouse and servicemember maintained sufficient contacts with Virginia, causing servicemember to also be assessed taxes on review); PD 11-114, 2011 WL 4056776 (Jun. 21, 2011) (denying MSRRA protection where spouse maintained sufficient contacts with Virginia); PD 11-104, 2011 WL 4056766 (Jun. 10, 2011) (denying MSRRA protection of spouse who shared same domicile as servicemember but established sufficient connections with Virginia to abandon that domicile prior marriage); PD 11-66, 2011 WL 1897357 (Apr. 26, 2011) (denying MSRRA protection because spouse did not have same domicile as servicemember prior to moving to Virginia pursuant to military orders); PD 11-16, 2011 WL 639128 (Feb. 11, 2011) (denying MSRRA protection due to contacts with Virginia and not maintaining same domicile as servicemember. This same opinion is also cited as 2011 WL 1167648); PD 10-237, 2010 WL 4594026 (Sep. 30, 2010) (denying MSRRA protection to spouse, examination of servicemember’s record resulted in finding that servicemember maintained sufficient contacts with Virginia, causing five year review of servicemember’s income for possible tax assessment).

²²⁰ See Department of Taxation, Commonwealth of Virginia, Policy Decisions: PD 11-193, (Dec. 2, 2011); PD 10-273, 2010 WL 8513292 (Dec. 16, 2010); PD 10-199, 2010 WL 4593945 (Aug. 31, 2010); PD 10-171, 2010 WL 4593905 (Aug. 10, 2010); PD 10-23, 2010 WL 4594011 (Mar. 26, 2010) (SCRA inapplicable to Virginia’s audit and reallocation of deductions and adjustments where Virginia domiciled spouse filed separate return from nonresident servicemember).

²²¹ Department of Taxation, Commonwealth of Virginia, PD 10-220, 2010 WL 4593994 (Sep. 16, 2010).

²²² *Id.* at *1.

²²³ *Id.*

²²⁴ *Id.* at *2.

²²⁵ *Id.*

²²⁶ *Id.*

included these: “filing a State of Legal Residence Certificate (Department of Defense Form 2058), obtaining a driver’s license, registering to vote and voting in local elections, registering an automobile, and exercising other benefits or obligations of a particular state.”²²⁷ The referenced Form 2058 is entitled “State of Legal Residence Certificate.”²²⁸ The authority for this form is the Tax Reform Act of 1976.²²⁹ The purpose of the form is so the federal government withholds the correct state income tax for a member based upon the member’s domicile.²³⁰

It is noteworthy that the spouse filing for the MSRRA exemption and resulting refund triggered the analysis of the servicemember’s status.²³¹ States like Virginia have amended the income tax withholding form so that employers will not withhold tax and the exempt military spouse will not have to file for a refund citing the MSRRA exemption.²³² Here, the decision was favorable to the military family because there was sufficient information connecting them to State A. It is reasonable to expect that a spouse who elects MSRRA protection on the tax withholding form will trigger review of the servicemember’s domicile. This case and others demonstrate the need for spouses who claim MSRRA protection need to sufficiently document that claim. As the next case from Virginia will demonstrate, the path to filing a MSRRA exemption is fraught with danger and can lead to unexpected tax consequences.

In Virginia Department of Taxation decision PD 10-237, a case decided just two weeks after PD 10-220, the litigation was again initiated by a spouse filing for refund under the MSRRA exemption, but the opposite conclusion was reached.²³³ Here, the servicemember was stationed in Virginia for approximately a decade.²³⁴ The member registered to vote in Virginia, obtained a Virginia driver’s license, and registered a vehicle there.²³⁵ The member never declared Virginia domicile on the State of Legal Residence Certificate (Department of Defense Form 2058), so Virginia taxes were not withheld from the military pay for any tax year.²³⁶ In 2009, the member was temporarily assigned to State B and filed a Form 2058 to change the State of Legal Residence for taxes from State A to State B.²³⁷ All of this becomes relevant because the spouse filed a routine Virginia tax return claiming MSRRA exemption in 2010 for the 2009 tax year.²³⁸

²²⁷ *Id.*

²²⁸ U.S. Dep’t of Def., DD Form 2058, State of Legal Residence Certificate (Feb. 1977).

²²⁹ Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1787.

²³⁰ *See supra* note 228.

²³¹ *See supra* note 221 at *1.

²³² Vir. Dep’t of Taxation Form VA-4, Rev. 11/09.

²³³ Department of Taxation, Commonwealth of Virginia, PD 10-237, 2010 WL 4594026 (Sep. 30, 2010).

²³⁴ *Id.* at *1.

²³⁵ *Id.*

²³⁶ *Id.* at *2.

²³⁷ *Id.*

²³⁸ *Id.* at *1.

Virginia denied the spouse's MSRRA exemption claim initially based on the fact that the servicemember changed his domicile to State B in 2009, resulting in the couple not having the same domicile.²³⁹ Instead of leaving the issue as is and paying the assessed taxes on the spouse's income, the spouse appealed the assessment decision.²⁴⁰ On appeal, the spouse contended that both spouses' domicile was in State A during 2009, and that the servicemember spouse only changed domicile to obtain a hunting permit in State B during the temporary duty assignment there.²⁴¹ The Virginia Department of Taxation first analyzed the overt acts that demonstrated the servicemember's intent to establish domicile.²⁴² Of great significance to the military family in this case, the Department found that the member's domicile was Virginia and the spouse's domicile was in State A.²⁴³

The Department concluded that the spouse was not entitled to the MSRRA exemption in Virginia because the spouse and member did not share the same domicile.²⁴⁴ In addition, the Department mandated that the servicemember "must file Virginia income tax returns for the 2005 through 2009 taxable years. The returns, along with the payment of any tax due, should be submitted to: Virginia Department of Taxation, Office of Tax Policy, Appeals and Rulings...."²⁴⁵

The impact of this case on military families is profound. A spouse filed for MSRRA exemption and the end result was assessing both the spouse for income tax and also the servicemember for multiple years of past due taxes. Invoking the MSRRA protections for spouses should be done cautiously and with the assistance of legal counsel competent to advise in this area of the law. The need for legal counsel on this issue is even more critical in certain states. Virginia has demonstrated it takes a close look at claims for MSRRA exemption and will also examine the servicemember's life in search for an opportunity to impose previous year tax assessments. Other states have challenged servicemember domicile for the purpose of income tax assessment both before and after the MSRRA was enacted, including Minnesota and Oregon. The Minnesota litigation provides a good example of what other courts have used as a foundational analysis, so it will be discussed next.

B. Other State Challenges to Servicemember Domicile: Minnesota and Oregon

The most notable challenge to servicemembers' domicile is when the Minnesota Department of Revenue attempted to levy income tax upon a dozen Public Health Service (PHS) officers stationed in Minnesota but who claimed

²³⁹ *Id.* at *2-3.

²⁴⁰ *Id.* at *1.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at *2-3.

²⁴⁴ *Id.* at *2.

²⁴⁵ *Id.* at *3.

domicile elsewhere.²⁴⁶ These officers, like active duty servicemembers, benefit from SCRA protections.²⁴⁷ There were two aspects of the Minnesota tax rule at issue: Rule 8001.0300, subpart 2, establishing a presumption that the domicile of one spouse is the same for the other, and Rule 8001.0300, subpart 3, a list of “A-Z” factors used to determine a person’s domicile.²⁴⁸ The Minnesota District Court had little trouble concluding that the provisions in the SSCRA preempted the marital domicile presumption from applying to the officers despite two previous rulings by the Minnesota Tax Court, predictably, holding that there was no such conflict.²⁴⁹ The second Rule presented an issue of first impression in the federal courts. Minnesota Rule 8001.0300, subpart 3 are the “A-Z factors.”²⁵⁰ The factors are these:

Subp. 3. Considerations. The following items listed will be considered in determining whether or not a person is domiciled in this state:

- A. location of domicile for prior years;
- B. where the person votes or is registered to vote, but casting an illegal vote does not establish domicile for income tax purposes;
- C. status as a student;
- D. classification of employment as temporary or permanent;
- E. location of employment;
- F. location of newly acquired living quarters whether owned or rented;
- G. present status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available for rent to another;
- H. whether homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and whether the homestead status of the former living quarters has not been renewed;
- I. ownership of other real property;
- J. jurisdiction in which a valid driver’s license was issued;
- K. jurisdiction from which any professional licenses were issued;
- L. location of the person’s union membership;
- M. jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles;
- N. whether resident or nonresident fishing or hunting licenses purchased;

²⁴⁶ United States v. Minnesota, 97 F.Supp.2d 973 (D. Minn. 2000).

²⁴⁷ *Id.* at 974-75 (citing 42 U.S.C. § 213(e) which is an Administration provision for Public Health Service officers, extending them the protections under the SCRA). The particular provision at issue in *Minnesota* was then Section 574 of the SSCRA (currently Section 571 of the SCRA). See *Id.* at 978.

²⁴⁸ *Id.* at 974.

²⁴⁹ *Id.* at 983.

²⁵⁰ *Id.*

- O. whether an income tax return has been filed as a resident or nonresident;
- P. whether the person has fulfilled the tax obligations required of a resident;
- Q. location of any bank accounts, especially the location of the most active checking account;
- R. location of other transactions with financial institutions;
- S. location of the place of worship at which the person is a member;
- T. location of business relationships and the place where business is transacted;
- U. location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member;
- V. address where mail is received;
- W. percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota;
- X. location of jurisdiction from which unemployment compensation benefits are received;
- Y. location of schools at which the person or the person's spouse or children attend, and whether resident or nonresident tuition was charged; and
- Z. statements made to an insurance company, concerning the person's residence, and on which the insurance is based.

Any one of the items listed above will not, by itself, determine domicile.

Charitable contributions made by a person will not be considered in determining whether that person is domiciled in Minnesota.²⁵¹

The District Court, acknowledged that relocating under the compulsion of military orders and living in base quarters cannot change a person's domicile, that a member could only live in such quarters during the period of orders, but a person could always take other steps to change domicile.²⁵²

This understanding assumes availability of either military or privatized housing on a military installation, which for many installations is unavailable for assigned members, and seems to be an outdated view. Even if base housing was available, many members and their families may not desire to be surrounded by the military way of life every waking moment, preferring instead to settle into a normal

²⁵¹ Minn. Rule 8001.0300, subp. 3

²⁵² *Id.* at 978 n.6 (quoting I JOSEPH HENRY BEALE, CONFLICT OF LAWS 155 (1916)).

community and have as close to a normal life as possible during a tour of duty. There are national benefits to active duty families settling, to the extent possible, in predominantly civilian neighborhoods.²⁵³

The District Court concluded that the clear purpose of the Act was this: “the SSCRA protects servicepeople from ‘double taxation’ by both their home state and the state in which they serve the United States.”²⁵⁴ The opinion then discusses how federal courts have struck down the imposition of a city revenue-generating fee on motor vehicles operated on the streets²⁵⁵ and a school board-imposed tuition on children whose parents were not domiciled in North Carolina.²⁵⁶ Faced with a void of federal authority on point with the legal standoff between the United States and Minnesota, the District Court distilled a few principles to guide its analysis:

First, and most obvious, no state can force a serviceperson to pay a revenue-building tax unless he is deemed to be a resident or domiciliary thereof. [Citing *California v. Buzard*, 382 U.S. 386, 393 (1966)]. Correlatively, an attempt to tax must bear a close relationship to a serviceperson’s activities within the state. [Citing *Sullivan v. United States*, 395 U.S. 169, 175 (1969)]. Any revenue-raising tax may be imposed only if a serviceperson’s domicile, as protected by the SSCRA, is in the taxing state as well. From these principles it can be deduced that any state law or regulation which leads to a serious risk that, on the basis of domicile, a serviceperson will be forced to pay income tax to a state in which he bears no substantial connection violates the SSCRA. Furthermore, the SSCRA likely preempts any state law or regulation that leads to a serious risk that a serviceperson would be subject to double taxation, by both his state of claimed domicile and the state in which he is posted, regardless of whether the state of claimed domicile actually does impose such a tax. [Citing *Dameron v. Brodhead*, 345 U.S. 322, 326 (1953)].²⁵⁷

In addition to the federal guidance, Minnesota law imposed an income tax on individuals domiciled in that state and also on “any individual domiciled outside the state who maintains a place of abode in the state and spends in the aggregate more than one-half of the tax year in Minnesota, unless the individual or the spouse of the

²⁵³ Active duty integration with civilian communities helps bring national conflict home to the nation and hopefully results in more informed political decisions. With all of our armed forces holed up on installations the true impact of war will not impact civilian communities. Active duty families living in civilian communities helps the nation become more acquainted with the wars it fights, much like activated Reserve and National Guard personnel accomplish.

²⁵⁴ *Id.* at 978 (citation omitted).

²⁵⁵ *Id.* at 979-80 (discussing *United States v. City of Highwood*, 712 F.Supp. 138 (N.D.Ill.1989)).

²⁵⁶ *Id.* at 980 (discussing *United States v. Onslow City Bd. of Educ.*, 728 F.2d 628 (4th Cir.1984)).

²⁵⁷ *Id.* at 981.

individual is in the armed forces of the United States....”²⁵⁸ This left the substantive question to be answered of whether officers were domiciled in Minnesota.

The District Court concluded that Minnesota’s domicile analysis did not significantly differ from traditional domicile analysis.²⁵⁹ As noted, federal law easily preempted Minnesota’s marital presumption that the domicile of one spouse was determinative of the other spouse’s domicile.²⁶⁰ However, in that discussion, the District Court based its decision on the reasoning that it “violates both the clear line of case law handed down under the SSCRA as well as substantial public policy concerns.”²⁶¹ The opinion then cites Supreme Court precedent to support this statement: “As the cases discussed above indicate, the SSCRA allows the imposition of a tax only when there is a direct nexus between the tax and a serviceperson’s activities within the state of his posting.”²⁶² However, a reader of *Sullivan* or the SSCRA line of cases would be hard pressed to support the contention that a “direct nexus” allows a state to impose “a tax” on a servicemember. It is clear from *Sullivan* that whether or not a nexus exists, states can still impose some form of tax, such as sales tax on servicemembers; the only nexus being a purchase in a particular location. Of concern is that *Minnesota* seems to create the notion that nexus overcomes federal preemption.

The litigation between the PHS officers and Minnesota highlighted certain factors, which included:

- 3(F): The location of a newly-acquired home, whether owned or rented;
- 3(J): The state which issued a person’s driver’s license;
- 3(M): The state in which a person’s car is registered, as well as the physical location of the automobile; and
- 3(U): The location of organizations and clubs to which a person belongs.²⁶³

²⁵⁸ *Id.* (quoting MINN. STAT. § 290.01, subd. 7).

²⁵⁹ *Id.* at 981 (quoting Minn. Rule 8001.0300, subp. 2, stating in part: “The term ‘domicile’ means the bodily presence of an individual person in a place coupled with an intent to make such a place one’s home. The domicile of any person shall be that place in which the person’s habitation is fixed, without any present intentions of removal therefrom, and to which, whenever absent, that person intends to return. A person who leaves home to go into another jurisdiction for temporary purposes only is not considered to have lost that person’s domicile. But if a person moves to another jurisdiction with the intention of remaining there permanently or for an indefinite time as a home, that person shall have lost that person’s domicile ... The mere intention to acquire a new domicile, without the fact of physical removal, does not change the status of the taxpayer, nor does the fact of physical removal, without the intention to remain, change the person’s status.”).

²⁶⁰ *Id.* at 982-83.

²⁶¹ *Id.* at 982.

²⁶² *Id.* at 983 (citing *Sullivan v. United States*, 395 U.S. 169 (1969)).

²⁶³ *Id.* at 984.

The District Court distinguished the factors analysis from the marital presumption because, “the factors...are merely that- factors, incidents the state may examine to assist in a determination of domicile.”²⁶⁴ On the other hand, the District Court explained that a presumption “is obviously strong medicine and carries a much greater risk of frustrating the purposes of the SSCRA than one of twenty-six indicia of domicile.”²⁶⁵ The District Court was satisfied that the “concerns here of any one factor at issue here upsetting the system established by the SSCRA are thus much weaker than the problems presented by the marital presumption.”²⁶⁶

Curiously, part of the District Court’s analysis was that the United States Department of Health and Human Services advised members to be careful not to take actions that could be viewed as intent to change domicile, thus indicating the scope of the SSCRA protections.²⁶⁷ In addition, the protections under the Act are individual rights for servicemembers and some for spouses. How can a department’s pamphlet negatively impact an individual right or play a significant role in determining the purpose of a statute?

The District Court took special interest in the word “solely,” defining that term to mean “exclusively” and that it “directs the Court to look to only the single factor identified.”²⁶⁸ However, the cases relied upon by the District Court concerned the use of “solely” in the Revenue Act of 1934 and the Employee Retirement Income Security Act.²⁶⁹ The cited cases may provide insight into Congress’s use of “solely” in statutory language but do not speak to the purpose of the SCRA, which exists to assist servicemembers compelled to move under military orders. The District Court took the word “solely” to apply only to one of a set of factors used by states to determine domicile.²⁷⁰ However, the plain meaning of the word “solely” as used in the SCRA could easily be read to cover activity inherent to residing in a particular location.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* (stating “The Department of Health and Human Service’s own policy manual” Subchapter CC29.9, Instruction 2, highlighting “factors which a state might consider in making residency determinations, including the state in which a motor vehicle is registered, the state that issued an officer’s driver’s license, and the state in which an officer is registered to vote.”).

²⁶⁸ *Id.*

²⁶⁹ *Id.* (citing *Helvering v. Southwest Consol. Corp.*, 315 U.S. 194, 198 (1942) (discussing whether the term “reorganization” meant either “a statutory merger or consolidation, or...the acquisition by one corporation in exchange solely for all or a part of its voting stock...” under Section 112(g) (1) of the Revenue Act of 1934, 48 Stat. 680); and *Carollo v. Cement & Concrete Workers District Council Pension Plan*, 964 F.Supp. 677, 682 (E.D.N.Y.1997) (discussing when a change in a base accrual formula is justified where 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(F) provided “if the base for the computation of retirement benefits changes solely by reason of an increase in the number of years of participation.”)).

²⁷⁰ *Id.*

The District Court concluded that a plain reading of the SSCRA would allow a state to impose taxation (declare a servicemember domiciled in the host state instead of the home state) “as long as other factors exist, in addition to physical presence in the state, which leads to the conclusion that a serviceperson has affirmatively chosen the state of posting as his home.”²⁷¹ The reasoning to support this conclusion is that if such factors could not be looked to, then the Act “would render every state incapable of ever taxing the incomes of a serviceperson without the serviceperson’s consent. Such a result would be inherently unfair.”²⁷²

The reasoning and conclusion of the District Court are confusing. There is no basis to conclude that the SSCRA would ever render every state incapable of ever taxing the incomes of members without their consent. Just the opposite is true. Servicemembers are protected from such actions by host states because it is the home state that reserves the right to tax members.²⁷³ Further, if servicemembers choose a particular state and establish domicile prior to being ordered to another state, then their purpose for doing so is irrelevant, even if it is that they appreciate and can benefit from the taxation philosophy of the home state.²⁷⁴ That does not change the fact that the home state always reserves the right to impose revenue generating taxation on members living elsewhere. The statement in the opinion that the Act would make states incapable of ever imposing an income tax is baseless and derails the analysis.

The District Court provided a caveat to its holding that federal law did not categorically preempt the factors discussed, but that “applying these factors in a manner which does not truly pay heed to a particular serviceperson’s intention to remain in Minnesota following the conclusion of his service could easily render the factors preempted as applied.”²⁷⁵ In the end, the conclusion of the District Court is narrow. The Order held that the marital presumption was preempted by the domicile provision of the SSCRA but that Section “does not preempt the use of the factors listed in Minn. Rule 8001.0300 subpart 3(J), (M), (F), and (U) to determine the domicile of PHS officers.”²⁷⁶

The position advocated below in this article arrives at a different conclusion than the District Court arrived at in *Minnesota*. State tax authorities have relied on *Minnesota* in pursuing servicemembers for income tax even though the result is at odds with the SCRA modification to traditional domicile analysis.²⁷⁷ As the

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See supra*, note 163.

²⁷⁴ *See supra*, note 51

²⁷⁵ *Minnesota*, 97 F.Supp 2d at 985.

²⁷⁶ *Id.*

²⁷⁷ *Palandech v. Dep’t of Revenue*, No. TC–MD 100015C, 2011 WL 1045641 (Or. T.C. March 23, 2011).

following case demonstrates, the reasoning in *Minnesota* has left servicemembers more vulnerable to state attacks on domicile.

Oregon has not hesitated to initiate litigation against servicemembers for income tax assessments. A recent case demonstrates how a servicemember with Oregon connections cannot simply file a Department of Defense Form 2058, maintain a driver’s license and vote in another state.²⁷⁸ Oregon may require much more.

In March 2011, after a trial on the matter, Oregon concluded that a Public Health Service dentist was required to file a return for tax years 2004, 2005, and 2006.²⁷⁹ One may be taken aback by some of the factors the Court discussed, including where the servicemember’s spouse chose to give birth to their two daughters in 1988 and 1990, respectively.²⁸⁰ The fact that this couple chose to have their daughters delivered in Oregon, even though they lived in Washington, was worthy enough to discuss, albeit because the member’s spouse “had an established relationship with an obstetrics/gynecologist in Oregon and preferred to continue with that physician, in part because there had been complications with her first pregnancy.”²⁸¹ It seems a bit much to delve into such private details of a person’s life in a discussion on tax liability over a decade later. Nonetheless, there were other relevant factors that led to the Court’s conclusion.

The key facts that were weighed include the following: The servicemember “retained his Washington driver license and voter registration until he retired in 2006.”²⁸² However, the Court deemed these overt acts as a guise to maintain enough connections to Washington to overcome Oregon domicile.²⁸³ The Court reached this conclusion because the servicemember had other connections to Oregon.²⁸⁴ The critical connections to Oregon included that the member owned one lot of land in Oregon, held an Oregon dental license, in addition to military duties he worked part-time at an Oregon dental office, his mother moved to Oregon from another state, he had a brother living in Oregon a short distance from his residence, both the member and his spouse held bank accounts in Oregon, and registered vehicles in Oregon.²⁸⁵ Weighing the connections to Oregon versus Washington, the Court held that this servicemember was domiciled in Oregon.²⁸⁶ The Court upheld the deficiency assessments for tax years 2004 through 2006.²⁸⁷

²⁷⁸ *Id.* at *9-10.

²⁷⁹ *Id.* at *2.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at *8.

²⁸⁴ *Id.* at *9.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at *10.

²⁸⁷ *Id.*

Palandech is not the only case demonstrating Oregon’s commitment to pursue servicemembers. The case involving (now retired) Senior Chief Petty Officer Martin Carr and his spouse Hollie into Oregon Tax Court provides a clear example of how the factors analysis, as reviewed by the District Court in *Minnesota*, actually bring about the exact opposite result of what the domicile provisions in the Act are intended to prevent.²⁸⁸

The Carrs, *pro se*, challenged Oregon’s assessment of personal income taxes against them for 2001, 2002, and 2003.²⁸⁹ The Magistrate viewed the issue as whether the Carrs had a “sufficient nexus to the State of Oregon, despite Senior Chief Carr’s status in this state as a serviceperson under active duty, to make them responsible for paying personal income taxes on their income.”²⁹⁰

These are the uncontested facts: Senior Chief Carr served on active duty in the Navy since January 23, 1980.²⁹¹ His home of record was Nevada, a residence of his parents, and he never changed that home of record.²⁹² The first time the Navy ordered Carr to Oregon, and the first time Carr lived in Oregon, was in 1993.²⁹³ Carr completed a routine three year tour and was ordered to California in early 1996.²⁹⁴ While in California, Carr filed for bankruptcy, listing California as his domicile.²⁹⁵ Carr had placed Oregon as a preference on where he would not mind being stationed next.²⁹⁶ In 1999, after another three-year tour had elapsed, the Navy again ordered Carr to Oregon.²⁹⁷

While in Oregon for the second time, Carr’s family dependents accompanied him and he purchased a home.²⁹⁸ Carr was not stationed at a military installation so there was no military housing available to him or his family.²⁹⁹ He registered vehicles in Oregon.³⁰⁰ Carr did not register to vote in Oregon, did not obtain an Oregon driver’s license, and declared he had no intention of remaining in Oregon once his tour of duty expired.³⁰¹

The Carrs lived at nine different addresses between 1992 and 2001.³⁰² They had extended family still living in Nevada, but no connection to a particular

²⁸⁸ Carr v. Dep’t of Revenue, No. TC-MD 040979A, 2005 WL 3047252 (Or.T.C. Nov. 4, 2005).

²⁸⁹ *Id.* at *1.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

address or any real estate in Nevada.³⁰³ The Magistrate then turned to the question of whether, as the Carrs claimed, the SSCRA or SCRA domicile provisions protected their declaration that Oregon was not their domicile.³⁰⁴

After briefly mentioning the domicile protection available to servicemembers, the Magistrate zeroed in on the District Court's decision in *Minnesota*.³⁰⁵ In particular, the Magistrate cited only to the reasoning in *Minnesota* of what the word "solely" meant and the conclusion that a state may impose taxes upon a servicemember "as long as other factors exist, in addition to physical presence in the state, which leads to the conclusion that a serviceperson has affirmatively chosen the state of posting as home."³⁰⁶

Despite the Carrs' unequivocal and repeated declarations that they had no intent to remain in Oregon and had never made Oregon their domicile, the Magistrate was "nonetheless of the opinion they, albeit perhaps unknowingly, have made Oregon their domicile."³⁰⁷ Apparently, in Oregon, the test for domicile is not the historical presence coupled with intent to abandon the former and present intent to remain in the new, it is "overt acts, no one of which, including a statement of intent, is determinative."³⁰⁸ The Oregon test includes an examination of overt acts, and even though such connections to the state are "tenuous," so long as it is the strongest of associations, Oregon will impose an income tax on a nonresident servicemember and spouse.³⁰⁹

The Magistrate went on to conclude that the Carrs "plainly cannot support Nevada as their domicile" due to their current lack of connections with that state.³¹⁰ Apparently, in order for a servicemember or spouse to maintain domicile in their host state, they would need to own property, maintain driver's license, vote, register vehicles, and speak convincingly (to whom is not clear) of returning to the home state. If the Carrs had done these things, it would still not be conclusive, but "their case would be stronger."³¹¹ The Magistrate concluded that the Carrs needed to pay the Oregon income tax assessment for the previous three years, a decision which the Magistrate acknowledged had dramatic financial consequences to the Carrs.³¹² But, this is not the end of the Carrs' story.

³⁰³ *Id.*

³⁰⁴ *Id.* at *1-2.

³⁰⁵ *Id.* at *2 (citing *Minnesota*, 97 F. Supp. 2d 973).

³⁰⁶ *Id.* (quoting *Minnesota*, 97 F. Supp. 2d at 984) (the Tax Court Magistrate only cited to *Minnesota*, neglecting to include quotation marks, hence the absence of internal quotation marks to the quoted language).

³⁰⁷ *Id.* at *3.

³⁰⁸ *Id.* (citing *Hudspeth v. Dept. of Revenue*, 4 OTR 296, 298 (1971)).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.* at *3.

³¹² *Id.*

The now-civilian “Marty” and Hollie Carr were gracious in being interviewed for this article.³¹³ The case Oregon mounted against them goes down as one of the most traumatic experiences of their lives, even when compared with twenty-six years of active duty service in the United States Navy.³¹⁴ The Navy stationed Carr in Portland, Oregon as a recruiter in 1999.³¹⁵ He still maintains that neither he nor Hollie intended to remain in Oregon past the time of his ordered presence.³¹⁶ The decision of the Tax Court was filed in November 2005.³¹⁷ Carr retired from the Navy in January 2006.³¹⁸ He and Hollie moved to Georgia from Oregon in that same month, just as he had asserted to the Oregon tax authorities.³¹⁹ One of the main issues impacting their decision to settle down upon retiring from the Navy was future employment opportunity.³²⁰ Upon inquiry he confirmed that if a good position was available in Oregon (or another state for that matter) he would have strongly considered taking it, but he certainly had no present intent to remain in Oregon at any time he lived there.³²¹

Carr recalled a tax official mentioning that Carr’s name was in the phone book and he owned a house, so the initial inquiry began into taxing him.³²² Upon inquiry as to why he did not obtain legal assistance from a military attorney, he explained that there was no nearby installation.³²³ His command was aware of the litigation against him and was deeply concerned.³²⁴ The closest legal assistance office for Carr was in Washington.³²⁵ That office informed him that no attorney could represent him in the litigation and that even if they could, no attorney in that office was licensed to practice in Oregon.³²⁶

The Carrs did consult with an attorney in Oregon but were reasonably informed that due to the lack of precedent on the issue there was no predictability of how the litigation would end and truly no end in sight if they chose to retain counsel and fully litigate the issue.³²⁷ Rather than face criminal sanction, the Carrs ended up paying Oregon the multiple-year income tax assessment.³²⁸

³¹³ Telephone Interview with Martin and Hollie Carr (Mar. 14, 2010).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

The Carrs had the option to retain civilian counsel, but that is costly. The military legal assistance program was unable to assist the Carrs in their dilemma. Legal assistance does not seem to be designed or staffed to represent servicemembers in cases like this. But, there is still much that can be done to assist families like the Carrs.

These decisions from Virginia, Minnesota, and Oregon validate the concern that state courts may tend to interpret the federal questions raised by the SCRA favorable to the state. To further the point, there is a history of federal courts repeatedly deciding the issue of preemption at odds with state decisions,³²⁹ and then other state court decisions give only cursory treatment to SCRA implications when deciding against a servicemember.³³⁰ This is not to say that all states have reached results at odds with federal law.³³¹ Much can be done to educate servicemembers, their spouses, and state tax authorities on how the SCRA and MSRRA alter domicile analysis. Even with the limited capabilities of a military legal assistance program, there exists some obligation to educate military families of the litigation risk they can encounter. There are many tools available to meet this obligation, but it starts with a solid understanding and position on domicile analysis under the SCRA and MSRRA.

V. PROTECTING SERVICEMEMBERS' HUNT FOR HOME

The military journey can be the best experience of a person's life. The missions, travels, and relationships that come with military life demand continual attention by servicemembers and spouses. It is common experience in military communities to always be asking and answering the question of where a person claims as home, or where they are from. Servicemembers and military families frequently move locations, inherently making contacts to each state in which they live. For those who chose the military as a career, there may be very little thought of what the future may hold. Anticipating or dreading the next duty location is sufficient excitement or worry for the day. For deployed troops, returning to any part of the United States is sufficient to say they are home. The unique nature of military life is in direct conflict with traditional domicile analysis because servicemembers

³²⁹ Minnesota, 97 F. Supp. 2d at 983 (citing *Juskowiak v. Comm'r of Revenue*, No. 6607, 1996 WL 125912 (Minn. T.C. Mar. 18, 1996) (stating “*Juskowiak* examined neither the case law surrounding the SSCRA nor the extent to which application of these presumptions could seriously frustrate the intentions of Congress and the lives of servicepersons protected by the Act.”); *Wolf v. Comm'r of Revenue*, No. 7068, 1999 WL 640030, *2 (Minn. T.C. Aug. 17, 1999) (applying the holding in *Juskowiak*)). See also *Buzard*, 382 U.S. at 393 n. 7 (expressly noting that its holding in *Buzard* involving SSCRA domicile protections was directly at odds with the Virginia Court's holding in *Whiting v. City of Portsmouth*, 118 S.E.2d 505 (Va. 1961) (holding that a serviceman is only exempt from a city motor vehicle license tax if such a tax was paid to the home state)).

³³⁰ See *Carr v. Dep't of Revenue*, No. TC-MD 040979A, 2005 WL 3047252 (Or.T.C. Nov. 4, 2005).

³³¹ See, e.g., *In the Matter of Ordinance of Annexation No. 1977-4*, 249 S.E.2d 698, 708(N.C. 1978) (holding that a local official “cannot complain because Congress has exempted military personnel from local taxation. Soldiers and Sailors Civil Relief Act, 50 U.S.C. App. [§] 574.”).

will make their home wherever they are told to reside and for as long as they are told to remain in a particular location. This is why the domicile protections in the SCRA and MSRRA exist.

The SCRA and MSRRA should preempt the current domicile analysis employed by many state tax agencies and courts. A nexus or contacts based analysis like the A-Z factors Minnesota uses is fine, but it directly conflicts with the protections in the SCRA and MSRRA. Servicemembers and spouses engage in certain activity that is inherent to living in a state pursuant to military orders. These activities should not be held against servicemembers and spouses because it is inherent activity to living in any location. The SCRA and MSRAA should be read to preempt any factor that has to do with a person being “absent” from a home state and “present” in a host state. Those terms are central to the congressionally altered domicile analysis.

A. The Meaning of “Absent” and “Present”

The two words that must be properly defined in order for the SCRA and MSRRA to actually provide relief to members and spouses are “absent” and “present.” Defining these words is the key to determining whether or not Congress, through the Acts, actually modified domicile analysis at all. Many gaping holes exist in some of the reasoning and conclusions of judicial opinions interpreting the domicile provision in the SCRA. The central point that is missing from domicile analysis under the SCRA is that being “absent” from the home state of domicile and “present” in a host state involves more than just one factor.

If a member and spouse are absent from a home state because they are complying with the member’s orders, then they would not continue to maintain factors in the home state for items such as a personal residence, receiving mail, library cards, club memberships, school enrollment, and a host of other activities. They would naturally and reasonably make those associations in the state wherever they presently reside. This is not because they wish to abandon the old and chose a new domicile; they are simply conducting activities that are inherent to living in any location. States also cannot count against a member or spouse factors that are inherently impractical by virtue of being absent from a home state.

Based on the reasoning in *Minnesota* and state tax courts, any servicemember or spouse present in a host state would satisfy a number of factors simply by existing in that location, leaving them open to litigation on the issue of their domicile. While the SCRA and MSRRA protections do not prevent a voluntary change in domicile, it does protect servicemembers and spouses from a host state attack based upon factors that are inherent to civilized existence. Domicile for members and spouses should not be subject to challenge if at any time connections to a host state tip in favor of that state where the member only had the minimum contacts necessary

to live in such a way that would free the member up to perform the duties of the military position held.

Bringing the academic to the practical: drive through a housing area on any given military installation. Many houses will have two vehicles in the driveway, the member's and the spouse's, but often will have two different state vehicle registration tags. Is this because the spouses intend to have different domiciles? The answer is clearly of course not. It is simply a matter of how to comply with the registration requirements in the simplest, most expedient manner. Domicile analysis that considers inherent activity is hostile towards military families and improperly considers absence from a home state and presence in a host state. Walking through each A-Z factor demonstrates that many activities are inherent to being present in a host state, rendering them preempted.

B. Applying Preemption to State Domicile Factors

It is helpful to note that not all States insist on pushing the legal limits by hauling servicemembers into court to challenge their domicile. States, such as Missouri, have a reasonable and helpful approach to determining a servicemember's domicile. In Missouri, the "military personnel's domicile is presumed to be his or her home of record."³³² Home of record is defined as the "state of residency listed with the military in the individual's personnel file."³³³ A member's personnel file for state of residency is determined based on the member's declaration on the Form 2058.³³⁴ This presumption makes the law helpful to military families, unlike the time consuming process and wrangling required with states like Virginia, Minnesota, and Oregon using a factors based analysis to the disadvantage of servicemembers and spouses.

By using an A-Z factor analysis to determine domicile, servicemembers and spouses are not treated any differently than any other person, but the SCRA and MSRRA domicile provisions exist so that they should be treated differently. The language in the Act mandates that an A-Z factors approach is legally insufficient because there are activities inherent to living in a particular location. Those factors cannot be held against or even considered in determining the domicile of a servicemember or spouse. For ease of reference, this table lists the A-Z factors and highlights the factors that should not be included in SCRA and MSRRA domicile analysis.

The factors in **bold** indicate the activity is inherent to living in a particular location, triggering SCRA protection from a host state holding the activity against the member. The factors in *italics* indicate that the activity is not always inherent

³³² Missouri Dep't of Rev. Form DOR 558 (11-2011) available at http://dor.mo.gov/forms/558_2011.pdf.

³³³ *Id.*

³³⁴ See *supra* notes 228 - 230.

to being present in a particular location but could justify preemption as applied. The factors in plain text indicate the Act would not preempt those activities because they are not inherent to presence in a particular place.

<p>A. location of domicile for prior years;</p>	<p>This factor could possibly involve the prohibition in the SCRA that a member's and spouse's absence from a home state cannot result in the loss of domicile for tax purposes. The location of domicile for prior years should be presumed to remain intact unless express declarations are made to change domicile. Even so, the factor is still not one inherent to living in a particular location and is properly considered.</p>
<p>B. where the person votes or is registered to vote, but casting an illegal vote does not establish domicile for income tax purposes;</p>	<p>This will likely match the location at the home of record and declaration on the DD 2058 unless for convenience sake a member or spouse registers in the local jurisdiction, changing their registration each time they move.</p>
<p>C. status as a student;</p>	<p>Many members and spouses are enrolled in classes in the local community, especially because base education offices facilitate on-base college classes. Unless taking classes in a virtual setting, members and spouses stationed at a particular location are going to take classes where they temporarily live, where it is most convenient to obtain education. Perhaps this factor was meant to only single out fulltime college students, who would likely be temporarily residing in a state for the duration of college. If that is the case, it should be noted that many military assignments are less than the time it takes a student to complete undergraduate studies.</p>

<p><i>D. classification of employment as temporary or permanent;</i></p>	<p>This factor, if it means employment in the particular location, would certainly weigh in favor of servicemembers and spouses living in a particular place only so long as the servicemember is ordered to be there. Even so, the only way this factor could be relevant to determine a servicemember's domicile is if there was some declaration that the member intended to both depart military service and permanently remain in the present location.</p>
<p>E. location of employment;</p>	<p>All military service is at the discretion of the respective Department concerned. There is no guarantee a member will even be retained to serve until retirement eligible. Also, all active duty service subjects a member to transient residence in a variety of locations. A servicemember does not get to choose where the respective service will order the location. The nature of military service is at odds with this factor because servicemembers simply do not know how long their service will last in a location and where the military will order them next.</p>
<p>F. location of newly acquired living quarters whether owned or rented;</p>	<p>Aside from national economic policy concerns favoring home ownership, this factor has nothing to do with whether or not a member and spouse intend to permanently reside in a host state. This factor is more indicative of a local housing market and risk tolerance than a person's domicile. The considerations that go into purchasing or renting involve many aspects, but changing domicile is seldom even a concern that is factored into the decision. If an adequate house is not available to rent, then a member may be forced to consider purchasing even if that is undesirable.</p>
<p>G. present status of the former living quarters, i.e., whether it was sold, offered for sale, rented, or available for rent to another;</p>	<p>The inherent nature of military life being transient, and the statutory domicile protection afforded to members and spouses due to that transience could result in this factor being preempted as applied. A member who cannot sell a home is not choosing to maintain the host state connection; it is just an unfortunate situation for the member.</p>

<p>H. whether homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and whether the homestead status of the former living quarters has not been renewed;</p>	<p>This factor is more indicative of what is financially advantageous to a transient servicemember and spouse. If a member or spouse owns multiple properties, then it is reasonable to look to which one has been declared the homestead, because then, the factor is not a factor that is inherent with living in a particular place. However, for members and spouses who own only one home, wherever their present host residence may be, they should not be discouraged from or penalized by enjoying the homestead exemption as other homeowners do. For people like the Carrs, who owned only one residence, why should they be penalized for doing what common financial sense dictates?</p>
<p>I. ownership of other real property;</p>	<p>This factor could be relevant for those who voluntarily acquired real estate in certain locations, especially if the acquisition was to facilitate settling in a particular place after military service. Nonetheless, the factor is not preempted because it is not inherent to living in a particular location or being absent from a home state.</p>
<p>J. jurisdiction in which a valid driver's license was issued;</p>	<p>This factor is a bit tricky and should be dependent upon whether or not a home state makes provision for a domiciled (but temporarily absent) servicemember or spouse can renew their license in the home state while maintaining physical presence in another host state in compliance with military orders. For example, many states make provision for a member and sometimes dependents to extend the validity of the license while the member and dependents are living outside of the home state on military orders.³³⁵ If the home state has no such provision then the factor is preempted because the member and spouse would need to comply with the laws of the host state. How could a license be maintained in a home state if there is no home state address to put on the license and no provision made for an exception?</p>

³³⁵ See, e.g., CAL. VEHICLE CODE § 12817 (2012); CONN. GEN. STAT. § 27-102a (2012); HAW. REV. STAT. § 286-107(g) (2012); IDAHO CODE ANN. § 49-319(8)(a) (2012); KAN. STAT. ANN. § 8-247(b) (2012); and MICH. COMP. LAWS § 257.811.

<p>K. jurisdiction from which any professional licenses were issued;</p>	<p>The factor is not preempted because it is not a factor inherent to presence in a particular place or absence from a home state, but it seems unreasonable. Some professional licenses, such as to practice law, are valid in all jurisdictions if practicing on behalf of the United States. There is no need to go through the rigors of obtaining such licenses from other jurisdictions.</p>
<p>L. location of the person’s union membership;</p>	<p>This factor is facially invalid for servicemembers because they are not members of any union. Perhaps it could be used for a spouse. It is not a factor that is inherent to residing in a particular place so it is not preempted.</p>
<p>M. jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles;</p>	<p>This tax, which every state likely does not impose, is both a property tax and a privilege tax.³³⁶ This factor is preempted because efficient transportation is inherent to living in a particular location, especially for servicemembers. The act of registering a motor vehicle requires a physical address be listed. Often, the most efficient method to comply with registration laws is to register the vehicle at the nearest location to the host state residence. This is an act that is inherent with living in a particular location, unless we demand all those stationed far from the home state to potentially need to travel back to the state or expend time and resources to maintain registration in that state. Also, just as with a driver’s license, if there is no home state address to associate a vehicle registration and no exemption provision for members then how could a vehicle be registered in the home state?</p>
<p>N. whether resident or nonresident fishing or hunting licenses purchased;</p>	<p>Servicemembers and spouses are required to obtain such licenses in the place they currently reside in order to enjoy these activities. States could mandate that only those who truly claim domicile there can pay a reduced rate for such a license. This would place servicemembers and spouses at an economic disadvantage for having to pay a nonresident fee. However, the activity is not one that is inherent to living in a particular area.</p>

³³⁶ State v. Storaasli, 230 N.W. 572, 574 (Minn. 1930) (stating “It is a property tax in the sense that it exempts the vehicle licensed from other taxation as property. It is in lieu of other taxes. But it is equally clear that it is a privilege tax . . . It is so imposed on nonresidents as a privilege tax.”).

<p>O. whether an income tax return has been filed as a resident or nonresident;</p>	<p>This factor is not preempted because it is discretionary with the tax filer as to the chosen status. Filing taxes as a resident in the home state (if that state taxes income) and filing in the host state as a non-resident, is equivalent to a declaration of domicile.</p>
<p>P. whether the person has fulfilled the tax obligations required of a resident;</p>	<p>This factor is not clear. It seems the factor would be looking to distinguish those who have not paid income tax to a home state, or who have complied with the required filing in Minnesota. On its face, the factor is not one preempted as inherent to living in a particular location.</p>
<p>Q. location of any bank accounts, especially the location of the most active checking account;</p>	<p>This factor is, perhaps, a bit antiquated in the modern-day system of direct deposits and online banking. Does this factor mean that a majority of members and spouses could have a Texas connection if the bank that houses their checking account is in a place like San Antonio, Texas? Local banking activity, to the extent it still exists today, is more of a convenience factor. All servicemembers are required to maintain a bank account for direct deposit; so not having an account in some location is not an option. In the event a person switches local bank accounts every time new orders are received, the factor is one inherent to presence in a particular location. This factor would always be preempted as applied due to the necessity of direct deposit and a military mandated checking account.</p>
<p><i>R. location of other transactions with financial institutions;</i></p>	<p>In this modern era of electronic transactions, what does this factor say about common military financial institutions providing products such as loans, services, and investments to personnel and their families all over the world? However, the factor could be relevant if a person, for example, had a very close relationship to a lender in a particular location and repeatedly obtained financing for investment properties or the like. Still, the factor has more to do with where a person can obtain more favorable financing or where a trusted financial and investment advisor is located rather than an indication of where a person intends to permanently remain.</p>

<p>S. location of the place of worship at which the person is a member;</p>	<p>This factor is subject to preemption on two fronts. First, the factor directly conflicts with aspects of a constitutionally protected conduct. For example, some religious practices focus on cohesion with a local group of likeminded individuals. The factor inhibits the free exercise of religion because there are potentially negative governmental consequences attached to participating in such activity. The factor leaves servicemembers and their families with a choice to either tread carefully in exercising their religious freedom or risk an adverse impact by a state tax authority</p> <p>The intent is to fully participate in a constitutionally protected activity, not to express where they intend to permanently reside.</p>
<p><i>T. location of business relationships and the place where business is transacted;</i></p>	<p>This factor most likely does not speak to routine transactions such as purchasing a vehicle or the like. Sales tax is paid on such transactions regardless of location or domicile. Where is a person buying or selling goods, obtaining or rendering services. These business actions are not inherent to where a person lives solely in compliance with military orders. Although, some relationships that could be referred to as business relationships will be wherever a member or spouse are stationed. It is important to be mindful of <i>Mitchell</i>, where the Court concluded that lengthy travels and business transactions did not change Mitchell’s domicile.³³⁷</p>
<p>U. location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member;</p>	<p>Such memberships are likely to change based upon where a person lives. For athletic organizations, military members, as part of their conditions of employment, must meet minimum health and fitness standards. All members are either going to be frequent visitors of local gym facilities on a military base or in the local area. Memberships in clubs or other social organizations, such as a golf course, are activities directly related to where a person currently resides. This factor is preempted.</p>
<p>V. address where mail is received;</p>	<p>Receiving mail at the current host state residence is an action inherent to living in a particular location and is thus preempted.</p>

³³⁷ *Mitchell v. United States*, 88 U.S. 350, 353 (1874).

<p>W. percentage of time (not counting hours of employment) that the person is physically present in the host state and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than the host state;</p>	<p>Excluding the assumed normal eight hours worked each weekday, people will typically spend the remaining sixteen or so hours (nearly half of which is spent sleeping) in the local area, in close proximity to the location of their work for the following day. Even if a person were to return each weekend to the home state, the time would never overcome that spent in the host state. Servicemembers are also under strict limitations to stay within the local area or no more than a certain distance from the ordered duty location in the event they are recalled to deploy or some other exigency arises. This factor is preempted due to the inherent nature of military work and the practical matter of not being able to ever spend more time in a home state than the host state. Spending more time in the host state than the home state is inherent to living in a particular location by virtue of military orders. In addition, the absence from the home state is not counted against the member or spouse.</p>
<p>X. location of jurisdiction from which unemployment compensation benefits are received;</p>	<p>Like factor L above, this factor is facially invalid for servicemembers because they would no longer be servicemembers and ordered to live in a particular location if no longer employed by the federal government. Perhaps it could be used for a spouse. It is not a factor that is inherent to residing in a particular place so it is not preempted.</p>
<p>Y. location of schools at which the person or the person's spouse or children attend, and whether resident or nonresident tuition was charged;</p>	<p>The non-collegiate schools that dependents attend are going to be in the place of residence. For college classes, the temporary time spent at a college or university is not likely to trigger a change in domicile for the student and so should not count against the parent. In the end, the activity of attending school in a convenient location near a host state residence is inherent to living in a particular location. Must a family be held to the impossible task of arranging for daily travel from the host to home state? Of course not. Should a non-resident child attending college in a particular location have anything to do with a parent's domicile? How can it? The child's decision is influenced by a variety of factors including where they even get accepted to attend college. The factor has nothing to do with a parent's domicile. Also, the same concerns expressed in factor C above are relevant here.</p>

<p>Z. statements made to an insurance company, concerning the person's residence, and on which the insurance is based.</p>	<p>For insurance, members and spouses will likely obtain insurance on only the property they currently possess, which is often the present residence, vehicles, and any rider policies on valuable possessions such as jewelry. Insurance on items like a house and vehicles necessarily need to be in the location of the items, a host state. Insurance is an item that we have become accustomed with to manage risk. We commonly obtain renters or homeowners insurance, state mandated vehicle insurance, personal property rider insurance, professional license insurance, and possibly umbrella liability insurance. This factor is inherent to being present in a particular place solely in compliance with military orders, rendering it preempted.</p>
<p>Charitable Contributions.</p>	<p>Last, charitable contributions made by a person should be excluded from the analysis if contributions are made as part of practicing one's faith. Even if contributions are not made pursuant to practicing one's faith, public policy should encourage charitable contributions and not hold this against individuals in any way. Still, the same reasons for attending a particular religious organization should apply to this factor as well, preempting it, because contributions will inherently be made to organizations where a person lives.</p>

Not surprisingly, the factors used against some of the Public Health officers in *Minnesota* included those which are inherent to living in any location: F: location of a newly-acquired home, whether owned or rented; J: The state which issued a person's driver's license; M: state in which a person's car is registered, as well as the physical location of the automobile; and U: location of organizations and clubs to which a person belongs.

Apparent from a substantive discussion of each of the factors is that many are irrelevant to servicemembers or clearly preempted by the SCRA due to the activity being inherent to being absent from a home state and present in a host state. The academic discussion still leaves military legal assistance practitioners with practical needs, like what to do when a client walks in with a demand, audit, or summons from a state challenging the domicile in an effort to tax income.

C. Making the Law Work for Servicemembers and Military Families

There are a variety of ways to protect domicile. The most useful relief would be to amend 50 U.S.C. App. § 571(a). Not altering the SCRA and MSRRA to clarify the confusion on domicile factors analysis will be held as a statement

against servicemembers and spouses that Congress is okay with state tax authority action on this topic.³³⁸ A clarification to the SCRA and MSRRA could be as simple as including this sentence: “For purposes of this Section, ‘absent or present’ means the physical presence in or absence from a particular tax jurisdiction and the activity which is inherent to residing in a particular tax jurisdiction.” Amending a statute is possible but may prove time consuming. There are immediate steps that can be taken to educate and protect the military community.

The most immediate and relevant advice useful to clients is the need to prevent a challenge to domicile. This can easily be incorporated into installation newcomer’s briefings, especially for those states that have engaged in litigation with members and spouses. Military Tax Centers can highlight MSRRA compliance requirements to spouses seeking to claim MSRRA exemption from host state taxation. Spouses can then get their documentation in order and update their W-4 tax withholding form to prevent a later challenge or quickly respond to a challenge. Documenting connections maintained to a home state can provide a sound basis to repel a host state challenge. This will help prevent challenges to domicile and more easily respond to challenges.

Prevention also involves legal assistance offices having information readily available on the host state’s laws. This can be as simple as a preventive law brochure summarizing domicile and how to prevent challenges. If the client is concerned about this issue, have them complete a comprehensive questionnaire to identify which States may have a claim to the client’s domicile. Appendix 1 provides a sample list of relevant questions.

There are many individual actions a legal assistance practitioner can take to help a client. Research the law of a client’s home state to see if there are military specific laws on driver’s license extensions for active duty and spouses and any other home state laws that extend substantive protection to members and spouses. Write a letter on behalf of the client to the home state tax authority requesting an opinion that the member and spouse are in fact domiciled in the home state. The authority would, of course, need documentation supporting the conclusion. Such determinations would provide an additional hurdle to host state challenges because it would place two states in direct opposition to each other, potentially resulting in the host state digressing from a challenge.

If a member or spouse receives a notice of deficiency, audit, or verification³³⁹ from a host state tax authority, all of their documentation should be in order. The

³³⁸ See *United States v. Kansas*, 580 F.Supp. 512, 516-17 (D. Kan. 1984) (assuming Congress is aware of state tax authority practices and would amend federal law to prevent such practices Congress deemed to frustrate the purpose of federal law).

³³⁹ See e.g. N.M. Dep’t of Rev. Bulletin B-300.14 (Revised /Sep. 2012), available at <http://www.tax.newmexico.gov/SiteCollectionDocuments/Publications/Bulletins/bul-300-14-military-spouses-residency-relief-act-12-09.pdf>.

member's home of record documentation, Form 2058, any home state contacts currently maintained would be helpful to have on hand in support of the member's position. Impress upon clients that the most minor details are relevant, even where their children were born. It could be critical for a legal assistance attorney to write a state tax authority a letter explaining a position favorable to the client, including citation to relevant Supreme Court cases. A sample letter for editing is provided at Appendix 2.

If a member or spouse receives a summons to appear in court, immediately notify the Chief of Legal Assistance for the member's military department, coordinating, of course, through the supervising military attorney as required. The respective military department can coordinate a referral package put together by the client and legal assistance attorney to the United State Department of Justice, Tax Division. The Division's Office of Special Litigation handles tax issues that do not involve the IRS. The Division will then conduct an internal review of the legal issues involved and determine whether or not the United States has a sufficient interest in litigating the matter. If the Division determines that the United States has a sufficient interest in the litigation, as in *Minnesota*, it could initiate a declaratory judgment action against the host state.

Based on the caselaw cited above, highly recommend your client refrain from proceeding *pro se*. However, you may want to assist the client, if able, in drafting a request to delay any hearing until the Department of Justice Tax Division makes a determination on whether to file for a declaratory judgment against the host state. Another option available to the client would be to retain local counsel to initiate a removal³⁴⁰ action to federal court based upon federal question³⁴¹ jurisdiction.

Be mindful of ethical concerns when advising married clients on this issue. As the tax case from Virginia illustrated, one spouse's filing may be detrimental to the other spouse. One attorney may not be able to provide competent counsel to both spouses on this issue. As for dual representation, an attorney would need to verify licensing jurisdiction regulations. For military practitioners, additional restrictions may apply that limit dual representation.

Finally, be mindful that many of the best arguments that can be made on behalf of a client are yet to have undergone judicial review. This issue is not only ripe for preventive law measures but also for advocacy.

VI. CONCLUSION

The purpose of the SCRA is to free servicemembers and now qualifying spouses from some of the burdens of military life so they can focus on their military

³⁴⁰ See 28 U.S.C. § 1441 (2012).

³⁴¹ See 28 U.S.C. § 1331 (2012).

duties. The quandary that some states have cast servicemembers and their spouses into by challenging their domicile need not continue. By requiring servicemembers and spouses to meticulously document and consume their energies in maintaining connections with a home state, even though the SCRA says they need not do so to maintain domicile, some states contradict the very intent of the SCRA. This area of law could very well be in its infancy due to the MSRRA reviving the age-old issue of domicile.

Servicemembers increasingly have little predictability as to when they will receive military orders to a new duty location. Scrutiny of domicile must take into account the uncertainty of where a servicemember and spouse may reside and the duration of that residence. Legal assistance practitioners can help prevent and respond to host state domicile challenges. For active duty military and their spouses, domicile should not be subject to a host state challenge using absence from a home state and presence in a host state. These terms necessarily include those activities and connections inherent residing in a particular location. It is only with this understanding that servicemembers and spouses can truly call a place home, a decision a state tax authority should not decide for them.

Appendix 1: Domicile Legal Assistance Client Questionnaire

1. Which state do you call “home” and why?
2. With which state would you say you have the most connections?

Domicile Declarations:

3. What state is reflected on your DD Form 2058 and Leave and Earning Statement? Why did you claim that state?
4. Which state issued your marriage license?
5. If divorced, which state issued a divorce decree?
6. In which state(s) have you been a party to litigation?
7. Where do you own property? (Land, residence, rentals)
8. Do you claim a homestead exemption on your property for property tax purposes?
9. How much have you paid in property taxes? (this is relevant to form the basis of an argument for double taxation...only States without income tax collect the same revenue by other means).

Privileges / Exercising Rights

10. Which state issued your current driver's license?
11. Where do you have a vehicle registered?
12. In which state do you normally operate your vehicle(s)?
13. Where are you registered to vote?
14. Do you hold any professional licenses? From which state(s)?
15. In which state(s) do you have a fishing or hunting license? Resident or nonresident?
16. Have you ever used local law enforcement, fire services, or other community services?
17. Have you ever received state unemployment or worker's compensation benefits?
18. Have you or your dependents applied for or received instate tuition rates for school?
19. Where do you receive mail?
20. Have you ever filed a permanent change of address form with the U.S. Postal Service?

Income / Financial Transactions

21. In which state(s) have you spent most of you time working?
22. Is your employment location permanent or temporary?
23. Do you own a small business? If so, in which state is it registered?
24. Do you bank locally or primarily online?
25. What other transactions do you have with financial institutions, such as a local investment firm?
26. What state-oriented insurance do you carry? Vehicle liability coverage?
27. Where have you filed a resident or nonresident income tax return?

28. Have you paid income tax to any state?

Community Relationships:

29. Are you a member of a union in a particular state?

30. Are you a member of a place of worship in a particular state?

31. In which state are you a member of a social, fraternal, athletic organization, club, lodge, or any other organization?

32. In which state do you spend most of your leisure time?

33. Where do you and/or your dependents attend school?

34. Do you provide charitable contributions to an organization in a particular state?

Appendix 2: Sample Letter to State Tax Authority

[Date]

[Sender's Address]

[Recipient's Address]

[Appropriate greeting]:

I represent the interests of [Client] regarding the [notice of deficiency, audit, or verification] received from your office. My representation is pursuant to the military legal assistance program, authorized under 10 U.S.C. § 1044. [Air Force attorneys must include a statement like this in compliance with Air Force Instruction 51-504, paragraph 1.6.4. making it clear the Air Force does not represent the client in resolving the matter.] We request that the [notice of deficiency, audit, or verification] be [abated or withdrawn] against [Client] based on the authorities and reasons discussed below.

The domicile of servicemembers and spouses is protected for purposes of taxation under 50 U.S.C. App § 571, referred to as the Servicemembers Civil Relief Act (SCRA), which also includes the Military Spouse's Residency Relief Act (MSRRA). This law states in part that [Client] "shall neither lose nor acquire a residence or domicile for purposes of taxation...by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders."

This statute alters domicile analysis for servicemembers and their spouses for purposes of income taxation. Even without this protection, the historical domicile analysis as developed by the Supreme Court of the United States favors [Client's] position in this case. Of importance is that domicile requires both a physical presence and the intent to remain with permanency.³⁴² Once established, domicile is presumed to continue until it is shown to have been changed.³⁴³ The motive for maintaining or changing domicile is irrelevant.³⁴⁴ The focus of determining a person's domicile is whether intent to permanently remain domiciled in a particular jurisdiction is for an indefinite time, meaning one that is not contemplated to end.³⁴⁵ Since [Client] is in [host state] solely in compliance with military orders, an end to this residency is anticipated when [Client's] next military assignment is received. [Client] has not taken any actions with the motive to change domicile from [home state].

In addition to historical domicile analysis, [Client] benefits from the protection of the [SCRA or MSRRA]. This law must be interpreted "with an eye friendly to those who dropped their affairs to answer their country's call,"³⁴⁶ and must be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."³⁴⁷ The statute simply means that the taxable domicile of servicemembers and their spouses will not change due to military assignments.³⁴⁸ This statute should not be dependent on state law because it is intended to have uniform nationwide application.³⁴⁹

Some states use a simple test to determine the domicile of a servicemember, such as home or record or the domicile declared by the servicemember.³⁵⁰ A servicemember's declared domicile is accomplished by completing a Department of Defense Form 2058 entitled "State of Legal Residence Certificate."³⁵¹ Without a predictable application of the law, servicemembers and their spouses may be threatened with a domicile challenge every time they move to a new state. This is why they should be able to rely on their declaration on their State of Legal Residence Certificate.

Even if a factors bases domicile analysis is used, the language of the [SCRA or MSRRA] exempts the absence from [home state] and presence in [host state] from the analysis. This includes activity that is inherent to being absent from [home state] and present in [host state], including but not limited to: owning or renting a residence, student status, employment location, obtaining a driver's license, location of a motor

³⁴² See *Mitchell v. United States*, 88 U.S. 350 (1874).

³⁴³ *Id.* at 353.

³⁴⁴ See *Williamson v. Osenton*, 232 U.S. 619, 625 (1914).

³⁴⁵ *Id.* at 625.

³⁴⁶ *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948) (quoting *Boone v. Lightner*, 319 U.S. 561, 575 (1943)).

³⁴⁷ *Boone*, 319 U.S. at 575.

³⁴⁸ See *Dameron v. Brodhead*, 345 U.S. 322, 325 (1953).

³⁴⁹ See e.g. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

³⁵⁰ See e.g. Missouri Dep't of Rev. Form DOR 558 (11-2011).

³⁵¹ U.S. Dep't of Def., DD Form 2058, State of Legal Residence Certificate (Feb. 1977).

vehicle, compliance with motor vehicle registration requirements, obtaining a local fishing or hunting licenses, location of financial transactions, receiving mail, amount of time spent in a location, dependent's attendance at school, non-profit organization membership, church attendance, and statements made to insurance companies regarding residency.

Based on the cited legal authorities and the fact that litigating this matter will detract from [Client's] ability to support the military mission for which [Client] is present in [host state], we respectfully request that the [notice of deficiency, audit, or verification] be [abated or withdrawn].

Please notify me at your earliest convenience if this matter will not be resolved in [Client's] favor. If the matter is not resolved by this letter, we request that you suspend the proceedings so that I can seek to secure representation of [Client] in this matter by the Department of Justice, Tax Division, Office of Special Litigation. We are committed to expeditiously resolving this matter without further escalation.

[Preferred closing],

[Attorney signature]

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